

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 Due Process Hearing Officer

**Final Decision and Order
ODR No. 20715-1718AS
CLOSED HEARING**

Child's Name:
M.M.

Date of Birth:
[redacted]

Date of Hearing:
08/14/2018, 08/29/2018

Parents:
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
09/24/2018

Introduction

This special education due process hearing involves the educational rights of a student (the Student), who resides within the Canon-McMillan School District (the District). The Student is an elementary school-aged child with Joubert Syndrome (JS). JS is a rare disorder that is characterized by brain abnormalities. Intellectual disability, language deficits, and impaired motor skills are common symptoms of JS.

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* Both parties (the District and the Student's parents - "the Parents") agree that the Student is a "child with a disability" as defined by the IDEA. Specifically, the Student qualifies for special education as a child with a primary disability of Other Health Impairment (OHI) as a result of JS, and secondary disabilities of Autism and Speech and Language Impairment (S/LI). The Student does not have an intellectual disability, and is receiving appropriate services in regard to the Student's physical needs.

The Student receives special education pursuant to an Individualized Education Program (IEP). The Student's IEP team placed the Student into a District-run Therapeutic Emotional Support (TES) program in November of the 2017-18 school year. The TES placement decision is described below, but both parties agree that the TES placement was appropriate at that time.

The parties disagree about whether the Student made meaningful progress in the TES program. This case assumes an unusual posture relative to most special education cases because the Parents argue that the Student made meaningful progress in the TES program. The District also acknowledges some improvement but takes the position that the Student's progress was not meaningful.

In May of the 2017-18 school year, the IEP team drafted a new IEP for the Student. Both parties agree that the May 2018 IEP is appropriate. However, the District proposed moving the Student into an approved private school (APS) for the 2018-19 school year. The District made this recommendation because it believes that the Student's progress in the TES program was not meaningful and also because the TES program would change significantly in the 2018-19 school year. The District believes that the changed program is not appropriate for the Student and that the May 2018 IEP can be implemented in an APS. After some investigation, the Parents believe that an APS is not appropriate for the Student. They believe it is appropriate for the Student to remain in the TES program despite changes to that program.

More specifically, the Parents want me to order the District to implement the May 2018 IEP in the TES program. The District seeks an order permitting an APS placement over parental objection.

For reasons discussed below, I find that the TES placement is no longer appropriate for the Student. I also find that the District has not met its burden to find that either of two potential out-of-district placements are appropriate. Therefore, I cannot award the relief that either party seeks. At the same time, I will not issue an order that leaves the Student in limbo. The order below is designed to avoid that outcome to the extent possible.

Findings of Fact

I commend both parties and their attorneys for their efficient presentation of this case. The parties filed written stipulations in advance of the hearing. An original copy of the stipulations was made part of the record as Hearing Officer Exhibit 1 (H-1). I adopt some of those stipulation as my own findings, with citation to H-1. I have edited some of those the stipulations to protect the Student's identity. None of my edits change the substance of the stipulations.

In addition to the stipulations, I have carefully reviewed the record in its entirety, but make findings only as necessary to resolve the issues before me. Consequently, not every document in evidence and point made in testimony is referenced herein. These findings are intended to be read in conjunction with the stipulations above. Some stipulated facts are repeated below for flow and readability. I find as follows:

Background

1. The parties stipulate that all of the Student's IEPs are appropriate. NT 110.
2. Soon after birth, the Student was diagnosed with JS. H-1.
3. The Student has also been diagnosed with PDD NOS.¹ H-1.
4. The 2015-2016 school year was the Student's Kindergarten year. H-1
5. The 2016-2017 school year was the Student's 1st grade year. H-1
6. The 2017-2018 school year was the Student's 2nd grade year. H-1.
7. The 2018-2019 school year is the Student's 3rd grade year. H-1.
8. There is no dispute that the Student is very bright, with average to above-average intelligence. Despite the Student's behavioral difficulties and resistance to academically challenging tasks, there is no dispute that the Student learns new academic concepts quickly. The Student's performance on academic assessments is variable, and may be related to the Student's behavior more than the Student's content knowledge.

Kindergarten (2015-16)

9. An Evaluation Report of September 10, 2015, (2015 ER) identified the Student as being eligible for special education services under the OHI category due to the diagnoses of JS and PDD-NOS. H-1.
10. The Student's first IEP, dated October 1, 2015, provided the Student with itinerant Learning Support services (the 2015 IEP). H-1
11. Under the 2015 IEP, the Student received 84% of instruction in the regular education classroom. H-1.
12. The 2015 IEP stated that the Student did not have behaviors which interfered with learning. H-1.
13. Despite the language in the 2015 IEP, the Student exhibited non-compliant and aggressive behaviors (e.g. punching, biting, kicking) in kindergarten. S-7.
14. The District reevaluated the student and issued a Reevaluation Report on March 31, 2016, (2016 RR). Based on the results of the 2016 RR, the IEP team changed the Student's eligibility category to a primary category of OHI with secondary categories of Autism and a Speech or Language Impairment (S/LI). H-1.

