

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student and Glastonbury Board of Education

Appearing on behalf of the Student: Attorney Courtney Spencer
Law Office of Courtney Spencer LLC
100 Riverview Center, Suite 120
Middletown, CT 06457

Appearing on behalf of the Board: Attorney Leander Dolphin
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-01919

Appearing before: Attorney Ann F. Bird
Hearing Officer

DECISION ON REMAND

I. Background

This matter returns to this Hearing Officer on remand from the United States District Court for the District of Connecticut (District Court) in Case No. 3:20cv-00690 (VAB).

The Student filed a request for due process with the Connecticut Department of Education on April 10, 2019. The request for due process challenged the decision of the Glastonbury Board of Education (Board) to change the Student's special education placement from Meliora Academy, a private school, to PRIDE, a self-contained public school program in his community.

This Hearing Officer was assigned to the case and conducted an extensive, seven day evidentiary hearing on the request. At its conclusion, the Hearing Officer entered a twenty-one page Final Decision and Order, including seventy-three Findings of Fact and forty-four Conclusions of Law along with Discussion as well as a ten page Addendum, on April 21, 2020. (HO Decision)

The Hearing Officer concluded that the Student does not require a private classroom in order to receive a Free Appropriate Public Education (FAPE) and that the Board's proposed Individualized Education Program (IEP) and placement at PRIDE fulfilled the requirements of the Individuals with Disabilities Education Act (IDEA) and state law.

On appeal, the District Court denied each party's motion for summary judgment and refused to vacate the HO Decision or remedial order denying relief. The District Court instead issued a Ruling and Order on Cross-Motions for Judgment on the Administrative Record on December 29, 2021 (Remand Order). The District Court directed the Hearing Officer to issue additional findings consistent with the Remand Order.

The parties submitted briefs to the Hearing Officer on the issue of the Remand Order on November 28, 2022.

In the Remand Order, the District Court identified two general areas requiring additional findings: 1) whether the parents had an opportunity for meaningful participation in the January 30, 2019 PPT decision to change the Student's placement to PRIDE or whether the Board predetermined the Student's placement; and 2) whether PRIDE offered the Student a Free Appropriate Public Education (FAPE) in light of a) the appropriateness of the timing of the transition given the Student's supposed difficulty with transitions; b) relevant differences in the two IEPs, including provision of 1:1 ABA support and consultation services for related services and feeding; and the c) appropriateness of placement at PRIDE in light of student's medical needs.

II. Further Findings, Conclusions and Analysis

A. Parent Participation at January 30, 2019 PPT

1. Parents' View of Vulnerability to Infection

The District Court's first concern with parent participation at the January 30, 2019 PPT focused on whether the PPT took into account the parents' view that the Student was too vulnerable to contagious respiratory infections to attend PRIDE. In specific, the District Court noted that the parents submitted three letters from the Student's physicians (physician letters) to the PPT and that although the HO concluded that the parents' views were considered, the PPT did not read two of the three letters aloud at the meeting.

The HO Decision includes Findings of Fact and Conclusions of Law that are set forth below in standard text concerning whether the January 30, 2019 PPT took into account the parents' view of the Student's vulnerability to contagious respiratory infections. Further review of the record in accordance with the Remand Order produces the additional Findings of Fact and Conclusions of Law set forth below in *italics*:

a) Findings of Fact

16. The Student's Pediatrician described his health status on July 16, 2018, as "healthy male", able to participate in the school program, including athletic activities and competitive sports, to the limit of his tolerance. (Exhibit B 10)

17. On the other hand, another of the Student's physicians, Dr. Milanese, noted on April 12, 2018 that his "genetics diagnosis" renders "his immune function . . . compromised" such that he is "extremely vulnerable to respiratory illnesses." (Exhibit P 43; see also Exhibit B 2; Exhibit P 3; Exhibit P 7; Exhibit P 11). This health problem, Dr. Milanese explained, resulted in many absences due to respiratory infections while the Student was attending the Breakthrough Magnet School in 2014 and 2015. (Exhibit P 43)

17A. *There was no evidence presented concerning the features of the Student's Breakthrough Magnet School program other than that it was "public" and that he was in an integrated preschool class of about 15 students. Accordingly, there is no evidence of the school size, staff size, or infection control protocols, if any, associated with that program. (T Mother; Exhibit P 4)*

18. The evidence demonstrated, however, that the Student has been free of significant illness, including respiratory infections, for at least the last three years. (T Mother) As Dr. Milanese wrote, "the prior pattern of respiratory infections and missed school days has disappeared." (Exhibit P 11) Although the Student continues to miss school for regular medical appointments, his attendance has been good. With one exception, he has not been absent from school for more than two consecutive days during the 2016-2017, 2017-2018 or 2018-2019 School Years. (T Mother; Exhibit B 71; Exhibit P 47a; Exhibit P 15)

