

*This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.*

## **Pennsylvania Special Education Hearing Officer**

### **Final Decision and Order**

**ODR No. 27490-22-23**

#### **CLOSED HEARING**

**Child's Name:**

T.M.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents:**

None

**Local Education Agency:**

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**Hearing Officer:**

James Gerl, CHO

**Date of Decision:**

May 4, 2023

## **BACKGROUND**

The school district filed a due process complaint seeking declaratory relief concerning which of the various options for the student's program it should implement.

I find in favor of the parents with regard to all issues presented because the school district has not proven that its complaint is appropriate or that any of the options that it has proposed would provide a free and appropriate public education to the student.

## **PROCEDURAL HISTORY**

The hearing for this matter was concluded in one virtual hearing. The hearing and decisional process were shortened by the parties agreeing to numerous stipulations of fact. Three witnesses testified at the hearing. Parent exhibits P-1 through P-4 were admitted into evidence. Parent exhibit P-5 was excluded because it contained settlement discussions and because it was not relevant to the issues presented. School district exhibits S-1 through S-25 were admitted into evidence.

Prior to the due process hearing, the unrepresented parent and counsel for the school district participated in a prehearing conference. Also prior to the hearing, the school district submitted a written brief pertaining to whether or not the school district could file a due process complaint such as this one.

After the hearing, counsel for the school district submitted a written closing argument/post-hearing brief and proposed findings of fact. The parents were invited to submit a written closing argument but elected not to do so. All arguments submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the

findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

To the extent possible, personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

### **ISSUES PRESENTED**

The due process complaint, as explained and clarified at the prehearing conference, presents the following issues:

1. Whether the school district has proven that it may file a due process complaint to help it select which of three potential programs for the student should be implemented?

2. Whether the school district has proven that it should implement one of the following programs for the student:

(a) the October 2022 IEP;

(b) the December 2022 IEP revision; or

(c) may the district exit the student from special education?

## **FINDINGS OF FACT**

Based upon the parties' stipulations of fact, I have made the following findings of fact:

1. The student is a [middle-school aged student].
2. The student is a resident of and a student in the school district.
3. The school district is the local education agency for the student.
4. The student is a student with a disability eligible for and in need of special education services under the Individuals With Disabilities Education Act (IDEA) with a disability category of emotional disturbance [redacted]
5. An evaluation report finding the student eligible for special education was completed on September 23, 2022.
6. The September 23, 2022 evaluation report identified the student's needs as resiliency and coping skills, ability to regulate emotions and stress, and ability to identify causes of negative reactions.
7. An initial individualized educational plan (hereafter referred to as "IEP") was created based upon the strengths, needs and recommendations of the September 23, 2022 evaluation report.
8. The student's IEP team met on October 7, 2022 to review and discuss the evaluation report and to create the October 7, 2022 IEP.
9. The student's mother participated virtually in the October 7, 2022 IEP team meeting.
10. The October 7, 2022 IEP proposed a placement of itinerant emotional support at the student's neighborhood school in the district.
11. The October 7, 2022 IEP proposed a program that included direct instruction in coping skills with special education advisory support three

periods per cycle in lieu of regular education advisory, with resiliency training one time per cycle and special education advisory, and then advisory humanities the other three times per cycle.

12. The October 7, 2022 IEP proposed modifications and specially designed instruction that included classroom, homework and testing accommodations.

13. On October 9, 2022, the district sent the parents a Notice of Recommended Educational Placement (hereafter referred to as "NOREP") proposing to implement the October 7, 2022 IEP.

14. On October 12, 2022, the parents signed and approved the NOREP. The IEP was implemented.

15. A December 6, 2022 IEP revision provided various options. The first option would allow the student to go to a special education case manager for advisory support and allow the student to participate in the initiatives class.

16. The second option provided by the December 6, 2022 proposed IEP revision would allow the student to meet with a special education case manager one-on-one during third period two times per cycle with one period for resiliency skills and one period for advisory support, and then be scheduled out of one of the student's special classes (music) to do so.

17. The two options were sent to the parents after the December 6, 2022 IEP team meeting.

18. On December 13, 2022, after the parents had not responded concerning which option that they preferred, the district sent the parents a NOREP to implement the second option being recommended in the proposed IEP revision of December 6, 2022.

19. The district sent the parents the NOREP multiple times, but the parents did not return the December 13, 2022 NOREP or disagree with the prior NOREP from October 12, 2022.

