

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:

27136-22-23

Child's Name:

D.H.

Date of Birth:

[redacted]

Guardian:

[redacted]

Counsel for Parent:

Pro se

Local Education Agency:

Pottstown School District
Admin Bldg.,
230 Beech St.
Pottstown, PA 19464

Counsel for LEA:

Shannon R. Pierce, Esq.
Fox Rothschild LLP
980 Jolly Road, Suite 110
Blue Bell, PA 19422

Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

December 22, 2022

INFORMATION AND PROCEDURAL HISTORY

The student in this matter (Student)¹ is [mid-teenaged], currently not attending school and eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) under the category of multiple disabilities.² The Parent filed the current due process complaint with allegations that the District failed to offer the Student a free appropriate public education for the 2022-2023 school year. In response, the District denied all claims and submitted a Motion to Dismiss the complaint on the grounds of mootness and outside the jurisdiction of a special education hearing officer.

For the following reasons, the claims of the Parent are denied, and the complaint is dismissed.

ISSUES

- 1) Was the District's proposed program and placement of the Student in the PLLA (Leadership Learning Academy) for the 2022-2023 school year an appropriate offer of FAPE?

- 2) If the District failed to offer the Student a FAPE, what, if any, remedy is appropriate?

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

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

FINDINGS OF FACT

2021-2022 School Year

1. During the 2021-2022 school year, the Student was in the [redacted] grade enrolled in the District. (N.T. 26)
2. On June 30, 2022, the District and Parent, through counsel, entered into a settlement agreement to resolve March and April 2022 due process complaints filed by the Parent. (S-1, S-2; N.T. 28, 33-34, 100, 117)
3. The June 2022 settlement agreement provided the Student with compensatory education and a commitment to fund placement at Parent's chosen private school for the 2022-2023, 2023- 2024, 2024-2025, and 2025-2026 school years. The agreement was predicated upon the Parent and Student's continued residency in the District. (S-2; N.T. 20-22)
4. In July 2022, the District advised the Parent it received information that [Parent] no longer qualified as homeless under the McKinney-Vento Act and was no longer regarded as a District resident.³ (N.T. 30-31, 102)
5. On July 30, 2022, the Parent filed a *pro se* complaint with the United States District Court, Eastern District of Pennsylvania.⁴ The complaint challenged the District's McKinney-Vento determination and requested the Court void the June 2022 settlement agreement.⁵ The complaint

³ The McKinney-Vento Act, 42 US Code §§11431-11435

⁴ See 2:22-cv-02664-WB

⁵ As of the date of the due process hearing, the settlement agreement remained valid. (N.T. 45)

sought monetary damages. The District advised the Parent that during the pendency of the proceeding, it remained the Student's LEA. (S-3; S-8, p. 5, 14; N.T. 31-32)

6. Since the June 2022 settlement agreement, the Parent has not completed any applications for Student's enrollment in a private school. (N.T. 105-108, 111, 129, 133-134)
7. On August 8, 2022, the Regional Coordinator for Pennsylvania's Education for Children and Youth Experiencing Homelessness Program advised the District that the Student and Parent no longer qualified as homeless under the McKinney-Vento Act. (S-8, p. 6-8; N.T. 35)

2022-2023 School Year

8. On August 24, 2022, the Parent filed a due process complaint and requested an Order for a private placement and compensatory education. On September 19, 2022, Hearing Officer Gerl determined the matter moot and dismissed the Parent's complaint (S-4; N.T. 38)
9. In August 2022, the Parent contacted the District and requested an IEP meeting. Because the Parent had not selected a private school for the Student, the District held the meeting to keep lines of communication open, foster school enrollment and discuss educational placements. (P-3, p. 2, P-4; S-5; N.T. 38-41)
10. At the September 15 meeting, the team discussed educational options, including the high school's emotional support program, the District's leadership and learning academy (PLLA), and private school placement. The Parent requested the Student's placement at the high school in general education. The District ended the meeting before it was concluded because the Parent became upset and reportedly yelled

and used profanity. No IEP or NOREP proposing placement in the PLLA was issued to the Parent. (S-5, S-7; N.T. 20-21, 38-41, 56)

