

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

Closed Hearing

ODR No. 27360-22-23

Child's Name:

B.G.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

Pro Se

Local Education Agency:

Southeast Delco School District
1560 Delmar Drive
Folcroft, PA 19032-2102

Counsel for LEA

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

March 16, 2023

The student in this matter (Student)¹ is a [redacted] student in the (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) as a child with Emotional Disturbance, Other Health Impairment (OHI) (ADHD) and a Specific Learning Disability.² The District filed a due process Complaint seeking to change the student's placement to a District therapeutic program, "the Academy," because Student cannot make meaningful educational progress unless in an environment with services and supports that are not available at the current neighborhood school.

After the District filed this Complaint and a hearing date was established, the District requested a continuance on the grounds that the District was closed for observance of a federal holiday. The Parents' objection to the continuance was considered, but the District's request was granted to ensure the availability of needed witnesses. After the continuance was granted, the Hearing Officer, on multiple occasions, requested dates of Parents availability for this hearing, and the Parents did not reply.³ Furthermore, the Parents were provided with notice of the hearing and all prehearing correspondence but did not participate in the due process hearing; nor submit a written closing statement, although the hearing transcript was provided that outlined the due date. For the following reasons, the relief requested by the District is granted.

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision, and will be redacted from the cover page prior to posting on the website of the Office for Dispute Resolution.

² 20 U.S.C. §§ 1400 – 1482. The implementing federal regulations are found at 34 C.F.R. §§ 300.1 – 300.818, and the state regulations are found at 22 Pa. Code §§ 14.101 – 14.163.

³ HO-1

ISSUE

- 1) Is the District's proposed placement of the Student at the therapeutic academy an appropriate offer of FAPE?

FINDINGS OF FACT

2021-2022 School Year

1. During the 2021-2022 school year, the Student was enrolled in the [redacted] grade in the District. (S-25)
2. In the fall of 2021, the District completed an evaluation of the Student after a Parent request based on a medical diagnosis of ADHD. (S-3; N.T. 14)
3. For inclusion in the evaluation, the District assessed the Student's ability, achievement and social-emotional functioning. Testing administered included the Wechsler Intelligence Scale for Children – Fifth Ed. (WISC-V); the Kauffman Test of Educational Achievement, Third Ed. (KTEA-3); the Wechsler Individual Achievement Test – Fourth Ed. (WIAT-IV); the Behavior Assessment System for Children – Third Edition (BASC-3); Conners' Rating Scales; and the Emotional Disturbance Decision Tree (EDDT). (S-4)
4. According to the WISC-V, the Student's full-scale IQ was determined to be in the "very low" range. Based on sub-test scores, the ER determined that the Student experienced difficulty in engaging in

higher-order thinking, struggled to manipulate complex information, form inferences, make predictions, and problem-solve. (S-4; N.T. 26)

5. On the KTEA-3 Student's performance was below average in reading, math, and written language. Student's oral reading frequency on the WIAT-IV was below average. On curriculum-based assessments, Student was in the 7th percentile for reading and the 2nd percentile for math. (S-4)
6. For the BASC-3, a Parent and the [redacted] grade general education teacher completed rating scales. The Parent indicated that Student's externalization of problems, school problems, and behavioral symptoms were clinically significant. The general education teacher rated the Student in the moderate clinical range (S-4)
7. On the Conners' Rating Scales, both Parents and the general education teacher rated Student as having a very elevated score in defiance/aggression. On the EDDT, the Student was determined to display many behaviors related to an emotional disturbance. Although the Parents' ratings suggested a score in the high clinical range, the general education teacher's ratings suggested the moderate clinical range. (S-4)
8. For inclusion in the evaluation, the school psychologist performed a classroom observation and solicited parental and teacher input. The Student was observed to be off-task significantly more than peers. (S-4)

9. The Functional Behavioral Assessment (FBA) completed for inclusion in the ER identified off-task and non-compliant behaviors, including weekly elopement, as behaviors of concern. (S-5)
10. After the evaluation, the IEP Team concluded that Student was eligible for and in need of specially designed instruction as a child with an Other Health Impairment (OHI) on the basis of ADHD and a Specific Learning Disability (reading, writing, math). (S-4, S-25)
11. On November 23, 2021, the District issued its evaluation report (ER). At the meeting to discuss the ER, the Parents disclosed that Student experienced two head injuries. An addendum was added to the ER containing this information, and the Student was referred to an IU program for additional assessment. (S-4; N.T. 106-107)
12. On December 20, 2021, the Parents, through a NOREP, agreed to the District's provision of itinerant learning support. (S-8)
13. The implemented December 2021 IEP provided academic goals designed to address reading fluency, comprehension, writing, and math. The positive behavioral support plan (PBSP) contained behavioral goals that addressed on-task behaviors and positive interactions. Specially designed instruction was offered that targeted behaviors of concern. (S-25)
14. Although the IEP and PBSP were implemented, the Student's negative and problematic behaviors interfered with instructional needs. The District tracked Student's behavior to determine patterns to

develop additional interventions. However, by the end of February 2022, the Student incurred numerous disciplinary consequences, including suspensions for insubordination, elopement, threats and assault. (S-10; N.T. 58-70)

