

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve the 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. 28395-23-24**

**Child's Name:**

C.R.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parent**

*Pro Se*

**Local Education Agency**

Bensalem Township School District  
3000 Donallen Drive,  
Bensalem, PA 19020

**Counsel for the LEA**

Maria B. Desautelle, Esq, Esq.  
Sweet, Steven, Katz and Williams  
215- Avenue, New Britain, PA 18901

**Decision Date:**

January 31, 2024

**Hearing Officer**

Charles W. Jelley Esq.

## **OVERVIEW OF THE DISPUTE**

The Parent filed the pending Due Process Hearing Complaint alleging multiple failures to provide a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup> At the current time, the Student is a [redacted] grader. The origins of the dispute started in [redacted] Grade, carried over into [redacted] Grade, and have now spilled over into [redacted] grade - 2023-2024 school year. This is the fourth due process hearing between the Parties in three school years. Tensions are high, positions are fixed, and neither side will budge.

The Parents contend that under the IDEA, the District failed to evaluate the Student prior to a change in location from one [redacted] school building to another [redacted] school in the District. In the alternative, they allege the District either refused to discuss or ignored the Parents' input that the change back to a previous [redacted] school building – Building 1- would impede learning and otherwise cause the Student to regress. The Parents now seek multiple forms of relief, including an Order placing the Student back in Building 2 or any other building in the District, with Learning Support, compensatory education, and an independent educational evaluation (IEE).

The District seeks a declaratory ruling that, at all times relevant, they procedurally and substantively complied with the IDEA during each school year. The District next seeks an Order affirming the District's authority to locate classrooms in any building in the District. Next, they seek a declaration that the Student's individual education program (IEP) and placement in the Supplemental Emotional Support classroom at Building 1 is

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<sup>1</sup> All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14).

otherwise appropriate. Finally, since the Parents are now withholding consent to complete a reevaluation, they want me to Order a comprehensive reevaluation.

After considering all of the intrinsic and extrinsic evidence, I now find it in part for the District and in part for the Parents. The Parents' request for compensatory education and return to Elementary School 2, with Learning Support, is Denied. The District's request for declaratory relief is Denied in part and Granted in part. Subject to the following findings and conclusions, the Parents and the District's request for a reevaluation is Granted in part and Denied in part.

### **STATEMENT OF THE ISSUES**

At the outset of the hearing, the Parent identified the following issues:

1. Did the District make an error in not evaluating or considering the surrounding Student specific circumstances when they offered the Student a free appropriate public education in Elementary School Building 1? If the answer to the question is yes, what relief is appropriate?
2. Was each Individual Education Program (IEP) offered from May 2023 to November 2023 reasonably calculated to allow the Student to be educated in the regular education classroom, with specially designed instruction, and make meaningful progress in light of their circumstances? If not, is the Student entitled to compensatory education?

### **FINDINGS OF FACT**

All evidence was carefully and thoughtfully considered; I will now make Findings of Fact and Conclusions of Law as necessary to resolve the issues presented. During the hearing, it became apparent that the Student needed a reevaluation. The Parties agree that a reevaluation is necessary but disagree on who should conduct the reevaluation. The evidence - testimony and documents - substantiated and contextualized the Findings of Fact. I

will, however, reference certain key events for context.

### **THE LITIGATION HISTORY BETWEEN THE PARTIES**

1. On February 16, 2022, the Parents requested a due process hearing. The ODR file number for the Parents' original Complaint was ODR File # 26100-21-22. Initially, the Parents were *pro se*. By March 16, 2022, the Parents had retained counsel and sought leave to amend their Complaint.
2. On March 21, 2022, the Parents filed their first amended due process complaint through counsel.
3. On April 26, 2022, a behavioral incident occurred in which the Student injured District personnel.
4. On April 27, 2022, the District requested a due process hearing by filing its own expedited Complaint at ODR FILE #26436-21-22. The District then concluded that the injuries to its personnel, caused by the Student during a behavioral outburst, satisfied the IDEA's definition of serious bodily injury and proposed to change the Student's placement. This Decision at ODR No. 26436-21-22 Ordered a 45-day interim alternative educational placement and also changed the Student's level of support from Itinerant to Supplemental Emotional Support in another elementary school -Building 2. The expedited Decision resolved the District's initial safety concern.
5. On May 3, 2022, the Parents, through counsel, filed a second due process complaint, which was also expedited. The ODR file number for the Parents' expedited Complaint is ODR FILE #26467-21-22.
6. On May 10, 2022, the Parents amended their original due process Complaint for a second time. In the body of the Amendment, the Parents waived the IDEA's dispute resolution period in writing. The District promised an identical waiver with its Answer and then again, while on the record during the May 16, 2022, hearing session,

