

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

Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name: C.O.

Date of Birth: [redacted]

ODR No. 18020-1617AS

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

Pro se

South Park School District
2001 Eagle Pride Lane
South Park, PA 15129

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Date of Hearing: September 26, 2016

Date of Decision: October 10, 2016

Hearing Officer: Brian Jason Ford, JD, CHO

Introduction

The South Park School District (District) proposes to move a student with disabilities (Student) from an educational placement located in its middle school to an approved private school for children with disabilities. The Student's parents (Parents) oppose this change. After negotiations failed, the District requested this hearing, pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The District seeks an order permitting it to move the Student without the Parents' consent.¹

For reasons discussed below, I find in favor of the District.

Issue

May the District move the Student to a more restrictive setting, without parental consent, in order for the Student to obtain a free appropriate public education (FAPE)?

Findings of Fact

All evidence submitted in this hearing was carefully considered, as was the entirety of the transcript. Not every entered document is referenced below, as I make findings of fact only as necessary to resolve the issue presented. I find as follows:

Background and Stipulations

1. The parties stipulate that the Student is a child with a disability, as defined by the IDEA. NT 34-35.
2. The 2010-11 school year was the Student's kindergarten year.
3. The Student attended the District's elementary school (Elementary School) for kindergarten from the start of the 2010-11 school year through March of 2011. NT 41-43.
4. In March of 2011, the Parents withdrew the Student from the District. *Id.*
5. The Student attended a public charter school (Charter) for the 2011-12 (1st grade), 2012-13 (2nd grade), 2013-14 (3rd grade), and 2014-15 (4th grade) school years. *Id.*
6. During the 2011-12 school year, the Charter identified the Student as a child with a disability, specifically an Emotional Disturbance and a Specific Learning Disability in reading.
7. The Student experienced behavioral difficulties while attending the Charter. *See, e.g.* S-5,
8. The Student received special education from the Charter pursuant to IEPs. The Student's last IEP from the Charter was offered and accepted in April 2014. That IEP placed the Student in itinerant learning support, and focused on the Student's behaviors (particularly in regard to modifications and specially designed instruction). S-5.

¹ Except for the cover page of this Decision and Order, identifying information is omitted to the greatest extent possible. The plural "Parents" is used throughout this Decision and Order as both of the Parents are parties to this matter.

9. The Parents re-enrolled the Student in the District for the 2015-16 school year (5th grade).
10. The District contracts with an outside agency to provide school-based counseling to students. See, e.g., NT 62-63. Throughout the entirety of the 2015-16 school year, the District recommended school-based counseling. *Id.* The Parents refused this service, either specifically, or as part of their overarching refusal to allow the Student to work with anyone that the District brought in from the outside. See *id.*

2015-16 School Year (5th Grade) – First Quarter²

11. 5th grade is usually housed in the District's middle school (Middle School). However, some of the District's buildings were under construction during the 2015-16 school year. As a result, the Student attended 5th grade in the Elementary School – the same building in which the Student attended most of kindergarten.
12. Upon the Student's re-enrollment, the District chose to implement services comparable to those in the Charter's last IEP until it could evaluate the Student and offer an IEP of its own.
13. For the first quarter of the 2015-16 school year (roughly a nine-week period), the Student was placed in an itinerant learning support program. In this program, the Student attended two co-taught classes (Language Arts and Math), and attended all other classes in a regular education setting.
14. During the first quarter of the 2015-16 school year, the Student also received modified assignments, modified homework, modified tests, and small group instruction.
15. During the first quarter of the 2015-16 school year, the Student had multiple, serious, potentially dangerous, behavioral episodes. During this time, on at least four occasions, the teachers evacuated the other students from the Student's class. The student would attack school property ([redacted]). S-1.
16. During the first quarter of the 2015-16 school year, the District attempted various behavioral interventions, including a ticket system to reward the Student's positive behaviors. None of the District's efforts were effective.
17. On September 29 and October 9, 2015, the District brought in an outside behavioral consultant to observe the Student in school. The consultant recommended use of a chart system to help the Student recognize and communicate the Student's feelings in an effort to reduce behaviors. The Student refused to use the chart.
18. After the outside consultant observed the Student, the Parents forbid the District from bringing in anyone from outside the District to work with the Student.
19. The Student's behaviors interfered with the Student's own learning, and the learning of other students. The Student frequently exhibited negative behaviors in response to school work