¹ Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS) was recognized as a type of Autism under the DSM-IV. For the most part, separate sub-diagnoses of autism were grouped collectively under a single diagnosis, Autism Spectrum Disorder, in the DSM-5. In this case, there is no disagreement that the Student is properly identified as a child with Autism.

15. The District completed a Functional Behavioral Assessment (FBA) of the Student and developed a Positive Behavior Support Plan (PBSP) on April 28, 2016. S-7.
16. The Student's IEP team also drafted an IEP on April 28, 2016, to be implemented during 1st grade (2016 IEP). The PBSP and behavioral goals were written into the 2016 IEP. H-1, S-7.

1st Grade (2016-17)

17. At the start of 1st grade, the Student received special education in accordance with the 2016 IEP, including the PBSP, in the Student's neighborhood elementary school. H-1.
18. The 2016 called for an itinerant amount of Learning Support. S-7.
19. During 1st grade (2016-17), the Student exhibited inappropriate and physically aggressive behaviors. S-10, S-13. During the first quarter of 1st grade the Student was restrained 9 times, had 37 behavioral incidents, had 17 after school detentions, was suspended for a day, and was sent home early twice. S-20.
20. The Student's IEP team met to revise the PBSP on November 15, 2016. S-9. The Student's behaviors did not improve after that meeting. S-20.
21. The Student's IEP team met again to revise the Student's IEP on February 1, 2017. At that time, the Student was becoming increasingly resistant to academic work in school. The IEP was revised to include one-on-one (1:1) support to complete academic tasks. The purpose of this support was to determine if the Student's response to increasing academic demands was the result of an academic skills deficit or was a behavioral issue. S-10.
22. The Student's behaviors did not improve, prompting the District to propose a psychiatric evaluation on April 2, 2017. S-11. The Student was assessed by a Board Certified Child and Adolescent Psychiatrist, who wrote a report on April 19, 2017. S-13. The psychiatric report was incorporated into a broader reevaluation conducted by the District around the same time. The Reevaluation Report was completed and issued on April 28, 2017 (2017 RR). S-16.
23. The psychiatrist wrote in the psychiatric report that the Student's behavior was "a safety issue for [the Student] and others." S-13. The 2017 RR recommended placement in a highly structured educational setting with intensive behavioral and therapeutic support. S-13.
24. The Student's IEP team reconvened on May 25, 2017 to consider the 2017 RR.² At this time, the District drafted an IEP placing the Student in the TES program in a different elementary school building (May 2017 IEP). S-16.
25. The May 2017 IEP called for the Student to spend more than 20% but less than 80% of the school day receiving special education programming. The 2017 IEP also called for the Student to spend 81% of the school day inside of regular education classrooms. S-16.
26. The May 2017 IEP was issued with a Notice of Recommended Educational Placement (NOREP). On May 30, 2017, the Parents rejected the May 2017 IEP via the NOREP. The Parents wrote that they

² Given the Student's behaviors, it is not clear why nearly a month passed between the issuance of the 2017 RR and the IEP team meeting in May 2017.

rejected the NOREP because they believed other accommodations could be implemented before a change to the TES placement. *See* S-17.

27. The IEP team met again on June 1, 2017. During that meeting, the Parents and District reached a compromise. Their compromise is documented in a new IEP that was issued at the meeting (June 2017 IEP). The June 2017 IEP noted the District's TES placement recommendation and the Parents' objections to that placement. The June 2017 IEP called for the Student's continued placement in the neighborhood elementary school but with scheduled monthly meetings to monitor the Student's academic and behavioral needs. S-18.
28. Effectively, the plan was to continue the 1st grade placement at the start of 2nd grade but with more frequent monitoring, reporting, and meetings. *See* S-18, S-19.

2nd Grade (2017-18)

29. The Student started second grade at the neighborhood school under the June 2017 IEP. This placement continued until November 3, 2017. H-1.
30. On October 6, 2017, the June 2017 IEP was revised to discontinue the Student's bus transportation. Previously, an aide was assigned to the Student's bus. After several incidents of the Student removing the seat belt and physically attacking (or attempting to attack) the aide, the District offered to supply a harness for transportation. The Parents decided instead to transport the Student themselves. The IEP was revised to reflect this change. S-20.
31. On October 13, 2017, the IEP team met again to discuss placement options. The IEP was updated, but the Student continued to attend the neighborhood elementary school. S-20, S-21.
32. On November 3, 2017, the IEP team met again. At this point, the District again recommend the TES program, and issued an IEP to provide the TES placement (November 2017 Revised IEP). S-20, S-21, *see also* H-1.
33. The November 2017 Revised IEP changed the Student's level of support to Supplemental Emotional Support with Speech and Language Support. S-21, H-1.
34. The District also issued a NOREP on November 3, 2017, recommending the change to the TES program. H-1, S-22. The Parents approved the NOREP the same day. S-22.
35. November 3, 2017 was a Friday. The Student began to attend the TES program on Monday, November 6, 2017. *See* H-1, NT *passim*.
36. The TES classroom teacher held a master's degree in special education and obtained an Ed.D. in the summer of 2017. NT 20. A paraprofessional was also assigned to the TES classroom. The TES program is also supported by a mental health therapist and a behavioral specialist. NT 23. The TES program is different from more typical emotional support programs as it is primarily focused on mental health and behavioral issues. NT 23. The TES program is fairly described as a "step down" from psychiatric partial hospitalization programs. NT 106-107.
37. The TES program is not typically a self-contained program. Typically, students receive a high level of emotional support while attending the TES program, but participate in at least some regular education classes throughout the day. During the 2017-18 school year, the other students who participated in the TES program spent the majority of the school day outside of the TES classroom. *See, e.g.* NT 26.

