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

CLOSED HEARING

ODR File Numbers:
19899-1718KE
20080-1718KE
(Consolidated)

Child's Name:
A.B.

Date of Birth:
[redacted]

Parents
[redacted] [redacted]

Guardian of the Person of the Student for Educational Purposes
[redacted]

Local Educational Agency
Great Valley School District
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Malvern, PA 19355

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Date of Decision
March 9, 2018

Hearing Officer
Brian Jason Ford, JD, CHO

Introduction, Procedural History, and Prior Litigation

This matter concerns the educational rights of the Student, who resides within the boundaries of the District.[1] The Student is a "child with a disability" as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. More specifically, the Student is a child with both autism and an intellectual disability.

The current dispute is understood only in the context of the long and acrimonious history of disputes between the District and the Student's parents (the Parents). The Parents first requested a special education due process hearing against the District during the 2015-16 school year. That matter ended when the Parents and District entered into a settlement agreement (the Settlement). Under the Settlement, the Student received all educational and therapeutic services at home. Service providers were selected by the Parents and paid by the District. *See* ODR No. 18698-1617KE at 4.

The Settlement required the District to fund the parentally-selected services through September 1, 2016. As the Settlement was coming to an end, the District became concerned that the parentally-selected services were not meeting the Student's needs. Consequently, the District evaluated the Student, and proposed an Individualized Education Program (IEP). The IEP offered extensive services, placement in a specialized school, and a transition plan to enable the Student to move from receiving all services at home to receiving services in a school. The IEP was offered on November 2, 2016 (the 2016 IEP). *Id* at 2.

The Parents rejected the 2016 IEP. The District then requested a due process hearing on January 27, 2017, to prove that its offer was appropriate; the matter was assigned to Hearing Officer Valentini. Although the Parents were represented by a reputable law firm when the Settlement was negotiated, the Parents were now *pro se*. As the hearing progressed, the Parents retained a non-attorney advocate. The evening before the due process hearing, the non-attorney advocate advised Hearing Officer Valentini that the Parents would not participate in the due process hearing. The hearing convened without the Parents present. A second hearing session was needed, and Hearing Officer Valentini took extra measures to enable the Parents to participate. The Parents again refused to participate. Despite this, Hearing Officer Valentini considered written input that the Parents sent during the hearing process. *See, e.g.* ODR No. 18698-1617KE at 7.

On April 10, 2017, Hearing Officer Valentini concluded that the Student's placement was the constellation of services offered by the District through the 2016 IEP, the transition plan, and a Notice of Recommended Educational Placement (NOREP) that the District issued with the 2016 IEP. ODR No. 18698-1617KE. This decision was not appealed.

Following the first due process hearing, the non-attorney advocate obtained a general power of attorney for the Student. Then, on August 28, 2017, the advocate requested a second due process hearing on the Student's behalf. The second due process hearing was assigned to Hearing Officer Jelley. The District filed a motion, challenging the advocate's standing to request a hearing on

[1] Except for the cover page, identifying information is omitted to the extent possible.

the Student's behalf. The District also objected to the advocate representing the Parents, arguing that such representation was prohibited by Pennsylvania's unauthorized practice of law statutes.

On September 6, 2017, Hearing Officer Jelley heard oral argument on the District's motion. Hearing Officer Jelley ultimately agreed with the District. Other states have laws that permit non-attorney advocates to represent children in special education due process hearings. Pennsylvania does not. Further, the general power of attorney did not give the non-attorney advocate standing. The general power of attorney did not change the advocate's legal relationship with the Student in such a way that the advocate met the IDEA's definition of a parent. *See* 20 U.S.C. § 1401(23). Consequently, Hearing Officer Jelley dismissed the second due process complaint. *See* ODR No. 19629-1718KE.

When dismissing the second due process complaint, Hearing Officer Jelley said:

> The Parent[s] can re-file on their own. Or the Parents can do whatever they'd like to do in terms of establishing someone with legal authority through a Court Order to take action on behalf of the child.

NT of ODR No. 19698-1718KE at 51.

Heeding those words, the Parents obtained an order from the Court of Common Pleas of [the Local] County, Pennsylvania, Orphans' Court Division. That order appointed the non-attorney advocate as "Guardian of the Person of [Student], a minor, limited to educational purposes..." The Orphan's Court Order goes on to enumerate what those educational purposes are. Pertinent to this hearing, one of those purposes is "[r]epresenting the minor in any pro se hearings regarding [the Student's] educational needs..."