² The District's attorney referred to four separate, nine-week periods during the 2015-16 school year. I think of these periods as "quarters" and use that language. It is not clear that each period was exactly nine weeks. It is also not clear whether these periods exactly correspond with the District's four "marking periods" of the 2015-16 school year (see, e.g. S-35). Rather, these are four periods of roughly equal time during the 2015-16 school year.

that the Student perceived as difficult. The Student would also simply refuse to do such work on many occasions. At the same time, the Student routinely did not complete homework.

20. During the first quarter of the 2015-16 school year, the District was concerned about the Student's academic progress. Although the Student did well in Science, Gym, and Music, the Student did poorly in all other subjects, including Math and English and Language Arts (ELA). S-35.
21. The District realized the Student's academic difficulties almost immediately, and modified the Student's schedule so that the Student attended two, 20-minute, periods during which the Student could work with a paraprofessional to catch up. The Student refused to work during these periods.

2015-16 School Year (5th Grade) – Second Quarter

22. During the second quarter of the 2015-16 school year, with the Parents' consent, the District placed the Student into a cyber education program (Cyber Program).³
23. District personnel expected that the Student would benefit from the Cyber Program because it was self-paced. NT 67-68.
24. The Student received the Cyber Program in the Elementary School. The District gave the Student a cubicle in a room that is usually used for small group instruction. Groups of other students would also do work in that room, but the cubicle was the Student's own. NT 75-76.
25. The Student was never alone in the room. A teacher or paraprofessional was always in the room with the Student. NT 75-77.
26. While the Student was enrolled in the Cyber Program, a teacher would outline the work that the Student was expected to complete each day. Although the Cyber Program was self-paced, the work outline was intended to close the gap that had widened during the first nine weeks of the school year.
27. Almost immediately, the Student refused to do school work in the Cyber Program. The District responded to this by increasing the amount of time that the Student worked directly with special education teachers. Very shortly after the Student started the Cyber Program, the District assigned the Student to a 45-minute block of one-to-one instruction with special education teachers, three days per week. NT 259-260.⁴
28. Even with significant one-to-one instruction, a self-paced program, and placement in a smaller classroom, the Student continued to exhibit aggressive behaviors, sometimes resulting in classroom evacuations, and continued to refuse to do work. S-1, NT *passim*.

³ The District's Cyber Program is not a public cyber charter school. Rather, the Intermediate Unit serving the District provides equipment, materials, and support for the District to run its own Cyber Program. The record indicates that the Cyber Program's curriculum came from the Intermediate Unit. For legal purposes, however, this was a placement within the District, no different from any of the District's own placements.

⁴ While the Student was assigned to a daily 45-minute block, that block was divided into 15-minute segments to cover different subjects with different special education teachers. The Student's behaviors would often cut into that time.

29. With the exception of Gym, the Student continued to perform as poorly or worse academically. The Student was now failing both Math and ELA. S-35.

2015-16 School Year (5th Grade) – Third and Fourth Quarter

30. The District and Parents withdrew the Student from the Cyber Program on February 4, 2016. S-20.

31. With parental consent, the District changed the Student's placement from itinerant learning support to supplemental learning support. During this time, the Student received two hours per day of one-to-one instruction with special education teachers for Reading, ELA, and Science. The Student attended all other classes in a regular education setting. NT 263-266.

32. During the third and fourth quarter, the District assigned a paraprofessional to the regular education classrooms that the Student went to. The District did this to assist the Student and monitor the Student's behaviors, although the paraprofessionals were always assigned to the classrooms, and not specifically to the Student. *C/f* NT 75, 77.

33. The Student's negative behaviors, including both the aggressive behaviors and passive work refusal, continued during the second and third quarters of the 2015-16 school year ([redacted]). NT *passim*; see, e.g. S-1, NT 54.