15. After the District determined that Student's removal from school constituted a pattern, a manifestation determination review (MDR) meeting occurred on February 28, 2022. The IEP Team concluded that Student's defiant and off-task behaviors were a manifestation of Student's disability. (S-9, S-10, S-12, S-15, S-16, S-25)
16. The school team noted that Student was triggered by certain circumstances, such as a task demand but recognized that identifying antecedents was difficult because Student's triggers were inconsistent. (S-10)
17. The District reviewed Student's programming, and a one-to-one PCA was recommended to offer support to the Student. (S-9, S-10, S-12, S-15, S-16, S-25)
18. In March 2022, the Parents approved the NOREP that recommended a PCA. The first PCA quit after one day because Student was non-compliant, disrespectful and attempted to trip her in the hallway. (S-1, S-16; N.T. 67-68)

19. Although the IEP and PBSP were implemented, the Student continued to engage in problematic behaviors that interfered with educational access.⁴ (S-19; N.T. 56)
20. Because of the Student's increased oppositional and defiant behaviors, and lack of progress, the District, with parental consent, performed a reevaluation (RR) of the Student. (S-1, S-10, S-17, S-18, S-19; N.T. 56, 58-69, 79)
21. The March 2022 RR consisted of a review of records, EDDT scales completed by the special education teacher and assessments of social-emotional functioning. (S-19)
22. The EDDT ratings suggested the impact on Student's education was elevated and behaviors were exhibited that negatively affected academics.
23. On the BRIEF-2 administered to measure Student's behavior, emotional, and cognitive regulation, the Student scored in the average range in self-monitoring and received a clinically elevated score for inhibitions, the ability to control impulses and stop behavior. (S-19)
24. The IU program could not reach the Parents for input regarding the Student's history, and current concerns or obtain complete medical records. The IU program did observe the Student. The program recommended a more emotionally supportive and therapeutic placement than the current setting. (S-22)

⁴ Student's first official disciplinary referral for the school year was on October 12, 2021, for insubordination and threats. Student then accrued close to twenty similar disciplinary infractions for insubordination and threats over the course of the next twenty-one weeks. In February 2022, Student began accruing discipline for assault.

25. The March 25, 2022, RR determined the Student eligible for special education based on an emotional disturbance.
26. On April 4, 2022, the District issued a NOREP that recommended Student's placement at the Academy for full-time emotional support beginning on April 25, 2022, and ESY. The District also sent referrals to two other therapeutic placements. (S-1, S-23; N.T. 117)
27. On April 20, 2022, the Parents, through a NOREP, disagreed with the District's recommendation. (S-23)
28. In May 2022, the recommended placements advised the District that the Parents were unresponsive to attempted outreach. (S-1)
29. The Student's behaviors documented during the 2021-2022 school year disrupted the classroom, interfered with instructional time, intimidated peers, and hindered the Student's and classmates' access to education. (S-9, S-10, S-12, S-15, S-16, S-25)
30. In June 2022, the Parents canceled a scheduled mediation. (S-1)

2022-2023 School Year

31. During the 2022-2023 school year, the Student attended the [redacted] grade in the District neighborhood school attended the previous year. Although contacted by other therapeutic educational placements, the Parents did not complete any intake procedures. (S-25; N.T. 117-118)

32. Between September 2022 and February 2023, daily logs completed by teachers documented nearly daily negative behaviors by the Student that included work refusal, disruptive behaviors and verbalizations, threats, yelling, refusal to enter the classroom, walking out of class without permission, interfering with work completion of peers, disrespect, name calling with slurs, throwing water in a child's face, harassment, stealing, bullying, and assault. (S-12, S-13, S-39; N.T. 81-103)
33. The Student's behaviors documented during the 2022-2023 school year disrupted the classroom, interfered with instructional time, intimidated peers, and hindered the Student's and classmates' access to education. (S-12, S-13, S-39; N.T. 81-103)
34. The District implemented the Student's IEP and PBSP during the 2022-2023 school year. (N.T. 92, 103)