20. The school district informed the parents that the December 6, 2022 IEP revision would be implemented effective January 6, 2023 if the parents did not respond.

21. On December 21, 2022, the student's mother emailed the school district stating that the parents would not be signing or returning the December 13, 2022 NOREP, did not want the student's class schedule to change, and supported the student not attending the advisory support class, as outlined in the October 7, 2022 IEP.

22. On January 5, 2022, the school district sent an e-mail to the parents offering an opportunity for the parents to revoke consent or exit the student from special education services. The district informed the parents that if the parents did not respond, the district would file a due process complaint to clarify which program to implement.

23. The parents did not respond to the school district's e-mail of January 5, 2022.

24. On January 17, 2023, the school district filed the instant due process complaint.

Based upon the evidence in the record compiled at the due process hearing, I have made the following findings of fact: <sup>1</sup>

25. [redacted] (NT 163 - 164)

26. The student has been diagnosed with depression. (S-1; NT 108 – 110, 140)

27. During the prehearing phase of this proceeding and continuing through the date of the due process hearing, the student’s mother was dealing with [redacted] (NT 147, 152)

28. The special education advisory class referred to in the October 7, 2022 IEP had a total of eight or nine students. There were three or four adults present, including the special education teacher. The advisory class would meet for three 45-minute periods in a six-day cycle in lieu of the regular education advisory. Included would be resiliency training that would provide lessons on various coping strategies and mechanisms to help the student with emotional regulation. The resiliency instruction would be provided in one of the three periods and for the other two periods, academic support would be provided. (S-3; NT 37 – 39)

29. The student avoided participation in the special education advisory class. From October 12 to November 10, 2022, the student attended only two of six special education advisory classes and zero of the resiliency lessons. Even though the student was present at school, the student did not go to the

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<sup>1</sup> (Exhibits shall hereafter be referred to as “P-1,” etc. for the parents’ exhibits; and “S-1,” etc. for the school district’s exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as “NT\_\_\_\_”).

special education class. Instead, the student attended the former regular education advisory class. (NT 40 – 42)

30. By the end of October 2022, the parents requested a change to the student's classes. On November 10, 2022, the student's IEP team, including the mother, met virtually to discuss revisions to the student's IEP. (NT 42)

31. At the November 10, 2022 IEP team meeting, the IEP team members proposed a change to the student's preferred regular education teacher with the regular education advisory period three times per cycle while still proposing special education advisory support the other three times per cycle, including resiliency skills for one of those classes. The parents and student declined this change. (S-8; NT 44 – 46)

32. On November 15, 2022, the district sent the parents a NOREP proposing to implement the revisions made at the November 10, 2022 IEP team meeting. (S-9; NT 46)

33. The student told the mother that the student did not want to attend the special education advisory class because it was not best for the student. The student's mother objected to the student attending the class with special education students who had one-on-one aides. The student's mother wanted the student's schedule changed back to the student's regular education advisory class but also wanted the student's IEP to remain in place. (NT 48, 115 – 125, 143, 151 – 157, 161 – 162)

34. On November 28, 2022, the assistant principal informed the mother that she would speak with the student about the student's not attending the special education advisory class. The assistant principal spoke with the student in the main office for approximately one minute to remind the student of the student's schedule and that the student needed to go to



the special education advisory class. Later on the same day, the assistant principal spoke again with the student one on one in the hallway outside of the regular education class after the assistant principal had pulled the student out of class. The second meeting was also approximately one minute, and the vice principal informed the student that the student needed to go to the special education advisory class and that if the student did not follow the student's schedule, it would be insubordination under the school's code of conduct. The vice principal then made a formal disciplinary referral of the student for insubordination for not attending the special education advisory class. No other disciplinary action was taken, and the student continued to attend the student's regular education class. (S-11; S-12; NT 83 – 86)

35. The student's mother had previously informed the assistant principal that pulling the student out of class was a trigger that caused the student's depression to be affected. (NT 136)

36. An IEP team meeting was scheduled for December 6, 2022. The parents were invited, and the mother replied that she would attend, but later clarified that she would attend by telephone. The parents did not attend the December 6, 2022 IEP team meeting. The district attempted to contact the parents but was unable to reach the parents [redacted] (P-3; NT 49 – 50)

37. The second option proposed at the December 6, 2022 IEP team meeting was initially suggested by the mother. (NT 54, 159 – 160)