34. Throughout the third and fourth quarter, the District attempted various, and increasingly intensive methods to curb the Student's behaviors and improve work compliance. This included altering and reducing the Student's work, various strategies to reward the Student's positive behaviors, and various strategies to replace the Student's negative behaviors. See, e.g. NT at 298.

35. None of the strategies improved the Student's behaviors.⁵ NT *passim*; see, e.g. S-1.

2015-16 School Year (5th Grade) – Evaluation and Placement Offer

36. The District determined very early in the 2015-16 school year that an evaluation was necessary. The District sought the Parents' consent to evaluate the Student on October 6, 2015. The Parents refused to provide consent. S-12.

37. Prior to the Cyber Program placement, the District used existing data and observations to draft a reevaluation report (RR) for the Student, and used that report to modify the Student's IEP to include the Cyber Program. S-13, 14. That RR, dated November 16, 2015, concludes that a more complete evaluation, including new testing, was necessary. S-13.

38. The District again attempted to obtain the Parents' consent to evaluate the Student on December 15, 2015, and January 6, 2016. On those occasions, the Parents refused to provide consent, but also did not return consent forms to the District. S-16, 17.

39. The District attempted to obtain the Parents' consent again on January 12, 2016. The Parents again refused, but this time returned the consent paperwork, indicating their refusal. S-18.

⁵ School-based counseling was also available, but refused by the Parents. See *above*.

40. On January 18, 2016, the District requested a due process hearing, seeking an order to evaluate the Student without the Parents' consent. S-22.
41. A due process hearing was scheduled and then continued on the Parents' motion. S-23, 24.
42. On February 2, 2016, the District completed another RR. This RR was based exclusively on informal observations, and was used for solely for a procedural purpose – moving the Student from the Cyber Program to Supplemental Learning Support. S-19.
43. On March 1, 2016, the Parents consented to the District's proposed evaluation. This rendered the District's due process complaint moot, and the District withdrew its due process complaint. S-26, 27.
44. The District evaluated the Student and drafted another RR. The RR was promulgated on March 30, 2016. The District contracted with a School Psychologist in private practice to conduct the evaluation. The School Psychologist was the primary evaluator and primary author of the RR. S-28; NT 105.
45. The March RR included a review of records and both current and historical observations. The School Psychologist also attempted to conduct standardized, normative assessments of the Student's intellectual ability and academic performance. S-28. The testing took an inordinately long amount of time as a result of the Student's non-compliance and need for frequent redirection. NT 184.
46. Despite the Student's threats to topple a bookshelf in the testing room if forced to do work, the School Psychologist was able to persuade the Student to complete enough of the testing to get some valid measures. For example, the School Psychologist was not able to obtain a full scale IQ score for the Student, because the Student would not comply with all of the testing. This prompted the evaluator to focus on the portions of the testing that could be used to obtain a valid GAI (General Ability Index).⁶ S-28, NT 184, 216.
47. During testing, the Student was extremely resistant to any tasks that required reading or writing. NT 190.
48. Behavior rating scales were completed by multiple teachers, but not by the Parents. Teachers rated the Student in the clinically significant and at-risk ranges across multiple domains, substantiating the degree of negative behaviors observed in school. S-28.
49. The School Psychologist concluded that the Student's behaviors were, in part, an effort to avoid or escape from work that the Student perceived as challenging – particularly reading and writing, areas tied to the Student's Specific Learning Disability. S-28, NT 190.
50. The School Psychologist concluded that the Student is still properly classified with a primary disability category of Emotional Disturbance and a secondary category of Specific Learning Disability. S-28. However, the School Psychologist's "primary concern was the degree to which we've seen over time [the Student's] behavior impact [the Student's] skills acquisition." S-190. Meaning that it will be extremely difficult to remediate the Student's

⁶ The GAI is an optional index score for the WISC-IV. The GAI is derived from the core Verbal Comprehension and Perceptual Reasoning subtests. The GAI provides an estimate of general intellectual ability, with reduced emphasis on working memory and processing speed relative to the FSIQ.

Specific Learning Disability because efforts at doing so trigger the Student's negative behaviors. See S-28.