The Private Academy

35. The Academy is a therapeutic program and school affiliated with the District and provides an enrollment opportunity for qualified residents to receive education in a full-time emotional support setting. (N.T. 118, 124)
36. The Academy has class sizes of twelve students and offers personalized attention. (N.T. 128)
37. The Academy partners with a healthcare facility to provide access to a psychiatrist and medication management. (N.T. 125)

38. Each student at the Academy is assigned to a therapist who works inside the classroom to help generalize skills learned in therapy. (N.T. 129)
39. The Academy has a fully integrated school-wide positive behavior support initiative. (N.T. 126-128)
40. The Academy specializes in providing individualized attention to students with behaviors such as elopement, physical aggression, self-harm, and a history of hospitalizations. (N.T. 124) 126.
41. The Academy reviewed Student's IEP and evaluation reports and determined that Student fit the profile of students at this placement. (N.T. 119, 122-124, 127-128, 131)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Witness Credibility

Hearing officers, as factfinders, are charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). The District offered the testimony of multiple witnesses. The Parents

did not participate in the due process hearing. The testimony was reviewed and weighed in light of the witnesses' participation in the hearing. Considering the testimony in light of the documentary evidence, I find that the witnesses were credible and reliable. The witnesses' testimony was consistent with the documentary evidence.

Burden of Proof

In *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 Court first noted that the term "burden of proof" is commonly held to encompass both the burden of persuasion (i.e., which party loses if the evidence is closely balanced) and the burden of production (i.e., the party responsible for going forward at different points in the proceeding). In *Schaffer*, only the burden of persuasion was at issue. An LEA may file a due process complaint when the LEA "[p]roposes to initiate or change the identification, evaluation, or educational placement of...a child with a disability... or the provision of FAPE to the child..." 34 C.F.R. §§300.503. As the party filing the complaint, the LEA bears the burden of persuasion.

IDEA PRINCIPLES: SUBSTANTIVE FAPE

FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is "'reasonably calculated' to enable the child to receive '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). Fairly recently, the U.S. Supreme Court considered once again the application of the *Rowley* standard, observing that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The Court explained that "an educational program must be appropriately ambitious in light of [the child's] circumstances... [and] every child should have the chance to meet challenging objectives." *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not "fully integrated into the regular classroom." *Id.* The Court thus concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit. See *Dunn v. Downingtown Area School District*, 904 F.3d 248, 254 (3d Cir. 2018).

IDEA PRINCIPLES: PROCEDURAL FAPE

From a procedural standpoint, the family plays "a significant role in the IEP process." Schaffer, *supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); see also *Letter to Veazey*, 37 IDELR 10 OSEP 2001 (confirming the position of OSEP that LEAs cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). Consistent with

these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to consider any "concerns" parents have "for enhancing the education of their child" when it formulates the IEP. *Winkelman v. Parma City School District*, 550 U.S. 516, 530 (2007). Full participation in the IEP process does not mean, however, that LEAs must defer to parents' wishes. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999)(noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives," and that failure to agree on placement does not constitute a procedural violation of the IDEA). As has previously been explained by the U.S. Department of Education, The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE).... If the team cannot reach an agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint. *Letter to Richards*, 55 IDELR 107 (OSEP 2010); see also 64 Fed. Reg. 12406, 12597 (1999) (same).

LEAST RESTRICTIVE ENVIRONMENT

A critical and rather paramount premise in the IDEA is the obligation that eligible students be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C.S. § 1412(a)(5)(A). *see T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

In order to ensure compliance with LRE obligations, LEAs must have available a “continuum of alternative placements” to meet the service needs of children with disabilities. 34 C.F.R. § 300.115(a); see also 22 Pa. Code § 14.145. The “continuum” of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, moving then toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115; *see also* 22 Pa. Code § 171.16(c)(specifying an order of priority for educational placements from the regular classroom in a public school through an approved private school). However, as set forth above, the least restrictive environment mandate does not contemplate a mere comparison of lesser and more restrictive settings; on the contrary, it begins with the premise that a child can be educated in the regular education classroom with appropriate supplementary aids and services. Furthermore, FAPE and LRE are related but separate, concepts;

indeed, an LEA can be in noncompliance with the LRE mandate but still provide FAPE. *A.G. v. Wissahickon School District*, 374 Fed. App'x 330 (3d Cir. 2010) (citing *T.R., supra*, at 575, 578); see also *H.L. v. Downingtown Area School District*, 624 Fed. App'x 64 (3d Cir. 2015).