11. On September 16, 2022, the Parent filed a due process complaint that requested an Order for a private placement. On September 30, 2022, Hearing Officer Gerl determined the matter moot and dismissed the Parent's complaint (S-6; N.T. 41-42)
12. On October 6, 2022, the District issued a NOREP to the Parent. Section 2 of the NOREP referenced the settlement agreement, the Parent's intention to reject it, and a discussion of the emotional support program at the high school and the PLLA. Section 2 also noted Parent's request for placement in general education and an explanation from the team that the Student was unsuccessful the prior school year and that the settlement agreement allowed for an appropriate, smaller setting. (P-7, S-7)
13. Section 3 of the NOREP explained that the District intended to follow the terms of the signed settlement agreement and facilitate a private placement for the Student. Section 4 of the NOREP indicated the team considered placement at the District high school but rejected that option because a settlement agreement was signed and in place. (S-7)
14. The educational placement recommended through the NOREP indicated the District intended to adhere to the June 2022 settlement agreement and work with the Parent to find a private placement. (S-7)
15. On October 10, 2022, the Parent rejected the NOREP and requested a due process hearing. (S-7)
16. On October 15, 2022, the Parent filed the current due process complaint.

17. During the 2022-2023 school year, the Student has not attended school, and the Parent has not selected a private placement. (N.T. 43)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

The Burden of Proof

The burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parent is the party seeking relief and must bear the burden of persuasion.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility

determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information 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 contradictions. This does not mean that I assign equal weight to all testimony. Hearsay, no matter how fervently believed by the witness, cannot form the basis of this decision. Further, in this case, portions of the Parent's testimony were speculative. The contradictions between the Parent's testimony and the testimony of District employees were notable, but the areas of disagreement were not outcome determinative. To the extent that my findings of fact are derived from testimony alone (as opposed to documentary evidence or a combination of both), the weight that I assign to each witnesses' testimony is reflected in my findings above.

General IDEA Principles: Substantive FAPE

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "reasonably calculated" to enable the child to receive

'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017). The *Endrew* decision was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982). In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id.* The Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew* decision is no different. A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925 (1988). However, the meaningful benefit standard requires LEAs to provide more than "trivial" or "de minimis" benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), cert. denied 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome or a specific level of achievement. See, e.g., *J.L. v.*

North Penn School District, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). In *Endrew*, the Supreme Court effectively agreed with the Third Circuit by rejecting a “merely more than de minimis” standard, holding instead that the “IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. 988, 1001 (2017). 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 time it is issued to offer an appropriately ambitious education in light of the Student’s circumstances.

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer*, *supra*, at 53. 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). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E)

Parent’s Claims

The Parent’s chief complaint that developed during the hearing centered on disagreement with the validity of the settlement agreement reached by both parties in June 2022. That agreement awarded significant monetary compensatory education and private school placement for the Student at the District expense through the 2025-2026 school year. As

made clear during a prehearing conference and through the statement of issues on the hearing record, the validity of that agreement is a matter currently pending in federal court and not the issue for resolution through this due process hearing.⁶ Concerning the issues raised in the due process complaint and agreed upon for hearing, the Parent has failed to sustain her burden of proof.

In the complaint, the Parent alleged that the PLLA program, proposed by the District, failed to offer the Student a FAPE. The hearing evidence does not support that contention. Testimony from both District witnesses established that the parties discussed the PLLA program at the September IEP meeting; however, PLLA was simply an option discussed by the team, along with the Parent's request for regular education, and not the District's proposal for FAPE for the 2022-2023 school year. The October NOREP and corroborative evidence clearly showed that the District intended to honor the June settlement agreement and work toward Student's placement in a private school. This point was reiterated during the meeting and in the documentation provided to the Parent, after the meeting. The September meeting to discuss placement options was held because the Parent requested it, not because District had an obligation to offer non-private school programming to the Student. The NOREP clearly and without ambiguity documented the September meeting discussion but ended not with a recommendation for placement but a District pledge to adhere to the June settlement agreement and cooperate with the Parent to secure a private placement for the Student. Finally, concerning the appropriateness of the PLLA as a placement option, that question cannot be reached for two reasons. First, the IEP never proposed this option for the Student for the 2022-2023 school year. Second, the Parent did not submit evidence to support her claim that it was, in fact, an offer of FAPE or information

⁶ (N.T. 9-10, 85)

regarding the substance and structure of the PLLA program. The Parent further failed to provide evidence that the District's consideration and ultimate rejection of PLLA constituted a violation of the IDEA. Based upon the foregoing, the Parent was unable to meet her burden by a preponderance of evidence to prove a violation of the IDEA; therefore, no remedy is warranted.

ORDER

AND NOW, this 22nd day of December 2022, in accordance with the foregoing findings of fact and conclusions of law, the Parent is not entitled to relief. Any claims not specifically addressed by this decision and order are **DENIED and DISMISSED**.

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.
Special Education Hearing Officer

December 22, 2022