51. The School Psychologist is knowledgeable about the services available within the District. NT 219-220.
52. The School Psychologist concluded that the services available within the District are insufficient to meet the Student's needs. Specifically, the School Psychologist concluded that the Student "needs intensive behavioral and therapeutic interventions and intensive levels of support throughout the school day like those provided in an approved private school or licensed private academy. Reduction of problematic behaviors needs to be a focus of [the Student's] educational programming so [the Student] can acquire behavioral strategies and coping skills that will enable [the Student] to engage in the learning process and further develop academic competencies." S-29 at 16.
53. Based on the March RR, the District concluded that a full-time emotional support placement was necessary in order for the Student to receive FAPE. The District then identified three Approved Private Schools (APS) that offered full-time emotional support and academic programming that the District believes will provide a meaningful benefit to the Student. See, e.g. S-34.
54. The Parents refuse to consider any APS offered by the District, refuse to tour any APS, and refuse to consent to any APS placement.⁷ *NT passim*; see, e.g. NT at 110.

Behavior Summary, Final Grades, Therapies, and Current Placement

55. By the end of the 2015-16 school year, the Student accrued 94 disciplinary actions. These included three detentions, eight out-of-school suspensions, two half-day out-of-school suspensions, and 81 warnings. Of the 94 incidents, nine involved destruction of school property. An additional 11 involved either disruption to class or pushing and shoving. S-1.⁸
56. With the exception of the second marking period, which corresponds to the time that the Student was enrolled in the Cyber Program, the Student did well in Science, Gym, and Music.⁹ The Student's performance in a Technology class also dramatically improved in the second two marking periods. Nevertheless, the Student failed Math and ELA. S-35.

⁷ Of the three placements identified by the District, District personnel have a clear preference for one. However, it is equally clear that all three placements were offered, the District considers all three placements to be appropriate, and would fund whichever of the three that the Parents selected. As noted above, the District does not seek an order permitting placement in a specific APS, but rather an order permitting the District to increase the restrictiveness of the Student's placement by moving the Student to an APS.

⁸ The testimony from all witnesses, including and especially the Student's father, leaves a very clear impression that the District's report of the Student's behavioral incidents understates the total amount and severity of the Student's behaviors. The testimony from all witnesses, as a whole, illustrates that the Student's behaviors were a problem every day. The document at S-1 reports only those incidents that precipitated formal action (ranging from warnings to suspensions) by the District.

⁹ The Student's Science class did not require much, if any, reading, but rather focused on hands-on learning. This, and the Student's other grades supports the School Psychologist's

57. Both because of the Student's failure to obtain credits, and because the missing credits were in core subjects, the District retained the Student in 5th grade for the 2016-17 school year. See, e.g. NT 309.
58. After a protracted fight with insurance companies, the Student began receiving private psychotherapy from a Licensed Clinical Social Worker on July 26, 2016. The Student was also privately diagnosed with Disruptive Mood Dysregulation Disorder and Oppositional Defiant Disorder around the same time, and began to receive medication for those disorders. P-1.
59. The Parents shared information about the Student's private psychotherapy and medication on the day of this due process hearing, September 26, 2016.
60. The Student is currently repeating 5th grade during the 2016-17 school year. With construction complete, the Student is attending the District's middle school.¹⁰ NT 158.
61. Within the first 14 school days of the 2016-17 school year, the Student was involved in a very serious behavioral incident, written up as two separate violations arising from the same series of actions. This resulted in an out of school suspension.¹¹

Legal Principles

Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the District the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to a student who qualifies for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is "reasonably calculated" to enable the child to receive

theory that the Student's behaviors are most evident in classes requiring reading, writing, and academic skills that the Student perceives as difficult.

¹⁰ The District houses its own alternative education program in its middle school. Neither party argued that program is appropriate for the Student. Moreover, the program is available to students starting in 6th grade. While the Student's biological cohort is in 6th grade, the Student is a 5th grader.

¹¹ Documentary evidence about the 2016-17 incident was not produced by either party for the hearing. The first day of school for students was September 6, 2016. NT 236. The hearing was 14 school days later on September 26, 2016. While the parties characterize the incident differently, there is no dispute that a behavioral incident occurred and resulted in an out-of-school suspension.

‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

More specifically, in *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district’s efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.”