38. The student's mother has stated that there is no program that the school district could offer to the student that would be acceptable. (NT 140, 161 – 162)

39. The student's mother does not believe that the student needs special education services, but the mother does not want to exit the student from special education because of the time that it takes to schedule an IEP

team meeting and implement a new IEP. (NT 143, 151, 156 – 157, 161 – 162)

40. The school district has not attempted to evaluate whether the student's avoidance of special education class is caused by or related to the student's disability. (Record evidence as a whole)

41. None of the student's IEPs or proposed IEPs note that the student's behavior affects the student's learning or the learning of other students. (Record evidence as a whole)

42. The IEPs developed by the school district do not include a behavioral intervention plan or other positive behavior supports and strategies to address the student's avoidance of special education classes. (Record evidence as a whole)

### **CONCLUSIONS OF LAW**

Based upon the arguments of the parties, all of the evidence in the record, as well as my own legal research, I have made the following conclusions of law:

1. A parent or a local education agency may file a due process complaint alleging one or more of following four types of violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq., (hereafter sometimes referred to as "IDEA") that occurred within the last two years: an identification violation, an evaluation violation, a placement violation or a failure to provide a free and appropriate public education. IDEA §615(f)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

2. The burden of persuasion in IDEA cases is placed upon the party filing the due process complaint. Schafer v. Weast, 546 U.S. 49, 44 IDELR

150 (2005); LE and ES ex rel. MS v. Ramsey Board of Education, 435 F. 3d 384, 44 IDELR 269 (3d Cir. 2006).

3. The United States Supreme Court has developed a two-part test for determining whether a school district has provided a free appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program is reasonably calculated to enable the child to make progress in light of the child's unique individual circumstances. Endrew F by Joseph F v. Douglass County School District RE-1, 580 U.S. 386, 69 IDELR 174 (2017); Board of Educ., etc. v. Rowley, 458 U.S. 178, 553 IDELR 656 (1982); KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

4. Where a student with a disability has behaviors that impede the student's learning or the learning of others, the student's IEP team must consider the use of positive behavior interventions and supports and other strategies to address those behaviors. IDEA § 614(d)(3)(B)(1); 34 C.F.R. § 300.324(a)(2)(i); 22 Pa. Code § 14-133; Sean C by Helen C v. Oxford Area School District, 70 IDELR 146 (E.D. Penna. 2017).

5. An IDEA hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates the Act. All relief under IDEA is equitable. Forest Grove School District v. TA, 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (at n. 11) (2009); Ferren C. v. Sch. Dist. of Philadelphia, 612 F. 3d 712, 54 IDELR 274 (3d Cir. 2010); CH by Hayes v. Cape Henlopen Sch. Dist., 606 F. 3d 59, 54 IDELR 212 (3d Cir 2010); Sch. Dist. of Philadelphia v. Williams ex rel. LH, 66 IDELR 214 (E.D. Penna. 2015); Stapleton v. Penns Valley Area Sch. Dist., 71 IDELR 87 (E.D. Penna. 2017).

See Reid ex rel. Reid v. District of Columbia, 401 F. 3d 516, 43 IDELR 32 (D.C. Cir. 2005); Garcia v. Board of Ed., Albuquerque Public Schools, 530 F. 3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a Disability, 52 IDELR 239 (SEA W.V. 2009).

6. Stereotypes about children with disabilities and an overemphasis on labels is antithetical to the individualization that is at the heart of IDEA. Andrew F, supra; 34 C.F.R. § 300.304(a)(6); Heather S v. State of Wisconsin, 125 F. 3d 1045, 26 IDELR 870 (7th Cir. 1997); Osage R-1 School District v. Sims ex rel. BS, 841 F. 3d 996, 56 IDELR 282 (8th Cir. 2011); School District of Philadelphia v. Post, 262 F. Supp. 3d 178, 70 IDELR 96 (E.D. Penna. 2017).

7. The school district has not proven that the instant complaint is a proper use of the due process hearing system.

8. The school district has not proven that any of the options offered by it to the student provide a free and appropriate public education and are otherwise compliant with idea.

9. The school district has not proven that its complaint should be sustained.

## **DISCUSSION**

### **1. Whether the school district may file a due process complaint to help it select which of three potential programs for the student should be implemented?**

The school district filed this complaint seeking declaratory relief concerning which of three potential options for the student should be implemented. Prior to the hearing, the hearing officer asked counsel for the school district to brief the legal authority supporting its filing of a due process

complaint for the issues raised by this complaint. Counsel for the school district addressed the question in a prehearing brief, as well as in the school district's post-hearing brief. The unrepresented parents have not taken a position with regard to this issue.