59. The Student's parents disagreed with the proposal to educate the Student at PRIDE. They provided the PPT with three letters from the Student's physicians recommending that his placement be continued at Meliora Academy. (Exhibit B 46; Exhibit B 35; Exhibit B 39; Exhibit B 45) The PPT accepted and reviewed these letters, even though none of the authors had visited PRIDE and none revealed knowledge of the 2019 IEP. (Exhibit B 46; T Russell; T Onyrimba) One of these physicians, in fact, incorrectly believed that the Board of Education was proposing to transfer the Student to a mainstream program. (T Onyrimba)

59A. *One of the three physician letters was read out loud during the PPT meeting. All three letters were present at the meeting and available for any member to review. The Board's Director of Special Education was among those present who did read all three letters. (T Kelley)*

60. None of the physician letters submitted for the January 30, 2019 PPT meeting stated a fact based objection to placement at PRIDE. None stated that the Student requires a private classroom or that he is too immune deficient to attend public school. (Exhibit B 35; Exhibit B 39; Exhibit B 45) Moreover, one of these authors, Dr. Onyrimba, previously recommended a class size for the Student of six as a means to limit exposure to illness. (Exhibit P 7) Another author, Dr. Roberts, earlier recommended that the Student should be educated in a small classroom of no more than 10 to 15 children. (Exhibit B 2)

60A. *Moreover, Dr. Onyrimba earlier explained to the Board's head nurse, in a conversation on October 12, 2018, that the Student's immune system is not as suppressed as a cancer victim or organ transplant recipient, and that his medical condition does not preclude him from attending public school. (T Kelley; T Megson; Exhibit B 52)*

60B. *More significantly, while all three physician letters were similar in their endorsement of the Meliora Academy program, none was directly pertinent to the decision before the PPT. The question before to the PPT was not whether the Meliora Academy program was appropriate, but whether PRIDE would be appropriate. After all, it was not a competition between the two possible providers, one public and one private, but a question*

whether or not the Board could educate the Student in an appropriate public school program in Glastonbury. (T Kelley, Exhibit B 35; Exhibit B 39; Exhibit B 45)

60C. This was not surprising because none of the physicians knew anything about PRIDE. (T Onyrimba; T Russell). They did not know that PRIDE would offer a segregated, highly structured and individualized program with infection control protocols in a less restrictive environment in the Student's home town. Dr. Onyrimba agreed, for instance, that if PRIDE could provide the equivalent of the Meliora program in a different location, the Student could attend PRIDE. (T Onyrimba; T Russell)

60D. In addition, some of the physicians apparently based their opinions in the letters, in part, on the incorrect assumption that the Student has difficulty adapting to change in his educational program. (Exhibit B 35; Exhibit B 39; Exhibit B 45)

60E. In fact, however, the Student does not have difficulty with change or transitions in his program. According to the Student's Meliora teacher – a person who knows the Student very well – he is mostly “ok with change” and is upset only if something he was particularly looking forward is removed. (T Caruso) Moreover, a six week trial of the Student in a classroom with other students and a new teacher at Meliora Academy produced no negative performance, behavior or health consequences. (Findings of Fact Nos. 67 and 68)

67. The Student's private classroom arrangement was unilaterally abandoned between August 30, 2018 and October 17, 2018, when the Student was placed in a group classroom with two other students from his team. (Exhibit P 44; T Caruso; T Guilmette) Although this transition also involved a new teacher (who was later let go due to poor performance), neither the Student's behavior nor his academic performance was negatively affected by his assignment to the group classroom. (T Guilmette; Exhibit B 30; Exhibit B 31)

68. The Student was returned to a private classroom because his parents expressed concern for his health due to exposure to other children. (Exhibit P 44) In fact, however, the Student's health, as reflected by his attendance, was not impacted by the change to a shared classroom. During the time he was in the group classroom, the Student was absent on two non-consecutive days in September 2018 and on two non-consecutive days in October 2018, a frequency consistent with his historic rate of absence during the 2018-2019 School Year as a whole. (Exhibit B 71)

60F. The testimony of some Meliora staff that the Student's academic performance declined while he was trialed in a different classroom at Meliora Academy was not credible. Those staff members were not directly working with the Student during that time and were relying on anecdotal and inconsistent reports from individuals who did not testify at the hearing. Finally, the behavioral and academic data collected by Meliora Academy during this time did not reflect any decline in performance or behavior. (T Guilmette; T Caruso, Findings of Fact No. 67 and 68)

61. Although the [physicians'] letters were considered by the PPT, the parents' objection to PRIDE did not prevail. (T Kelley; T Argens; Exhibit B 46) The 2019 PPT discussed that a transition to PRIDE would take place after the April vacation, allowing time to plan transition activities in cooperation with Meliora staff and PRIDE staff at a subsequent PPT meeting. In addition, the Student's parents were invited to tour the PRIDE Program, which they did. (Exhibit B 46; T Kelley)

61A. It is also clear that the January 30, 2019 PPT took the Student's parents' concern about infectious respiratory disease at PRIDE seriously. In particular, while the Board's head nurse opined that the Student was not then immunocompromised, the PPT took pains to plan a program that limited the Student's exposure to other students and included appropriate infection control features, a segregated classroom, a separate entrance and restroom, and robust hygiene protocols. (Findings of Fact Nos. 50-54 and 71-73)

b) Conclusions of Law

11. The evidence also demonstrated that the Student's parents attended the PPT meetings involved in developing the 2019 IEP and were represented by counsel. The parents participated in the process and their views were taken into account. Letters the parents procured from the Student's medical team recommending that he remain at Meliora Academy were reviewed and received as part of the record.