Shortly after the second due process complaint was dismissed, the Parents withdrew the Student from special education. At that moment, despite the Student's profound disabilities, the Student became a regular education student by operation of law. The District then conducted a special education evaluation, determined that the Student was eligible for special education and offered an IEP on October 18, 2017. The District offered a revised version of the IEP on November 17, 2017. The evaluation and both IEPs are discussed in detail below.

On November 6, 2017, the non-attorney advocate (hereinafter, the "Guardian") requested a third due process hearing on the Student's behalf. That complaint was assigned to me as ODR No. 19899-1718KE. The third complaint, among many other things, requested an independent educational evaluation (IEE) at the District's expense. Under the IDEA, when parents request IEEs at public expense, schools must either grant the request or request a due process hearing to prove the appropriateness their own evaluations. This prompted the District to file its own due process complaint, which was also assigned to me as ODR No. 20080-1718KE. I consolidated those cases.

In its complaint, the District not only alleges the appropriateness of its own evaluation, but also alleges that it offered appropriate IEPs to the Student on October 18, 2017 and November 17, 2017. The District asks me to find that its evaluation was appropriate, and that both IEPs were

appropriate at the time they were issued. The District also seeks an order to implement the November 17, 2017 IEP, which includes an out-of-district placement in a specialized program.

I must note that the District has not challenged the Guardian's standing to request a due process hearing on behalf of the Student since the Parents obtained the Orphan's Court Order. Although the matter does not fall within my jurisdiction, the District however continues to object to the Guardian's representation of the Parents, as that constitutes the unauthorized practice of law.

After numerous pre-hearing motions, this matter was scheduled to proceed on February 21, 2018. On February 20, 2018, the Guardian, the District's attorney, and I participated in a conference call; the Parents did not participate in the call. During that call, repeating the pattern in the first due process hearing, the Guardian announced that she and the Parents would not participate in this due process hearing. Instead, the Guardian demanded that I issue a final decision that she could appeal to court. *See* H-1. I confirmed that neither the Guardian nor the Parents were seeking a continuance for any reason, encouraged the Guardian and Parents to participate, and explained that the hearing would proceed without them, if they refused to attend. *See* H-1. I also explained that the Guardian and Parents' refusal to participate did not diminish the District's burden of proof in the hearing that it requested.

The hearing convened as scheduled on February 21, 2018. The District moved to dismiss the Guardian's complaint during the hearing. I explained that I would not address dispositive motions during the hearing, but would do so in writing after the hearing. The District then presented evidence in support of its case.

Parties

The Parents' status as parties to this hearing is somewhat ambiguous. The Guardian's original complaint in ODR No. 19899-1718KE was filed by the Guardian on behalf of the Student. The Parents did not file separately or join the Guardian's complaint. The Guardian filed an amended complaint, which includes the sentence: "NOW COMES, [Student] through [Student's] Parents and Court Appointed Educational Guardian, to Amend the previous hearing ODR 19899…".

Since the Guardian cannot serve as the Parents' attorney, I take this sentence to mean that the Parents join the Guardian's amended complaint. As a technical point, the Parents should have written separately to join the amended complaint because the Guardian cannot speak for them. Despite this, every interaction with the Parents confirmed that they are in complete alignment with the Guardian's position. The Parents have been copied on all substantive correspondence (e.g. motions, pre-hearing orders, notices and the like). More importantly, the Parents were informed of the Guardian's declaration that they would not participate in the hearing. I contacted the Parents directly to relay what the Guardian told me, urging them to participate. The Parents also received notice of the hearing directly. H-1.

In deference to the Parents' *pro se* status, and although there is some ambiguity, I consider the Parents to be parties to this due process hearing. Their lack of response to my conveyance of the Guardian's declaration, their failure to come to the hearing after receiving notice of it, and the absence of a request to postpone or continue the hearing is, constructively, their joining of the Guardian's refusal to participate. They confirmed through their actions that the Guardian spoke

truthfully – if technically not "for" them – when the Guardian announced that the Parents had decided not to participate.

The District's Motion to Dismiss the Parents' Complaint

The Parents and Guardian bear the burden of proof to substantiate the claims raised in their complaint and establish entitlement to the relief they demand. More specifically, the burden of proof 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 its 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).

