

*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

OPEN HEARING

ODR File Number: 20563/17-18 KE

Child's Name: J.H.

Date of Birth: [redacted]

Date(s) of Hearing:

July 2, 2018

July 16, 2018

Guardian:

[redacted]

*Counsel for Parent*

Pro Se

Local Education Agency:

Commonwealth Charter Academy

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Hearing Officer: Linda M. Valentini, Psy.D., Certified Hearing Official

Date of Decision: July 24, 2018

## Background and Procedural History

Student<sup>1</sup> is a late-teenaged student who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and PA Chapter 14.<sup>2</sup> Student has been enrolled in the Charter School (School), a virtual learning environment (aka cyber charter school), since the 2014-2015 school year. The School requested this due process hearing, asking for a determination that it offered Student a free appropriate public education (FAPE) for the 2017-2018 school year.<sup>3</sup> The Guardian counters that Student's current IEP is inappropriate, and asks for an Order that requires the School to develop a new reevaluation report and IEP that fully document Student's diagnoses and the manner in which they substantially affect Student's ability to learn and function in the educational setting; she requests that Student be awarded compensatory relief for procedural and substantive deprivation of FAPE.<sup>4</sup>

In reaching my decision I carefully considered the witnesses' sworn testimony, documents admitted into the record, and the parties' written closing arguments. Below I reference the evidence that I found to be directly relevant to deciding the issues before me; hence not all testimony nor all documents comprising the record are cited. Based upon the preponderance of the evidence before me I find in favor of the School.

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<sup>1</sup> 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. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>3</sup> The School asked for prospective relief, which I decline to award. Specifically, the School asked that I issue an Order requiring the Guardian to either: (a) make Student available for baseline assessments, progress monitoring, and transition assessments; cooperate in the scheduling of the related services listed in Student's IEP; and support Student's engagement in the on-line school; or, (b) withdraw Student from the School within ten (10) days after the entry of the Order. While my Order shall include elements under (a), I believe that I do not have the authority to order a parent/guardian to disenroll a student from an LEA as requested under (b).

<sup>4</sup> Although it was not an issue in the School's complaint, the Guardian asked for an Order that the School immediately provide Student with homebound instruction by a special education teacher qualified to teach a student with Student's disabilities. This relief is barred on the grounds of *res judicata*, given the February 28, 2018 Final Decision and Order by Hearing Officer Ford, noted in the Findings of Fact below, determining that Student does not require homebound instruction. *Res judicata*, or issue preclusion, forecloses "re-litigation in a later action . . . of an issue of fact or law which was actually litigated and which was necessary to the original judgment." *Dici v. Commonwealth of Pennsylvania*, 91 F.3d 542, 548 (3d Cir. 1996) (citations omitted). Issue preclusion applies if the following four elements are satisfied: (1) the issue decided in the prior adjudication was identical to the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issue in a prior action. *Id.* Consistent with general preclusion doctrine, the Pennsylvania intermediate appellate court has held the doctrine of *res judicata* applies in the educational context when a hearing has occurred. *Montour Sch. Dist. v. S.T.*, 805 A.2d 29, 40–41 (Pa. Cmwlth. 2002).

## Issue

Did the School offer Student a free appropriate public education for the 2017-2018 school year, and if not, what remedy, if any, is due?

