

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:

24756-20-21

Child's Name:

C.K.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Charles Jelley Esq.

Date of Decision:

January 7, 2022

INTRODUCTION

THE PARTIES' DESCRIPTION OF THE DISPUTE AND THE PROCEDURAL POSTURE

In March 2018, based on a determination by a third party, the Student was placed, by the third party, at a Residential Treatment Facility (RTF) in another district. While at the RTF, the Marple Newtown School District – the “host” district- acted as the Student’s local education agency (LEA) within the meaning of the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (Section 504). The LEA, where the RTF was located, provided all IDEA-based, specially-designed instruction (SDI), related services, and accommodation via an individual education program (IEP) in an all handicapped class on the grounds of the RTF. The RTF is also an approved private school that accepts day and residential students placed and funded by local school districts. By operation of the Pennsylvania School Code, 24 Pa. Section 13-1306, the Student’s individualized education here provided by the “host” district was funded by the Student’s “home” District – Penn Manor.

On or about March 21, 2021, acting on the information, the Student was about to be discharged from the RTF in July 2021, the Penn Manor School District (District or “home” District) and the Parents met to develop a “contingent” IEP for the Student.¹ For reasons that will become clearer, the terms “home” District, “host” district, and “LEA” are terms of art that confer specific legally enforceable IDEA and Section 504 rights, duties, and

¹ All references to the Student and the family are confidential. The Parents’ 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). The Parents’ claims also arise under Section 504 of the Rehabilitation Act. 29 U.S.C. § 701 *et seq.* References to the record throughout this decision will be to the Notes of Testimony (NT. p.), Parent Exhibits (P#p.) followed by the exhibit number, School District Exhibits (S#) followed by the exhibit number. Finally, Hearing Officer Exhibits will be marked as (HO#) followed by the exhibit number.

obligations on the respective parties to provide, oversee and ensure compliance with the IDEA and Section 504.

The Parents rejected the "home" District's "contingent" IEP and now seek full-time placement in an all-handicapped class combined with district-funded residential services. On the other hand, the District opposes the residential placement and seeks a declaration that the Student can be educated at a private school near the District. Before taking testimony, they informed the Parents of their intention to withdraw the offer of a "contingent" IEP and then motioned to Dismiss the complaint. For all the reasons expressed on the record, I denied the Motion. The District repeated the request in its closing. The Motion is denied for all the reasons described herein and on the earlier record. I now find in favor of the Parents in part and in part for the District. A Final **ORDER** granting appropriate relief follows.

STATEMENT OF THE ISSUE

Is the District's "contingent" IEP reasonably calculated to provide the Student with a free appropriate public education? If, not what is the appropriate relief?

Are the Student's multiple disabilities so "inextricably intertwined" that the Student requires a District funded educationally residential placement and special education in an all handicapped class at the residential facility. If no, what if any relief is appropriate?

FINDINGS OF FACT

THE IDENTIFICATION OF THE STUDENT AS A PERSON WITH A DISABILITY AND THE [Redacted] DIAGNOSIS

1. Student was evaluated on May 14, 2009, and found eligible for special education as a student with Other Health Impairment (OHI) as the primary designation and Speech or Language Impairment (SLI) as a

secondary designation. The Student was noted to have educational strengths in cognitive skills, functional communication, and social communication language skills. For example, the Student was described as eager to greet others and interested in electronics, including computers. The evaluation noted the Student needed to improve compliance to directions, develop awareness for personal boundaries, develop fine motor skills, and strengthen waiting taking turns. (P-#3).

2. In 2009, the recommendation was for the Student to participate in the general education curriculum with slow weaning from the emotional support program. The 2009 evaluation recommended "intensive specially designed instruction." The report recommended supports like a timer, visual schedule, and other higher-level behavioral management techniques to aid transitions. It was also suggested that the Student be evaluated for occupational therapy (OT). (P-#3).

3. The 2009 evaluation included cognitive and achievement testing, adaptive behavior, and other emotional, social, and behavioral functioning measures. (P-#3).

4. The May 9, 2012, reevaluation noted that the Student was receiving replacement instruction within the emotional support program, speech, and language therapy, occupational therapy, and full-time therapeutic staff support (TSS) in the classroom. Accommodations included; frequent sensory breaks between activities during which the Student may choose an item from a sensory basket (e.g., weighted jacket or stuffed animal) or take a rest break. (P-#3).

5. The May 9, 2012, reevaluation continued to find eligibility for special education with the primary designation of Other Health Impairment (OHI) and a secondary Speech or Language Impairment. (P-#3).

6. The Student was again reevaluated on March 9, 2013, and found to

have continued eligibility for special education as a student with OHI, Specific Learning Disability (SLD), and Speech and Language Impairment (SLI). Additional testing for ability and achievement was done for this evaluation. This testing found that Student fell behind grade level in achievement (particularly in math) and scored in the significantly below average to low average range on various dimensions of ability testing. Significant weakness was noted in working memory. Relative strength was noted in verbal intelligence, relative shortcoming in non-verbal intelligence. Adaptive behaviors were measured in the significantly below-average range overall. (P-#3).

7. Behavioral measures found hyperactivity and learning problems significant. Strengths included robust auditory learning and some progress with reading skills. The Student was noted to be social and engaging and to have strong home supports. Needs were identified as phonological awareness, decoding, word recognition, fluency, reading comprehension, spelling, written expression, handwriting, math computation, math problem solving, articulation, motor skills, expressive language, regulation of attention, impulses, actions, emotions, and adaptive skills. It was noted that the Student had been receiving small group/one-on-one instruction with a combination of learning and emotional supports, primarily outside of the classroom setting. The removals occurred because Student reportedly was having tantrums in the classroom requiring removal. (P#3).
8. The IEP team was asked to consider a more restrictive program in the future. The Student continued at a regular elementary school for the 2013-2014 school year. The Student was educated in full-time emotional support with learning supports, speech and language therapy, occupational therapy. The community behavioral health

agency authorized full-time school therapeutic support services (TSS). The reevaluation record reflects the Student did poorly in the program, with tantrum behavior and non-compliance becoming more of a concern at home and school. (P-#3 p.24).

9. The Student was hospitalized in June 2014. After discharge from the hospital, the student attended a therapeutic summer activities program but could not remain there safely. There were several crisis emergency room visits that summer, and the Student was admitted to a partial hospital day program. (P-#3 pp.24-25).
10. The stay in the partial hospital day program was short-lived due to dangerous behavior (e.g., impulsively running out of the building and into the street), which resulted in re-hospitalization on July 14, 2014. On September 9, 2014, the community-based health agency placed the Student into a residential treatment program on the grounds of an approved private school. (P#3 pp.24-25). The local behavioral health agency decided to place the Student into the residential treatment facility (RTF). The local "host" school district provided the Student's education. (P#3 pp.24-25). The "home" District funded the educational program, and the behavioral health agency funded the RTF through public health insurance. (NT *passim*).
11. While at the RTF and school, the Student made slow but steady progress. For instance, the Student was able to work on math problems, a subject that used to trigger tantrums. Also, the Student began to display more appropriate interaction with peers, with some engagement in play. The Student had a 1:1 staffing to maintain focus, manage distractions, and utilize coping skills as needed during the school day. (P#3).
12. As part of the discharge from the RTF, in 2016, the District initiated a

reevaluation to address concerns about continued eligibility for special education and provide updated information for educational planning. Background information was obtained from the academic and medical records, including the District's Re-Evaluation Report (RR) dated May 9, 2013, a June 29, 2014, Psychiatric Evaluation dated prepared during the 2014 inpatient hospitalization, the Re-Evaluation Reports of May 2009, and May 2012 completed by the District, and a Psychiatric Evaluation dated April 16, 2016, while at the RTF. (P-#3 pp.24-25).