repeated the request. Those waivers enabled all three matters to proceed on a consolidated record. As applied, this means that the evidence presented in the District's April 2022 initial expedited due process hearing need not be presented again in the non-expedited hearing.

7. On July 22, 2022, the hearing officer issued a Final Decision finding in part for the Family and in part for the District. The Final Order, in the consolidated cases, awarded the Student compensatory education, dismissed the Student's discrimination and retaliation claims for lack of jurisdiction, and concluded that all other violations of the Student's and Parents' procedural rights did not result in substantive harm; therefore, no other relief was Ordered. (The Decision is on file with the Parties and the Office for Dispute Resolution).
8. The hearing officer also concluded that the Student should continue to receive Supplemental Emotional Support Services for [redacted] Grade in Building 2 as previously Ordered in April 2022. (*Id*)

#### **THE COMPREHENSIVE EVALUATION**

9. In May 2022, the District completed a comprehensive reevaluation. The reevaluation included a variety of assessments and Parental input. The reevaluation noted that the Student had Average ability and achievement. The evaluation team concluded that the Student should be identified as a person with an Emotional Disturbance and an Other Health Impairment. (S-20).
10. The evaluation team further concluded that the Student exhibited the following "Strengths: verbal reasoning, vocabulary, word reading, reading comprehension, written expression, spelling, receptive and expressive language, articulation, homework completion, interest in music, curiosity, decreased incidents of elopement. The team next concluded that the Student had the following "Needs" "compliance with

classroom and school rules, physical aggression towards peers and adults, verbal aggression toward peers and adults, emotional regulation, executive functioning (impulse inhibition, self-monitoring, flexibility, emotional control, task initiation, working memory), care for and proper usage of property, responsibility for behavior, socialization with peers, safe choices" (S-20).

11. On or about May 23, 2022, the Parties met and reached a consensus on the contents of the Student's [redacted] Grade IEP. The IEP team proposed, and the Parents agreed that the Student should stay in the Supplemental Emotional Support classroom at Building 2, with supported participation in regular education for [redacted] Grade. (J-1).

#### **THE STUDENT'S [redacted] GRADE SCHOOL YEAR**

12. By all accounts, the Parties agree that during [redacted] Grade, the frequency, intensity, and severity of the Student's behaviors decreased and did not interfere with learning. The Parties further agree that, for the most part, during [redacted] Grade, the Student made across-the-board academic and behavioral gains. The District offered, and the Parents agreed that the Student should receive one-on-one counseling. The IEP included descriptive present levels, measurable goals and objectives, and related services like one-on-one counseling. The quarterly progress reports indicate consistent gains and measurable progress. (J-1, J-2, J-3, S- 14, S-17, S-20).
13. On or about December 20, 2022, during [redacted] Grade, the Parties participated in another IEP meeting. During the meeting, the District's Special Education Supervisor advised the Parents of District-wide discussions about consolidating the District's two Supplemental Emotional Support classes in two different elementary buildings into

one location. During the meeting, the Parents told the Supervisor they would oppose any building change. (S-8, S-9, S-10).

14. The Parties meet again on February 3, 2023, to review the Student's progress. The District offered additional psychological services, and the Parents refused the new related services. The Parents again stated they would oppose any change in moving the Supplemental Emotional Support classroom to another building. In February 2023, the District offered, and the Parents signed a Notice of Recommended Educational Placement (NOREP) approving the Student's participation in Supplemental Emotional Support at Building 2. The NOREP included handwritten comments from the Parents indicating that they would reject and oppose any change in school building for the 2023-2024 school year. The Parents' handwritten comments state that the IEP team never discussed the placement options mentioned in the NOREP. (S-8, S-9, S-10).
15. Although the Parents disagreed with the anticipated change in the location of the Supplemental Emotional Classroom, they did not request a hearing. (S-8, S-9, S-10)
16. In April 2023, the Special Education Supervisor called the Parents and later sent a letter to the Parents formally announcing the District's administrative decision to move all Supplemental Emotional Support Classrooms to Building 1. The Parents opposed the change and repeatedly told anyone who would listen about the Student's behavioral experience at that location. The April letter did not include a NOREP. (NT 284-286, P-21 p.3).
17. On May 17, 2023, the IEP team, including the Parents, met to revise the draft work in progress April 2023 IEP. During the meeting, the Parties updated the Present Levels, Parental Concerns, and the Student's Educational Placement description. (S-8, S-19, S-10). The