## Findings of Fact

1. Pursuant to a previous due process complaint, Hearing Officer McElligott issued a decision on September 30, 2017 finding that the School did not deny Student FAPE for the 2016-2017 school year and for the 2017-2018 school year through the date of the decision.<sup>5</sup> [S-1]
2. Because of the length of time the hearing was ongoing, Hearing Officer McElligott ordered the School to conduct current baseline assessments for progress monitoring of the IEP goals, and to make some additional specific modifications to update the April 2017 IEP. The resultant IEP would become the 'HO-ordered IEP' and would be the pendent appropriate IEP. The School made the ordered specific modifications on October 3, 2017 in fulfillment of part of the hearing officer's order. [NT 30-32; S-1, S-2]
3. Beginning in early October, the School made considerable efforts to obtain the baseline assessments that Hearing Officer McElligott had ordered. Virtual assessments were available, but at the Guardian's request the School agreed to conduct the assessments in person, either in Student's home or at its local office. Ultimately the Guardian did not allow the School access to Student and the IEP baselines for progress monitoring of the goals were never obtained. [NT 29, 33-35; S-7, S-23]
4. Although the School is a virtual learning environment, the October 3, 2017 IEP provided that Student would receive 1:1 'face-to-face' support from an Instructional Assistant two hours per school day as well as 1:1 'face-to-face' support from a Board Certified Behavior Analyst (BCBA) one hour per week. Student was also to receive 30 minutes of 'virtual' counseling per week.<sup>6</sup> [S-2]
5. The trained instructional aide working in-person with Student would be following recommendations for instructional strategies to address Student's needs that came from the BCBA and from the special education teacher, based upon the findings of a reevaluation considered by the IEP team. [NT 153-155, 157]
6. The School contracted with a provider agency to supply the in-home Instructional Assistant and the in-home BCBA. The provider agency and the School attempted to arrange the face-to-face services, but Student never received these services because

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<sup>5</sup> In addition to those cited here, there have been several other due process hearings regarding Student against the School as well as previously against the School District of residence. The decisions in those cases are not relevant here.

<sup>6</sup> Face-to face indicates that the support would be delivered in person at Student's home; virtual indicates support provided through a computer connection.

attempts to schedule with the Guardian through leaving telephone voice messages and sending webmail were unsuccessful.<sup>7</sup> [NT 31-32; S-4]

7. Student did engage in the virtual counseling sessions throughout the 2017-2018 school year. [NT 31-32]
8. On October 7, 2017, the Guardian requested 'homebound instruction' for Student. The School did not agree to provide homebound instruction, and the Guardian filed a due process complaint. [S-3; S-13]
9. On February 16, 2018 following a hearing on that complaint Hearing Officer Ford issued a ruling finding that Student did not require in-person instruction delivered by a special education teacher in the home in order to receive FAPE. [S-13]
10. With the exception of a few weeks in October 2017, Student did not participate in the School's on-line program (including the planned face-to-face services) from the date of Hearing Officer McElligott's Order through the end of the 2017-2018 school year including during the period after Hearing Officer Ford's decision.<sup>8</sup> [NT 104-105, 190, 193; S-23]
11. Student's teachers reached out to Student through webmail and telephone calls regarding classes and assignments throughout the 2017-18 school year, and routinely offered assistance to Student to manage and make up work. [NT 60-63; S-2]
12. Student's last reevaluation prepared by the School is dated March 13, 2015. [NT 132; P-2]
13. In December 2017 the School sought permission to complete Student's mandated triennial reevaluation, proposing a comprehensive evaluation including assessments of cognitive functioning and academic achievement, behavior rating scales, a speech and language evaluation and an occupational therapy evaluation. [NT 193-194; S- 6]
14. The Guardian requested an informal meeting, and requested the attendance of various individuals at that meeting. The School scheduled the meeting and invited the attendees requested by the Guardian, but the Guardian did not attend or participate in the meeting. [NT 76-77; S-6; S-8; S-23]
15. Given Student's age, and having been unsuccessful in securing permission for a comprehensive reevaluation, the School then proposed an evaluation focused only on transition planning. The Guardian did not consent to the transition evaluation. [NT 86-87, 193-194; S-12]

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<sup>7</sup> The Guardian represented that she spoke with several of these providers and that they said they were not qualified to work with Student. I cannot rely on this hearsay statement as neither party produced these individuals. [NT 191-192]

<sup>8</sup> It is noted that due to Student's age truancy and compulsory education laws do not apply.