38. The District attempted this model with the Student, but it became quickly apparent that the Student could not control the Student's behaviors outside of the TES classroom. Consequently, the Student spent nearly the entire school day inside of the TES classroom. NT *passim*.
39. The Student received one-to-one (1:1) support throughout the entire school day. The 1:1 support was provided mostly by the TES classroom teacher. At times, the Student received two-to-one (2:1) or three-to-one (3:1) support as the Student worked with the mental health therapist and behavior specialist. *See, e.g.* NT 127.
40. In addition to the District's staff, the Student received supports in school from a TSS provided by a third party mental health agency for several hours per day, Monday through Thursday. The TSS was supervised by a BSC, who was also contracted by the third party agency. NT *passim*.
41. Starting on November 6, 2017, the District kept a daily report of the Student's behavior in a log titled "Star Report." S-21, H-1.
42. The Star Report was a daily behavior log, linked to the behaviors targeted in the November 2017 Revised IEP. S-29. From November 3, 2017, to November 17, 2017, the Star Report tracked the Student's behavior in one hour increments. The Star Report was changed on November 20, 2017, to track the Student's behavior in half-hour increments. S-29.
43. For each hour or half-hour increment, the Student could earn up to two points for each of four behavioral domains (up to eight points total for each period of time). A two, or "great," was marked on the Star Report with a smiley face. A one, or "keep trying," was marked with a straight-line face. A zero, or "try again," was marked with a frown. S-29.
44. The Star Reports were designed to maximize the Student's opportunity to earn points. That way, the Student could receive a positive overall score on a Star Chart even after a problematic morning. NT 51-53.
45. Each day, the TES teacher would tally the total points that the Student earned, and present that tally both as a raw number and as a percentage of the total points that the Student could have earned during the day. The TES teacher would also provide a detailed narrative of the day. S-29.
46. The percentages reported on the daily Star Charts serves as a rough estimate of the amount of time per day that the Student showed appropriate behavior. S-29. Similarly, the percentages reported on the Star Charts were used as progress monitoring for goals in the November 2017 Revised IEP. S-21
47. The percentages reported on the daily Star Charts do not relate to the intensity or duration of the Student's behaviors. S-29, NT 102. Consequently, the Student could engage in extreme behaviors over a short period of time and still receive a positive score for the day. S-29.³ Similarly, the goals in the November 2017 Revised IEP do not target the intensity or duration of the Student's behaviors. S-21.

³ It is possible to track both the duration and intensity of behavioral episodes. The former requires a clock. The latter requires establishment of objective operational definitions. NT 158. Given the nature of the Student's behaviors, it is surprising that duration and intensity were not tracked. At the same time, tracking duration and intensity creates logistical challenges. The District was already completing detailed daily behavior logs, and it may not be fair to expect a teacher who is already providing 1:1 support to take out a stopwatch in the midst of serious behavioral episode.

48. Between November 6 and May 22, 2017, the Student disrobed in school 16 times. S-20, P-4. Fourteen of those incidents occurred between November 6 and December 22, 2017. *Id.* Some of those incidents occurred in the nurse's office which, given the Student's toileting needs, is not surprising.⁴ Most of those incidents occurred in the TES classroom, sometimes in the presence of other students. One incident, on December 12, 2017, occurred in a general education classroom. S-4.
49. The District tracked incidents of physical aggression. The term "physical aggression" was defined by the TES program's behavior specialist as hitting, kicking, throwing objects, and stabbing. S-25.
50. The second quarter of the 2017-18 school year ended on January 22, 2018. S-21. From November 6, 2017 through January 22, 2018, the Student attended 35 days of school, and averaged 16 incidents of physical aggression per day. S-21.
51. The Student's physical aggression was almost always directed towards adults. Those incidents often caused physical pain to the targeted adults. The targeted adults typically did not require medical attention. There were, however, four incidents in which adults required medical attention. Two of those incidents occurred on November 13, 2017 (the Student [injured] a paraprofessional and [] a nurse). One incident occurred the next day, November 14, 2017 (the Student [acted aggressively toward] a paraprofessional). The fourth occurred on January 3, 2018 (the Student [injured] the principal, who was attempted to restrain the Student [redacted]). *See, e.g.* S-25.
52. The District retained an independent doctoral-level Board Certified Behavior Analyst (BCBA-D) in late 2017 to observe the Student and make recommendations to the District. H-1, S-23, S-24.
53. The BCBA-D observed the Student on two occasions: December 21, 2017, and January 10, 2018, and issued reports following each observation. H-1, S-23, S-24.
54. During the observations, the BCBA-D observed the Student engage in some of the negative behaviors documented above, and also observed a negative interaction with a same-aged peer. The introduction of same-age peers into the TES classroom tended to exacerbate the Student's behavior. S-23, S-24. The Student's TES teacher also confirmed this pattern. *See, e.g.* NT 29.
55. After the first observation, the BCBA-D made recommendations including use of various visual organizers, intermittent reinforcement for positive behaviors, and use of behavior momentum techniques. The BCBA-D cautioned, however, that the Student seemed to lack some basic social skills, and recommended direct social skills instruction inside the TES classroom. The BCBA-D opined that the Student should demonstrate some mastery of those skills within a specialized setting before an effort is made to generalize those skills in other settings. S-23.
56. After the first observation, the BCBA-D also cautioned that intermittent reinforcement of negative behaviors would likely increase those negative behaviors. In essence, the staff's response to the Student's behaviors — although necessary⁵ — may prompt the Student to engage in the same negative behaviors. S-23. The BCBA-D also recommended crisis intervention planning. S-23.