The Parents and Guardian presented no evidence. They refused to participate in the hearing, and so they forsook their opportunity to substantiate their claims. There are some facts alleged in their complaint that are not in dispute, or that are confirmed by the District's evidence. These non-disputed facts do not preponderantly establish any of the Parents' and Guardian's legal claims or demands for relief. Moreover, as a matter of law, the Parents cannot prove any of the claims made in their complaint because they presented no evidence. They have not established entitlement to the relief they demand for the same reason. Consequently, the Parents' and Guardian's complaint is dismissed.

Issues in the District's Due Process Complaint

The issues raised in the District's due process complaint are:

1. Were the evaluation reports issued on September 19, 2017 and October 20, 2017 appropriate?
2. Were the IEPs issued on October 18, 2017 and November 17, 2017 appropriate?
3. May the District implement the November 17, 2017 IEP?

Findings of Fact

Although all evidence was carefully considered, I make findings only as necessary to resolve the issues before me. Consequently, not every document offered into evidence, and not all witness testimony is detailed here.

I find as follows:

1. The Parents withdrew the Student from special education on April 25, 2017. S-13.

2. In light of the Student's profound needs, the District proposed to evaluate the Student to determine eligibility for special education on May 5, 2017 (six school days after the Parents withdrew the Student from special education). S-25.

3. The Parents initially refused the District's request to evaluate, but the District persisted. The District formally sought the Parents' permission to evaluate again on August 8, 2017. This time, the Parents provided consent. S-51.

4. The evaluation commenced in two parts. First, the District conducted a records review. That enabled the District to draft a preliminary Evaluation Report and immediately conclude that the Student was entitled to special education. Second, the District conducted new assessments to determine what services the Student needed. S-59.

5. After the records review was completed, the District issued an evaluation report on September 19, 2017 (the Preliminary ER). S-60.

6. The Preliminary ER included parental input in several ways. First, the ER included parental input from a prior independent educational evaluation (IEE). Second, the ER included parental input from the large volume of email that the Parents sent to the District. S-60.

7. The IEE referenced in the Preliminary ER is a psychoeducational evaluation conducted by a doctoral-level neuropsychologist who is also a certified school psychologist. The IEE was completed and reported on July 22, 2016. S-60.

8. The Preliminary ER included a comprehensive review of the records that were available to the District, including a Functional Behavior Assessment (FBA). More specifically, the Preliminary ER included the following:

    a. Behavioral information gathered during a prior evaluation;
    b. A review of the Student's educational history;
    c. A review of the services offered through a Section 504 Service Plan that the District offered when the Parents withdrew the Student from special education[2];
    d. A review of the disciplinary incidents that occurred when the Parents sent the Student to school after revoking consent for services;
    e. A review of a school attendance improvement plan that the District drafted around the same time as the Section 504 Service Plan;
    f. A review of the Student's progress towards IEP goals from the period of time before the Settlement, when the Student attended school in the District;
    g. A review of the 2016 IEE (including the testing, interpretation of the test results, and recommendations to the IEP team);
    h. A review of a speech and language (S/L) evaluation that was also completed on July 22, 2016. The S/L evaluation was completed by an ASHA Certified Speech-Language Pathologist. The Student's behaviors precluded formal testing, but the Speech-Language Pathologist was able to obtain significant information from a

[2] When the Parents revoked consent for special education, the District was legally prohibited from providing special education to the Student. However, as a child with disabilities, the District determined that the Student was still entitled to regular education interventions via Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*

Functional Communication Profile and was able to make recommendations to the IEP team; and

i. A review of a Physical Therapy (PT) Review Summary, also completed on July 22, 2016, by a Physical Therapist who had worked with the Student in the Student's home since April 2016. The Physical Therapist reported information about the Student's PT needs and the Student's progress toward PT goals. The Physical Therapist also made recommendations to the IEP team. S-60

9. An FBA was also reviewed as part of the Preliminary ER. The FBA was conducted by a doctoral-level Board Certified Behavior Analyst (BCBA). The FBA included a review of existing data, interviews, and direct observation of the Student in the Student's home on August 8 and 10, 2016. The summary of the FBA matches what was found in the prior due process hearing: refusal, aggression to others, property destruction, spitting/mucus sharing, inappropriate verbalizations, inappropriate touch, emotional outbursts, and rage. Spitting seemed to be the predominant behavior. S-60, *see also* ODR No. 18698.