Benefits to the child must be ‘meaningful’. Meaningful educational benefit must relate to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

However, a school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than “trivial” or “*de minimus*” benefit is required. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student.

Least Restrictive Environment and Continuum of Alternative Placements

The IDEA requires placement in the least restrictive environment (LRE):

To the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and . . . special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2)(i).

The LRE requirement, as indicated in the text of the regulation, operates relative to an individual student's needs. Several different placement options may be appropriate for any given student at any given time. The LRE requirement compels LEAs to place students in the least restrictive of all possibly appropriate placements.

Consistent with the foregoing, the IDEA establishes a continuum of alternative placements. 34 C.F.R. § 300.115. LEAs must make this continuum available to students in order to meet the needs of each individual student. 34 C.F.R. § 300.115(a). The continuum includes, in order of increasing restrictiveness, instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b).

Discussion

The IDEA's FAPE and LRE requirements are intertwined. A school district may not place a student in an inappropriate placement simply because it is less restrictive. Conversely, a school district may not place a student in a more restrictive placement if a less restrictive placement is appropriate. In this case, it was the District's burden to establish that an APS is the least restrictive environment in which the Student can receive FAPE, despite the fact that an APS is more restrictive than the placement that the Student currently attends.

On the LRE continuum, the Student currently attends "special classes." 34 C.F.R. § 300.115(b). APSs fall into the category of "special schools," which are one step more restrictive along the continuum. *Id.* To make this change over parental objection, the District must prove that the change is necessary for the provision of FAPE.¹²

There is more than a preponderance of evidence that the Student's placement was inappropriate during the 2015-16 school year.¹³ Despite consistently increasing supports and

¹² Reasonable minds can differ about whether Hearing Officers have authority to order students into specific placements (the difference is between finding that an APS is necessary and finding that a *particular* APS is necessary). This question typically comes up when parents are seeking private school placement prospectively. See, e.g. ODR No. 14487-1314KE. While this distinction was discussed during the hearing, it is ultimately irrelevant in this case. The Complaint simply seeks an order allowing the District to increase the restrictiveness of the Student's placement by placing the Student into an Approved Private School (APS). Placement into a specific APS is not demanded.

¹³ There is no evidence that the 2015-16 placement was inappropriate at the time it was offered.

attempts to use different strategies throughout the school year, the Student's behaviors were simply out of control. There is no question that the Student's behaviors are a function of the Student's disability. The behavioral incidents are not some sort of calculated malice, but rather a symptom of the disability that the District has targeted through IEPs.

It is also abundantly clear that the District attempted everything possible within the Student's placement to both accommodate and remediate the Student's behavioral needs. At a technical level, it would have been better for the District to have assigned an aide to the Student, as opposed to the Student's classrooms. In practice, the District's hands were tied. It could not adjust the Student's IEP to include an aide in the absence of an evaluation, and it could not conduct an evaluation because the Parents refused to provide consent.¹⁴ More importantly, while an aide was never assigned specifically to the Student, the Student had an aide in substance. There was always an adult, either a teacher or a paraprofessional, with the Student at all times and, by necessity, attending to the Student's behavioral needs. Not even this level of support was effective.

While the Student's behaviors were a clear focus of this hearing, the Student's reading needs must not be overlooked. The record overwhelmingly supports the District's contention that the Student's negative behaviors increase whenever the Student is asked to do the difficult work that is needed to remediate the Student's reading disability. Without increased therapeutic supports targeting the Student's behaviors, there is every reason to fear that the Student's reading abilities will continue to lag further and further behind same-aged peers. Moreover, it is reasonable to expect the Student's behaviors to worsen, should there be a push to remediate the Student's reading.

Based on the foregoing, the District has satisfied its burden. Preponderant evidence clearly shows that the Student's current placement is not appropriate, and cannot be made appropriate through increased supports. In fact, increased supports within the current setting have failed. Consequently, in order for the District to satisfy its obligations to the Student, a more restrictive placement is necessary.