16. The School convened an IEP meeting on April 9, 2018 and the Guardian participated. The School reiterated its proposal to complete a comprehensive reevaluation including a transition evaluation and provided details requested by the Guardian on several occasions. However, the Guardian ultimately did not provide consent for the reevaluation. [NT 168, 171, 175-177, 193-194; S-19, S-20, S-21, S-22]
17. At the April 9, 2018 IEP meeting the IEP team discussed a plan for helping Student catch up on the work missed during the school year. After the meeting, the School issued a new IEP dated April 9, 2018 along with a NOREP of the same date. [S-18; P-5]
18. The April 9, 2018 IEP was substantially similar to the Hearing Officer-ordered IEP of October 2017, except that it included seventy-eight (78) pages of reports and related information that the Guardian submitted as Parental Input, an updated self-advocacy goal, and an increase in the in-home face-to-face Instructional Assistant support from two (2) hours per day to four (4) hours per day. [S-18]
19. With the exception of Student's participation in academic instruction for a few weeks in early October and Student's year-long participation in counseling the School was not permitted to implement either of Student's IEPs during the 2017-2018 school year. Further, the School was not allowed to fulfill Hearing Officer McElligott's order to conduct baseline assessments for progress monitoring of goals, or to provide a comprehensive reevaluation of Student including a transition evaluation. [NT 57, 116-117, 104-105]

### Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the School asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to 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); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *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). None of the witnesses presented with credibility issues.

Charter Schools: A charter school acts as the LEA for its students, and assumes the duty to ensure that a FAPE is available to a child with a disability in compliance with IDEA and Section 504 and their respective implementing regulations. 34 C.F.R. 300.209(c); 22 Pa. Code §§ 14.103, 711.3. Chapter 711 *et. seq.* of the Pennsylvania School Code, “Charter School and Cyber Charter School Services and Programs for Children with Disabilities”, contains regulations specific to individuals with disabilities being educated in charter schools and cyber charter schools. Chapter 711 incorporates by reference all the IDEA regulations at 22 Pa. Code 711.3. Chapter 711 also incorporates relevant antidiscrimination provisions in Section 504 and its implementing regulations. Charter schools and cyber charter schools must comply with 22 Pa. Code Chapter 4 relating to academic standards and assessment, 22 Pa. Code Chapter 11 relating to pupil attendance, and 22 Pa. Chapter 12 relating to discipline of students 22 Pa. Code §711. *et. seq.* Further references will be to the IDEA and/or its regulations.

Standards for a Free Appropriate Public Education: Student is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). ‘Special education’ is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26.

A child’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). FAPE “consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction.” *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Rowley*. The Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “meaningful educational benefits” in light of the student’s “intellectual potential.” *Shore Reg’l High Sch. Bd. f Ed. v. P.S.* 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir. 1988)); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently the U.S. Supreme Court concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017) This

standard is consistent with the above interpretations of *Rowley* by the Third Circuit. See also *E.D. v. Colonial School District*, No. 09-4837, 2017 U.S. Dist. LEXIS 50173, at \*36 (E.D. Pa. Mar. 31, 2017); *Brandywine Heights Area School District v. B.M.*, 2017 U.S. Dist. LEXIS 47550, at \*29 n. 25 (E.D. Pa. Mar. 28, 2017)

Local Educational Agencies [LEAs] need not provide the optimal level of service, maximize a child's opportunity, or even set a level that would confer additional benefits; the child must be offered 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); *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3<sup>rd</sup> Cir. 2012). The IDEA entitles Student to an appropriate educational opportunity, but an IEP is not required to incorporate every program, aid, or service that parents desire for their child. *Mary Courtney T; Ridley*. 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 in terms of a specific level of achievement, as noted in several federal district court decisions. See, e.g., *J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). 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). *Andrew F.* did not disturb this standard, which entitles a child to what is reasonable, not to what is ideal.

#### Discussion

The School has provided more than a preponderance of evidence that it attempted to implement the pendent appropriate Hearing Officer-ordered IEP of October 3, 2017 and its April 9, 2018 revision which I also find to be appropriate. Despite ongoing efforts to provide Student with FAPE under these IEPs, the School has been blocked from obtaining current baselines as ordered by Hearing Officer McElligott on September 30, 2017, and but for the virtual counseling, from implementing the virtual instruction and the face-to-face supports offered to Student. Further, the School has been prevented from conducting the mandated triennial reevaluation as well as a transition evaluation which is clearly needed given Student's age. I have no doubt that a comprehensive reevaluation, including cognitive, academic, behavioral/social/emotional, executive functioning, speech/language and gross/fine motor functioning updates would fully inform a robust IEP going forward. Given the Guardian's testimony that Student does not seem to understand or process what is said or directions given [NT 180-181], a current speech/language assessment is of significant importance. Additionally, of critical importance at this stage of Student's life, is a transition evaluation to assist Student's rapidly approaching adulthood with its expectations for competitive employment and independence.