10. Based on the review of records, the District was able to officially conclude that the Student is a child with a disability and is entitled to special education. S-60. Specifically, the District concluded that the Student is a child with Autism and an Intellectual Disability. S-60

11. Discussed below, after the Preliminary ER was completed, the District invited the Parents to an IEP team meeting to draft what was, technically, an initial IEP for the Student. The invitation was sent on September 27, 2017 and called for a meeting on October 13, 2017. S-63.

12. The Parents refused to attend the IEP team meeting. S-67.

13. The District attempted to reschedule the IEP team meeting twice and sent two additional invitations. S-68, S-69. The Parents refused to participate, claiming that the records review violated the Student's rights, and that the District was engaging in predetermination. *See, e.g.* S-79.[3]

14. The District convened the Student's IEP team without the Parents in attendance and drafted an IEP for the Student on October 18, 2017 (the Preliminary IEP). S-83. The District issued the Preliminary IEP with a NOREP. S-100.

15. The Preliminary IEP included the information from the Preliminary ER. S-83.

16. The Preliminary IEP included several goals and short-term objectives that promoted positive behaviors and functional life skills. For example, goals were drafted for the Student to develop a signature, type contact information, identify safety words, and safely participate in community activities. S-83.

[3] The Parents' refusal to participate in the IEP development process, coupled with their ardent claims that the District developed the IEP without them, is noteworthy.

17. The Preliminary IEP included extensive program modifications and specially designed instruction (SDI) to enable the Student to work towards the IEP goals. S-83.

18. Both the goals and SDI are derived from the Preliminary ER. S-60, S-83.

19. The Preliminary IEP included two 30-minute sessions of individual OT per six-day cycle, one 45-minute individual PT session per week, 90 minutes of individual S/LT per week, a personal care assistant assigned to the Student for transportation, 180 hours of BCBA consultative support per year, and 4 hours per month of parent training. S-83.

20. The Preliminary IEP also included an additional 15 minutes per week of consultation as a support for school personnel from SL/T, OT, PT, and Special Education (each provider giving 15 minutes per week just to support the entire team of educators who would work with the Student, and to coordinate services). S-83.

21. To accomplish everything in the Preliminary IEP, the District offered a full-time special education placement in which the Student could receive autistic support, life skills support, and S/L support. S-83.

22. The Preliminary IEP includes a statement that the Student's needs cannot be met in the District's schools. The Preliminary IEP called for placement in an out-of-district school. At the time, the District did not know what schools would accept the Student. Regardless, in the Preliminary IEP, the District acknowledged the need for a transition plan, with the intention to develop that plan after a placement was identified. S-83.

23. Credible testimony reveals that, for children like the Student in this case, it is not possible to draft a transition plan until a placement is identified. Any such plan must be developed in close coordination with the placement and must be relative to the unique features of the placement. NT, *passim*.

24. With the Preliminary IEP, the District also offered a Positive Behavior Support Plan (BPSP), derived from the FBA that was reviewed as part of the Preliminary ER. S-83.

25. The District completed the pending evaluations and issued another evaluation report on October 20, 2017 (the Final ER). S-85.

26. The Final ER included the report of a multi-day observation of the Student in the Student's home by a doctoral-level Certified School Psychologist who also holds a diploma issued by the American Board of School Neuropsychology (the CSP). S-85.

27. The CSP attempted to administer a number of standardized, normative tests with variable success, given the Student's behaviors and inability to focus on the task at hand. On tests of cognitive ability that could be scored, the Student scored below the 0.1 percentile as compared to same-age peers. The Student, who is a teenager, received an age equivalent score of less than three years old. S-85.

28. In contrast, the Student worked diligently on academic assessments. Even so, in basic reading and writing skills, the Student scored below the 0.1 percentile as compared to same-age peers. This placed the Student's academic abilities below the pre-kindergarten level. S-85.

29. The CSP also had a home caregiver complete a standardized rating of the Student's adaptive behaviors, which include the communication, socialization, and daily living skills that the Student needs for personal and social sufficiency. The Student's scores yielded a composite in the "Low" range, at the first percentile. Sub-rating scores were fairly consistent, and maladaptive behaviors were noted. S-85.

