



set forth below, Plaintiff's Motion will be granted in part and denied in part.

## **I. Findings of Fact**

1. In the fall of 1996, Defendant Parkland School District ("District") identified Matthew as a student suffering from a learning disability in mathematics. (App. Pan. Op. No. 770 at 2.)

2. On November 4, 1996, pursuant to Section 1414(d) of the IDEA, the District implemented an Individualized Education Plan ("November IEP") that placed Matthew at Springhouse Junior High School ("Springhouse"), in the Parkland School District.

3. The November IEP provided that Matthew would be placed in a learning support classroom for four sessions in each six day cycle. (App. Pan. Op. No. 770 at 2-3.)

4. In early January, 1997, due to Matthew's continued poor academic performance at Springhouse, Matthew's parents unilaterally withdrew Matthew from Springhouse and placed him at the Phelps School. (Pl.'s. P.I. Hearing Exs. 9, 10, 11)

5. Phelps is an accredited, private school in Pennsylvania, however it is not a state approved private school for special education placements. (P.I. Trans. at 80-82.)

6. During the 1996-97 spring semester at Phelps, Matthew's performance and homework completion improved. (Pl.'s. P.I.

Hearing Exs. 1, 2, & 3.)

7. Approximately one month after Matthew began at Phelps, his parents, still unsatisfied with the District's November IEP, requested a special education due process hearing. (P.I. Trans. at 91.)

8. Five sessions of these hearings were held between March 6, 1997 and May 27, 1997, before Hearing Officer Drenning.

9. On July 21, 1997, the Hearing Officer issued his Decision and Order concluding the following: (1) the November IEP was inappropriate for Matthew; (2) Matthew's educational needs were being met at Phelps; (3) Matthew's parents were entitled to reimbursement for his placement at Phelps for the 1996-97 school year; (4) Matthew's IEP team was to reconvene to revise Matthew's IEP for the 1997-98 school year.<sup>2</sup>

10. The District failed to appeal the Hearing Officer's Decision.

11. The parents however, filed two exceptions to the Decision. Only the second, the parents' request that the Appeals Panel find Phelps the appropriate placement for Matthew for the 1997-98 school year and during the pendency of the proceedings is relevant here.

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<sup>2</sup> Only those findings and conclusions relevant to the instant Motion are listed here. Additional provisions relating to the number of compensatory education hours and reimbursement for private tutoring need not be addressed to resolve the issues presently before the Court.

12. The issue of appropriate placement for Matthew during the spring semester of the 1996-97 school year was never before the Appeals Panel because the District did not file Exceptions to the Hearing Officer's Decision.

13. In its August 29, 1997 Opinion, the Appeals Panel affirmed the Order of the Hearing Officer requiring the District to adjust its November IEP for the 1997-98 school year to include annual goals, short term objectives, and specially designed instruction in two areas: numerical operations and homework. The Appeals Panel ignored the parents request for a "pendent placement" determination. See 20 U.S.C. § 1415(j).

14. As the 1997-98 school year approached, the District proposed a revised IEP ("1997-98 IEP") for Matthew in the Parkland School District.

15. Matthew's parents did not agree with the proposed 1997-98 IEP.

16. Again in the fall of 1997, upon his parents' initiative, Matthew returned to Phelps.

17. The District requested a second set of due process hearings to assess the appropriateness of the 1997-98 IEP. The first of those hearings took place before the Hearing Officer just one day after Plaintiffs filed their lawsuit in this Court. At the time the parties appeared for oral argument on the instant

Motion, a second session of the second set of hearings had taken place and a third session was scheduled for the following week.

18. In their Motion for a Preliminary Injunction, Plaintiffs ask this Court to order that (1) Matthew's placement pending the resolution of any proceedings brought under the IDEA is Phelps; (2) the District reimburse the parents for the costs incurred for Matthew's placement at Phelps for the current school year; (3) the District pay all future costs of Matthew's placement at Phelps pending the resolution of this dispute; (4) the due process hearing scheduled to resume on January 29, 1998, regarding the appropriate placement for Matthew for the 1997-98 school year, be terminated and dismissed.

19. Since the due process hearings before Hearing Officer Drenning were scheduled to resume just six days after the Court heard oral argument on the Motion, the Court denied Plaintiffs' Motion from the bench as to their request that the due process

hearings be enjoined.<sup>3</sup> For the reasons that follow, the Motion will be granted as to the remaining requests.