13. The December 2016 reevaluation report noted the Student scored in the significantly below average range for Reading, Writing, and Mathematics. Basic Reading Skills were noted to be an area of relative strength. Mathematics was reported to be an area of relative weakness. According to standardized testing, the Student demonstrated basic reading skills at around a 2-grade level. Reading Comprehension, Mathematics, and Written Expression at the K.3 to 1.4-grade level. According to the teacher, on curriculum-based assessment, the student could read at a 3rd-grade level, do math at grade level, and have language skills at the 2nd-grade level. The reevaluation explained that the difference between the standardized testing and the curriculum-based measurement likely reflected the Student's increased comfort and performance in the familiar situation of the classroom with the teacher. (P-#3).

14. The team then recommended a designation of Multiple Disabilities with Intellectual Disability as primary, followed by Speech and Language Impairment and Emotional Disturbance. The team also identified the Student's additional IDEA designation of Other Health Impairment (connoting Attention Deficit Hyperactivity Disorder (ADHD) and motor and sensory processing difficulties. (P-#3 p.24).

15. According to the Psychiatric Evaluation dated April 6, 2016, the Student has the following diagnoses based on the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*:

- Intermittent Explosive Disorder.
- Attention-Deficit/Hyperactivity Disorder, Combined presentation, severe Unspecified Anxiety Disorder.

- Autism Spectrum Disorder, Social Communication: Level 2 requiring substantial support Restrictive,
- Repetitive Patterns of Behavior: Level 2: Requiring substantial support with accompanying intellectual impairment and language impairment associated with a medical or genetic condition or environmental factor-yes
- [Redacted] Syndrome [redacted].
- Reactive Attachment Disorder of Childhood. (P-#3 pp.24-25).

[Redacted] SYNDROME DIAGNOSIS

16. [Syndrome] is a rare developmental disorder characterized by a pattern of congenital anomalies, behavioral and cognitive problems, including intellectual disability. (P#3, NT p.84). [This Syndrome] is "defined by pervasive and progressive behavioral and sleep disturbances." (P#33). People with [this syndrome] have characteristic behavioral issues including but not limited to headbanging, impulsivity, hyperactivity, frequent and prolonged tantrums, sudden mood changes... aggressive or attention-seeking behaviors such as hand biting, face slapping, skin picking, and wrist biting. The available [Syndrome] research notes that repeated headbanging can cause retina detachment. Older children may yank at fingernails or toenails or insert objects into body orifices. (P#31 p.2, P#33 p.2).

17. [This Syndrome's] physical aggression behaviors are "highly associated with environmental contingencies" and particularly prevalent among those with hearing and vision loss. (P#33 p.3). [This Syndrome's] maladaptive and self-injurious behaviors can result in serious physical injury. [This Syndrome] behaviors typically increase with age and can be particularly difficult to control in adolescents and adults. (P#33 pp.2-3).
18. [This Syndrome] is also associated with physical differences, including low vision, seizures, and decreased pain sensitivity.
19. Sleep disturbance for persons with [this Syndrome] is debilitating and results in chronic fatigue. Persons with [this Syndrome] cannot synchronize their biological clock with an average 24 hour day. Shortened sleep cycles or inability to enter deep sleep disrupts nighttime patterns, causing daytime irritability and drowsiness. Persons with [this Syndrome] teachers and caretakers who employ behavioral management strategies must acknowledge [this Syndrome] sleep deprivation as a factor and include strategies to reduce [this Syndrome] sleep-related behavioral issues as an environmental control (P#33 p.4).
20. [The Syndrome] behavioral outbursts progress with age and are not subject to cure or reduction via known chemical therapies; instead, behavioral intervention, techniques, including as-needed restraints, constant supervision, safety strategies, and environmental controls, are a must. (P#33 pp.1-6).
21. The Student displays a majority of the common [Syndrome's] characteristics. (NT p.85, p.2187). For example, the Student has a history of aggressive behaviors, including hitting, kicking, biting, slapping, and pushing others. Self-injurious behaviors (SIBs) include head-banging, biting self, throwing self into walls, picking skin and nails.

On one occasion, the Student self-removed ten stitches from a self-inflicted 1.5-inch laceration to the forehead. The student broke a foot bone and had numerous cuts, scraps, and a bloody nose on other occasions. The record also notes that self-injury has resulted in repeated scarring. (P#11 pp.1-2, P#33 p.3; P#3 pp.4-5).

22. The Student engages in property destruction, disruptive behaviors, verbal aggression, disrobing in public, and inappropriate touching or groping. The Student is known to elope, with a history of chasing through traffic. The Student has a history of lack of safety awareness. Consistent with the [Syndrome] diagnosis, the Student targets specific caregivers - the mother - or teachers. (P#11 pp.1-2, P#33 p.3).
23. The Student's [Syndrome]-related behaviors interfere with learning, can cause property damage, risk repeated acts of severe bodily injury or self-harm to self or others. (P#11p. 2, p.16) (behavior list includes aggression, inappropriate touching, property destruction, self-harm, elopement, sleep disturbances), P#14 (danger to self and others), P#31 p.5, P#8 (danger to self and others); P#10 p.26 (self-mutilation, self-aggression, like jumping out a moving car (P#5 p.1), broken foot bone (P#8, P#27). (P#34).
24. The Student's [Syndrome] sleep disturbance and [Syndrome]-related behaviors interfere with learning and pose a high risk of increased [Syndrome]-related maladaptive behaviors throughout the day. At home, the Student does not regularly sleep through the night, waking several times a night and rising at 4:30 in the morning. (NT 86:16-20 (Parent), P#3 p.8).
25. The 2016 reevaluation report noted that the Student's sleeping pattern was extended to 5:30 am at the first RTF. Each residential placement noted twenty-four-hour awake staff vigilance is necessary to manage

the [Syndrome] disability-related behaviors. (NT p.86-87, P# 34).

26. The 2016 reevaluation report also noted that the Student was beginning to target aggression towards the mother. (P#3 p.8). The record does not reflect any further study of the targeting was ever completed. The District prepared a 2016 reevaluation report that stated this emerging aggression and headbanging behavior pattern warranted further study. (P3).

27. The Student, through repeated acts of head-to-hard surface headbanging, detached the retina causing blindness in the right eye. Self-inflicted blindness is an act of severe self bodily injury. The Student picked at a footsore and peeled the skin on another occasion. On a third occasion, the Student broke a bone in one foot during the second RTF placement. If headbanging too hard services is not addressed, this pattern of self-inflicted severe bodily injury may cause total blindness. (P #25 NT p.149, p.151).