30. The Student was also evaluated by an Autistic Support teacher who is also a BCBA (the Teacher). The Final ER includes the Teacher's observations. The Teacher was able to update information obtained by the prior BCBA by using a standardized rating scale that was completed by multiple raters across multiple domains (the ABLLS-R). The rating also included written parental input, and the Teacher's observations of the Student, who was asked to complete various tasks. S-85

31. The ABLLS-R produced substantial information about the Student's skills in the following domains: reading/spelling, math, cooperation/reinforce effectiveness, visual performance, receptive language, motor information, vocal imitations, manding,[4] labeling, interverbal skills,[5] spontaneous vocalization, syntax and grammar, play and leisure skills, social interaction skills, and various life skills and classroom skills.[6] The Student needed support across nearly all of those domains. S-85

32. The Teacher also administered the Assessment of Functional Living Skills (AFLS) – a community participation skills assessment protocol, which assesses skills necessary for independence in the community. Domains included basic mobility, community knowledge, shopping, eating in public, money, phone, time, and social awareness and manners. Data could not be collated in all of these domains, and the Student required assistance in most domains. S-85.

33. The Student was also evaluated by a masters-level registered, licensed Occupational Therapist. The Occupational Therapist attempted to administer a standardized assessment but was unable administer the entire test because of the Student's non-compliance. Based on the parts of the test that could be administered, the Student scored in the average range for Visual Processing, Hearing Processing, and Touch Processing. The Student scored in the "definite dysfunction" range for Planning and Ideas. The Student could not be scored in the domains of Social Processing, Body Awareness, and Balance and Motion. S-85.

[4] Generally speaking, "manding" is a behavior in which the Student makes a demand or command. Often, therapists deploy strategies designed to encourage manding, as it can be a precursor to more developed language.
[5] Generally, interverbal skills relate to the Student's ability to fill in blanks based on known information (e.g. missing words from known songs and the ability to answer personal questions).
[6] Some classroom skills were not measured because the Student does not attend school.

34. The portions of the tests that could be completed, in conjunction with the Occupational Therapist's observations, yielded meaningful information about the Student's need for OT. S-85.

35. The Student was also evaluated by a Physical Therapist. The Physical Therapist obtained information from the Parents, observed the Student, and attempted to conduct a standardized PT assessment. The Student's difficulties with motor planning, following multi-step directions, and anxiety about completing motor tasks made it impossible to complete the standardized assessment. However, using the standardized assessment as a guide, the Physical Therapist was able to provide information about the Student's PT needs based on observations and parental input.

36. The Student was also evaluated by a masters-level Speech-Language Pathologist (S/LP, who holds a Certificate of Clinical Competence from the American Speech-Language-Hearing Association.[7] S-85

37. The S/LP attempted to administer a standardized assessment of the Student's receptive and pragmatic language, as well as the Student's articulation. The S/LP had to modify the assessment, which is permitted, but the modification prevented the S/LP from presenting scaled scores, percentile ranks, or age equivalencies. However, the S/LP's observations of the Student, in conjunction with portions of the assessment that the Student completed, and a standardized rating scale completed by the Parents, enabled the S/LP to provide a significant amount of insightful information about the Student's ability to process and use language. S-85.

38. A doctoral-level BCBA conducted an FBA as part of the Final ER. The FBA is remarkable for its detail and thoroughness. The BCBA described her observations of the Student in great detail, provided clear operational definitions of targeted behaviors that are specific to the Student, and provided well-supported hypotheses of the function of the Student's behavior. S-85.

39. All of the evaluators noted the same behaviors that were present during the evaluation that was considered previously by Hearing Officer Valentini. Of those, spitting was a prominent behavior. NT *passim*.

40. The evaluators described the spitting behavior the same way that Hearing Officer Valentini previously found. The spitting is not directly from Student's mouth. Rather, the Student rakes fingers inside the mouth getting an accumulation of spit and mucus, and then flings it. NT *passim*.

41. As described by the BCBA, the Student has "incredible aim," and typically aims for the face. That BCBA, who works with a population of students who have profound needs and

[7] The School Psychologist, Behavior Analyst, Occupational Therapist, Physical Therapist, and Speech-Language Pathologist did not all evaluate the Student on the same day. The evaluation was spread over several days. S-85. The record does not reveal exactly which days each evaluator was in the Student's home, but at least two of them went together during each visit.

engage in similar behaviors, testified credibly that she had "never been spit on as much as I was in that 44 minutes [of observing the Student]." NT 237-238.