⁴ The Student urinates in a toilet but does not defecate in a toilet. Instead, the Student goes to the nurse's office, puts on a pull-up, lies down, and defecates into the pull-up. The Student also had some incidents of encopresis, but that was not the norm. The Student's toileting needs are related to JS. *See, e.g.* NT 60.

⁵ District personnel cannot sit idly by while the Student engages in dangerous behaviors. But any reaction to those behaviors could be reinforcing for the Student.

57. After the Second observation, the BCBA-D's report was, in essence, that the Student's accommodations in the TES program were necessary but insufficient. After describing the extraordinary level of supports that the Student received, the BCBA-D wrote (S-24):
- “While this method of intervention was effective currently, the intensity and detail necessary to maintain this type of individualized instruction is something that is not likely to be generalized to a less restrictive learning environment (more students, the need to delay reinforcement, etc.)”
58. The BCBA-D went on to explain that the Student engaged negatively with peers when additional students came into the TES classroom at the end of the school day. Sharing the staff's attention appeared to be problematic for the Student. S-24.
59. The BCBA-D also noted that a disagreement about the Student's placement was developing between the Parents and the District. At that point, the BCBA-D noted that the parties, “may possess alternative perspectives in regard to the intensity of the current programming and legitimacy of maintaining those supports beyond the immediate future.” S-24.
60. Although not explicitly noted in either observation report, the BCBA-D testified that educators should plan for an “extinction burst.” *See, e.g.* NT 125, 130. This means that as whatever is reinforcing the Student's negative behaviors is taken away, the Student's behaviors will get significantly worse before they get better. This testimony was credible and not contradicted, and so I accept it as a fact.
61. The BCBA-D also testified that as the student gets older, other students will become less accepting of the Student's differences. Consequently, the Student's maladaptive behaviors will result in increasing social isolation if they are not replaced with positive or appropriate behaviors. *See, e.g.* NT 126. This testimony was credible and not contradicted, and so I accept it as a fact.
62. A functional behavioral assessment was completed on January 16, 2018, and updated in March of 2018. H-1.
63. On January 17, 2018, an IEP team meeting was held and multiple changes were made to the Student's IEP. Many of those changes, including the use of a visual schedule, Behavior Momentum techniques, specialized First-Then charts to focus on rewards, and use of timers, were based on the BCBA-D's recommendations. The IEP also added 1:1 support during lunch and recess, and scheduled breaks. The IEP now reflected that the Student spent only 9% of the school day in a regular education setting. H-1.
64. The District completed a Re-evaluation and issued a report on April 16, 2018 (2018 RR). The 2018 RR recommends additional placements be explored to address the Student's behaviors and intense therapeutic needs. The Parents voiced their opposition to alternative placements. H-1.⁶
65. More specifically, the 2018 RR concludes that the Student has been educated in a self-contained setting with intensive behavioral supports and 1:1 or 2:1 instruction since entry into the TES

⁶ The District used a standardized form for the 2018 RR. That form includes a spot for team members to sign to indicate attendance at the meeting. Next to those signatures, there are boxes to check to “Agree” or “Disagree.” Those boxes are intended to be used only when determining if a child has a specific learning disability, but are often used to mark agreement or disagreement with evaluations. In this case, the Parents checked the “disagree” box and all other participants checked the “agree” box. S-25.

program.⁷ With this level of support, the 2018 RR acknowledges that the Student made progress by decreasing incidents of physical aggression to an average of 14 incidents per day. The 2018 RR also acknowledges progress with disrobement, but notes that behavior is not yet extinguished. S-25.