28. The Student bears extensive physical scarring from self-inflicted acts of severe bodily injury. (P#10 p.17, P#34).

29. The 2016 reevaluation report indicates the Student has the following IDEA, Section 504, and DSM-5 diagnosed disabilities:

- [redacted] Syndrome,
- Autism Spectrum Disorder,
- Anxiety,
- Intellectual Disability,
- Seizure Disorder,
- Oppositional Defiant Disorder,
- Attention-Deficit Hyperactivity Disorder (combined presentation, severe),
- Intermittent Explosive Disorder,
- Blindness/Visual Impairment,

- Speech-Language Impairment,
 - Disruptive Mood Dysregulation Disorder (P #8),
 - Obsessive-compulsive disorder (P5) and
 - Insomnia. (NT pp.84-85, S#31, P#3, P#10, P#15 p.26).
30. For Section 504 purposes, the above list of medical, behavioral health conditions, and disabilities constitute a record of impairments that substantially affect the Student's primary life function of learning, sleeping, and learning. (NT *passim*).
31. On January 4, 2017, and continuing there for the remainder of the 2016-17 school year, after discharge from the first RTF, the "home" District placed the Student in out of District all handicapped private school placement. (S# 27, p. 8; NT p.424, S#1, p.4).
32. On August 23, 2017, before returning for the 2017-2018 school year, the Student was admitted for second inpatient treatment at a different facility. (S#27, p.8, NT p.424, S#4, p.6).
33. Approximately one month later, upon discharge, the Student returned to the out of District private school placement on September 23, 2017, and attended school at the location until February 21, 2018. (S#27, p.8, NT. p.424, S#4, p.6).

THE JANUARY 2018 IEP

34. The Student's January 10, 2018, IEP noted that the Student was working on 4th-grade oral reading fluency, 5th-grade reading comprehension, 2nd-grade math computation, 2nd grade Saxon math concepts, demonstrated improvement in written communication, demonstrated ability to manipulate utensils, lunch items, demonstrates independence in school-related self-help skills, types six to seven-word per minute, tolerates work demands well. (P-7 p.15).
35. The IEP notes grabbing others, throwing objects, slapping others,

biting others, pushing others, destroying materials, verbal aggression, screaming, throwing self into walls, the high-intensity body drops, and elopement as concerns. (P#7 pp-12-18). From September 28, 2017, to December 19, 2017, the private school collected data to develop a plan to use "Nonviolent Physical Intervention." The Student's 15-day targeted present levels totaled 115 events of self-injurious behavior (7.6 a day), 561 events of aggression towards others (37.4 per day), 141 events of property destructions (9.4 per day), 60 events of elopement (4-per day), 209 events of verbal aggression (13.9) and 113 events of screaming (7.5 per day). (P#7 pp-12-18). On February 21, 2018, the Student re-entered inpatient treatment for the third time. (S#27, p.8).

36. In April 2018, the Student was discharged from inpatient and was admitted, on May 1, 2018, to the current "RTF." The current RTF is located within the Marple Newtown School District. (S#27, p.8, NT p.4, S#6, p.8). The Marple Newtown School District – the "host" district – became the Student's local education agency (LEA) charged with developing the IEP and providing FAPE. The Student's county behavioral program made the RTF placement. Like before, the county, through medical assistance funding, funds and monitors progress at the residential placement. While the "home" District, by application of 24 P.S. Section 1306, pays Marple Newtown, the "host" District, to provide a FAPE. (NT *passim*).

THE PLACEMENT AT THE CURRENT RTF AND THE NEW IEP

37. The May 2018 Marple Newtown – "host" district"- IEP essentially adopted in *toto* the January 2018 "home" District private school IEP; subject to a 60-day assessment, then calling for a new IEP with a new IEP revision date. (S#6). After a thorough review of the record, the 60-day IEP revision was not produced. (NT *passim* referenced in S#13).

38. The first IEP from the "host" district - Marple Newton - in the record begins in June 2019. The June 2019 IEP changed the focus of the Student's IEP from a mix of 4th and 2nd academics, with behavioral goals and functional skills, to an IEP that emphasizes life skills, functional academics, approach, including a coordinated school and residential positive behavior program. The coordinated residential and school behavior management program included authorization to use multiple forms of physical restraint and the introduction of a protective [device]. A physician approved the restraint and the use of the [device]. (S#13).
39. Based on the severity of the Student's behaviors and the threat of serious bodily injury, the RTF developed, and the "host" district adopted the RTF behavior plan. The RTF developed behavior plan included positive techniques and a restraint protocol that authorized up to six (6) person on the floor face up physical restraints. The "host" school district and the residential staff documented and timed each discrete episode of restraint. After each restraint episode, the staff was debriefed, and the restraints were logged. Initially, the "home" District was advised about each restraint episode. Later on, the notices to the "home" District stopped, consistent with Pennsylvania Department of Education (PDE) practices; the RTF and the "host" staff reported each episode to PDE. (S#13, NT pp.318-409, P#34, S#8, p. 3 - noting a medical prescription for restraint and [device] was obtained from a licensed physician. (NT.p.327, p.454, P#11, P#13).
40. When the Student entered the RTF, they created a behavior support plan that was implemented across residential, educational, and community settings. (S#7, p. 1).
41. From May 2018 to July 2021, the Student's RTF-school-based Behavior Support Plan was revised several times. (S#7; S#9; S#10, S#14,

S#16; S#20, S#21; S#23). Each revision was implemented across all settings. *Id.*

42. The RTF and the educational staff completed "Unusual Incident Reports," documenting the use of restraint. Exhibit P#34 is a 685-page document documenting the type of restraint, one to six-person restraint, the duration of the restraint, the location of the restraint (on the floor or in a chair), any medical treatment provided to the Student after the restraint, debriefing of the staff, and notice to the Parent about each episode. The first "Unusual Incident" report is dated October 24, 2018, and the last record is dated July 8, 2021. The Parents' and the District's summary of the Exhibit 34 notes that the Student was hundreds of times. (The Parents argue the Student was restrained 567 times, 544 times in class, and 23 in residence. The District suggests the Student was restrained 119 times. (S#11, P #34, Parents' Closing page 71 vs. District's Closing page 8).
43. Exhibit 34 and the quarterly RTF behavioral reports note that as the Student's sleep pattern improved, the frequency of the restraint, aggression and maladaptive decreased, while at the same time, school performance improved. As the frequency of restraints decreased, the number of people needed to implement the restraints reduced to one-person chair holds or two or three-person supine face-up holds. (P#34, S#7; S#9; S#10, S#14, S#16; S#20, S#21; S#23).
44. Parent testified that the Student sometimes required up to seven-person restraint. (Tr. 154). The last restraint involving six or more staff members occurred on January 16, 2019. (P-34, p. 214-19, Tr. 386). All of the restraints that occurred in 2021 required two people. (P-34, p. 848-867).
45. The "home" District copied and used the RTF behavior and restraint

plan to develop the “contingent” IEP behavior support plan and restraint plan. (S#21).

46. The RTF 2020 Behavior Support Plan also included:

- replacement behaviors,
- immediate staff access to 1 blocking pad,
- a visual schedule of activities that included schedule breaks,
- verbal, gestural, and physical prompts and reinforcers,
- process for extinction planned to ignore, blocking, redirection; and,
- detailed procedures for staff to interact with the Student calmly. (S#21).