11A. The PPT addressed the Student's parents' concern about infectious disease at PRIDE by providing a program that limited the Student's exposure to other students and included appropriate infection control features, a segregated classroom, a separate entrance and restroom and robust hygiene protocols. (Findings of Fact Nos. 50-54 and 71-73)

12. It was reasonable for the Student's PPT and the Board of Education to disagree with the conclusory claims of these [sic] physicians who were not informed about the proposed placement and who presumably had no educational expertise. Indeed, none of the physician letters provided by the parents actually recommended that the Student be educated in a private classroom or stated that he is medically unable to attend a public school. To the contrary, in other letters, the Student's physicians uniformly recommended a small, structured program with a classroom of up to six and even as many as fifteen students, entirely consistent with the 2019 IEP.

13. The fact that the Student's parents' position did not prevail does not establish that they were denied a meaningful opportunity to participate in the placement discussion or that their input was not considered. *Luo v. Baldwin Union Free School District*, 67 I.D.E.L.R. 15 (E.D.N.Y. 2016) *aff'd* 69 IDELR 88 (2d Cir. 2017). In the absence of a consensus among PPT members, as in this case, the Board of Education was responsible for the choice of a special education placement, not the parents. *Letter to Richards*, 55 I.D.E.L.R. 107 (January 7, 2010).

2. Predetermination

Secondly, the District Court concluded that the HO Decision did not sufficiently analyze the record concerning whether the Board predetermined the Student's placement at PRIDE.

Specifically, the District Court claimed that there is substantial evidence in the record to suggest that district staff agreed to alter the Student's placement before the multidisciplinary evaluation and PPT meeting on January 30, 2019 took place, thereby impeding parental participation in the process.

The HO Decision includes the Findings of Fact and Conclusions of Law concerning predetermination that are set forth below in standard text. Further review of the record in light of the Remand Order produces the additional Findings of Fact and Conclusions of Law set forth below in *italics*:

a) Findings of Fact

10. Before that [public school] placement was implemented [by the Ellington Board of Education], the family moved to Glastonbury. The Student registered with the Glastonbury Public Schools on August 28, 2018, two days before the start of the 2018-2019 School Year. The Glastonbury Board of Education convened a PPT to address the Student's transition to the district on August 31, 2018. Student's parents attended the PPT meeting and were represented by counsel. At that time, the PPT decided to continue the Student's placement at Meliora Academy while it conducted a multidisciplinary evaluation. (T Russell; T Kelley; Exhibit B 23)

10A. The Board did not discuss alternate placements in its public school system at the August 31, 2018 PPT because it realized that the Student's situation is complex. As the Board's Director of Special Education credibly explained, the Board did not predetermine a placement for the Student, but believed it required a fuller understanding of the Student's profile before it could make recommendations as to an appropriate placement. (T Kelley)

10B. The Director's testimony that the Board did not predetermine a placement for the Student at PRIDE is credible. The Director's demeanor while testifying was calm and professional and her statements were consistent with one another and with corroborated facts. (T Kelley)

19. The Board of Education performed its multidisciplinary evaluation, including examination of all areas of disability, during the Fall of 2018. The reports of the evaluation, as well as the Student's progress at Meliora Academy, were presented at a meeting of the Student's Planning and Placement Team (PPT) on January 30, 2019. Student's parents attended the PPT meeting and were represented by counsel. (Exhibit B 46; Exhibit B 26; Exhibit B 27; Exhibit B 28; Exhibit B 40; Exhibit B 41; Exhibit B 43)

19A. In addition, the Board investigated whether and how it might meet the Student's needs in a less restrictive Board setting. As the Board was aware, the Board was legally obligated to provide a program for the Student in a public school unless it could not do so satisfactorily, as part of its "least restrictive environment" duty. As part of its due diligence in that investigation, the Board engaged a feeding specialist who had worked on the Student case earlier to consult with a possible program. In addition, the Board recruited its head nurse to participate with the Student's PPT's planning process. (T Kelley; T Hoskins; T Megson)

19B. *The head nurse noted in a record that a PPT meeting was held in August 2018 “to create an IEP and plan to return [the Student] to GPS”. In so doing, the head nurse was reflecting that it was the PPT’s goal and legal obligation to educate the Student in a Board program in his community if possible. The head nurse’ testimony that this was a goal and not a predetermined conclusion, was credible and convincing. (T Megson)*

19C. *As part of its due diligence in planning for the Student, the Board’s head nurse also contacted the Student’s Pediatrician, Dr. Onyrimba, to discuss his immune status. Dr. Onyrimba explained to the Board’s head nurse, on October 12, 2018, that the Student’s immune system is not as suppressed as a cancer victim or organ transplant recipient, and that his medical condition does not preclude him from attending a public school. The head nurse’s testimony in this regard was also credible. Her demeanor was calm and her testimony was internally consistent and consistent with other corroborated facts. Significantly, her credibility is supported by a contemporaneous note she made of her conversation with Dr. Onyrimba on the day in question. (T Kelley; T Megson; Exhibit B 52)*