## II. Discussion

### A. Statutory Background

The IDEA's purpose is "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). Toward that end, the IDEA allows states to receive federal funding provided that their educational programs

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<sup>3</sup> The broadest issues in this litigation, those relating to the appropriateness of the IEP proposed by the District for the 1997-98 school year, are not presently before this Court. At this juncture, Plaintiffs have not yet exhausted their administrative remedies as to this issue. See Komninos v. Upper Saddle River Board of Education, 13 F.3d 775 (3d Cir. 1994). The 1997-98 IEP is in the process of being reviewed, for the first time, before Hearing Officer Drenning. The Court refuses to intrude upon the state administrative process, a process that "offers an opportunity for state and local agencies to exercise discretion and expertise in fields in which they have substantial expertise." Id. at 779. Plaintiff's argument that allowing the hearing officer the opportunity to hear the issue anew would "force the parties to take too many laps around the same track" is not sufficient to excuse the comprehensive administrative procedure mandated by the IDEA. See Stauffer v. William Penn School District, 829 F.Supp. 742, 749 (E.D.Pa. 1993) ("Exhaustion of administrative remedies is not futile simply because it may be time consuming"). The statute provides excellent protection for the parents while the parties make the requisite laps. That protection is embodied in the provision for a pendent placement determination. Thus, the Court's pendency determination as discussed herein is entirely independent of any ultimate decision regarding the appropriate placement for Matthew for the current academic year.

comply with not only the Act's substantive requirements but also the procedural safeguards that the IDEA extends to children with disabilities and their parents. These procedural safeguards are meant to "guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think are inappropriate." Honig v. Doe, 484 U.S. 305, 311-12 (1988).

Under the IDEA, a "free appropriate public education" is one that is "provided in conformity with the individualized education program required under section 1414(d)." 20 U.S.C. § 1401(8). The IEP is the "centerpiece of the statute's education delivery system for disabled children." Honig, 484 U.S. at 311. The IEP must include, inter alia, a statement of the services to be provided to the child, an assessment of the child's current educational levels, and the annual goals set for that child. See 20 U.S.C. § 1414(d)(1)(A). The parents have the right to participate in the development of an appropriate IEP for their child. 20 U.S.C. § 1401(d)(1)(B). Parents also have the right to both administrative and judicial review of the placement proposed by the school in an IEP. In Pennsylvania, parents who object to an IEP may first request an "impartial due process hearing" before a hearing officer. 22 Pa.Code § 14.64 (1997). Any party aggrieved by the hearing officer's decision may then appeal that decision to the Special Education Appeals Panel. Id.

at § 14.64(m). When a final administrative decision has been rendered, a dissatisfied party then has the right to bring a civil action in either federal or state court. 20 U.S.C. § 1415(i)(2); Drinker v. Colonial School District, 78 F.3d 859, 864 n.10 (3d Cir. 1996).<sup>4</sup>

Most importantly for the instant Motion, the IDEA requires that during the course of any administrative and judicial proceedings brought under the Act, "the child shall remain in the then current educational placement." 20 U.S.C. § 1415(j). This requirement is known as the IDEA's "pendent placement" or "stay put" provision. See Susquenita School District v. Raelle S., 96 F.3d 78, 82 (3d Cir. 1996). The "pendent placement" provision provides, in pertinent part:

During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then-

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<sup>4</sup> Section 1415(i)(2) of the IDEA provides in relevant part: Any party aggrieved by the findings and decision made under subsection . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.  
20 U.S.C. § 1415(i)(2).

current educational placement of such child.  
20 U.S.C. § 1415(j).

**B. Standard for a Preliminary Injunction**

Section 1415(j) functions, in essence, as an automatic preliminary injunction. Drinker, 78 F.3d at 864. "The provision represents Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until their dispute with regard to their placement is ultimately resolved. Once a court ascertains the student's current educational placement, the movants are entitled to an order without satisfaction of the usual prerequisites to injunctive relief." Woods v. New Jersey Dep't of Educ., No. 93-5123, 20 *Indiv. Disabilities Educ. L. Rep.* (LRP Publications) 439, 440 (3d Cir. Sept. 17, 1993) (emphasis added); see also Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) ("the statute substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships"). Thus, for purposes of a Motion for a Preliminary Injunction, the dispositive inquiry under section 1415(j) is the identification of the child's "current educational placement."