66. Given the conclusions about the Student's needs, the 2018 RR concludes that the Student, "continues to require intensive behavioral and academic supports to address [Student's] complex needs that are not being met in the public school setting." Therefore, the 2018 RR recommended exploration of "additional placements" to address the Student's "extreme behaviors and intense therapeutic needs." S-25.
67. The District held an IEP team meeting on May 14, 2018, and a new IEP was drafted (the May 2018 IEP). S-26, H-1. As a technical matter, the May 2018 IEP includes many references to a full-time emotional support placement in the TES program. Simultaneously, the May 2018 IEP reiterates the conclusion in the 2018 RR that the Student requires an out-of-district placement. H-1, S-26
68. The District issued the May 2018 IEP with a NOREP also dated May 14, 2018 (the 2018 NOREP). The NOREP recommended placement in an out-of-district facility.⁸ Two potential out-of-district programs are named in the 2018 NOREP. However, as noted on the 2018 NOREP, the District did not recommend a specific school. S-27.
69. Prior to issuing the NOREP, the District sought the Parents' consent to send information about the Student to the out-of-district placements. The collection of student information along with an application to an out-of-district placement is often called a "referral packet." Generally, under FERPA,⁹ schools cannot send referral packets without parental consent.
70. The Parents provided consent to send referral packets sometime between the first and second session of this due process hearing.
71. The doctoral-level teacher and the behavior specialist who operated the TES program during the 2017-18 school year accepted a job in another school district, and will not be part of the TES program during the 2017-18 school year.
72. The behavior specialist who supported the TES program during the 2017-18 school year moved with his family out of state, and will not be part of the TES program during the 2017-18 school year. NT 170.
73. At the time of the hearing, additional students were slated to join the TES program during the 2018-19 school year. Those students were slated to spend more time in the TES classroom than the other students who participated in the TES program during the 2017-18 school year.¹⁰ *See, e.g.* NT 28.

⁷ More accurately, the nearly self-contained aspect of the program started very shortly after the Student's TES placement, not immediately upon arrival.

⁸ For clarity, "out-of-district" simply means a school that is not operated by the District. An out-of-district placement can be physically located within the District.

⁹ The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g; 34 CFR Part 99.

¹⁰ Somewhat uncertain but un-rebutted testimony was that the other students assigned to the TES program during the 2017-18 school year spent 90% of their day outside of the TES classroom. The students slated to start the TES program in the 2018-19 school year would spend more time in the TES classroom during the 2018-19 school year. This means that the Student would be in the TES classroom with other children much more frequently.

74. The Parents disapproved the 2018 NOREP on May 21, 2018, and requested a due process hearing on May 25, 2018. H-1.

Legal Principles

1. Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

All witnesses testified credibly.

2. The 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 Parents are the party seeking relief and must bear the burden of persuasion.

3. 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, including school districts, 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 historical 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 minimis*” 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 minimis*” 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.

4. 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. There may be a multitude of potentially appropriate placements for any student. The IDEA requires LEAs to place students in the least restrictive of all potentially appropriate placements. There is no requirement for an LEA to place a student into an inappropriate placement simply because it is less restrictive. However, LEAs must consider whether a less restrictive but inappropriate placement can be rendered appropriate through the provision of supports and services.

Discussion

1. It Is Not Appropriate to Continue the 2017-18 Placement

It is not appropriate to continue the 2017-18 placement into the 2018-19 school year for two reasons. First, the 2017-18 TES program as it operated during that school year, no longer exists. Second, continuing the 2017-18 TES program would not be appropriate even if it continued to exist.

1(a). The 2017-18 Placement No Longer Exists

The 2017-18 TES placement, as implemented during the 2017-18 school year, no longer exists. Regardless of what is written in the Student's IEP, the hallmarks of the Student's 2017-18 TES program in the real world were:

- Full-time, nearly self-contained, placement in the TES classroom.
- A minimum of 1:1 support at all times, and frequent provision of 2:1 or 3:1 support, often supplemented by a TSS and BCBA from an outside agency.
- Direct instruction from a doctoral-level teacher.

Very soon after the Student's transition to the TES classroom, the Student spent nearly the entirety of the school day in the TES classroom. No other students were in the TES classroom for nearly the entirety of that time. Consequently, the Student received between 1:1 and 3:1 support for nearly the entire school day. The Student received all academic instruction from a doctoral-level teacher with extensive background and training. The Student received behavioral interventions from the same teacher and a team of exceptionally well-qualified professionals.

The educators who formed the lynchpin of the Student's program during the 2017-18 school year will not return for the 2018-19 school year. Further, and more importantly, the Student will be educated with other children if the Student remains in the TES classroom during the 2018-19 school year. The introduction of other children to the TES classroom tends to increase and worsen the Student's behaviors.

As a technical matter, the Parents seek an order requiring the District to implement the May 2018 IEP within the TES program. As a practical matter, such implementation will leave the Student in a placement that is substantially different from the placement that the Student received during the 2017-18 school year. Even if the Parents had proven that the 2017-18 TES placement was appropriate, the order that they seek would not maintain that placement. Rather, such an order would leave the Student in the same physical location with new staff, less individualized attention, and a higher likelihood of social isolation (as the Student would be more likely to display maladaptive behaviors to peers).

In sum, the Parents seek an order that would result in a change to the Student's placement in fact even if not on paper. The Parents have not proven by preponderant evidence that the new placement that would flow from their demand is appropriate for the Student. This alone requires me to deny the Parents the particular relief that they seek.