IDEA envisions certain disputes in which a local education agency may file a due process complaint. For example, if a school district refuses to pay for an independent educational evaluation at public expense, the school district is required to file a due process complaint. 34 C.F.R. § 300.502. IDEA also recognizes that a local education agency may, but is not required to, file a due process complaint to override the failure of a parent to give consent to an evaluation. 34 C.F.R. § 300.300. In addition, IDEA recognizes that a local education agency may file a due process complaint in certain cases involving discipline of a student with a disability or safety concerns related thereto. 34 C.F.R. § 300.532.

IDEA also provides a general provision stating that a parent or public agency may file a due process complaint for issues involving identification, evaluation, educational placement or the provision of a free and appropriate public education that involves an alleged violation of IDEA that occurred within the past two years. 34 C.F.R. § 300.507(a). In addition, the Pennsylvania Code also provides that when a parent rejects a public agency's proposed provision of a free and appropriate public education, the public agency may request an impartial due process hearing. PA Code § 14.162(c).

The school district's brief cites case law concerning the authority of an IDEA hearing officer to award declaratory relief in certain cases where a violation has been proven. It is well settled that an IDEA hearing officer has such authority; that is not the issue in the instant case. The issue is whether

this request for direction as to which of three options the district should select is an appropriate use of the due process hearing system.

The only caselaw cited by the school district's brief as authority to support its filing of the due process complaint in this case is two hearing officer decisions. Although hearing officer decisions are not precedential in nature, they may be cited by a party, and if the reasoning is persuasive, they may be relied upon.

The two hearing officer decisions cited by the school district in this case, however, are distinguishable as neither case involved a school district seeking guidance concerning which program to implement for a student. In DL v. Neshaminy Sch Dist, ODR File No. 19622-17-18 (September 20, 2017), the dispute concerned which of two school districts was the correct local education agency for the student. The facts of that case are clearly distinguishable from those of the instant due process complaint. The second case cited by the school district is TW v. Sch Dist of Philadelphia, ODR File No. 14391-13-14 (February 26, 2014) in which the school district's complaint was ancillary to the main issue of whether an independent educational evaluation at public expense should be provided. Once again, the facts of this case are clearly distinguishable. It is instructive that the school district could not find or cite a single reported court opinion or hearing officer decision with a fact pattern resembling this one.

It is the duty of the local education agency to determine a program for a particular student that provides a free and appropriate public education. IDEA, Section 612; 34 CFR Section 300.200. Thus, the school district must select the option that provides FAPE to the student and is otherwise compliant with IDEA. It should be noted that the school district is not without options. After it selects the program for the student that provides a free and

appropriate public education and otherwise meets IDEA requirements, and the parent refuses to accept the placement, the school district may issue prior written notice and implement the program. 34 C.F.R. § 300.503. If the parent is aggrieved by the school district's action and believes that the school district has violated IDEA, the parent may file a due process complaint or otherwise access the law's procedural safeguards. Similarly, the school district at that point could also file a due process complaint.

In the instant case, the school district has not cited any legal authority that supports its filing of the instant complaint. Thus, the school district has not met its burden of establishing that it may file a due process complaint seeking guidance concerning which program to implement. Accordingly, the complaint is dismissed, and the relief sought by the school district is denied.

**2. Which of the following programs for the student should the school district implement?**

- a. The October 22 IEP; or**
- b. The December 2022 IEP revision, or may the district exit the student from special education services; or**
- c. May the district exit the student from special education?**

It is not necessary to reach the issue of which of the three programs identified by the school district should be implemented because the school district has not proven that its due process complaint was appropriately filed under IDEA. Even assuming *arguendo*, that the school district's complaint is a valid exercise of the IDEA procedural safeguards, however, it is clear that

the school district has not met its burden of proving that any of the three options it has proposed provides a free and appropriate public education to the student.

As the Supreme Court has made clear, the requirements of FAPE are dependent upon the unique individual circumstances of a child with a disability. See, Andrew F, supra. In the instant case, the evaluation of the student revealed that the student's needs include the need for the resiliency training proposed by the school district. It is clear from all of the evidence in the record that the student would receive meaningful benefit from the resiliency training that was proposed by the district.