In making its decision, the Court will use its "independent

judgment" "based on a preponderance of the evidence," while giving "due weight to the administrative determinations." See Board of Education v. Rowley, 458 U.S. 176, 205-206 (1982). The Court must "avoid substituting [its] educational judgments for those of state administrative bodies." See Delaware County Intermediate Unit #25 v. Martin K., 831 F.Supp. 1206, 1220 (E.D.Pa. 1993).

### **C. Application of the Pendent Placement Provision**

Most often, the "pendent placement" provision is invoked by a child's parents in order to block school districts from effecting unilateral change in a child's educational program. See Honig, 484 U.S. at 323 (finding that in creating section 1415(j) "Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school"). In such cases, the Third Circuit has instructed that "the dispositive factor in deciding a child's 'current educational placement' should be the Individualized Education Program . . . actually functioning when the 'stay put' is invoked." Drinker, 78 F.3d at 867 (quoting Woods, 20 IDELR at 440). According to Defendant, the last functioning IEP was in the public school system pursuant to the November IEP, and therefore, the public school placement must remain Matthew's

pendent placement for the duration of the litigation. (P.I. Trans. at 33.)<sup>5</sup>

This case, however, differs from many in which a child's pendent placement is at issue. In this case, it is the parents who changed the child's placement. The parents, unconvinced that the November IEP was appropriate for Matthew based on his continued inability to perform in his classes, chose to remove Matthew from public school and to place him in private school at their own expense. They had no interest in having Matthew remain in the Parkland schools. Thus, the protective purpose underlying the pendent placement provision was not triggered at the point at which Matthew's placement was changed.

In Susquenita, the United States Court of Appeals for the Third Circuit ("Third Circuit") provides the Court with guidance. In that case, the Third Circuit was faced with a similar set of facts and a different procedural history. As in this case, in Susquenita, it was the parents, not the school district, who advocated change. It was the parents who unilaterally withdrew the child and placed her in a private school. At the due process hearing in Susquenita however, the hearing officer found against the parents and decided that the IEP proposed by the public

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<sup>5</sup> The District's proposed IEP for the 1997-98 school year was never accepted by Matthew's parents. Thus, there has been no suggestion that the placement proposed in the 1997-98 IEP is the pendent placement.

school was appropriate. The parents appealed. The Special Education Appeals Panel reversed the hearing officer's decision, finding that the proposed IEP was deficient in a number of respects and that "[the child's] educational program was not reasonably calculated to provide for meaningful education benefit." Susquenita, 96 F.3d at 79 (citation omitted). Accordingly, the Appeals Panel found that the parents claim for reimbursement of the costs of sending their child to private school was permissible. Id. at 80. The Appeals Panel also found that the child's pendent placement was the private school, unless its Order was overturned in a Commonwealth or federal district court. Id.

The Third Circuit held that when parents of a disabled child choose to withdraw that child from the proposed public school placement, they do not thereby invoke the protection of the pendent placement provision. The Court explained that "prior to the time that the education appeals panel announced its decision, the pendent placement provision was inoperative." See Susquenita, 96 F.3d at 83. However, at the moment at which the Appeals Panel found in the parents' favor, there was "agreement" between the state educational agency and the parents, and a new pendent placement was created. The Court relied on the language of the statute in support of this proposition. The statute permits the "state or local educational agency and the parents or

guardian [to] otherwise agree" to a pendent placement other than the child's placement at the commencement of the administrative proceedings.<sup>6</sup> Based on the Supreme Court's decision in School Committee of the Town of Burlington v. Dep't of Educ., 471 U.S. 359, 372 (1985) establishing "that a ruling by the education appeals panel in favor of the parents' position constitutes agreement for purposes of section 1415[j]," the Susquenita Court found that the Appeals Panel's decision set a new "agreed upon placement" sufficient to alter pendency. Susquenita, 96 F.3d at 83. Therefore, from the point of the panel decision forward, the child's pendent placement, by agreement of the state, was the private school.

Defendant argues that Susquenita's teachings are not applicable here because in this case there was no "agreement" from the state educational agency as to Matthew's placement at

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<sup>6</sup> The educational agency and contesting parents may agree to a change in placement under section 1415(j). Federal regulations under the statute thus provide as follows:

During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.  
34 C.F.R. § 300.513.