THE DISTRICT’S OFFER OF A CONTINGENT IEP

47. In December 2020, at an Intensive Treatment Meeting (ITM) meeting reviewing the Student eligibility for RTF services, the RTF residential, “host” district academic staff, the Parent, and the community-based mental health agency discussed discharging the Student from the RTF. (NT p.133, NT p.449 P#23, p.12-13). This meeting was not an IEP meeting, so no one from the “home” District was present. (Tr. pp.132-33, p.446, pp.448-49).

48. When the “home” District’s Director of Student Services (Director) learned that the community-based behavioral health agency was discussing discharge plans from the RTF, she requested that the RTF and the school agree to a two-hour school one-hour in-residence observation. The staff also decided to show her the proposed residence the Student could move to upon discharge from the RTF. (NT pp.449-50).

49. At the ITM meeting, the educational and residential staff discussed if the Student was discharged from the RTF, the Student should move from the currently locked RTF residence to an unlocked children’s residence on the private school campus. The eligibility and funding

differences between the RTF placement decision making based on public Medical Assistance regulations/funding and a school district funded FAPE based residential program are discussed at NT. p.174, p.51, and NT pp.374-75).

50. During the observation, the Director noted one staff person and a teacher were prompting the Student to take breaks. The Director observed one staff member working with the Student and several other residents. (NT p 453).
51. Based upon the data from RTF and the school staff, along with input from a consulate with a board-certified behavior analysis (BCBA), from the Intermediate Unit (IU), along with the BCBA from the Student's previous District funded private school placement and the BCBAs, from another local private school, who observed the Student at the RTF, the Director prepared a "contingent" IEP. On March 10, 2021, the District held an IEP meeting, at which time it proposed a contingent IEP. (S#27, p. 2). (NT p.465, pp.465-66).
52. The RTF and school-related data from February 2021 noted a reduced level of SIB, aggression, and frequency of aggressive behaviors (NT pp.466-67).
53. In preparing the "contingent" IEP, the District also consulted with a BCBA employed by the local IU regarding student support during transportation to and from school. (NT p.472, NT p.461).
54. The District members of the contingent IEP team determined that the Student should be placed in a setting that focused on teaching emotional, behavioral, functional academics, and daily skills. The "contingent" IEP called for a highly modified curriculum focusing on language, communication, and emotional regulation/safety skills; and instruction in basic functional daily living skills, including those needed

for increased independence. (S#27, p. 27).

55. The "contingent" IEP copied the goals in the "host" district IEP. For example, the "contingent" IEP included completing keyboarding tasks accurately, completing vocational studies, and goals in reading, math, communication, and transition skills (S#27, p. 37-40).
56. The "contingent" IEP also included a goal for the Student to ride the bus safely to and from school. (S#27, p.41, NT. p.472, pp.536-37). The "contingent" IEP included supports from a trained one-on-one support staff who, when necessary, would have access to the blocking pads and implement the proposed behavior plan during the van ride. (S#27, p.43, p. 44, NT p.473).
57. The "contingent" IEP behavior program also included the same multi-person restraint protocol in the RTF- school behavior plan (S#28, p.23) and Crisis Plan prepared by the school where the Student would attend. (S#28, p.23).
58. The "contingent" IEP included training for all staff who would work with The Student, including initial and ongoing training on [the Syndrome] and how it may impact the Student; monthly ABA training, and monthly training on Student specific needs, including the "host" District's positive behavior support plan. (S#27, p. 45).
59. On March 22, 2021, the District issued a Notice of Recommended Educational Placement (NOREP) which proposed that upon discharge, the Student could be educated at one of the two out of District private schools that the Director consulted with in preparing the contingent IEP. The NOREP rejected a District funded FAPE based residential placement. (S#29, p.1-3).
60. The "host" District NOREP recommended that the Student receive specialized transportation to and from the private school on a van with

a driver and 1:1 staff trained to respond to implement the behavior and restraint program on the van. (S#29, p. 2)

THE SECOND PRIVATE SCHOOL OBSERVATION AND REPORT

61. A second private school consulted by the "home" District, located about 45 minutes away from the Student's residence, conducted a video observation of the Student, prepared a report, described the observation, and made recommendations about the Student's in-school behavior. (NT p.463, S#22).
62. The report contained behavioral management recommendations, educational recommendations, and recommendations about community-based in-home supports. (S#22, p. 9-13).
63. The private school recommended that the Student's current RTF and school-based behavioral interventions continue in future educational and residential settings, including the restraint protocols, the use of the [device], and the applied behavior analysis (ABA) techniques. (S#22).
64. The private school recommended community-based, home, or community-based Intensive Behavioral Health Services (IBHS), suggesting a two-to-one staff ratio. (S#22, p. 12). The report noted concerns that the "host" District and the Parents could expect a response burst of aggression, severe bodily injury, and decreased functioning if the Student enrolled and returned to the "home" District and the family home. The report recommended a two (2) day staff orientation and training protocol to prepare for the Student's arrival. (S#22).
65. The other private school suggested in the NOREP also accepted the first private school's recommendations. Although the second private school did not observe the Student, did not review the Unusual

Incident restraint log, or talk to the RTF or “host” school staff, they agreed to accept the Student. (S#22).

APPLICABLE LEGAL PRINCIPLES DESCRIBING IDEA AND SECTION 504 FAPE PRINCIPLES

The IDEA requires states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. § 1412. Local education agencies meet the obligation of providing a FAPE to eligible students through the development and implementation of IEPs, which must be “reasonably calculated to enable the child to receive ‘meaningful educational benefits in light of the student’s ‘intellectual potential.’”² Substantively, the IEP must respond to each child’s individual educational needs and circumstances. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

In the *Board of Education of Hendrick Hudson Central School District v. Rowley*³, the court established the actionable procedural and substantive dimensions of FAPE. A finding of a procedural violation requires preponderant evidence the district violated IDEA and parallel state law procedural requirements. If the violation is purely procedural, the question becomes, did the violation(s) result in a loss of educational benefits to the student. Or did the violation significantly impede the parents’ opportunity for participation in the IEP process? As for the substantive component, the court held the evidence must establish “the [IEP] developed through the Act’s procedures [was] reasonably calculated to enable the child to receive educational benefits. Later on, in *Endrew*⁴ relying on *Rowley*, the court held when the student is in an integrated setting, the determinative question is whether the IEP is reasonably

² *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

³ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982)

⁴ *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017)

calculated to enable the child to achieve passing marks and advance from grade to grade. If, on the other hand, the student is in a self-contained setting, the question becomes is the IEP appropriately ambitious, including challenging objectives, even if the advancement through the general education curriculum is not a reasonable prospect. *Id.*

The Third Circuit has interpreted *Rowley* and then *Endrew* to mean that the “benefits” provided to the child must be meaningful. The meaningfulness of the educational benefit is relative to the child’s potential.⁵ Taken as a whole, the benefit should provide “significant learning.” At the same time, the district is not required to maximize a child’s potential.⁶ The meaningful benefit standard requires LEAs to provide more than “trivial” or “de minimis” benefit.⁷ It is well-established that an eligible student is not entitled to the best possible program, or the type of program preferred by a parent, or to a guaranteed specific level of achievement.⁸ Thus, what the statute guarantees are an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’”⁹

A FAPE, however, encompasses much more than academics. Instead, I must consider the totality of a child’s circumstances to determine whether the LEA offered the child a FAPE. In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services by and through an IEP that is reasonably calculated at the

⁵ *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

⁶ *See, Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988).