1(b). It Is Not Appropriate to Continue the 2017-18 Placement Even If It Were Available

I note, again, that the Parents seek an order requiring the District to implement the May 2018 IEP in the TES program. A more generous interpretation of the Parents' demand is a request for the continuation of the 2017-18 TES program. Under that more generous reading, the non-existence of the 2017-18 TES program, by itself, is not conclusive.

Under the IDEA, LEAs are obligated to provide a FAPE to students with disabilities. If a student cannot receive a FAPE without a particular service, the LEA must provide that service. If the necessary service is not available within the LEA, the LEA must obtain the service without regard to cost. Consequently, if the Student required the 2017-18 TES placement in order to receive a FAPE, the District may be obligated to recreate the 2017-18 placement, despite staffing changes and the addition of other children.

In this case, the parties have stipulated that all of the Student's IEPs are appropriate. Further, no issues concerning the Student's receipt of a FAPE during the 2017-18 school year are before me. I will not, therefore, render any decision about the Student's receipt of FAPE during the 2017-18 school year. Instead, I will limit my analysis to the appropriateness of continuing the 2017-18 program into the 2018-19 school year. I conduct this analysis without regard to the appropriateness of the program during the 2017-18 school year, and under the factually incorrect assumption that the 2017-18 program still exists.

The Parents argue that implementation of the 2017-18 TES program decreased the frequency of the Student's negative behaviors. The Parents also argue that the Student met goals as measured by daily Start Chart percentages. The District argues that the decrease in the frequency of the Student's behaviors is not significant, and that the Star Charts are not an appropriate measure of the Student's progress going forward. I agree with the District.

Counterintuitively, the Star Chart percentages say almost nothing about the Student's behavior.¹¹ The percentages on the Star Charts provide no information about the frequency of each of the Student's targeted behaviors.¹² To the extent that each behavioral incident resolved in 30 minutes or less, the Star Charts provide no information about the duration of the Students behaviors. Perhaps most importantly, the Star Charts provide no information about the intensity of the Student's behaviors. As such, the Star Charts are simply not evidence that the 2017-18 program was appropriate, let alone that it must be continued.

Beyond the Star Charts, the Parents' analysis of the District's reports of the Student's behavior shows a more significant decline than the District's analysis of the same data. This discrepancy is a result of the District taking in longer periods of time to calculate averages, while the Parents divide the data by quarters. *See* S-1. According to the Parents' analysis, the Student engaged in physical aggression 16 times per day on average during the second marking period. That fell to 14 incidents by the third marking period, and 6 incidents in the fourth marking period.

The Parents' data analysis is not evidence that the Student should remain in the 2017-18 TES program. At best, the analysis shows that even with 1:1 support (minimum) in a full time, nearly self-contained, mostly empty therapeutic placement, the Student still engaged in physical aggression six times per day on average after seven months of programming. Reviewing the raw data, there were only four days in the fourth quarter in which the Student had no incidents of physical aggression. S-31 at 25-28, 43-46. The fourth marking period data was collected daily from April 7, 2018 to June 7, 2018. S-31.

The extraordinary high level of services that the District provided to the Student during the 2017-18 school year were insufficient to extinguish the Student's physically-aggressive behaviors. The downward trend of those behaviors when expressed as a daily average per marking period is good. But, relative to

¹¹ Absent the stipulations, I would have considerably more to say about this point.

¹² The Star Charts provide information about each type of the Student's behaviors. The percentage on the Star Charts is simply a calculation of the total points the Student received over possible points. Star Charts were used to track individual incidents of the Student's physically aggressive behaviors. Analysis of that information is below.

the seriousness of the behaviors, the trend line does not establish the appropriateness of the program. Moreover, the importance of the downward trend is undercut by one of the Parents' arguments.

The Parents argue that the Student's transition to the TES program was poorly planned. The Parents highlight that the Student switched schools and started TES program the first school day after the decision was made. The Parents argue that there should have been a more gradual transition, and that the abruptness of the change resulted in an increase in negative behaviors. I accept this argument. Consequently, I find that the frequency of physically aggressive behaviors in the second marking period and a portion of the third marking period is inflated. As a result, I also find that the slope of the decrease in average daily incidents of physical aggression (viewed marking period by marking period) is artificially steep. It is impossible to tell if the decrease in the Student's daily average incidents of physical aggression is attributable to the services that the Student received or to the Student's acclimation to the TES program. It is equally impossible to tell if the Student's behaviors were improving at all, or simply returning to pre-transition levels after acclimation.

The Parents note that some of the Student's most serious behaviors were extinguished or nearly extinguished while the Student attended the TES program. Disrobement and toileting accidents are two examples. I reject, however, any suggestion that physical aggression is somehow not a serious concern. The incidents of physical aggression are serious. Physical aggression in school is isolating at best and dangerous at worst. The few incidents in which the Student's behavior caused real harm to another person are only likely to increase as the Student becomes older, bigger, and stronger. It is not acceptable to simply manage the Student's behaviors. The District must work to extinguish the Student's behaviors while the Student is still young.