19D. *Dr. Onyrimba’s testimony concerning her conversation with the head nurse was not credible. Dr. Onyrimba testified that she did not recall speaking to the head nurse, but also admitted that if PRIDE replicated the Meliora program in a different location, it would be appropriate for the Student’s medical needs despite its status as “public”. (T Onyrimba)*

19E. *Dr. Onyrimba was in a very difficult position during her testimony. She had every incentive to please the Student’s parents, with whom she has a close and ongoing relationship. She was also very misinformed about the PRIDE program, being under the impression that it is a mainstream public school program populated by nondisabled students, rather than a very small, highly structured, secluded and individualized program located on a public school campus. Her testimony was internally inconsistent and contradicted written records. (T Onyrimba)*

b) Conclusions of Law

14. Nor did the evidence suggest that the Board of Education predetermined the PRIDE placement outside of the PPT process. Instead, the Board of Education conducted a multidisciplinary evaluation to study the Student. It maintained the Student at his parents’ preferred school for six months while that evaluation was performed. The evaluation results demonstrated that the Student’s needs can be met in a less restrictive public school setting within the Student’s community. The Student’s private school teacher and administrator agreed that the Student can be educated in a less restrictive setting.

15. The fact that the Board of Education retained the services of a feeding specialist is not evidence of predetermination. The Board of Education engaged a feeding specialist to assist in the process of planning to meet the Student’s needs at a public school. This reflected a careful, conscientious exploration of the placement issue.

15A. *Nor is the fact that the head nurse wrote about a “plan to return to GPS” in her August 2018 note evidence of predetermination. That language was consistent with the nurse’s understanding of the Board’s ongoing duty and goal to educate all students in the least*

restrictive environment. “Plan” means “goal” or “aim”. Merriam Webster’s Dictionary. A goal is not a conclusion, but an aspiration.

15B. It would not have been possible for the Board to fulfill its duty to educate the Student in the least restrictive environment without exploring possible ways to meet his needs in the Board’s schools. Its consultation with a feeding specialist and inquiry into the Student’s immune status were part of that process.

B. Free Appropriate Public Education

The second general area addressed in the Remand Order is whether the HO properly analyzed the question of FAPE in light of three subareas: timing of the transition, differences in the 2018 and 2019 IEPs, and medical issues.

1. Timing of Transition

The HO Decision includes Findings of Fact and Conclusions of Law concerning the appropriateness of the timing of the proposed transition to PRIDE that are set forth below in standard text. Further review of the record pursuant to the Remand Order produces the additional Findings of Fact and Conclusions of Law set forth below in *italics*.

a) Findings of Fact

35. The Transition Assessment of the VB-MAPP determines if a child has acquired the necessary skills to be educated in a less restricted educational environment. The data demonstrated that while the Student will still require direct instruction and other supports, he is ready to start to experience more advanced academic and social programming in a less restrictive educational environment. (Exhibit B 37)

36. The Student’s Meliora teacher and Meliora’s Chief Administrator both agree that the Student is ready to be educated in an environment that is more traditional and less restrictive. (T Caruso; T Guilmette)

61. Although the [physicians’] letters were considered by the PPT, the parents’ objection to PRIDE did not prevail. (T Kelley; T Argens; Exhibit B 46) The 2019 PPT discussed that a transition to PRIDE would take place after the April vacation, allowing time to plan transition activities in cooperation with Meliora staff and PRIDE staff at a subsequent PPT meeting. In addition, the Student’s parents were invited to tour the PRIDE Program, which they did. (Exhibit B 46; T Kelley)

60E. In fact, however, the Student does not have difficulty with change or transitions in his program. According to the Student’s Meliora teacher – a person who knows the Student very well – he is mostly “ok with change” and is upset only if something he was particularly looking forward is removed. (T Caruso) Moreover, a six week trial of the Student in a classroom with other students and a new teacher at Meliora Academy produced no negative performance, behavior or health consequences. (Findings of Fact Nos. 67 and 68)

60F. *The testimony of some Meliora staff that the Student's academic performance declined while he was trialed in a different classroom at Meliora Academy was not credible. Those staff members were not directly working with the Student during that time and were relying on anecdotal and inconsistent reports from individuals who did not testify at the hearing. Finally, the behavioral and academic data collected by Meliora Academy during this time did not reflect any decline in performance or behavior. (T Guilmette; T Caruso; Findings of Fact No. 67 and 68)*

67. The Student's private classroom arrangement was unilaterally abandoned between August 30, 2018 and October 17, 2018, when the Student was placed in a group classroom with two other students from his team. (Exhibit P 44; T Caruso; T Guilmette) Although this transition also involved a new teacher (who was later let go due to poor performance), neither the Student's behavior nor his academic performance was negatively affected by his assignment to the group classroom. (T Guilmette; Exhibit B 30; Exhibit B 31)