May 2023, NOREP stated that the Supplemental Emotional Support Class would move from Building 2 to Building 1. (*Id*).

18. All in all, during the 2022-2023 School –[redacted] Grade- Year, the Parties participated in nine (9) IEP meetings. (S-16). The monthly IEP meetings took a toll on the Parties' relationship. At one point, the Assistant Superintendent, concluded that his meeting participation triggered disagreement. (NT pp. 423-425).

**THE 2023-2024 [redacted] GRADE RETURN TO BUILDING 1**

19. After filing the Complaint, the Parents requested an Interim Ruling claiming that the change from Building 2 to Building 1 violated the Student's "stay put" right to remain at Building 2 pending a Final Order on the merits. After taking testimony and reviewing the Parties' written arguments, this hearing officer issued an Interim Ruling finding in favor of the District. The Interim Ruling held that the change to Building 1 was otherwise permitted. The Ruling further held that the Parents did not prove an outright change or a reduction in the level of specially designed instruction, participation in regular education, special education, and related services. Due to this Ruling, the Student started school at Building 1. As a consequence of the Interim Ruling, the Student started school at Building 1. (A copy of the Interim Ruling is on file with the Parties and the Office for Dispute Resolution).

20. On September 9, 2023, October 16, 2023, and November 14, 2023, - during [redacted] Grade - at Building 1, the District held additional IEP Meetings to report on progress and update the May 20, 2022 IEP. (S-24, S-31).

21. The record is preponderant that within days of returning to Building 1, the intensity, frequency, and severity of the Student's misbehavior began to escalate. During September, October, November, and December 2023, the detailed Student-specific data sheets show the



Student was verbally and physically aggressive. On multiple occasions, the Student punched staff in the face and stomach, kicked staff, spit on staff, threw objects, like a stapler, at staff, turned over chairs, destroyed property, and eloped from the classroom. On several occasions, the Student left the building without permission for short periods. (J-2 a-k).

22. On October 16, 2024, the Student had a behavioral outburst that lasted for an extended period. The staff's contemporaneous notes and the Student-specific data sheets show that during the outburst, the Student made homicidal statements, like [redacted]. At other times, the Student made gestures with their hand, pretending to [redacted]. When asked why they made the gestures, the Student responded that they wanted to get expelled. The Student also directed racial and anti-Semitic statements towards certain staff members. At other times, the Student commented, "I want to get you fired." During the height of the outburst, the Student eloped from the Supplemental Emotional Support classroom and roamed around the building, disrupting other classes. While the record is unclear, the staff somehow redirected the Student back to the hallway outside the Emotional Support classroom. As the Student went down the hallway, the Student suddenly escalated and began to remove all of their clothing while making additional staff-specific rambling derogatory statements. For some time, approximately thirty-plus minutes, the Student was either [redacted] in the hallway or the classroom. (J-2-pp.30-33, NT pp.653-662). When the Student refused to [redacted], using a mat taken from the classroom, the staff set up a protective barrier around the Student. At some point, and the record is unclear, the staff convinced the Student to return to the classroom. Before entering the classroom, the staff moved the other

students to another room. Ultimately, the staff convinced the Student to get [redacted]. (S-26-d, S-26-c, NT p.274, NT p.380-382).