1(c). Conclusions Regarding Continuation of the 2017-18 Program

The Parents highlight three primary factors to suggest that the Student should remain in the 2017-18 program.¹³ First, some serious behaviors were nearly extinguished. Second, the Student met Star Chart goals. Third, the Student's average daily incidents of physical aggression decreased from the second to fourth marking period. I reject all of these factors. The seriousness of some behaviors does not make other behaviors less serious. The Star Charts do not provide objective information about the intensity or duration of the Student's behaviors, and the Star Chart percentages do not even provide information about the frequency of individual behaviors. Examining individual behaviors, specifically physical aggression, it is not clear that the Student's behavior improved because the initial data was likely inflated by the Student's abrupt transition to the TES placement. Even if the incidents of physical aggression truly decreased, they were hardly extinguished. An appropriate placement must have a realistic chance of extinguishing the Student's behaviors while there is still time.

Under these circumstances, the Parents ask for an order to implement the May 2018 IEP in the TES placement. Under the facts of this case, such an order would fundamentally change the Student's program. There is no evidence that the new placement is appropriate for the Student, and some evidence that the new placement is inappropriate.¹⁴

¹³ Again, this ignores that the 2017-18 TES program no longer exists, and the particular order demanded would not maintain the 2017-18 TES program. In addition, the Parents argue that more could be done within the TES program before an out-of-district placement is necessary – but the Parents do not actually make this demand. They seek implementation of the May 2018 IEP within the TES placement. The practical impact of such an order is described above.

¹⁴ The Parents also argue that an out-of-district placement is inappropriate because it is more restrictive than the 2017-18 TES program. The Parents have not established the appropriateness of continuing the

The Parents are not entitled to the order they seek for these reasons.

2. The Out-Of-District Placements

The District has not actually offered any particular out-of-district placement. The District did not have the Parents' consent to send referral packets until after the hearing started. When the 2018 NOREP was issued, the District concluded that the TES placement was not appropriate, and two schools were being considered. Even so, the District had no assurance that either school would accept the Student. The 2018 NOREP says, "a specific school has not been recommended since the District has not received consent to share information with potential placement options."

The logic concerning the appropriateness of the Parents' demand applies equally to the District's demand. It is the District's obligation to prove that an out-of-district placement is appropriate for the Student. Unfortunately, there is nearly no evidence in the record concerning the match between the Student's needs and either of the out-of-district placements. Generally, the Parents testified that they visited both schools and believe that neither were a good fit for the Student. Generally, District employees and the BCBA-D testified that the Student needs a level of support that can only be provided in an out-of-district placement. No specific evidence was presented concerning the type of service that the Student would receive in either school. Consequently, the District has not proven by preponderant evidence that either out-of-district placement is appropriate for the Student.

I am persuaded that the Student requires a level of support that cannot be provided within the TES setting. I cannot think of a higher level of support that can be provided within a public school. I am persuaded that an out-of-district placement is appropriate for the Student, at least into the immediate future. I am persuaded that, in general, out-of-district placements have a greater ability to educate the Student without isolating the Student, and are better equipped to handle the Student's anticipated extinction burst as negative behavior reinforcers are removed. Despite this, I will not order the Student to attend an unspecified out-of-district placement that may or may not accept the Student. I cannot issue such an order because it is the District's burden to prove that its offered placement is appropriate and, to date, the District has not offered either out-of-district placement. Even if the 2018 NOREP offered either or both out-of-district placements, there is no preponderant evidence supporting the appropriateness of either placement. This lack of evidence, however, is directly attributable to the Parents' withholding of consent to send referral packets. The placement order going forward will address these circumstances.

3. Placement Going Forward

I recognize that my conclusions create their own set of problems. There is simply no evidence for me to conclude that either school under consideration is appropriate for the Student. This lack of evidence, and the fact that neither school has been offered in a literal way, is attributable to the Parents. I am also persuaded that out-of-district placements are better equipped to provide appropriate services to the Student, compared to the District. At the same time, I have found by preponderant evidence that continuation of the 2017-18 TES program (as implemented) would not be appropriate even if that program were still available. I have also found no support for the particular order that the Parents demand: implementation of the May 2018 IEP in the TES placement. All of this leaves the Student in limbo —

2017-18 TES program. As described above, the LRE mandate does not require placement in an inappropriate program. I do not address the LRE question for that reason. I note, however, that if restrictiveness take into account contact with peers, any out-of-district placement is not necessarily more restrictive than a self-contained emotional support classroom that happens to exist in a public school building.

which is manifestly unjust. I am also loathe to return this matter to the Student's IEP team without a clear path forward. Such orders just return the decision-making to the parties, who are already at impasse. I am compelled, therefore, to craft a remedy that will ensure the Student receives a FAPE to the extent that I am able. I acknowledge that my placement decision is far from ideal, but my intention is to remove the decision away from the IEP team in the short term, leave both parties with a voice in the decision-making process, and plan for the most likely possibilities.