68. The Student was returned to a private classroom because his parents expressed concern for his health due to exposure to other children. (Exhibit P 44) In fact, however, the Student's health, as reflected by his attendance, was not impacted by the change to a shared classroom. During the time he was in the group classroom, the Student was absent on two non-consecutive days in September 2018 and on two non-consecutive days in October 2018, a frequency consistent with his historic rate of absence during the 2018-2019 School Year as a whole. (Exhibit B 71)

68A. *The January 30, 2019 PPT discussed the timing of the proposed transition to PRIDE, to take place after the April break. This was not "the middle of the school year", as some of his physicians and the District Court incorrectly assumed. The Student's school program is provided all year. It spans twelve months, with no extended summer vacations. The April goal allowed time for his team to plan and conduct transition activities. (T Kelley)*

b) Conclusions of Law

40A. *The PPT's choice to implement the transition to PRIDE after the April school break was appropriate and reasonable. This allowed time to plan and conduct transition activities during February, March and April. Since the Student's school program operates for twelve months, all year, the April break offered the best opportunity to take advantage of a natural recess.*

2. Differences in IEPs

The HO Decision includes Findings of Fact concerning and Conclusions of Law regarding differences in the two IEPs, including provision of 1:1 ABA support and consultation services for speech, occupational and physical therapy set forth below in standard text. Further review of the record in light of the Remand Order produces the additional Findings of Fact and Conclusions of Law set forth below in *italics*

a) Findings of Fact

41. The Annual Goals and Objectives of the 2019 IEP target the same learning areas as those of the 2018 IEP. Although some language was changed and some objectives were combined or restated, the 2019 IEP reflects consistency and continuity in carrying out the goals and objectives of the Student's 2018 IEP. (Exhibit B 46; Exhibit B 23; T Caruso)

Footnote to Finding of Fact 41. The modest differences between the goals and objectives of the 2018 IEP, which the Student's parents highly endorse, and the 2019 IEP reflect a difference in style of instruction and style of expression. The author of the 2018 academic goals and objectives prefers to break down the steps of instruction and write her objectives differently than does the author of the 2019 IEP academic goals and objectives. (T Caruso)

42. The 2019 IEP also included a set of Program Accommodations and Modifications to be provided in all sites and activities. These included accommodations and modifications in the categories of Materials/Books/Equipment, Tests/Quizzes/Assessments, Grading, Organization, Behavior Interventions and Support, Instructional Strategies, and Other. (Exhibit B 46) Again, these Program Accommodations and Modifications were virtually identical to those contained in the 2018 IEP. (Exhibit B 23)

46. The 2019 IEP included the same mix of instructional and related services as did the 2018 IEP, with somewhat less time devoted to academic instruction in order to provide more time per week for feeding and oral motor therapy. (Exhibit B 46; Exhibit B 23) This sacrifice of academic instruction in favor of feeding and oral motor therapy was suggested by the Meliora Staff and accepted by the Board of Education even against the preference of its own feeding consultant. (T Hoskins)

47. The 2019 IEP offered a total of 6.75 hours (405 minutes) per school day over five days per week of specialized instruction and related services. (Exhibit B 46)

48. Notably, the 2019 IEP offered the same number of hours of service per school day (6.75 hours) over the same five days per week as provided in the 2018 IEP. (Exhibit B 23)

49. The Student's Annual Goals and Objectives, Modifications and Accommodations, instructional services and related services appropriately targeted each of the areas of Concerns/Challenges/Needs identified in the Present Levels of Performance section of the 2019 IEP. In addition, these services, goals and objectives and modifications and accommodations were reasonably calculated to enable the Student to receive educational benefit and progress in his program. (Exhibit B 23; T Kelley; T Russell)

49A. The 2019 IEP includes one to one adult support for the Student throughout the school day to assist with instruction, behavior and data collection. (T Argens) The 2018 IEP had this same service performed by a Meliora "ABA instructor". The Board's adult support paraprofessional would be highly trained and closely supervised by certified staff as well as PRIDE's Board Certified Behavior Analyst (BCBA). The evidence did not reflect a significant

difference between the services provided by the Board's paraprofessional and Meliora Academy's "ABA instructor". (T Kelley; T Russell)

49B. *The 2019 IEP includes consultation time for the Student's special education teacher to meet with his related services providers one hour each week and to consult with the BCBA for two hours each month. These related services providers were the speech language therapist, the occupational therapist, the physical therapist, and the feeding specialist. (T Kelley). The 2019 IEP also provides for monthly parent meetings. (Exhibit B 46) The 2018 IEP similarly provided time for instructional staff to consult with related service providers on a regular basis. The assumption that the 2019 IEP did not include consultation service is incorrect. Moreover, there was no evidence that the 2019 IEP provision for consultation with related service providers was insufficient or inadequate.*

b) Conclusions of Law

8. Not every procedural violation of IDEA is sufficient to support a finding that a student was denied FAPE, however. Mere technical violations will not render an IEP invalid. *Amanda J. v. Clark County School District*, 267 F.3d 877, 892 (9th Cir. 2001). In matters alleging a procedural violation, a due process hearing officer may find that a student did not receive a FAPE only if the procedural violation did one of the following: (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. 34 C.F.R. Section 300.513(a)(2); *L.M. v. Capistrano Unified School District*, 556 F.3d 900, 909 (9th Cir. 2008).