⁷ *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995)

⁸ *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011).

⁹ *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

LEAST RESTRICTIVE ENVIRONMENT (LRE)

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

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), the court held that districts must determine whether a student can receive a FAPE by adding supplementary aids and services to create less restrictive placements. If a student cannot receive a FAPE in a less restrictive placement, the LEA may offer a more restrictive placement. Even then, the LEA must ensure that the student has as much access to non-disabled peers as possible. *Id.* at 1215-1218. Furthermore, 34 C.F.R. § 300.115 prescribes that "[e]ach public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services," which includes "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions"). That said, "[i]f placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program . . . must be at no cost to the parents of the child." 34 C.F.R. § 300.104. Therefore, there is no tension between the

FAPE and LRE mandates by design. There is no requirement for an LEA to place a student into an inappropriate placement simply because it is less restrictive. However, LEAs must consider whether a less restrictive but inappropriate placement can be appropriate through supplementary aids and services.

THE THIRD CIRCUITS "INEXTRICABLY INTERTWINED" RESIDENTIAL TEST

The parties used the terms "RTF" and "residential placement" interchangeably throughout this hearing. That can be confusing because the words are not entirely interchangeable as the differences are significant. An RTF is a mental health term of art.¹⁰ RTFs are not educational placements. RTF placements, including behavioral health placements, are authorized by non-educational personnel for primarily non-educational purposes.¹¹ In the context of an IDEA case, a residential placement – as opposed to an RTF – is part of the continuum of LRE placements that LEAs must make available when appropriate. Non-educational entities like the community-based agency here make RTF placements; they do so based on the criteria of "medical necessity."¹² It is black letter law that LEAs are never obligated to fund medical care.¹³ In analyzing whether a full-time residential placement is necessary, a hearing

¹⁰ As defined by the Office of Mental Health and Substance Abuse Services (OMHSAS), residential treatment facilities (RTF) are childcare facilities licensed under Chapter 3800 of 55 PA Code and certified by OMHSAS. Residential Treatment Facility (RTF) offer behavioral health treatment services that provide 24-hour living arrangements and behavioral health treatment for children and adolescents whose needs can only be served in a setting that has services and supports 24 hours per day, seven days per week.

¹¹ RTF may be appropriate when behavioral health treatment services cannot be safely provided in a less restrictive setting. RTF services may also be recommended when outpatient and community-based services have been tried but the youth's behavior has not stabilized and continues to create a safety-risk to themselves or others.

¹² HEALTH CHOICES BEHAVIORAL HEALTH SERVICES GUIDELINES for MENTAL HEALTH SERVICE NECESSITY CRITERIA, Appendix T (B)(1).
<https://pa.performcare.org/assets/pdf/providers/resources-information/appendix-t.pdf>.

¹³ See, *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3d Cir. 1981).

officer must inquire whether the residential placement is "a response to medical, social, or emotional problems that are segregable from the learning process." *Kruelle* 642 F.2d 693. Stated another way, the test requires this fact finder to determine if the residential placement is "required for emotional problems and is, therefore, the responsibility of the parents or social service agencies or whether a full-time placement is a necessary ingredient for learning." *Id.* In *Kruelle*, the Third Circuit acknowledged that "the concept of education is necessarily broad. . . ." *Id.* at 693. In that case, however, the Court acknowledged that not every therapeutic service can be construed as being educational for the purposes of classifying children under the IDEA. *Id.* at 694. To determine IDEA eligibility for residential services, hearing officers and courts must "assess the link between the supportive service or educational placement and the child's learning needs." *id.* In *Mary Courtney T.*, the Third Circuit, relying on *Kruelle*, provided further guidance:

[W]e . . . considered "whether full-time placement it may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process." [*Kruelle*, 642 F.2d at 693.] If the placement was required by the former, the school was obligated to bear the cost; if the placement was necessitated by the latter, the costs of the placement was "the responsibility of the parents or social service agencies." [*Id.* at 693-94.] And to differentiate between the two possible predicates to residential placement, the *Kruelle* Court instructed that we are to look at whether the "social, emotional, medical and educational problems . . . [are] so intertwined that realistically the court can't perform the Solomon-like task of separating them." [*Id.* at 694 (internal quotation and citation omitted).] The *Kruelle* panel concluded: "The relevant question in the present case is whether the residential placement is part and parcel of a specially designed instruction to meet the unique needs of a handicapped child." [*Id.*] *Mary Courtney T.*, 575 F.3d at 243-44.

The *Kruelle* panel, applying this framework, held that the child's emotional and medical needs were not severable from his educational needs. "[H]ere,

consistency of programming and environment is critical to [the child's] ability to learn, for the absence of a structured environment contributes to [the child's] choking and vomiting which, in turn, interferes fundamentally with his ability to learn." *Kruelle*, 642 F.2d at 694. Both the IDEA and Section 504 anticipates that, for some students, a residential placement in a hospital or institution may be the least restrictive environment in which the student can receive a FAPE. 34 C.F.R. § 300.115(b)(1), 34 CFR 104.133(C)(3).¹⁴

Simply stated, when a student's educational needs are "inextricably intertwined" with the student's social, emotional, and mental health needs, and the student will not derive educational benefit without the coordinated aspects of a residential program, such a placement is considered to be intrinsic to the student's education and therefore necessary for FAPE. *Kruelle*, at 687. "The unseverability of such needs is the very basis for holding that the services are an essential prerequisite for learning." *Kruelle* at 694.

CONTINGENT IEPs

In the Third Circuit, courts have introduced the concept of a "contingent" IEP. Parents whose children are placed in RTFs want to know what services the "home" district will offer when the student is discharged. Hearing Officer Ford, in ODR FILE #24373 *Chichester School District* (SEA PA 2021) (collecting cases) – currently on appeal- traced the origins of the "contingent" IEP concept.¹⁵ In short, "contingent" IEPs attempt to plan for and explain how the

¹⁴ 34 CFR 104.133 (C)(3). *Residential placement*. If a public or private residential placement is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the placement, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

¹⁵ Beginning in *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712 (3rd Cir. 2010), *In re: I.H., a Student in the Cumberland Valley School District*, ODR Nos. 1481-1011-KE, 1589-1011-KE (consolidated, 2010), *A.Z. on behalf of M.Z. v. Mahwah Twp. Bd. of Educ.*, 2006 U.S. Dist. LEXIS 22305 (D.N.J. Mar. 30, 2006), Interim Order *In re: G.A., a Student in the Colonial School District*, ODR File No. 21018-1819-AS (August 22, 2018), *L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610 (E.D. Pa. 2018). The quoted language from ODR File No. 21018-1819-AS comes from a pre-hearing order. The parties resolve their dispute shortly after the hearing officer issued that order, and so there was no final decision on the merits. The case does not appear on the ODR website for that reason.

“home” district will provide an IEP to the student upon discharge from a Section 1306 educational – RTF placement. Essentially, “home” districts may offer “contingent” IEPs without prematurely incurring an immediately enforceable FAPE obligation until the student is discharged. “contingent” IEPs, as an offer of a FAPE, are subject to the *Rowley - Endrew* procedural and substantive requirements. Finally, “contingent” IEPs are subject to the IDEA’s prior written notice, and procedural due process challenges—20 USC § 1415(b)(6)(A).