42. The Student is motivated, at least in part, by watching people wipe off the spit. Consequently, "in order to reduce that attention, [people providing services to the Student should] wait until [the Student is] looking away to wipe the spit, regardless of where it might be. If the area is covered with spit, after the task is completed then we will ask [the Student] to clean it up, but not during." NT 237.[8]

43. The Final ER included recommendations to the IEP team. S-85.

44. After the Final ER was issued, the Parents returned the NOREP that was issued with the Preliminary IEP on November 6, 2017. The Parents accepted that the Student was a child with a disability, entitled to special education. The Parents rejected the District's placement offer. S-100.

45. The IEP team met again on November 13, 15, and 17, 2017. Again, the Parents refused to participate. *See, e.g.* S-104, S-107, S-112.

46. On November 17, 2017, the District issued an IEP (the Final IEP) with a NOREP. The IEP is dated November 13, reflecting the initial meeting, but was issued on November 17, 2017. S-111, S-113.

47. The Final IEP was updated to reflect information obtained as part of the Final ER. S-111.

48. Given the Student's age, the Final IEP describes the Student's independent living and employment goals, and details the services that the District will provide to help the Student achieve those goals. S-111.

49. The Final IEP includes measurable, objective, baselined goals with short term objectives and benchmarks for the following: Syntax, Following Directions, Word Knowledge Skills, Pragmatic Language (reciprocal language), Auditory Comprehension, PT, OT, Behavior, Reading (letter and sound knowledge, sight words), Math (number identification, counting objects), Generalization of Skills, and Social Skills. S-111.

50. The Final IEP included substantial modifications and SDIs. These were similar to those in the preliminary IEP, but more specific and targeted. Notably, the Final IEP included PCA support not only for transportation, but also for assistance with activities of daily living and data collection. S-111.

51. For related services, OT and PT services remained the same, BCBA consultation was increased to "daily" and became a support for school personnel, and SL/T was changed

[8] This prompted me to inquire about whether that type of intervention – a person willing to be spit on and not immediately wipe it away – actually exists. Credible testimony reveals not only that such people exist, but that this type of inquiry is what prompted the District to make its ultimate placement recommendation. *See, e.g.*, NT 237, 273-274.

from 90 minutes per week of individual therapy to two, individual 30-minute sessions per week with an additional 30-minute group session per week. S-111.

52. The full time special education placement remained the same, as did the District's conclusion that the Student required an out-of-district placement in order to receive a FAPE. S-111.

53. The Final IEP also noted the need to develop a transition plan after an out-of-district placement was identified. S-111.

54. In addition to the NOREP, the Final IEP was also issued with a Positive Behavior Support Plan (PBSP), which is aligned both with the Final IEP's goals and with the FBA that was included in the Final ER. S-84.

55. The Parents rejected the Final IEP, via the NOREP, on November 26, 2017. S-113.

56. From the issuance of the Preliminary IEP, the District sought the Parents' consent to send the Student's records to potentially-appropriate out-of-district placements.[9] The Parents initially refused to provide consent. Then, on December 29, 2017, the Parents reversed course and provided consent. *See, e.g.* S-135.

57. The District sent application packets to nine specialized schools and programs after obtaining parental consent. S-135. Of those, the Student was accepted into one. NT *passim.*

58. The Student was accepted into a specialized program operated by the Intermediate Unit in which the District is located. The specialized program is housed in a neighboring school district. NT, *passim.*

59. At the time of the hearing, 14 other students participated in the specialized program. NT 254.

60. Every student in the specialized program is assigned a one-to-one "behavior mentor" throughout the day. The Student will be assigned a behavior mentor upon enrollment. A BCBA is assigned to the program two days per week. A Speech-Language Therapist and an Occupational Therapist are assigned full-time. A part-time vocational specialist is also assigned to the program. *See, e.g.* NT 254-255. These personnel are supplemented as needed to provide whatever services are mandated by each student's IEP. *Id.*

61. The specialized program provides instruction in community-based life skills and functional academics. *See, e.g.* NT 257-258, 262, 266,

62. The specialized program is capable of implementing the Final IEP and PBSP. NT 259-263, 266-268.

[9] Consent is necessary due to FERPA.