The due process requirements of the Pennsylvania regulations implementing the IDEA track this federal standard:

No change in the identification, evaluation, educational placement or IEP of an exceptional student or an eligible young child may be made during the pendency of an administrative or judicial proceeding unless agreed to by the parties to the proceeding.  
22 Pa.Code § 14.61(b).

Phelps. While the Court recognizes that the "agreement" in this case does not come from the appeals panel as it did in Susquenita, but rather from the "local educational agency," the Court does not find this distinction determinative.

In Hearing Officer Drenning's decision, he found that (1) the November IEP was inappropriate for Matthew and (2) the Phelps school was meeting Matthew's educational needs. He then went on to award the parents reimbursement for Matthew's educational costs at Phelps for the 1996-97 spring semester. He specifically found that the two prong test for whether parents are entitled to reimbursement of private school costs had been met. See Burlington, 471 U.S. 359 (1985) (IDEA authorizes reimbursement of tuition when District's proposed IEP is found to be inappropriate and parents make unilateral placement which later proves to be appropriate).<sup>7</sup> Without question, this decision provided a ruling

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<sup>7</sup> A placement is appropriate if it is "reasonably calculated to enable the child to receive educational benefits." See Board of Education v. Rowley, 458 U.S. 176, 206 (1982). The hearing officer's finding that Phelps was meeting Matthew's "educational needs" coupled with the finding that the parents clearly met the two-prong Burlington test for reimbursement and the testimony of Dr. Michael Murphy quoted below, demonstrates to this Court that the hearing officer established Phelps as an appropriate placement for the 1996-97 school year and that the District understood that Decision as such. The Court notes Defendant's argument that the Hearing Officer's Decision merely established the Phelps placement as "proper under the act" when it awarded reimbursement for the 1996-97 semester at Phelps. Defendant argues that the awarding of the so-called "equitable Carter remedy" does not necessarily change pendency. Florence County School District Four v. Carter, 510 U.S. 7 (1993). However, by Dr. Murphy's own admission, as quoted below, the

"in favor of the parents' position." As in Susquenita, when the parents received such a ruling, there was "agreement."

Susquenita, 96 F.3d at 83. By failing to appeal the decision, the District accepted the agreement.<sup>8</sup>

The following dialogue between the Court and defense counsel that took place at the hearing on the Motion solidifies the Court's view that the "agreement" in this case as described above is sufficient to alter pendency. The Court asked counsel whether the District itself could change pendency by agreeing to a private school placement initiated unilaterally by a disabled child's parents. Counsel agreed that it could.

The Court: Well, what if that private school placement that was initiated unilaterally had been accepted by the school district?

Counsel: The parties are always free to change pendency by acceptance.

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District accepted the Hearing Officer's finding that Phelps was meeting Matthew's educational needs in 1996-97. To the Court, this acceptance is no different from a letter to the parents to that effect, a method of acceptance that Defense counsel agreed was sufficient to alter pendency.

<sup>8</sup> It is true, as Defendant contends, that the Third Circuit has not had the opportunity to address whether "agreement" from the local educational agency is sufficient to alter pendency. However, the statute itself so permits. See 20 U.S.C. § 1415(j) ("...unless the State or local educational agency and the parents [] otherwise agree") (emphasis added). In addition, in this case, the District accepted the "agreement" when it did not appeal.

The Court: Well, that placement would have constituted then an agreed upon placement and would have become the last current appropriate placement.  
Counsel: If in fact the circumstances were that.  
The Court: The school district wrote a letter saying we accept it?  
Counsel: We accept it, sure, okay.

(P.I. Trans. at 19-20.) Later in the hearing, Dr. Michael Murphy, the Director of Pupil Services for the Parkland School District was called to the stand. The Court engaged Dr. Murphy in the following illuminating discussion:

The Court: Dr. Murphy, as Director of Pupil Services, did you have authority to agree to IEP for students at Parkland School District?  
Dr. Murphy: Yes.  
The Court: Did you understand the hearing officer's finding to be that Phelps was meeting Matthew's educational needs?  
Dr. Murphy: I understood that he believed that.  
The Court: And you did not appeal that?  
Dr. Murphy: Correct.  
The Court: So all -- I mean you had accepted that finding?  
Dr. Murphy: Yes.

(P.I. Trans. at 113.)