APPROPRIATE RELIEF

In this instance, both Parties desire declaratory relief as appropriate relief within the meaning of the IDEA. *Sch. Dist. of Phila. v. Post.*, 262 F. Supp. 3d 178, 197 (E.D. Pa. 2017) (citing 20 U.S.C. § 1415(i)(2)(C)(iii)). The Parents seek multiple findings. First, they seek a finding that the Student’s disabilities are so “inextricably intertwined” such that the Student needs a residential placement. Second, they seek a finding that the “contingent” IEP is inappropriate, and third, in the alternative, the RTF, when combined with the “host” district” IEP is the Student’s “stay-put” placement. While the District desires a finding that its “contingent” IEP and placement are appropriate.

WITNESS CREDIBILITY

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses and must make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.”¹⁶ One purpose of an explicit credibility determination is to give courts the information they need in judicial review.¹⁷ I find that all witnesses testified credibly in that all witnesses candidly shared their

¹⁶ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

¹⁷ *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Pa.* 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa.Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

recollections of facts and their opinions. I did not discern any efforts to withhold information, misstate the facts or deceive me.

To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference. Before I discuss the procedural and substantive topics like the substance of reevaluation and the "contingent" IEP, I must discuss how much persuasive weight I will give to the testimony of certain witnesses on specific topics in dispute.

PERSUASIVE WEIGHT OF THE TESTIMONY

In this instance, the Director went to the RTF-day school to obtain firsthand knowledge about the Student's current educational and residential services. The Director did not collect any data, she did not take any contemporaneous notes, and she did not prepare a standalone report. Therefore, I give her testimony about the single visit reduced weight. I now find her recollection about the visit described as an observation does not comport with the expected data collection and observation requirements otherwise seen in a reevaluation report. 22 Pa Code Chapter §§ 14.124, 14.131, and 14.132. The failure to record and share the observations before the "contingent" IEP meeting interfered with the Parents and the other members of the team's participation in the reevaluation and the IEP process. Therefore, her testimony is accorded less weight.

Upon returning to the District, the Director contacted the BCBA at the IU and the BCBA's at the two private schools to review the existing data from the day school and the RTF. The BCBA from the IU did not observe the Student, and she did not talk to the teaching or residential staff. Likewise, the BCBA/administrator from the first private school did not speak to the teaching staff or the residential staff. As their testimony is based on a review of the file, I will give her input about the Student's circumstances, the "contingent" IEP, the behavior plan, the ongoing use of restraints, and the restrictiveness of each

placement reduced weight. I also find it curious while both individuals are BCBA's neither asked for and when provided to the District, the District did not provide either with the 685-page restraint log.

On the other hand, the two BCBA's from the second private school talked to the teaching staff and the residential team and completed a virtual observation. After the observation, they prepared a report describing the Student's interaction with the teacher, time on task, and peer interactions. The report made a series of teacher, student, and support staff recommendations. The report also made clear recommendations about needed staffing ratios and training. The BCBA's sought answers to Student specific behaviors and circumstances. To their credit. I will give the report moderate weight, subject to the following.

Unfortunately, the Director never made the restraint log available to the second private school BCBA's. The record is also preponderant that the Director did not discuss the suggested use of mechanical restraint with any of the BCBA's. The failure to discuss the proposed use of restraints on the van is a material change to the otherwise detailed restraint protocol, absent discussion about the use of restraint; I will give the BCBA's' testimony about the behavior plan and the restraints little to moderate weight. As an aside, discussed in more detail below, the suggested use of mechanical restraints is not supported by a team of knowledgeable individuals; therefore, to the extent, the witnesses did opine on the use of mechanical restraints, missing Student specific objective data, the testimony is questionable.

While all BCBA's have a background, training, and experience in developing behavior plans, they are not special education teachers; therefore, I will give little to no weight to their testimony about the appropriateness of the "contingent" IEP. Absent direct testimony from the teaching staff, I will also give the BCBA's' testimony about the teachers' ability to implement the "contingent" IEP as drafted reduced weight. I do this, noting that the "host"

District's omission of the teacher as a member of the "contingent" IEP team is a troubling procedural violation. Finally, as the BCBAs are not educators, I give their testimony about the restrictiveness of the placement little weight.

On the other side, while the Parents' expert, a school psychologist, prepared a report, reviewed the records, regrettably, he too also failed to have any discussions with the District or the staff at either of the private schools. Also, while he commented on the Student's disabilities, he did not provide convincing testimony about whether the Student's disabilities were "inextricably intertwined." Therefore, when viewed as a whole, I will give his testimony about whether private school is the LRE and the necessity of a residential placement reduced weight. At the same time, as the only witness qualified to administer and interpret standardized testing, I will give his testimony about the Student's circumstances, needs, and strengths moderate greater weight than the BCBAs.

THE BURDEN OF PROOF

Generally, the burden of proof consists of two elements: the burden of production and persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief.¹⁸ The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise.¹⁹ In this case, the parents seek relief and must bear the burden of persuasion.

ANALYSIS AND CONCLUSIONS OF LAW

THE LACK OF A REEVALUATION CREATED A SERIES OF HARMFUL PROCEDURAL VIOLATIONS

First, the "contingent" IEP case law does not modify the IDEA's procedural and substantive benchmarks. Second, the IDEA and Section 504 each require

¹⁸ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

districts to reevaluate students before a significant change in placement.²⁰ Third, the case law also establishes that before any substantial or material change in a student's educational program, a school district should conduct a reevaluation, particularly when the new placement is more restrictive.²¹ These black letter requirements did not occur. Rather than complete a comprehensive evaluation, I now find the District completed a cursory review of the records. Contrary to applicable requirements, the Director did not allow the Parent or other IEP team members to review the existing data. Once completed, the "team" never fully addressed the question of whether additional assessment data was a need. This omission prevented discussion about whether the Student's multiple disabilities are "inextricably intertwined," what SDIs, related services, or supplemental aids are needed and FAPE related. Simply put, the District never asked the Kruelle "inextricably intertwined" question.

The failure to complete this critical analysis interfered with the full evaluation of the Student's needs, weaknesses, and circumstances. This failure also interfered with the Parent's and the teams' ability to participate in the development of the IEP fully. Next, even assuming the limited record review was appropriate, the Director failed to notify the Parents they had the right to request additional assessments.²²

¹⁹ See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

²⁰ 34 C.F.R. § 104.35(a). ("A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluationof any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.")(emphasis added.) 34 C.F.R. 300.324(b)(1)(ii)(D) ("Each public agency must ensure that. . . the IEP team revises the IEP, as appropriate to address [t]he child's anticipated needs.")

²¹ Board of Educ. of City of White Plains, 20 IDELR 1475 (SEA NY 1994), *Brinmer v. Traverse City Area Pub. Sch.*, 22 IDELR 5 (W.D. Mich. 1994). This is also the position of the Office of Civil Rights (OCR). *Kelso (WA) Sch. Dist. No. 4*, 20 IDELR 1003 (OCR 1993), *Mobile County Sch. Dist.*, 19 IDELR 519 (OCR 1992).