Applicable Legal Principles

The Burden of Proof

The burden of proof is set forth above in the section dismissing the Guardian's complaint. The District faces the same burden in establishing the issues it has raised in its due process request.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *Mary Courtney T. v. School District of Philadelphia,* 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Historically, the Third Circuit has interpreted Rowley to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative 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).

Under the meaningful benefit standard, 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). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "*de minimus*" benefit. *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). 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).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimus*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics — as is clearly evident in this case.

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 an appropriately ambitious education in light of the Student's circumstances.

Least Restrictive Environment (LRE)

The IDEA requires LEAs to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a). That continuum must include "instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(b)(1), see also 34 C.F.R. § 300.99(a)(1)(i). LEAs must place students with disabilities in the least restrictive environment in which each student can receive FAPE. *See* 34 C.F.R. § 300.114. Generally, restrictiveness is measured by the extent to which a student with a disability is educated with children who do not have disabilities. *See id.*

There is no tension between the FAPE and LRE mandates, despite some appearances to the contrary. *See, e.g. Lebron v. N. Penn Sch. Dist*., 769 F. Supp. 2d 788, 799 (E.D. Pa. 2011), *citing Oberti v. Bd. of Educ. of Clementon Sch. Dist.*, 995 F.2d 1204, 1214 (3d Cir. 1993). The two provisions work in harmony because special education is not a place. Rather, for any student, a FAPE could be provided in any number of environments. Once a student's needs are assessed, and a determination is made about what constellation of services the student must receive, the LEA's obligation is to place the student in the least restrictive placement in which those services can be delivered. In the same way, the LRE mandate does not force students to fail in a less restrictive environment before moving to a more restrictive environment. LEAs may not put students in inappropriate placements simply because they are less restrictive. At the same time, LEAs must consider services that enable students to receive a FAPE in less restrictive environments when making placement decisions. *See Lebron, supra*.

Evaluation Criteria

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and revaluations. 20 U.S.C. § 1414.

In substance, evaluations must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining" whether the child is a child with a disability and, if so,

what must be provided through the child's IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child" and must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors". 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

> assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess "all areas of suspected disability". 20 U.S.C. § 1414(b)(3)(B).

Discussion

The record in this case establishes that the Preliminary ER, Preliminary IEP, Final ER, and Final IEP were all appropriate.

The Preliminary ER on its own was as comprehensive as an evaluation could be at the time it was written. LEAs should be cautious: a review of records on its own rarely constitutes an appropriate evaluation, especially for a student with complex needs who has been out of school for an extended time. Under the unique facts of this case, however, the Preliminary ER was appropriate in context. The District explicitly acknowledged both that a more complete evaluation was needed, and that the Preliminary ER was a mechanism by which to put unquestionably-necessary programming in place as quickly as possible. It is important to keep in mind that, as a matter of law, the Student was a *regular education* student at the time of the Preliminary ER. At the same time, the District clearly understood that the Student required special education. The District's efforts to expedite the process are laudable.

At a more technical level, the Preliminary IEP also satisfied all IDEA mandates, but relied upon older information. Based on other information available to the District, the information at hand appeared to still be valid.

The Preliminary IEP was also appropriate at the time it was offered. There is some question as to whether this issue is moot. The Parents partly approved a NOREP issued with the Preliminary IEP, agreeing to eligibility but rejecting the offered program and placement. Consequently, the

District was prohibited from implementing the substantive provision of the Preliminary IEP. Less than a month later, the District issued the Final IEP. As such, the Preliminary IEP was explicitly preliminary when it was issued, was never approved, and was never implemented.

Assuming the issue is not moot, the Preliminary IEP was appropriate at the time it was offered. It was (and still is) urgently important for the Student to receive services. It was proper, therefore, for the District to make a very well-supported estimate of what services the Student required, and then offer those services as expeditiously as possible. As with the Preliminary ER, the District did not let the perfect become the enemy of the good. In doing so, the District took all information available at the time, and drafted an IEP that was calculated to provide a FAPE at the time it was offered.