While the analysis may end with the conclusion above, I believe that it is important to acknowledge and consider the Parents' arguments to the contrary. The Parents agree that the 2015-16 school year was "a nightmare" in regard to the Student's behaviors. NT 326. However, the Parent argues that the situation has improved to the point where an APS placement is no longer necessary. Specifically, the Parents highlight that the Student now receives counseling and is on medication. The Parents also suggest that the Student linked the District's elementary school to a past trauma, and that the Student's behaviors should improve now that the Student attends the District's middle school. The Parents also point to the Student's behaviors at the start of the current, 2016-17, school year as evidence of progress. These arguments are not persuasive, contrary to the evidence, or both.

Regarding counseling and medication, it is commendable that the Parents fought so hard to secure these services for the Student. Hopefully, they will be effective. Obtaining these services, however, does not remove the District's responsibility to provide FAPE to the Student. At an evidentiary level, the Parent provided evidence only that the Student is receiving these services.

¹⁴ Evaluation, in this context, means the type of thorough evaluation that the District ultimately received consent for, after it requested a hearing. A simple review of records could not justify the assignment of an aide to the Student, as that would be a significant, substantive revision to the Student's IEP.

It is not clear how long those services will remain in place, what the projected outcome or treatment plan is, or how long it will take to achieve that outcome.

Moreover, an APS placement should be complementary to the Student's counseling. An APS is not a disciplinary placement. The Parent's testimony, as a whole, leaves a very clear impression that the Parents view an APS as a punishment; a school for children with "bad" behavior. To the contrary, the District readily admits that the Student's behaviors are a function of the Student's disability. The District made a point of this throughout the hearing, and rebuffed any assertion by the Parent that the Student is "bad." See, e.g. NT 144, 279. Increased therapeutic support is necessary for the Student to obtain FAPE. The therapeutic support offered within an APS should only bolster the private services that the Parents have secured.

Regarding past trauma, the Parents argue that the elementary school building itself is a trigger for the Student. As such, they suggest that the Student's behaviors should improve elsewhere. This argument is not supported by the evidence presented during the hearing. The Parent testified to trauma occurring on a school bus prior to the Student's transfer to the Charter School. Even if I were to accept that testimony as fact, that is not evidence of a past trauma in the elementary school.¹⁵ Carefully sifting through the Parent's testimony, and viewing that testimony in the most favorable light to the Parents, reveals some vague suggestion of negative experiences in the elementary school before the transfer to the Charter School. This is insufficient to support a finding that there was prior trauma in the elementary school, let alone that the elementary school building is triggering, or that the Student's behaviors are expected to improve outside the elementary school. Moreover, there are facts to the contrary. The Student exhibited behaviors in the Charter School, in the elementary school building, on the bus, and in the middle school as well. S-1, S-5. Whatever experiences the Student had in the elementary school, the Student's behaviors are not exclusively linked to that single, physical location.

Regarding the Student's current behaviors, the Parents point to the Student's current behaviors as a sign that things are improving. I disagree. The Student was suspended out of school as a result of a serious behavioral incident within the first 14 school days of the 2016-17 school year. That is not boast-worthy. That is shocking. That is absolutely contrary to the picture of a good start to the 2016-17 school year that the Parents attempted to paint. That is not evidence that the Student has taken a turn for the better, and can now manage without the increased supports offered in an APS. Rather, that is evidence that the 2016-17 school year started where the 2015-16 school year ended, supporting the District's argument that a therapeutic setting is needed in order for the Student to derive a meaningful educational benefit.

¹⁵ There is no finding of fact on this point, as the Parent's testimony did not amount to preponderant evidence.

Conclusion

The District has established through preponderant evidence that the Student's current placement does not include the therapeutic supports necessary in order for the Student to receive FAPE. The District has also established through preponderant evidence the Student's current placement cannot be made appropriate through increased supports in the same location. The District seeks to [move] the Student to a therapeutic APS to ensure the provision of FAPE. This change constitutes an increase of restrictiveness by one degree on the IDEA's continuum. That change is necessary for the Student to receive a FAPE, and so the District may place the Student into an APS without the Parents' consent.

ORDER

Now, October 10, 2016, it is hereby **ORDERED** that the District may place the Student into a more restrictive setting, specifically a therapeutic APS with programming reasonably calculated to accommodate and remediate both of the Student's disabilities.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER