

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

PENNSYLVANIA SPECIAL EDUCATION HEARING OFFICER
FINAL DECISION AND ORDER

CLOSED HEARING

ODR FILE NUMBER

23066-19-20

CHILD'S NAME

A.A.

DATE OF BIRTH

[redacted]

PARENT

[redacted]

Counsel for Parent

Pro Se

LOCAL EDUCATION AGENCY

Propel Charter Schools
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Pittsburgh, PA 15203

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HEARING OFFICER

Cathy A. Skidmore, Esquire

DATE OF DECISION

1/10/2020

INTRODUCTION

The student (Student)¹ is a mid-teenaged student attending Propel Charter Schools (School) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parent filed a Due Process Complaint against the School in late November 2019, asserting that its decision to place Student in an interim educational placement outside of the School was not appropriate.

PROCEDURAL HISTORY

- A. The Parent's Due Process Complaint was filed on November 29, 2019, and asserted a challenge to a forty-five day out of school placement for Student.
- B. The Complaint appeared to raise a claim to the disciplinary protections in the IDEA that require an expedited hearing and decision timeline. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)). The hearing was scheduled within the expedited timelines upon assignment to this hearing officer.
- C. On December 9, 2019, following assignment of the case, this hearing officer sent information about the expedited hearing and procedures

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. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 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 are set forth in 22 Pa. Code §§ 711.1 – 711.62.

via email to the Parent³ and counsel for the School. (Hearing Officer Exhibit (HO-) 1.) Delivery to both email accounts was provided by the email client. (HO-1 at 16-17.)

- D. The information provided to the parties included the standard Prehearing Directions and this hearing officer's expedited procedures that emphasized the need to adhere to the timelines.⁴ (HO-1.)
- E. On December 17, 2019, this hearing officer communicated to both parties via email to request their participation in a conference call to discuss hearing planning and procedures. (HO-1 at 18.)
- F. The Parent did not respond to the December 9, 2019 or December 17, 2019 communications via email, but did leave a voicemail message for this hearing officer on December 26, 2019. This hearing officer promptly, via email, reiterated the request for a conference call. (HO-1 at 19.)
- G. The Parent did not respond to the December 26, 2019 email communication. She had not received any of the email communications in the case because she had changed her email address. (Notes of Testimony (N.T.) 10, 108-10.)
- H. On the morning of the scheduled hearing, counsel for the School advised that he was ill and likely contagious. He participated by telephone and various options including the possibility of rescheduling

³ The email address for the Parent was set forth in her Complaint.

⁴ The Office for Special Education Programs (OSEP) has explained on more than one occasion that the expedited timelines are not subject to any exception or extension. *See, e.g., Letter to Snyder, 67 IDELR 96 (OSEP 2015); Questions and Answers on IDEA Part B Dispute Resolution Procedures at Question E-7 (OSEP 2013).*

(due to his illness and the Parent's lack of awareness of the applicable procedures) was discussed. (N.T. 10-15.)

- I. The Parent was not able to reschedule for a date that would allow for a timely expedited decision, and asked that the hearing convene as scheduled. The hearing did proceed on the scheduled date with counsel for the School participating by telephone. (N.T. 10-11.)
- J. This hearing officer asked the School to proceed with its evidence first, and it did so; the Parent also testified.

ISSUE

Whether the School's proposal for Student to be placed in an out of school alternative setting for a period of 45 days was and is appropriate for Student?

FINDINGS OF FACT

1. Student is a mid-teenaged, [redacted] high school student who is enrolled at the School. Student is eligible for special education on the basis of an Emotional Disturbance. (N.T. 24; S-4; S-9 at 1.)
2. Student was reevaluated in 2016 with a Reevaluation Report (RR) issued in November of that year. At the time, Student was regularly engaging in problematic behaviors including leaving designated areas without permission, refusing to comply with directives, disruptions in the classroom, work refusal, throwing or misusing objects, hitting or kicking objects, as well as difficulty focusing and remaining on task. Assessment of social/emotional/behavioral functioning indicated a variety of concerns that included self-regulation, accepting responsibility, hyperactivity, conduct problems, aggression, and depression. Student was determined to be eligible for special education based on an Emotional Disturbance. (S-4.)

3. An Individualized Education Program (IEP) developed in December 2016 identified needs relating to behavior (remaining in designated areas, verbal and physical disruption, and physical aggression). This IEP contained annual goals addressing those behavioral concerns (leaving designated areas, physical disruption and aggression, and verbal disruption) in addition to development of coping skills. Student's program was one of emotional support at a supplemental level, with participation in the regular classroom at all times with the exceptions of counseling provided twice weekly and social skills instruction outside of the regular classroom one hour per week. (S-5.)
4. A new IEP was developed in December 2017 at a time when Student was attending a private school. This IEP identified needs with respect to reading, vocabulary, and mathematics, as well as coping skills. Annual goals addressed behaviors necessary for a return to public school, social skills, and reading fluency. Student's program was one of full time emotional support at the private school. (S-6.)
5. Student was reevaluated again in the fall of 2018 following a return to the School. The 2018 RR noted Student's difficulties with peers, continued concerns with leaving designated areas, disruptive behavior, and difficulty maintaining focus and attention. Student also exhibited mood swings. Student's scores on assessment of academic achievement for the 2018 RR, however, were in the average range with the exception of math problem solving. (S-7.)
6. The 2018 RR summarized a recent FBA that examined the behavior of leaving designated areas without permission. The function of that behavior was hypothesized to be sensory-seeking. (S-7 at 9.)
7. Rating scales completed by a teacher for the 2018 RR reflected significant concerns with hyperactivity, aggression, conduct problems,

anxiety, depression, attention problems, atypicality, and adaptability, with at-risk concerns in several other areas.⁵ (S-7 at 12-14.)

8. The 2018 RR also summarized Student's disciplinary infractions in the fall of 2018 that included disruptive and defiant behavior, skipping class or consequences (such as detention), leaving designated areas without permission, using inappropriate language, and violating the dress code. (S-7 at 9-12.)
9. The 2018 RR determined that Student remained eligible for special education on the basis of Emotional Disturbance and recommended behavioral and emotional support. (S-7 at 14-16.)
10. A new IEP was developed in November 2018. Identified needs related to post-secondary transition as well as behavior (remaining in designated areas and disruptions). This IEP contained annual goals addressing the identified behavioral concerns through a Positive Behavior Support Plan (PBSP) providing consequences for exhibiting the behaviors of concern including opportunities for breaks, nonverbal cues and redirection, and reflection. Program modifications/items of specially designed instruction were: opportunities for breaks; prompting and redirection; limitations on multi-step tasks; leadership opportunities; positive reinforcement; and test and assignment accommodations (extended time, small group testing, chunking of assignments). This IEP provided for emotional support at an itinerant level with Student participating in regular education 100% of the school day. (S-8.)

⁵ There were not rating scales reported for the Parent or Student on this instrument.

11. For the 2019-20 school year, Student was in co-taught classes for most subjects and the level of emotional support was considered to be at a supplemental level. (S-9 at 9.)
12. A new IEP was developed in October 2019. Student was reportedly making progress on one of the behavior goals (remaining in designated areas) and had mastered the other (refraining from disruptive behavior), but had demonstrated some regression since the start of that school year. (S-9 at 9.)
13. Needs identified in the October 2019 IEP related to post-secondary transition (exploration of career, post-secondary education, and independent living options) and behavior (remaining in designated areas and demonstrating appropriate classroom behavior). (S-9 at 14-20.)
14. Annual goals in the October 2019 IEP were for remaining in designated classrooms to perform directed tasks and decreasing disruptive behavior. (S-9 at 24.)
15. Program modifications/items of specially designed instruction in the October 2019 IEP were: a PBSP; small group instruction for engaging in assignments; wait time after redirection; guided notes; opportunities to interact with peers and adults; physical movement/activities; daily check-ins; opportunities for frequent breaks; prompting and redirection; limitations on multi-step tasks; leadership opportunities; positive reinforcement; preferential seating; personal space; and test and assignment accommodations (extended time, small group testing, chunking of assignments). This IEP provided for emotional support at a supplemental level with Student participating in regular education for the entire school day with the exception of a single daily special education class. (S-9.)

16. The PBSP in the October 2019 IEP revised the two behavior goals based on Student's then-current performance. The PBSP contained consequences for demonstrating the behavior of concern and the replacement behaviors; in addition, antecedent strategies were outlined: positive reinforcement; clear directions; prompts and redirection; wait time after cues and redirection; hands-on activities; "if, then" statements; and physical space. Breaks at Student's election, with or without support based on need, were also included, as were daily check-ins throughout the school day. (S-9 at 10-13, 34-41.)
17. The School currently monitors Student for causing disruptions or leaving a designated area. The School professionals concluded that those behaviors were occurring with increasing frequency over the course of the 2019-20 school year through the date of the hearing. (N.T. 26-27, 33, 64.)
18. Also over the course of the 2019-20 school year, Student's academic performance (grades) have improved. (N.T. 36, 64.)
19. Student is permitted to take short breaks as needed on Student's request or at a suggestion of staff; is prompted and redirected for disruptions or leaving a designated area; and is reminded of positive reinforcement for exhibiting appropriate behavior. (N.T. 28, 42-43.)
20. Student is provided with guided notes; preferential seating; daily check-ins with an adult. Student also has a health and wellness (special education) class where students with an emotional disturbance learn and practice coping skills. (N.T. 28-29.)
21. School professionals who work with Student meet as needed to discuss the program and possible revisions. (N.T. 32-33.)

22. A few days prior to November 14, 2019, [incident redacted]. The School provided for peer and parent mediation following that incident. (N.T. 49, 81-82, 84.)
23. On November 14, 2019, Student was involved in an incident at school [incident redacted]. Prior to that incident, Student had expressed to the Parent concern with possible repercussions from peers [redacted]. (N.T. 45, 47, 85, 88.)
24. After the November 14, 2019 incident, the School proposed to conduct a reevaluation of Student. (N.T. 49-50.)
25. After the November 14, 2019 incident, the School also proposed an alternative out of school placement (an Alternative Education for Disruptive Youth program operated by the local Intermediate Unit) for a period not to exceed forty five days while the reevaluation would be conducted. That proposal was made because, in that smaller alternative setting, Student would have the opportunity to learn new coping skills and strategies to learn to manage emotions and behaviors; Student would also be provided with weekly counseling. The proposal was also viewed as a consequence of the behavior on November 14, 2019. (N.T. 49-54, 61-63.)
26. The School issued a Notice of Educational Placement/Prior Written Notice form (NOREP) for the alternative placement to the Parent on November 29, 2019. The Parent did not approve the NOREP. (N.T. 65-66; S-1.)
27. The Parent did not agree that Student should be placed in an alternative setting and filed the Complaint to challenge that action. (N.T. 80-81.)

28. The School also issued a form seeking the Parent's consent for a reevaluation to include a Functional Behavior Assessment, rating scales, and observations. (S-2.)
29. The Parent did agree with a reevaluation and signed and returned the Permission to Reevaluate form to the School. (N.T. 102.)
30. Student served an out of school suspension following the November 14, 2019 incident, then returned to the School. (N.T. 55, 66-67, 88.)
31. Student received five minor disciplinary referrals after returning from suspension, three for skipping consequences and two for leaving a designated area; however, the referrals for skipping consequences were due at least in part to late arrivals or early dismissals for valid reasons. (N.T. 55-56, 101-02, 104.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. In a case such as this, it should be recognized that 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). Accordingly, the burden of persuasion in this case must rest with the Parent who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also 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). This hearing officer found each of the witnesses who testified to be credible, testifying to the best of her recollection, and their accounts were consistent as to facts necessary to decide the issues.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision.

IDEA Principles: Substantive FAPE

The IDEA provides for a free, appropriate public education (FAPE) for eligible children with disabilities. 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.

Local education agencies (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). See also *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, 137 S. Ct. 988, 197 L.Ed.2d 335 (2017). A major premise across *Endrew*, *Rowley*, and the IDEA is that the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

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).

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).

The federal Office of Special Education Programs has explained this principle as requiring “first consideration” of the regular education classroom

with supplementary aids and services. *Letter to Cohen*, 25 IDELR 516 (OSEP August 6, 1996).

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the LRE as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. *Id.* Importantly, LRE principles “do not contemplate an all-or-nothing educational system” of regular education versus special education. *Oberti, supra*, 995 F.2d at 1218 (quoting *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)). All LEAs are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa. Code § 711.3 (incorporating Section 300.115(a) into state regulations applicable to charter schools). And, the “continuum” of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, moving first 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 when a private school is recommended).

However, as set forth above, the LRE mandate does not contemplate a mere comparison of lesser and more restrictive settings; rather, it begins with the premise that a child can be educated in the regular education classroom with appropriate supplementary aids and services.

The Parent's Claims

The issue presented is whether the School's proposal to place Student in an alternative education setting for a period of up to forty-five days is appropriate. At the outset of this discussion, the unusual posture merits some discussion. The case proceeded pursuant to the expedited timelines because the Complaint challenged the School's decision to place Student in an out of school setting for a period of forty-five days. Such determinations are typically made by an LEA in the context of a disciplinary measure that amounts to a change in placement for a child with a disability following a violation of the LEA's code of conduct. 20 U.S.C. § 1415(k); 34 C.F.R. § 300.530. In such a case, the matter must proceed under expedited timelines. 20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c); see n. 4, *supra*. In addition, the child's placement during the pendency of any such dispute is the alternative setting. 20 U.S.C. § 1415(k)(4)(A); 34 C.F.R. § 300.533. This procedure is an exception to the standard rules of pendency. See 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).

Evidence presented at the hearing revealed, however, that even though the proposal of a forty-five day alternative setting for Student was, at least in part, for disciplinary reasons, the School did not remove Student and instead permitted Student to return to school because of the usual pendency provisions.⁶ It also became apparent that the proposal was made in large part because the School recognized that Student needed a higher level of behavioral and emotional support.

⁶ The School did not assert any basis for proceeding on an expedited basis. This decision is issued within the expedited timelines, but is also within the standard timelines set forth in 34 C.F.R. § 300.515.

Although the School professionals involved in the placement recommendation clearly believe very strongly that Student requires the level and type of support that the full time alternative setting offers, the evidence is preponderant that important LRE principles were not adequately considered. Here, Student would move from a supplemental level of emotional support in the LEA building, where Student is included with typical peers for a majority of the school day, to a full time, out of school setting. This change would constitute a giant leap across the LRE continuum without consideration of progressively and incrementally more restrictive programs and placements. Additionally, and critically, Student's 2018 and 2019 IEPs contained PBSPs that merely provided antecedent strategies and consequences, without also specifying how Student would acquire necessary skills through specially designed instruction and/or related services in order to decrease inappropriate behavior and increase appropriate behavior as contemplated by the annual goals. To the extent that the special education class focused on coping skills was intended to do that, it is apparent that the School professionals perceive that level of support to be inadequate for Student during the 2019-20 school year. However, the School is required to provide a continuum of special education placement options. This hearing officer concludes that, in this case, it is not appropriate for Student to move directly from the regular school to an alternative setting pending a reevaluation.

The parties have agreed to the reevaluation of Student that should be completed no later than early March. In an abundance of caution, the attached order will address that reevaluation in the event of any circumstances that might delay the process. The parties are encouraged to conduct another FBA as soon as possible so that additional emotional and behavioral interventions, including specially designed instruction, may be implemented relatively quickly in the current school environment. After the

reevaluation is completed, the parties will need to convene an IEP meeting to review Student's needs and decide how Student should be supported based on the information collected throughout that process, whether or not a change in placement is then determined by the team to be necessary.

ORDER

AND NOW, this 10th day of January, 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The School's proposal in November 2019 to place Student in an alternative education setting for a period of up to forty-five days is not appropriate for Student.
2. To the extent the School does not have possession of the signed consent form returned by the Parent for the reevaluation, the same should be secured as quickly as possible. If the School does not obtain the Parent's written consent to the reevaluation proposed at S-2, or if consent is rescinded, the School may proceed with that planned reevaluation within applicable timelines even in the absence of parental permission as provided by 20 U.S.C. § 1414(c) and 34 C.F.R. § 300.300.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is relinquished.

Cathy A. Skidmore

Cathy A. Skidmore, M.Ed., J.D., C.H.O.
HEARING OFFICER
ODR File No. 23066-19-20