²² 34 CFR 300.305 et seq. *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007)(district must notify the parents of determination not to collect additional assessments and inform the parents of their right to request an assessment).

This series of procedural violations created several other actionable harmful violations. The District's 2016 RR noted the need for further "study" of the Student's targeted aggression towards the mother. As designed by the Director, the family is expected to implement the behavior and restraint protocols in the home. Absent the "study," neither the Director nor the other members of the IEP have any objective data if the family can implement the behavior plan. Absent the "study," the Director and the IEP team did not consider what, if any, related services, like parent training, are needed to implement the home version of the behavior plan. This omission, along with the others described herein, for this particular Student, is substantive. While the behavior plan and the use of physical restraint are the "contingent" IEP focal points, neither the Director, the IU BCBA, nor the private school BCBAs reviewed the 685-page restraint log. This omission is particularly troubling in light of the private school BCBAs opinion that the Student will experience an upward response burst of problem behaviors on return.

Absent a review of the log, the Director's and the BCBAs' opinions about staffing recommendation (1:1 vs. 2:1), staff training needs, and the need for 2-on-1 staffing in the community are not data-based. A basic understanding of the Student's history of serious bodily to self or others makes this omission a substantive evaluation flaw. This omission also creates a severe safety risk.

Finally, when the implementation of the behavior/restraint plan on the van came up during the testimony, the lack of additional assessment data became apparent. During the testimony, a District's witness suggested that the staff use a "safety harness" as a mechanical restraint to block head-to-hard surface headbanging during the van ride. This quick off-the-cuff suggestion demonstrates a basic understanding that selecting a mechanical restraint requires a full individual assessment, input from the IEP team, and medical authorization. Neither the IEP team nor the group of persons who reviewed the existing data included a medical professional or knowledgeable about selecting

a mechanical restraint. The suggested use of mechanical restraint on board a moving van evidences a fundamental misunderstanding of how teams decide when and how to use restraint.²³

The combined effect of these procedural violations crosses the line from forgivable harmless transgressions to substantive violations that interfered with the Parents' right to be part of the reevaluation and the IEP process.²⁴ The procedural violations also denied the team the opportunity to review the student's necessary data.²⁵

THE MAKEUP OF THE "CONTINGENT IEP" TEAM IS A SUBSTANTIVE FLAW

The IEP team failed to include several mandatory members. I now find this procedural violation is substantive and not a harmless error based on this record. The IDEA requires a district to ensure that an IEP team includes: 1. The parents of the child. 2. No less than one child's general education teacher (if the child is or may be participating in the general education environment). 3. No less than one special education teacher of the child or, where appropriate, no less than one special education provider. 4. A district representative who: i) is qualified to provide, or supervise, the provision of specially designed instruction to meet the unique needs of children with disabilities; ii) is

²³ *Susavage v. Bucks Cty. Sch. Intermediate Unit No. 22*, Nos. 00-6217, 22, 2002 U.S. Dist. LEXIS 1274 (E.D. Pa. Jan. 22, 2002)(suffocation death of disabled student on a van linked to the failure to perform an assistive technology evaluation in selecting a mechanical safety harness).

²⁴ *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007) (when the district decides to rely exclusively on existing data and not conduct further assessments, it must provide prior written notice to the parent of its decision triggering parents right to request evaluation). The failure to go beyond reviewing existing data can constitute a denial of FAPE if more information is needed to develop an appropriate IEP. *New Mexico Pub. Educ. Dep't*, 115 LRP 12278 (SEA NM 03/02/15) (A district's failure to conduct a comprehensive reevaluation deprived the parent and IEP team of the information it needed to fashion an appropriate IEP).

²⁵ A student's transfer to a new school or program merits a reevaluation. *Flagler County (FL) Sch. Dist.*, 34 IDELR 182 (OCR 2000); and *Wilson County (NC) Schs.*, 114 LRP 45134 (OCR 05/07/14). The repeated use of restraint or seclusion merits a reevaluation. *District of Columbia (DC) Pub. Schs.*, 120 LRP 37042 (OCR 10/07/20) (noting that a district may have violated Section 504 and Title II when it failed to reevaluate a student after he was subjected to restraint and seclusion on multiple occasions throughout the school year).

knowledgeable about the general education curriculum; and iii) is knowledgeable about the availability of district resources. 5. An individual who can interpret the instructional implications of evaluation results. 6. At the parent's discretion or the district, other individuals with knowledge or special expertise regarding the child, including related services personnel, are appropriate. Whenever appropriate, the child. 34 CFR 300.321 (a). The District's March 2021 IEP failed to include the Student's special education teacher, the OT, a speech therapist, the Student's current teacher from Marple Newtown, or a school psychologist. The combined effect of these procedural violations crosses the line from forgivable harmless error violations to a substantive interference with the Parent's right to be part of the evaluation and IEP process.²⁶ The procedural violations also denied the team the opportunity to review the student's necessary data.²⁷ Accordingly, I now find this series of procedural violations ultimately "impede[d] the child's right to FAPE," "cause[d] a deprivation of educational benefit," and "significantly impede[d] the parent's opportunity to participate in the decision-making process regarding the provision of FAPE" (20 U.S.C. § 1415(f)(3)(E)). An appropriate **FINAL ORDER** follows.

SUMMARY AND DISPOSITION OF THE CLAIMS

The Parents seek three forms of relief. First, the Parents seek a finding the "contingent" IEP is inappropriate. Second, they seek a conclusion that the RTF

²⁶*Letter to Anonymous*, 48 IDELR 136 (OSEP 2007) (when the district decides to rely exclusively on existing data and not conduct further assessments, it must provide prior written notice to the parent of its decision triggering parents right to request evaluation). The failure to go beyond reviewing existing data can constitute a denial of FAPE if more information is needed to develop an appropriate IEP. *New Mexico Pub. Educ. Dep't*, 115 LRP 12278 (SEA NM 03/02/15) (A district's failure to conduct a comprehensive reevaluation deprived the parent and IEP team of the information it needed to fashion an appropriate IEP).

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placement constitutes an implied agreement the Student's continued day. Third and finally, they seek a finding that the financial burden of providing in-home behavioral services needed to implement the District's "contingent" IEP behavior program, otherwise violates the IDEA restriction that the Student's education is "free."

For all the reasons above, I now find the District's 2021 "contingent" IEP offering eight (6) hours of in-class instruction and two (2) hours of dedicated transportation with one-on-one is inappropriate, insufficient, and inadequate. Next, I disagree with the Parents and find the RTF is not the Student's stay put program when combined with the "host" program. Under the IDEA and Section 504, the District cannot be charged with legal responsibility, in this instance, with the acts of an unrelated third party.

Because I find the "contingent" IEP is inappropriate, I need not reach the Parent's argument that the offered program was not free. Finally, the District's Motion Dismiss that the Parents' Complaint is denied. While I acknowledge that the "host" district was the Student's then-current LEA, the action here is about the "home" District's "contingent" future commitment of resources. The District offered PWN, and an exact NOREP spelling out the proposed action that formed the basis of the complaint is clear either take action or lose your rights. If the Parents did not act, the NOREP and IEP would have gone into effect. The failure to act would have resulted in a change in the legal relationship between the Parties.