The Final ER is appropriate by any measure. Technically, each and every one of the evaluation criteria referenced above was satisfied. As a whole, the Final ER was one of the most thoughtful, enlightening evaluations that this Hearing Officer has ever read. The evaluators, all exceedingly well-qualified professionals, took painstaking care to comprehensively assess the Student across every conceivable domain. They recognized that the Student's constellation of needs are complex and interconnected, and so they worked together as a team across disciplines. Regarding standardized assessments, the evaluators were explicit about what they were and were not able to accomplish. They cautiously interpreted tests to be sure they were measuring the Student's abilities, and not the Student's test-taking skills. Their vast patience with the Student is indicative of their professionalism. Their observations were meticulously reported. Their conclusions and recommendations to the IEP team sit on strong foundations.

The Final IEP is appropriate in the context of this case. There is no flaw whatsoever in any aspect of the IEP except for the transition plan. Credible testimony from multiple witnesses explains why a comprehensive transition plan could not be crafted until a specific placement was found. Documentary evidence explains that a specific placement could not be found when the IEP was offered because the Parents withheld consent for the District to release records. The Parents, therefore, are entirely responsible for the incomplete transition plan.

The goals, objectives, program modifications, SDIs, related services, and supports for school personnel in the Final IEP are all appropriate. They are all very clearly derived from the Final ER, and all are designed to give the Student tools that the Student will need to obtain a modicum of independence. In terms of substantive programming, the Final IEP is exemplary.

The physical placement offered through the Final IEP is also appropriate. The District could say only that it was offering an "out-of-district" placement when the Final IEP was issued because the Parents withheld consent for the District to share information with specialized schools and programs. With this restriction in mind, the IEP offered an appropriate placement.

There is no dispute that the District's regular high school, even with supports and services, is inappropriate for the Student. This may be the only thing that the District, Parents, and Guardian agree about. Rather, the District believes that the Student should be educated outside of the home, and the Parents and Guardian advocate for services inside of the home. The District, therefore, advocates for a less restrictive placement than the one that the Parents prefer.

Instruction in a specialized school is less restrictive than instruction in the home *per se*. *See* 34 C.F.R. § 300.115(b)(1). All of the evidence in this case preponderantly establishes the Student is capable of receiving a FAPE in a specialized school. No evidence is to the contrary. Consequently, the District's offer is consistent with the Student's right to be educated outside of the Student's home.

The IU's specialized program is an appropriate out-of-district placement for the Student. The program was designed for individuals who are similar to the Student both in terms of needs and age. It is able to implement the Final IEP. In short, the specialized program is the mechanism by which the IEP will be effectuated. It is fortunate that such programs exist.

I am persuaded that it is of the utmost importance to implement the Final IEP within the specialized program as quickly as possible. I also recognize that it is not literally possible for the District to compel the Parents to approve the IEP or send the Student to the specialized program. Unlike other provisions of the IDEA (e.g. parental consent for evaluations), there is nothing that authorizes LEAs to override withheld parental consent for programs or services. I will craft an order accounting for this scenario.

ORDER

Now, March 9, 2018, it is hereby **ORDERED** as follows:

1. The ER of September 19, 2017, was appropriate at the time is was offered.

2. The ER of October 20, 2017, is appropriate.

3. The IEP issued on October 18, 2017, was appropriate at the time it was offered.

4. The IEP issued on November 17, 2017 is appropriate.

5. The IU specialized program that accepted the Student is appropriate and constitutes the out-of-district placement offered in the November 17, 2017 IEP.

6. The District shall take any necessary action to complete the Student's enrollment in the IU specialized program as soon as possible.

7. The Student's IEP team, including the Parents, Guardian, and representatives of the IU specialized program, shall meet within ten (10) school days of this order to draft a transition plan.

8. If the Parents or Guardian refuse to participate in the IEP team meeting, the remainder of the IEP team shall develop a transition plan for the Student in their absence.

9. Upon completion of the transition plan, the November 17, 2017 IEP, PBSP, NOREP, transition plan, and IU specialized program shall be the Student's placement, and shall be pendent in the event of any appeal of this order to any court of competent jurisdiction, or any dispute about the transition plan itself.

10. The District shall incur no liability for failing to provide a FAPE to the Student if the Parents or Guardian take any action that prevents the District from implementing any aspect of the Student's placement, including but not limited to withholding consent and refusing to send the Student to school.

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

/s/ Brian Jason Ford
HEARING OFFICER