10. In addition, the PPT developed an IEP that included specialized instruction, related services, measurable annual goals and objectives and program accommodations and modifications that were designed to meet each of the Student's educational needs. In fact, the instructional services, goals and objectives and program accommodations and modifications set forth in the 2019 IEP are virtually identical to those of the 2018 IEP, which the Student's parents endorse as appropriate.

10A. *The 2019 IEP also included the services of a one to one adult paraprofessional throughout the school day to assist with instruction and behavior and collect data. The 2018 IEP's reference to the person providing this service as an "ABA Instructor" did not reflect a significant variation in the nature of support provided.*

16. The Student's suggestion that the Board of Education committed a procedural violation by removing "areas of need" and eliminating objectives from his program without a factual basis to do so is belied by the record. The evidence was clear that the 2019 IEP addresses precisely the same areas of need as did the 2018 IEP. In addition, the 2019 IEP provides the same services at the same levels as did the 2018 IEP with the sole exception of substituting some oral motor therapy for some academic support at the recommendation of Meliora Academy staff.

17. While it is true that the 2019 IEP includes slightly fewer objectives than did the 2018 IEP, these revisions were not procedurally inappropriate. Minor changes in the wording of objectives primarily reflected differences in the style of expression and instructional techniques preferred by the staff involved rather than a change in direction for the services.

17A. *The 2019 IEP also included time for instructional staff and paraprofessionals to consult with related service providers, such as the speech, occupational and physical therapists and feeding specialist on a regular basis. Although this consultation was described and quantified somewhat differently than in the 2018 IEP, the changes were neither significant nor inappropriate. Minor changes in the manner of professional support for the Student's staff would not impede the Student's right to FAPE, impede his parents' participation or deprive him of educational benefits.*

17B. *The Board's training of staff is not a matter for inclusion in the IEP and is not a subject of this proceeding. 300 CFR Section 300.320; 300 CFR Section 300.508.*

17C. *The caseloads of the feeding specialist and school nurse are also not matters for inclusion in the IEP and are not a subject of this proceeding. 300 CFR Section 300.320; 300 CFR Section 300.508.*

24. Finally, in order for a procedural violation of IDEA to amount to a deprivation of FAPE, the violation must either impede the right to FAPE, significantly impede the parents' opportunity to participate in the process, or deprive the student of educational benefits. 34 C.F.R. Section 300.513(a)(2); *L.M. v. Capistrano Unified School District*, 556 F.3d 900, 909 (9th Cir. 2008). In this case, the evidence showed that there was no significant impact on the Student's parents' participation in the IEP process or the Student's educational benefits.

3. Medical Needs

The HO Decision includes Findings of Fact concerning and Conclusions of Law Fact concerning the appropriateness of placement in light of student's medical needs that are set forth below in standard text. Further review of the record in light of the Remand Order produces the additional Findings of Fact and Conclusions of Law set forth below in *italics*

a) Findings of Fact

16. The Student's Pediatrician described his health status on July 16, 2018, as "healthy male", able to participate in the school program, including athletic activities and competitive sports, to the limit of his tolerance. (Exhibit B 10)

17. On the other hand, another of the Student's physicians, Dr. Milanese, noted on April 12, 2018 that his "genetics diagnosis" renders "his immune function . . . compromised" such that he is "extremely vulnerable to respiratory illnesses." (Exhibit P 43; see also Exhibit B 2; Exhibit P 3; Exhibit P 7; Exhibit P 11). This health problem, Dr. Milanese explained, resulted in many absences due to respiratory infections while the Student was attending the Breakthrough Magnet School in 2014 and 2015. (Exhibit P 43)

18. The evidence demonstrated, however, that the Student has been free of significant illness, including respiratory infections, for at least the last three years. (T Mother) As Dr. Milanese wrote, "the prior pattern of respiratory infections and missed school days has disappeared." (Exhibit P 11) Although the Student continues to miss school for regular medical appointments, his attendance has been good. With one exception, he has not been absent from school for more

than two consecutive days during the 2016-2017, 2017-2018 or 2018-2019 School Years. (T Mother; Exhibit B 71; Exhibit P 47a; Exhibit P 15)

50. The 2019 IEP was to be implemented at the Board of Education's PRIDE Program (PRIDE). PRIDE a self-contained special education program that is housed at the Board of Education's Nayaug School. Nayaug School also serves a population of about 500 mainstream students. (T Exhibit B 46; T Kelley, T Russell; T Argens)

51. PRIDE is a small, highly structured and individualized program for students in Grades Kindergarten through Five who experience autism or related disabilities. (T Kelley, T Russell; T Argens)

52. PRIDE consists of two classrooms connected by a sensory room. It has its own restroom and separate entrance, so that students need not enter or use any part of the larger school environment unless dictated by their individual needs. (T Kelley; T Argens; T Russell)