23. The staff recommended, and the Parents agreed to have the Student evaluated at a local behavioral health clinic. Although the District subpoenaed the records, and the Parents consented to release the evaluation, the clinic refused to release the records. The Parents did not provide the District or the hearing officer with a copy of the discharge paperwork. (NT pp.871-874).
24. On October 16, 2023, and October 18, 2023, the staff completed a Comprehensive School Threat Assessment. The findings indicate that the Student made threatening statements and engaged in aggressive behaviors with intent to harm/injure others. The assessment findings indicate that the Student's behaviors are likely consistent with the definition of simple assault and fell short of a finding of any serious bodily injury. The assessment indicated that the Student's behaviors disrupted other students' learning environment and created specific safety concerns. The threat assessment further found that the Student's homicidal threats to [redacted] lacked any real intent and/or any overly specific plans. (S-26-c).
25. On October 30, 2023, the District issued a Notice of Recommended Educational Placement (NOREP) offering to complete a Functional Behavioral Assessment (FBA). The District also offered additional one-on-one time for 20 minutes a week with the District psychologist. Due to confusion over the delivery of the NOREP, the Parents returned it in November 2023. The Parents agreed to the FBA and refused the one-on-one time with the psychologist. (S-25, S-34).
26. From May 2023 through December 14, 2023, although the Parents inquired, the District did not see a reason to complete a reevaluation. Then, on or around December 14, 2023, the District asked, and the

Parents refused to consent to complete a comprehensive educational reevaluation. The December 2023 Permission to Reevaluate seeks consent for updated psycho-educational evaluation to complete cognitive functioning, academic achievement, social-emotional functioning, behavior, attention/executive functioning ability, behavioral, emotional, and social assessment, checklist, and other school-based performance measurements. (S-34).

27. The District did not evaluate the Student before moving the Student from Building 2 to Building 1. (N.T.p.178).

## **GENERAL LEGAL PRINCIPLES**

### **BURDEN OF PROOF AND CREDIBILITY**

Generally, 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. The Party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. In this case, the Parents are the Party seeking relief and must bear the burden of persuasion.<sup>2</sup>

During a due process hearing, the hearing officer makes "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."<sup>3</sup> Explicit credibility determinations give courts the information that they need in the event of a judicial review. While no one-factor controls, a combination of factors causes me to pause and comment on the particular testimony of several witnesses.<sup>4</sup>

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<sup>2</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

<sup>3</sup> *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003).

<sup>4</sup> The fact finder's determination of witness credibility is based on many factors. Clearly, the substance of the testimony, including the detailed description of the relevant events, consistency /corroboration with others recollection, the accuracy of recall of past events when contrasted with written documents, played some part in my credibility determination. Furthermore, when the witness contradicts him or herself or is contradicted by the testimony of other witnesses can

On the Parents' side, I found the Mother open, thoughtful, and frightened for the Student's safety. I found her testimony candid and complete in acknowledging what she knew and how she felt. At the same time, she acknowledged the difference between what she believed and what she did not know. The Mother took ownership of her statements and actions. She was otherwise credible in describing the sequence of events leading up to the Family's opposition to the proposed change in placement.

I also found the testimony of the District's and the Parents' witnesses were clear, cogent, and detailed in describing the Student's actions, reactions, troubles, and feelings after returning to Building 1.

### **THE IDEA OFFERS STUDENTS A FREE APPROPRIATE PUBLIC EDUCATION**

The IDEA is a "comprehensive scheme of federal legislation designed to meet the special educational needs of children with disabilities."<sup>5</sup> In exchange for federal funding, states pledge to comply with several substantive and procedural conditions in providing educational services to qualifying disabled students.<sup>6</sup> In turn, state recipients then apportion federal funds to Local Educational Agencies ("LEAs") - school districts - responsible for providing day-to-day educational services in compliance with the IDEA.<sup>7</sup> The IDEA makes clear that a FAPE consists of "specially-designed instruction," "supplemental services," and "related services, along with "accommodations" that meet the Student's needs and circumstances.<sup>8</sup> The IDEA also includes a "least restrictive environment" provision that guarantees the Student's instruction must "to the greatest extent possible, satisfactorily educate disabled children together with

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play a part in the credibility determination. Finally, no-verbal observable actions factors like constantly adjusting body movement, eye contact, feigned confusion, and whether the responses are direct or appear to be either evasive, unresponsive or incomplete are important in determining persuasiveness.

<sup>5</sup> *M.A. ex rel E.S. v. State-Operated Sch. Dist.*, 344 F.3d 335, 338 (3d Cir. 2003).

<sup>6</sup> *T.R. v. Sch. Dist. of Philadelphia*, 4 F.4th 179, 182-83 (3d Cir. 2021).

<sup>7</sup> 20 USC §§1412-1414.

<sup>8</sup> *Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. V. Rowley*, 458 U.S. 176, 188-89, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

children who are not disabled, in the same school the disabled child would attend if the child were not disabled."<sup>9</sup> However, the LRE requirement does not require school districts to offer all levels of services in all school buildings.<sup>10</sup>

### **THE IEP PROCESS REQUIRES PARENT AND TEACHER INPUT**

The "centerpiece" of the IDEA is the "individualized education program" ("IEP"), which serves as the "primary vehicle" by which states provide students with a FAPE. <sup>11</sup> "An IEP is a written statement, 'developed, reviewed, and revised' by [an] 'IEP Team'—a group of school officials and the parents of the Student—that spells out how a school will meet an individual disabled student's educational needs."<sup>12</sup> In addition, an IEP sets forth the Student's "present levels of academic achievement, offers measurable annual goals to enable the child to . . . make progress in the general educational curriculum, and describes supplementary aids and services . . . provided to the child to meet those goals." *Id.*<sup>13</sup> Hearing officers analyze the appropriateness of the IEP at the time it was issued, sometimes called the "snapshot" rule, and not at some later date.<sup>14</sup>

### **THE IDEA AUTHORIZES APPROPRIATE RELIEF**

The type and measure of appropriate relief awarded depends on the scope of the proven harms. Parents who allege a substantive violation—such as a denial of a FAPE—may seek compensatory relief.<sup>15</sup> Parents may also seek prospective injunctive or declaratory relief for procedural violations independent of any resulting deprivation of a FAPE. *Id.* Likewise, districts can seek declaratory relief otherwise affirming their decision-making and planned course of action. *Id.*

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<sup>9</sup> *S.H. v. State-Operated Sch. Dist. of City of Newark*, 336 F.3d 260, 265 (3d Cir. 2003); see also *Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1213-14 (3d Cir. 1993)

<sup>10</sup> See, e.g., *H.H. v. Indiana Bd. of Special Educ. Appeals*, 50 IDELR 131 (N.D. Ind. 2008).

<sup>11</sup> *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

<sup>12</sup> *Y.B. ex rel. S.B. v. Howell Twp. Bd. of Educ.*, 4 F.4th 196, 198 (3d Cir. 2021).

<sup>13</sup> 20 U.S.C. §§ 1414(d)(1)(A)(i)(I).

<sup>14</sup> *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564- 65 (3d Cir. 2010).

<sup>15</sup> *G.L. v. Ligonier Valley Sch. Auth.*, 802 F.3d 601, 322 Ed.Law Rep. 633 (3d Cir. 2015)(citing, *M.C v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996).

## **ANALYSIS AND CONCLUSIONS OF LAW**

### **THE STUDENT'S IEPS WERE OTHERWISE APPROPRIATE**

IEP teams are charged with two broad powers. First, after reviewing the existing data, the team must develop an individualized program that meets the student's needs.<sup>16</sup> The May 2023 IEP included a clear statement of present levels, measurable goal statements, robust specially designed instruction, and related services. The positive behavior support plan was clear. Therefore, I now find that the IEP, when offered in May 2023 for the 2023-2024 school year, was reasonably calculated to provide a FAPE when offered.

By October 2023 and certainly by mid-November 2023, the District either knew or should have known that the Student was not learning. The near-constant verbal threats [and actions] are acts the merit a reevaluation.

The District's response to the Student's intermittent states of dysregulation was otherwise reasonable, and its December 2023 request to reevaluate is timely. Considering that the Parties were providing testimony and at the same time trying to get the Student's crisis evaluation, I now find the delay in requesting a reevaluation a harmless procedural delay. Despite the Parents' consent to release the records and a subpoena to produce the records, the behavioral health clinic refused to release the outpatient evaluation. I now find that the clinic's refusal to provide the records interfered then and continues to interfere with the IEP team's understanding of the Student's behavioral needs and the surrounding circumstances.

Case law holds that once on notice that the Student is not learning, like here, the District must be given a reasonable rectification period to take action. During the rectification period, the Parents rejected the District's offer to add another related service – psychological support. Next, the Parents rejected the District's request to

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<sup>16</sup> 34 CFR §§ 300.320 through 300.324.

reevaluate the Student. These actions extended the rectification period. Accordingly, based on this record, the Parent's denial of FAPE and/or failure to implement claims and demand for compensatory education are **DENIED**. This conclusion does not end the analysis.

Second, considering the Student's needs outlined in the evaluation, the IEP team must select and ensure that the selected placement can, with supplemental aids and services, implement the IEP.<sup>17</sup> After agreeing to the goal statements and participation in the Supplemental Emotional Support classroom, the Parents now ask that I place the Student into an Itinerant Learning Support classroom in another building. The record is preponderant that the Student has emotional and behavioral needs that would go unmet if the Student were placed in an Itinerant Learning Support classroom. The May 2022 reevaluation report, the IEP, the Student-specific data sheets, the quarterly progress monitoring graphs, and the corroborating Excel spreadsheet data summaries all support the need to provide Emotional Support. Therefore, I now conclude that a change to Learning Support is unacceptable. The Parents' request is Denied.

I next conclude that from May 2023 to the present, the Parties have regularly met, and the Parents shared their viewpoints in emails and at the IEP meeting. Likewise, the District team members shared their thoughts; the Parties reviewed the available objective data and anecdotal notes in the Student-specific data sheets and reached a reasonable consensus conclusion. The District provided the Parents with prior written notice of the proposed actions and refusals to act at all times relevant. The fact that the team did not follow the Parents' wishes does not, absent more, prove a procedural parental participation violation. Stated another way, I now find that the Parents did not muster preponderant proof that the District ignored the Parents' input. Therefore, the Parental participation claim is **DENIED**.

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<sup>17</sup> 34 CFR §§ 300.114(a) (2), *H.L. v. Downingtown Area Sch. Dist.* 65 IDELR 223 (3d Cir. 2015, unpublished); 34 CFR § 300.115-116.

These findings and conclusions, however, do not end the analysis.

### **A COMPREHENSIVE REEVALUATION IS IMPERATIVE**

After hearing the testimony, the Parties now agree that the Student requires a reevaluation. The Parents ask me to direct the District to pay for an independent evaluation by an evaluator of their choice. On the other hand, the District demands that District staff complete the reevaluation. After carefully reviewing the record and with the benefit of my direct observations of the Parties, I now find instead that appropriate relief requires me to **ORDER** an independent hearing officer evaluation under 34 CFR §300.502(d) and 22 PA Code §14.102(a)(2)(xxix).

The tension, distrust, and emotions during the hearing were sometimes palpable. At one point, I commented on the record that each Parties' frustrations had reached the level of raw, open emotion. My observation of how the Parties react to each other's positions and demeanor during the hearing, along with their email communications to each other and me, now leads me to conclude that an independent third-party evaluator should complete an independent evaluation. I firmly believe that once the Parties review the results of an independent evaluator's testing, they will more likely than not put their suspicions and differences aside.

Once completed, I also believe that an independent evaluation will help clear up the Student's learning and behavior needs. Assuming the Parties collaborate, as I believe they will, the independent evaluation should put the Student back on a path to learning. The following **ORDER** will provide the necessary structure and detail how, when, and where the Student will undergo a two-part comprehensive independent hearing officer-directed reevaluation. Let me explain.

### **THE REEVALUATION INCLUDES STANDARD NORM-REFERENCED TESTING**

Part one of the reevaluation will include a standard battery of assessments like those suggested by the District, including but not limited to cognitive ability testing, achievement testing, and social, behavioral, executive, and emotional



functioning. I further find that based on the record, the reevaluation should also include an occupational therapy evaluation. An occupational therapist should examine if the Student's sensory regulation needs impact the Student's self-regulating ability. As the hearing was winding down, the District was completing a functional behavioral assessment. The data is not part of the record; therefore, after reviewing the behavioral assessment, the independent evaluator is free to repeat or expand the scope of the functional behavioral assessment. The standard testing battery proposed by the District does not go far enough.

Since May 2023, the Parents have asked the District if they could assess the likelihood that the Student would regress upon returning to Building 1. Pretty much across the board, the staff stated that they were not aware of any way to collect that data. Given the Student's current profile of escalating acts of dysregulation, I now find that the reevaluation should include a diagnostic educational evaluation placement. Finally, without elaborating, the Parents requested parent training; therefore, the independent evaluator should assess if parent training is otherwise needed to provide a FAPE.