I fully appreciate that Student's Guardian has been admirable in taking responsibility for this child over the years when the biological parents were unable to do so. During the time she has been Student's guardian she has kept a persistent eye on Student's education. Throughout, it seems that zealous pursuit for 'the perfect' has often been the enemy of 'the good' or the legally-mandated 'appropriate'. By law Student is entitled to what is appropriate, not to what is ideal, and certainly not to what is perfect. Although the Guardian was undoubtedly within her rights to reject any or all offered services given Student's no longer being of an age where school attendance is mandatory, her decisions did not impose upon the School a legal duty to conform its offers to her requests. I find that at all times relevant to the instant matter the School offered

Student FAPE in accord with Student's circumstances. I find that the School's offering of a blended virtual and face-to-face educational environment for the period in question was more than appropriate and commendable and represented FAPE.

Because the School offered FAPE, the Guardian's request for a remedy of compensatory education must be denied. Compensatory education is an equitable remedy; when parents actively prevent the LEA from delivering FAPE, the remedy is reduced or, as in this case, eliminated.

Given that Student is now beyond Pennsylvania's compulsory school attendance age, and has very few precious years of entitlement to special education remaining, it is my sincere hope that the parties can cease engaging in repeated litigation and work together for this soon-to-be young adult's educational benefit. The Order below is issued with the hope that a complete reevaluation will inform Student's educational program going forward into the upcoming school year.

#### Order

It is hereby ordered that:

1. The School offered Student a free appropriate public education for the 2017-2018 school year through the date of this decision, and therefore no remedy is due.
2. The Student's October 3, 2017 Hearing Officer-ordered IEP and the April 9, 2018 IEP are appropriate and constitute offers of FAPE at the time they were developed, with the understanding that baselines were not able to be assessed.
3. To satisfy the requirement for a triennial re-evaluation and to obtain current data necessary to update/revise the IEP, within 60 calendar days the School is ordered to conduct a comprehensive multidisciplinary reevaluation of Student which shall consist of the following based on input from teachers, the Guardian, and valid/reliable testing instruments: assessment of cognitive ability; assessments of academic achievement including such assessments as are necessary to obtain baselines for IEP goals; assessments of social, emotional and behavioral functioning including a Functional Behavior Assessment (FBA); a speech/language evaluation; an occupational therapy evaluation; and, a comprehensive transition assessment. The School shall proceed with this reevaluation pursuant to this Order, without the need to issue a PTRE or to obtain the Guardian's written or verbal consent. If Student is not made available for this comprehensive reevaluation in whole or in part the School is not liable for a denial of FAPE.
4. Within 10 calendar days of the completion of the reevaluation ordered above, the School shall convene a multidisciplinary team meeting to review the results of the reevaluation

with the Guardian. Within 5 calendar days after that meeting, the School shall convene an IEP team meeting to craft a new IEP in light of reevaluation results. The School is not required to revise Student's April 9, 2018 IEP through the time that the above-ordered assessments/evaluations are being completed and a new IEP is finalized.

5. The April 9, 2018 IEP is the pendent IEP through the completion of the comprehensive reevaluation ordered below and through to the time at which the subsequent IEP drafting process ends in an approved NOREP. The April 9, 2018 IEP shall remain the Student's pendent IEP in any subsequent litigation unless the parties agree otherwise in writing, or a subsequent order changes pendency.

Any claims not specifically addressed by this decision and order are denied and dismissed.

*Linda M. Valentini, Psy.D., CHO*

July 24, 2018

Linda M. Valentini, Psy.D. CHO  
Special Education Hearing Officer  
NAHO Certified Hearing Official