53. PRIDE currently serves ten students, eight of which work with one teacher and are based in the larger of the classrooms while the other two work with the other teacher and are based in the second classroom. The second teacher also has other responsibilities outside of PRIDE. The Student was to become part of the larger class group of about eight students. (T Argens; T Kelley)

54. Most of the eight students in the larger group spend as much as 80% of their time in the mainstream environment of Nayaug School. As a result, there are typically only a few students in the larger classroom at any one time. The larger classroom includes five cubicles, or individual work spaces with partitions, where students can work with a teacher, paraprofessional or service provider in a quiet, distraction free environment. Each student has a one to one paraprofessional to support academic, therapeutic and behavioral needs as necessary. (T Argens; T Kelley)

54A. The individual work spaces with five foot partitions are a good size, large enough for a student chair, an adult chair and a table between them. (T Argens; T Kelley)

59. The Student's parents disagreed with the proposal to educate the Student at PRIDE. They provided the PPT with three letters from the Student's physicians recommending that his placement be continued at Meliora Academy. (Exhibit B 46; Exhibit B 35; Exhibit B 39; Exhibit B 45) The PPT accepted and reviewed these letters, even though none of the authors had visited PRIDE and none revealed knowledge of the 2019 IEP. (Exhibit B 46; T Russell; T Onyrimba) One of these physicians, in fact, incorrectly believed that the Board of Education was proposing to transfer the Student to a mainstream program. (T Onyrimba)

60. None of the physician letters submitted for the January 30, 2019 PPT meeting stated a fact based objection to placement at PRIDE. None stated that the Student requires a private classroom or that he is too immune deficient to attend public school. (Exhibit B 35;

Exhibit B 39; Exhibit B 45) Moreover, one of these authors, Dr. Onyrimba, previously recommended a class size for the Student of six as a means to limit exposure to illness. (Exhibit P 7) Another author, Dr. Roberts, earlier recommended that the Student should be educated in a small classroom of no more than 10 to 15 children. (Exhibit B 2)

65. At Meliora Academy, the Student belongs to a team of seven students of his general age group under the supervision of a special education teacher. He receives most of his instruction and related services in his own private classroom, but occasionally accesses the adjoining service room and other areas of the school, including the hallway and gym, where he is in the company of many other students. (T Bergenty; T Caruso; T Guilmette).

66. At least a few times each week, the Student participates with as many as six peers from his team for group activities or instruction in the Student's private classroom or the team classroom. (T Caruso) Since Meliora Academy only serves disabled students, he does not have access to nondisabled peers. (Exhibit B 23; T Guilmette)

66A. Two of the six peers from the Student's team at Meliora Academy with whom he shares group activities and instruction also spend about half of their time attending a cooperating Catholic School with mainstream peers. There was no evidence as to the size of the Catholic School or the relevant classes or settings involved in those students' experiences, or whether any hygiene protocols are in place there. (T Guilmette)

67. The Student's private classroom arrangement was unilaterally abandoned between August 30, 2018 and October 17, 2018, when the Student was placed in a group classroom with two other students from his team. (Exhibit P 44; T Caruso; T Guilmette) Although this transition also involved a new teacher (who was later let go due to poor performance), neither the Student's behavior nor his academic performance was negatively affected by his assignment to the group classroom. (T Guilmette; Exhibit B 30; Exhibit B 31)

68. The Student was returned to a private classroom because his parents expressed concern for his health due to exposure to other children. (Exhibit P 44) In fact, however, the Student's health, as reflected by his attendance, was not impacted by the change to a shared classroom. During the time he was in the group classroom, the Student was absent on two non-consecutive days in September 2018 and on two non-consecutive days in October 2018, a frequency consistent with his historic rate of absence during the 2018-2019 School Year as a whole. (Exhibit B 71)

69. Meliora Academy developed and implemented a Health Plan for the Student to address his cardiac and gastrostomy needs: (Exhibit B 6) The Health Plan sets forth various common sense steps that Meliora Academy implemented to protect against transmission of respiratory illness as follows:

- Staff working with [Student] will adhere to standard infection control practice – educate staff/students on purpose and technique of handwashing and respiratory hygiene (cough into elbow or tissue)

- Avoid unnecessary exposure to persons exhibiting [signs or symptoms] of illness; Staff - consult with nurse and supervisor if [signs or symptoms] of illness are present, reassignment may be necessary
- Students – as per school policy any student presenting with [signs or symptoms] of illness will be evaluated by the school nurse
- Class locations/schedule/activities may need to be temporarily adjusted to maintain [Student's] health and safety.