### **THE DIAGNOSTIC EDUCATIONAL EVALUATION AND PLACEMENT**

Part two of the reevaluation for this particular Student includes a diagnostic educational evaluation placement. A diagnostic educational evaluation placement is a temporary change in the classroom location or building to collect data and learn more about a student's unique needs and circumstances. The diagnostic educational evaluation placement can also address the appropriateness of the current level of service, class placement, and the location where services should be provided. Diagnostic educational evaluation placements are forms of appropriate relief when the current evaluation is inconclusive, or the data is insufficient to develop an appropriate IEP.<sup>18</sup> Given the state of the record as a

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<sup>18</sup> Appendix A to the IDEA Part B regulations, Question 14 (1999), provides that while an IEP must precede placement "This requirement does not preclude temporarily placing an eligible child with a disability in a program as part of the evaluation process -- before the IEP is finalized -- to assist a

whole, I now find that both of these factors exist here. Finally, even though the Student will change school buildings or leave the District briefly, diagnostic educational evaluation placements are part of a comprehensive evaluation process; therefore, "stay-put" is not an issue.<sup>19</sup>

The record is preponderant that the Student, for whatever reason, behaves differently in Building 1. While both sides have opinions as to what is causing the behavioral outbursts, neither Party has provided cogent evidence as to the basis for the reemerging outbursts in Building 1. The Parents argue that the Student's previous experience in Building 1 caused long-lasting trauma. The District staff, on the other hand, believes that the Parents are overly focused on academics rather than behavior. Therefore, to sort out how the Student's emotions, behaviors, and executive functioning skills are interfering with the Student's education in Building 1 versus Building 2, part two of the reevaluation will require the District to provide and fund a diagnostic educational evaluation placement.

The District is directed to either locate an outside provider who can provide the diagnostic educational placement classroom or create, implement, and provide a diagnostic placement in the District. The diagnostic educational placement should occur in any other building but for Building 1 and may occur in or outside the

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public agency in determining the appropriate placement for the child. See also, footnote 16 for additional persuasive authority. See also *In re: Student with a Disability*, 115 LRP 3214 (SEA NM 05/21/15); *Timberlane Reg'l Sch. Dist.*, 45 IDELR 139 (SEA NH 2006); See, also Footnote 18.

<sup>19</sup> See *Charles County Pub. Schs.*, 121 LRP 8601 (SEA MD 07/29/20) (finding that because the student's behaviors interfered with her learning and her safety, the district's proposal to place the student on a temporary basis did not amount to predetermination); *In re: Student With a Disability*, 41 IDELR 143 SEA CT 2004) (granting the district's request for a consent override where in a therapeutic setting was necessary to identify all of the child's special education and related service needs); *East Windsor Bd. of Educ.*, 114 LRP 36178 (SEA CT 05/15/14) (noting that because the district needed more information so that the teen's IEP could be revised "with a greater opportunity to learn and experience success" diagnostic placement is appropriate); *Middletown Bd. of Educ.*, 10 ECLRP 77 (SEA CT 2013) (concluding that a child needed to be placed in a self-contained classroom for the duration of the assessment in order to be fully and safely evaluated was appropriate); and *Edinburg Consolidated Indep. Sch. Dist.*, 67 IDELR 132 (SEA TX 2015) (noting that the district needed to reevaluate a student with autism who had recently reenrolled in its schools in a diagnostic placement was appropriate).

District.

The diagnostic placement staff, at a minimum, should collect curriculum-based measures of the Student's reading, math, writing, social, and emotional behaviors. To the extent practicable, the staff at the diagnostic placement are directed to implement the goals, specially designed instruction, positive behavior support program, and all related services identified in the last agreed IEP. The staff are next directed to track, graph, and share the Students' academic, social, behavioral, and emotional functioning with the Parties every week. Data summaries and graphs should be provided to the independent evaluator for weekly analysis and inclusion in the independent evaluation report. The staff at the diagnostic educational placement should communicate by phone or email, at their sole discretion, about the Student's daily experience at the close of each day.

Finally, the independent evaluator can expand the scope of the part one traditional assessment and the diagnostic educational placement evaluation to collect all data needed to complete a full comprehensive evaluation of the Student's needs, circumstances, and weaknesses. The independent evaluator must produce a written report as outlined herein.

### **THE DISTRICT IS DIRECTED TO SELECT THE EVALUATOR**

The District, not the Parents, must select an independent evaluator and begin the part one standard testing battery as soon as possible. If the District does not select an evaluator within 10 school days of the Order, then the Parents are free to select the independent evaluator. The independent evaluator's role and responsibilities should end once the District provides the Parents with a Notice of Recommended Educational Placement.

The 60-day reevaluation time clock for the part one reevaluation begins to run once the evaluator is named. In their sole discretion, the independent evaluator can expand the scope of the testing and assessment or the diagnostic educational placement based on the testing results. I expect the data collection for standard

testing and the diagnostic educational evaluation placement to be completed in 60 calendar days.

**THE DISTRICT IS DIRECTED TO COMPLETE A DIAGNOSTIC EVALUATION**

The District, not the Parents, is further directed to select a provider or set up a diagnostic educational placement classroom, in or outside the District, within 15 calendar days of this Order. The diagnostic educational placement evaluation should begin no later than 25 calendar days from the date of this **ORDER**.

If, after 15 calendar days, the District cannot set up or select a diagnostic educational placement provider, the District is directed to contact the Pennsylvania Department of Education, Bureau of Special Education, no later than day 16 and request technical support and general supervision in completing the diagnostic educational evaluation placement.

**THE DEVELOPMENT OF THE COMPREHENSIVE REEVALUATION REPORT**

Within 60 calendar days, the independent evaluator will compile the assessment and diagnostic placement results and prepare a written reevaluation report. The comprehensive report should be provided to both Parties at the same time within 5 days. Within 25 days of receipt of the report, the IEP team, including the Parents, will prepare, and the District will offer the Parents a revised IEP, including a description of the proposed placement and a Notice of Recommend Educational Placement. The Parents then have 10 calendar days to review the proposed IEP and placement and respond to the Notice of Recommended Educational Placement.

**THE DIAGNOSTIC EDUCATIONAL REEVALUATION TIMELINE AND THE RETURN TO THE "STAY PUT" PLACEMENT**

The diagnostic educational evaluation placement time clock starts the first day the Student attends the diagnostic educational placement and ends the day the District offers the Parents and Student a new IEP and a revised Notice of Recommended Educational Placement.

## SUMMARY

The Parent's denial of a FAPE, placement, and parental participation claims are **DENIED**. The District's demand for declaratory relief that the IEP and placement in Building 1 was an offer of a FAPE is **GRANTED**. The Parties' request for a reevaluation is **GRANTED** subject to the terms and conditions set forth herein. The District is **ORDERED** to fund and provide all necessary resources to promptly complete the battery of standardized tests and the diagnostic reevaluation outlined herein.

All other claims, demands, or requests for appropriate relief are **DENIED**.

## FINAL ORDER

**AND NOW**, this 31st day of January 2024, I now find the above Findings of Fact and Conclusion of Law have resolved this dispute. The Parties are now free to appeal this ORDER.

1. The Parents' denial of a FAPE, "stay-put," and Parental participation claims are **DENIED**.
2. The Parents' request to move the Student to another building in the District with Learning Support is **DENIED**.
3. The Parents' claim for relief in the form of compensatory education is **DENIED**.
4. The District's request for declaratory relief is **GRANTED** in part and **DENIED** in part. The District's request to find the IEP and placement in Building 1 was appropriate when made is **GRANTED**.
5. The District request to complete a reevaluation is **GRANTED** in part and **DENIED** in part.
6. The District's request to have District staff complete the reevaluation is **DENIED**.
7. The District is **ORDERED** to fund and provide a two-part reevaluation as described herein. The District is further directed to promptly notify the Pennsylvania Department of Education if they cannot start or complete the reevaluation testing/assessments or the diagnostic educational placement evaluation **ORDERED** herein.
8. The Parents' demand for an Independent Evaluation at the District's expense is **DENIED**.

9. All other claims for appropriate relief, causes of action, demands, or affirmative defenses not argued for in the Parents' or the District's closing statements and not discussed herein are now dismissed.

Date: January 31, 2024

s/ Charles W. Jelley, Esq. LL.M.

Hearing Officer  
ODR FILE 28395-23-24