The Court finds no difference in substance between a letter of agreement from the District accepting the Phelps placement and the District's failure to appeal a decision it knew established Phelps as the last current appropriate placement. Based on the

above dialogue between the Court and Dr. Murphy, it is evident that the District's choice not to appeal the Hearing Officer's decision was tantamount to acceptance of an agreement to establish pendency at Phelps. As Defense counsel stated, an acceptance by the District of Matthew's placement at Phelps "would have constituted [] an agreed upon placement and would have become the last current appropriate placement." (P.I. Trans. at 19-20.) By choosing not to appeal, the District accepted the private school placement. See Rowley, 458 U.S. at 206. Phelps was thus established as the "last agreed upon placement." Therefore, Plaintiffs are entitled to an order establishing this placement as the "pendent placement." See Drinker, 78 F.3d at 864.

#### **D. Financial Responsibility**

Financial responsibility attaches once a pendent placement determination is made.

While parents who reject a proposed IEP bear the initial expenses of a unilateral placement, the school district's financial responsibility should begin when there is an administrative or judicial decision vindicating the parents' position. The purpose of the Act, which is to ensure that every child receive a 'free and appropriate public education' is not advanced by requiring parents, who have succeeded in obtaining a ruling that a proposed IEP is inadequate, to front the funds for a continued private education.

Susquenita, 96 F.3d at 86 (concluding that a school district may be required to pay for tuition and expenses associated with a

pendent placement prior to the conclusion of litigation); see also Clovis v. Office of Administrative Hearings, 903 F.2d 635 (9th Cir. 1990). In July 1997, Matthew's parents received an administrative decision vindicating their position. The District accepted that decision. The District therefore, cannot avoid interim responsibility for funding Matthew's private school placement pending the outcome of any proceedings brought under the Act.<sup>9</sup>

There is no doubt that Congress has imposed a significant burden on the States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Florence County School District Four v. Carter, 510 U.S. 7, 15 (1993). Requiring the District to reimburse Matthew's parents for the costs of his education at Phelps from the beginning of the 1997-98 school year until the present merely forces the

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<sup>9</sup> Defendant makes much of the fact that the Hearing Officer's decision vindicating the parents' position related only to the 1996-97 school year. The Court agrees with Defendant and intimates no view as to the appropriate placement for Matthew for the current school year. However, pendent placement is an entirely independent determination based on the "last agreed upon placement." The designation of Phelps as Matthew's "pendent placement" does not decide the issue of the appropriate placement for Matthew during the 1997-98 school year.

District to belatedly pay expenses that it should have paid all along.

### **III. Conclusions of Law**

1. Title 20 U.S.C. § 1415(j), the pendent placement provision, functions as an automatic preliminary injunction. Drinker v. Colonial School District, 78 F.3d 859, 864 (3d Cir. 1996).

2. Until the time that the local educational agency and the parents "otherwise agreed" to Matthew's placement at Phelps, the pendent placement provision was inoperative. Susquenita School District v. Raelee S., 96 F.3d 78, 83 (3d Cir. 1996).

3. The critical determination in identifying the pendent placement when the parents of the disabled child have unilaterally withdrawn that child from the public school placement is the "last agreed upon placement." Susquenita, 96 F.3d at 83-84.

4. When the hearing officer found that the November IEP was inappropriate and the Phelps placement was "meeting Matthew's educational needs" and the District failed to appeal that decision, Phelps became the "last agreed upon placement."

5. As the "last agreed upon placement," Phelps is Matthew's pendent placement pursuant to 20 U.S.C. § 1415(j).

6. Once pendent placement was established in the summer of 1997, by agreement of the District, financial responsibility on the part of the District followed. Susquenita, 96 F.3d at 84.

7. The District is required to reimburse Matthew's parents for the costs of educating Matthew at Phelps from the beginning of the 1997-98 school year to the present and pending the outcome of any proceedings brought under the Act.

8. The District's financial obligations with respect to the pendent placement are immediate and may not be deferred until the close of the litigation. Id.

9. The pendent placement determination is a separate and independent decision from the issue currently before Hearing Officer Drenning regarding the appropriate placement for Matthew during the 1997-98 school year.

An appropriate Order follows.



(3) Parkland School District shall continue to pay the costs of Matthew K.'s placement at Phelps pending the outcome of any administrative and judicial proceedings brought under Section 1415 of the Individuals with Disabilities Education Act. 20 U.S.C. § 1415(j).

That portion of the Motion seeking the termination and dismissal of the due process hearings scheduled before Hearing Officer Drenning is **DENIED**.

BY THE COURT:

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JOHN R. PADOVA, J.