(Exhibit B 6)

70. The Meliora Health Plan was developed by Meliora's school nurse and is not part of the 2018 IEP. Both the 2018 and 2019 IEP's, however, include "sterile environment" as part of Program Accommodations and Modifications. (Exhibit B 46; Exhibit B 23)

71. Significantly, the Board of Education committed that it could and would follow precisely the same protocols for disease control and respiratory hygiene at PRIDE as set forth in Meliora Health Plan. (T Argens; T Kelley; T Russell; Exhibit B 46)

72. A school nurse serves PRIDE and is available to assist PRIDE staff with health education and respiratory hygiene, as well as to assess students and staff members who exhibit signs or symptoms of illness so that those who might be contagious can be excluded or segregated. (T Megson; T Argens) PRIDE regularly sanitizes all surfaces, and the floors and hallways of Nayaug School are disinfected daily. (T Argens; T Kelley)

72A. If the school nurse assigned to PRIDE is absent, a substitute is provided. If the nurse is called away unexpectedly, the head nurse intervenes to send another nurse to meet the program's needs. (T Megson)

73. The small, structured and self-contained nature of PRIDE renders the program capable of effectively implementing appropriate protocols for disease control and respiratory hygiene, including those contained in the Meliora Health Plan. (T Argens; T Kelley; T Russell)

73A. The small, structured, and self-contained nature of PRIDE, combined with its appropriate protocols for disease control substantially replicates the Meliora Program's ability to meet the Student's medical needs and are adequate to protect the Student from unnecessary exposure to respiratory infection at school. (Findings of Fact Nos. 50-54 and 69-72)

73B. Although situated on the campus of a larger mainstream public elementary school, PRIDE would not present a substantially greater risk of respiratory infection to the Student than does Meliora Academy, where he has not been sick. (Findings of Fact Nos. 50-54 and 69-72)

73C. There was no evidence that the fact that PRIDE students and staff spend time in a 500 student mainstream school, while the Student, his classmates and staff at Meliora Academy spend time in a 50 student school and a Catholic School of unknown size presents a significantly different risk of respiratory infection.

73D. *The relative infection risk presented by a 50 student versus a 500 student school was not an issue addressed by the Student's physicians or any other evidence presented at the hearing*

73E. *The Student's experience of illness at Breakthrough Magnet School several years earlier is not instructive as to the infection risk at PRIDE because there is no evidence of that school's size or hygiene protocols.*

b) Conclusions of Law

11. The evidence also demonstrated that the Student's parents attended the PPT meetings involved in developing the 2019 IEP and were represented by counsel. The parents participated in the process and their views were taken into account. Letters the parents procured from the Student's medical team recommending that he remain at Meliora Academy were reviewed and received as part of the record.

12. It was reasonable for the Student's PPT and the Board of Education to disagree with the conclusory claims of these physicians who were not informed about the proposed placement and who presumably had no educational expertise. Indeed, none of the physician letters provided by the parents actually recommended that the Student be educated in a private classroom or stated that he is medically unable to attend a public school. To the contrary, in other letters, the Student's physicians uniformly recommended a small, structured program with a classroom of up to six and even as many as fifteen students, entirely consistent with the 2019 IEP.

30. Indeed, the 2019 IEP is nearly identical to the 2018 IEP which the Student's parents endorse. In fact, the only significant difference between the two IEP's is that the 2019 IEP was proposed to be delivered in a less restrictive environment than the 2018 IEP: a public school in the Student's home community of Glastonbury, while the 2018 IEP was provided in a private school serving only disabled students an hour's van ride away.

32. Significantly, the Student's health would not be unreasonably threatened by attendance in the less restrictive environment of PRIDE. Like Meliora Academy, PRIDE uses reasonable infection control protocols to protect all of its students and staff from contagious pathogens. It disinfects classrooms, hallways and other facilities at least daily. It regularly sanitizes surfaces and encourages students and staff to wash their hands frequently and cough or sneeze into their sleeve. PRIDE excludes or segregates staff and students who are contagious and has a school nurse on hand to evaluate those who exhibit signs and symptoms of illness or who are suspected to be contagious.

33. The Student would not be exposed to significantly more infectious pathogens or more potentially contagious students or staff members at PRIDE than he is at Meliora Academy. At PRIDE, the Student would be exposed to approximately the same number of staff members providing him with services as he was at Meliora Academy – teacher, paraprofessional, nurse, occupational therapist, physical therapist, and speech and language therapist. He would also have about the same number of peers in his team or classroom group - seven at PRIDE and six at Meliora Academy.

34. The small size and structure of PRIDE renders screening of students and staff for possible contagion, as well as separation of the Student from those who are suspected of being contagious roughly as feasible as at Meliora Academy. While at Meliora Academy, the Student has a private classroom, he would have a private workspace with dividers at PRIDE. At PRIDE, the Student would use a separate school entrance, therapy room and restroom available only to the ten students and staff of PRIDE. At Meliora, he shares an entrance, hallways and gym with 50 students. At Meliora, he must be transported in a van with other students for two hours each day.

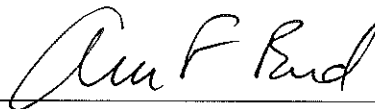
35. The Student's experience of good health and good attendance can continue at PRIDE, where he can also have the advantage of matriculating at a public school in his own community and eventually participating with nondisabled peers.

III Conclusion

As discussed in the pages above, further review and analysis of the record pursuant to the Remand Order has produced additional Findings of Fact and Conclusions of Law in each of the areas of the District Court's concern.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).



Hearing Officer Signature

ANN F BIRD

Hearing Officer Name in Print