The IDEA permits parents to file due process complaints about alleged violations for compensatory education when students move out of the district. The Act also allows parents to file tuition reimbursement claims when students are privately placed and never attend school in the community. Parents who make private school unilateral placements and receive equitable participation

services from one LEA – host district where the private school is located - are permitted to request an IEP from the home district.²⁸ Simply put, the District’s attempt to withdraw the “contingent” IEP did not moot the dispute is misplaced.²⁹

THE APPROPRIATE RELIEF

To remedy the failure to conduct a complete and comprehensive evaluation, to avoid leaving the parties in legal limbo when the current RTF placement ends, I now find the following is appropriate relief necessary to remediate the above violations.

First, upon discharge from the RTF, the Student should remain at the current residential setting, as an interim diagnostic placement, with District funding. The interim diagnostic placement will allow the Parties ample time to reevaluate the Student in all areas of unique need and circumstances necessary to prepare a new IEP. The reevaluation should address the unanswered questions, including by not limited too if the Student’s disabilities are “inextricably intertwined,” assess the need for related services like parent training and assistive technology related to the need for and use of mechanical restraints.

Assuming mechanical restraints are part of the reevaluation, the District must seek out and pay for a physician with background, training, and experience in the use of mechanical restraints for input and approval. As the Student is due

²⁸ *Letter to Anonymous*, 48 IDELR 136, 107 LRP 45732 (2/6/2007) (Question 11 and Question 12)(“ While school district B where the private school is located has an obligation to consider the child for equitable participation services in accordance with 34 CFR §§ 300.130 through 300.144, it does not have an obligation to make FAPE available to the child. Because the district of residence is generally responsible for making FAPE available if the parents desire FAPE, school district A, the district of residence, would be responsible for making FAPE available to the child. Subject to parental consent, school district B could provide school district A with a copy of the child's evaluation. See 34 CFR § 300.622(b)(3)”

²⁹ After the filing of Closing Statements the Ninth Circuits decided *Capistrano Unified Sch. Dist. v. S.W. and C.W. ex rel. B.W.*, [121 LRP 42964](#) (9th Cir. 12/30/21), to the extent some may think it impacts this Decision I now find it does not. This Decision is rooted in a Pennsylvania-specific statute, Section 1306 *et seq.* read in *pari materia*, with the IDEA and Section 504 that the “home” District has a continuing obligation to prepare to offer a FAPE and IEP on discharge. Unlike the Parent in the Ninth who was required to “ask” the district for a FAPE, Pennsylvania

for a reevaluation, all other assessments deemed appropriate after reviewing the existing data should be provided.

As a matter of equity, to correct the failed review of the records and required reevaluation, I now find the interim “diagnostic placement is limited to a term of 120 days.³⁰ The interim diagnostic placement is not the Student’s “stay-put” placement. *Id.* At the 60 to the 90-day mark, the District should cause a reevaluation report to be prepared and provide the same to the Parents. After that, the Parties should meet to develop a new IEP, as the District is now the LEA, with programming and funding obligations. If at any time during the 120-day diagnostic placement the Parties cannot reach an agreement over any of the Student’s needs or services, either Party can file another declaratory complaint. In the alternative, either Party is free to file a *Honig* injunction.³¹ The Student’s last agreed-upon IEP between the Parents and “host” district should continue through the “diagnostic” placement.

Second, pursuant to my equitable authority under 34 C.F.R. §300.502(d)(1) and 34 C.F.R. §300.502(d) to assure the reevaluation is independent, the District is directed to pay the “host” district to complete the above reevaluation.

Third, I have deep concerns that after three (3) years and hundreds of episodes of the multi-person chair and floor restraints, the conversation about managing the Student’s behavior is slowing moving to the use of mechanical restraints. While I acknowledge that the restraints, the blocking pads, and the [device] reduce the chance the Student will become totally blind, I also recognize that

practice requires the District to offer a “contingent” IEP. The underlying law and facts are different; therefore, the outcomes are not antagonistic

³⁰ See, Appendix A to the 1999 IDEA Part B regulations, Question 14 (1999)(in practice, a diagnostic placement is a structured program used to assess the needs of a student for whom an IEP may be needed but for whom either the current evaluation is inconclusive or the data is insufficient), *In re: Student with a Disability*, 115 LRP 32147 (SEA NM 05/21/15), *Mr. and Mrs. A v. Greenwich Board of Education*, 68 IDELR 39 (D. Conn. 2016), *Middletown Bd. of Educ.*, 10 ECLPR 77 (SEA CT 2013) (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.), *In Edinburg Consolidated Independent School District*, 67 IDELR 132 (SEA TX 2015).

the restraint techniques border on forms of punishment. Therefore, if the team does move in the direction of mechanical restraints, the District must consult with a human rights committee made up of knowledgeable persons to review the mechanical restraint protocol. I put these supplemental aids and support for personnel to ensure the Student and the staff are not set in harm's way.³² Finally, I acknowledge that my application of the emerging "contingent IEP" case law and the follow-along appropriate relief are issues of first impression. Therefore, I now find that the above Findings of Fact and Conclusions of Law were prepared following a careful, thoughtful, and deliberate review of the testimony and exhibits. I now find that this Decision and Final **ORDER** were prepared according to standard legal practice applying the extant law. All other claims, defenses, and counterclaims are now exhausted. A Final **ORDER** granting in part and denying in part the Parents' request for equitable declaratory relief follows.

ORDER

NOW, this January 7, 2022, it is at this moment **ORDERED** as follows

1. I now find that the District "contingent" IEP is inappropriate. The Parents' claim is **GRANTED**.
2. The Parents' request to find the RTF the "stay-put" placement is **DENIED**.
3. The District's Motion to Dismiss the Complaint is **DENIED**
4. Upon discharge from the RTF, the Student should remain at the the current residential setting, as an interim diagnostic placement, with District funding. During the interim diagnostic placement, the District

¹¹ If the district believes that maintaining the student's current placement is substantially likely to result in injury to the student or others, it may seek a court order to change the student's placement while the underlying IDEA action is pending. *Id.*

¹² *But cf, D.M. v. Board of Educ. of Toledo Pub. Schs.*, 121 LRP 41617 (N.D. Ohio 12/14/21)(motion to dismiss granted finding that case law not yet developed that three-person prone restraint of disabled student on the floor after he became aggressive violated Fourth and 14th Amendment rights).

should reevaluate the Student in all areas of unique need and circumstances necessary to prepare a new IEP. The reevaluation should address the unanswered questions, including by not limited too if the Student's disabilities are "inextricably intertwined," assess the need for related services like parent training and assistive technology related to the need for and use of mechanical restraints.

5. Pursuant to my equitable authority under 34 C.F.R. §300.502(d)(1) and 34 C.F.R. §300.502(d) to assure the reevaluation is independent, the District is directed to pay the "host" district to complete the above reevaluation.
6. If the team does move in the direction of mechanical restraints, the District must consult with a human rights committee made up of knowledgeable persons to review the mechanical restraint protocol. I put these supplemental aids and support for personnel to ensure the Student and the staff are not set in harm's way.
7. All other claims, defenses, counterclaims are otherwise **DENIED**.

January 7, 2022,

Charles W. Jelley, Esq. LL.M
Special Education Hearing Officer
ODR FILE #24756-2021