The most important of the unique individual circumstances of this particular student, however, involves the student's avoidance of the special education advisory class. Obviously, the student cannot receive the benefit of the resiliency training unless the student attends the class. Despite the significance of the student's avoidance behaviors, however, the school district has presented no evidence that it has attempted to assess whether the avoidance behaviors are caused by or related to the student's disability. Despite the avoidance behaviors and the district's awareness of the problem, none of the IEPs for the student that were developed by the school district have a check in the box indicating that the student had behaviors that impact the student's learning or the learning of other students. There is also no evidence in the record that the school district conducted a functional behavioral assessment or any other assessment regarding the avoidance behavior. Moreover, there is no evidence that the school district developed a behavioral intervention plan for the student or otherwise developed positive behavior supports and strategies to address the avoidance behaviors.



Instead, the vice-principal issued a disciplinary referral of the student for insubordination because of the student's avoidance behaviors. It is instructive that the initial reaction of school staff was to discipline the student. Students with disabilities have historically been subjected to disproportionate school discipline. See, "Report to Congressional Requestors: Discipline Disparities for Black Students, Boys, and Students with Disabilities," GAO-18-258 (Government Accountability Office, March 2018). It is also instructive that the assistant principal pulled the student out of class to warn the student about discipline for insubordination after the student's mother had specifically informed the Assistant Principal that being pulled out of class was a trigger that affects the student's depression. This action was an apparent act of cruelty. The school district's inclination to punish the student rather than appropriately address the student's problem avoidance behavior is unacceptable.

It is recognized that this is not a case involving a disciplinary change of placement that would require the school district to conduct a manifestation determination review concerning the student's behaviors. 34 C.F.R. § 300.530. Similarly, IDEA does not require a functional behavioral analysis or a behavioral intervention plan in most cases. IDEA does require, however, that when a student's behavior impedes the student's learning, the IEP team must consider the use of positive behavioral interventions and supports and other strategies to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). There is no evidence in the record that such matters were addressed by the student's IEP team in this case.

Because the school district has not assessed the nature of the student's avoidance behaviors or any relationship to the student's disability, and because the school district has not provided any positive behavior supports or

other strategies to deal with the student's avoidance behaviors as a part of the student's IEP, it cannot be concluded that any of the options proposed by the school district would provide a free and appropriate public education for this student. Accordingly, the school district has not met its burden of proving that any of the three options that it has proposed for the student should be implemented.

To the extent that the testimony of the witnesses was discrepant, the testimony of the mother was more persuasive and credible than the testimony of the school district witnesses with regard to this issue.

It is very clear that both parties to this case have been unreasonable. [redacted]. The student's mother testified that there is no program that the school district could offer that would be acceptable to her. Thus, it is possible that even if the school district developed a program that does properly address the student's avoidance behavior, thereby offering a free and appropriate public education to the student, the parents still might not accept the program.

The student's mother also testified that although she will not permit the student to attend the special education class, she does not want to exit the student from special education because of the length of time that it might take to obtain a new IEP in the event that it were necessary. This is not how the system works, however. A parent may not keep an IEP in their back pocket and decline to use it until some unspecified later time. If an IEP is developed for a student, the school district is legally required to implement it.

Even more disturbingly, the student's mother made some less than appropriate comments about the student being in a classroom with special education students [redacted]. Such stereotypical thinking is at odds with the individualization that is the backbone of IDEA.

As the U.S. Supreme Court has noted, the special education system developed by IDEA requires a collaborative relationship and effort between school districts and families. Schafer v. Weast, supra. The extremely toxic relationship between the student's parents and the school district in this case is intolerable, and it clearly adversely affects the student. The unreasonable behavior by the school district in failing to assess the student's problem behaviors and develop appropriate positive behavior supports and strategies, and the equally unreasonable behavior by the student's parents in obstructing efforts of the school district to appropriately educate the student must end. It is hoped that both parties will reflect upon the nature of their relationship to date and pursue a more collaborative effort in the future- for the sake of the student.

It is concluded that the school district has not met its burden of proving that any of the three options that it has identified for the student's program would provide a free and appropriate public education for the student. The school district's complaint must be dismissed.

**ORDER**

Based upon the foregoing, it is **HEREBY ORDERED** that all relief requested in the due process complaint is hereby denied. The complaint is dismissed.

**IT IS SO ORDERED.**

ENTERED: May 4, 2023

*James Gerl*

James Gerl, CHO  
Hearing Officer