To the best of my knowledge, the Parents have provided consent for the District to send referral packets to out-of-district schools. Also, to the best of my knowledge, the parties came to their own agreement concerning pendency during the lead up to this hearing. To the best of my knowledge, the Student returned to school at the start of the 2018-19 school year. I do not know what services the Student is receiving. The Student shall remain in that pendent placement until the Student's placement changes in accordance with this order.¹⁵ The parties shall proceed as follows:

1. The District shall immediately send referral packets to both out-of-district placements if it has not already done so.
2. The Student is in need of intensive interagency support. Pursuant to *Cordero v. Pa. Dep't of Educ.*, 795 F. Supp. 1352 (M.D. Pa. 1992), the District shall convene an intensive interagency team for the Student. The intensive interagency team shall review all available information about the Student's needs, and shall review all available information about both out-of-district placements under consideration. The intensive interagency team shall then determine if either out-of-district placement can implement the 2018 IEP — which both parties have stipulated is appropriate.
3. If the intensive interagency team determines that one of the out-of-district placements can implement the 2018 IEP, and that out-of-district placement accepts the Student, that out-of-district placement shall be the Student's placement. If the intensive interagency team determines that both out-of-district placements can implement the 2018 IEP, and only one out-of-district placement accepts the Student, the accepting out-of-district placement shall be the Student's placement. If the intensive interagency team determines that both out-of-district placements can implement the 2018 IEP, and both accept the Student, the Parents may choose which placement they prefer and that placement shall be the Student's placement. In any of these circumstances, the 2018 IEP shall be revised to reflect that placement.
4. If either out-of-district placement becomes the Student's placement, the Student's IEP shall be edited to expire at the end of the 2018-19 school year. The District shall comprehensively re-evaluate the Student during the fourth marking period of the 2018-19 school year. The Student's IEP team shall then reconvene and draft an IEP for the 2019-20 school year.
5. If the interagency team does not convene timely after the issuance of this decision, or determines that the 2018 IEP cannot be implemented in either out-of-district placement, or both out-of-district placements reject the Student, the parties shall take the following actions:
 - a. The IEP team shall formulate specific operational definitions of the Student's behaviors, and shall also formulate specific operational definitions to objectively monitor the intensity of each of the Student's behaviors.

¹⁵ By operation of law, the Student's pendent placement will also remain operative through any appeal of this decision unless the parties agree otherwise. As noted below, nothing in this decision is intended to preclude the parties from compromising and coming to their own agreement about the Student's placement.

- b. The IEP team shall draft a new IEP for the Student that requires educators to monitor the frequency, intensity, and duration of the Student's behaviors.
 - c. The IEP shall call for the elimination of the Student's problematic behaviors. The IEP shall accomplish this through measurable, objective, ambitious goals. Alternatively, if the IEP team concludes that a behavior cannot be eliminated within the term of the IEP, the IEP team shall specify which behaviors will require more than one IEP term to eliminate, and shall detail the objective data used to reach that conclusion.
 - d. The IEP shall include daily behavioral data collection and weekly data reporting.
 - e. The IEP shall include special education (student-specific SDI) as necessary to accomplish the IEP's goals.
 - f. The resulting IEP shall be marked as "draft," and shall include no information concerning placement. Then, simultaneously:
 - I. The District shall send referral packets, including the draft IEP, to all out-of-district placements that may be appropriate for the Student, regardless of cost or APS placement availability, including the two schools considered in the 2018 NOREP. The District shall also send the same information to any potentially appropriate placements run by the intermediate unit in which the District is located.
 - II. The IEP team shall consider whether or how the draft IEP can be implemented within the District's schools.
 - g. If the IEP team concludes that the IEP can be implemented within the District, the draft IEP shall be revised to reflect an in-district placement, and the Student shall attend whatever in-district placement enables the implementation of the IEP.
 - h. If the IEP team concludes that the IEP cannot be implemented within the District, and if the Student is accepted at an out-of-district or IU placement, the draft IEP shall be revised to reflect the out-of-district or IU placement, and the Student shall attend the out-of-district or IU placement.
 - I. If the Student is accepted in more than one out-of-district or IU placement, the Parents may choose from the placements that accepted the Student.
 - i. If the IEP team concludes that the IEP cannot be implemented within the District and the Student is not accepted at an out-of-district or IU placement, the District shall inform the Pennsylvania Department of Education, Bureau of Special Education (PED-BSE) that it is unable to educate the Student and shall seek placement assistance from PDE-BSE.
6. Nothing in this decision prohibits the parties from reaching their own agreement concerning the Student's placement.

An appropriate order follows.

ORDER

Now, September 23, 2018, it is hereby **ORDERED** as follows:

1. The Parents' demand for implementation of the May 2018 IEP within the District's TES placement is **DENIED**.
2. The District's demand for placement in an unspecified, out-of-district school that may or may not accept the Student is **DENIED**.
3. Within 5 school days of this Order, the District shall send referral packets and initiate the *Cordero* process in accordance with the decision above.
4. After the *Cordero* process is started, the parties shall proceed in accordance with the decision above.
5. Nothing in this Order prohibits the parties from reaching their own agreement concerning the Student's placement. In the absence of a written agreement, this Order controls.

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

/s/ Brian Jason Ford
HEARING OFFICER