The District's Claims

In this case, as permitted by the federal and state IDEA regulations, the District filed a due process complaint that it cannot provide for this eligible Student's educational needs due to the severity of demonstrated behavioral issues. Based on the evidence presented, the District has met its burden of proof. It has established by a preponderance of evidence that in order for the Student to receive FAPE, a change in educational placement must occur.

Because the Parents have objected to the recommended placement through a refusal to complete the necessary intake procedures, the District can only secure appropriate programming for this Student through a due process hearing. The IDEA regulations outline the due process hearing rights of the parents and LEA.⁵ In this case, the Parents chose not to participate in the due process hearing although provided with ample opportunity to do so. The IDEA mandates an efficient conclusion to due process hearings.⁶ Considering the nature of these issues that required efficient resolution and the Parents' refusal to provide dates of availability, this Hearing Officer was left with no choice but to commence this hearing without parental participation on the pre-scheduled date.

⁵ 34 C.F.R. §300.512(a)(1),(2),(3)

⁶ 34 C.F.R. §300.515(a)(c)

The preponderant evidence provided by the District at the due process hearing provided a solid basis to justify the conclusion that Student's emotional and academic support needs outweigh what is available through the current educational program. After the Parents indicated the Student's history of head injuries, the District referred the family to an IU program to obtain programmatic recommendations and assistance. As Student's school worsened, the District conducted evaluations and modified the IEP and PBSP with more intensive interventions. The supports were largely ineffective. The Student's behaviors continued to interfere with educational access and disrupt the programming of classmates. Although the Parents did not fully cooperate with the IU program, the ensuing recommendations were that the Student would benefit from a more therapeutic and individualized approach in an emotionally supportive setting.

There is a strong and specific preference in the IDEA that, (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.114(a)(2). The IDEA regulations also recognize, however, that there are circumstances where "the nature and severity" of an eligible student's disability makes education in a regular school setting unsatisfactory because the LEA does not have access to supports and services that allow it to address the effects of a severe disability. For those situations, the IDEA regulations require an LEA to provide "a continuum of alternative placements," such as "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. §300.115(a), (b).

This case clearly presents a situation where Student cannot be “satisfactorily” educated in a regular school placement. The record developed at the due process hearing strongly justified the District’s request for an order permitting it to enroll the Student into the Academy or comparable therapeutic placement. The District presented extensive evidence supporting the conclusion that Student now requires an educational placement that can provide therapeutic and academic support.

The District has presented preponderant evidence that the Academy will appropriately meet Student’s academic and therapeutic needs. The Academy is a therapeutic, highly structured, small, full-time emotional support placement, affiliated with the District. The Academy specializes in educating students that present with behaviors of elopement, extreme defiance, and physical aggression. In addition to providing emotional and academic support, the Academy partners with a healthcare setting to provide therapeutic support. This placement is intended to facilitate re-entry into the District when Student learns the necessary skills.

The IDEA statute and regulations are designed to encourage cooperation between parents and school districts. In order to benefit the child, both parties must work collaboratively. Many court decisions have noted that parents’ reasonable cooperation is always required. *See, e.g., K.C., v. Nazareth Area School District*, 806 F. Supp. 2d 806 (E.D. Pa 2011); *Kasenia R. ex rel. M.R. v. Brookline School Dist.*, 588 F.Supp.2d 175, 190 (D.N.H. 2008); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) It is the continuing obligation of both Parents and the School to assure that Student’s needs are met, no matter how difficult the relationship becomes. Here, the District tried to engage the Parents in a discussion of the benefits of the recommended placements for Student. Still, they refused to learn more about the proposed options and intended educational benefits.

Based on the unrefuted evidence, the District has established by a preponderance of evidence that it has exhausted its resources and that a change in Student's educational placement is necessary in order to provide FAPE.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. For the remainder of the 2022-2023 school year, the Student's placement is changed from the District school to the Academy.
2. Within five (5) school days following the entry of this Order, the District shall arrange transportation for the Student to the Academy.
3. The IEP team shall convene within five (5) school days after issuance of the first quarterly progress reporting period of the 2023-2024 school year, to review the Student's program and progress. A NOREP shall be issued with a recommendation for continued programming and placement of the Student.

Nothing in this decision and order shall be read to interfere with the parties' ability to modify any provision of this decision and order to the extent the parties agree in writing.

IT IS FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Joy Waters Fleming, Esquire

Joy Waters Fleming, Esquire
Special Education Hearing Officer

March 16, 2023