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Pennsylvania Special Education Hearing Officer **Final Decision and Order**

Closed Hearing

ODR File Number

26967-22-23

Child's Name

F.F.

Date of Birth

[redacted]

Parent

[redacted]

Local Educational Agency

York Suburban School District
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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

01/31/2023

Introduction

This special education due process hearing concerns the educational program and placement of F.F. ("student"), a middle school student who resides in the York Suburban School District ("District").¹

The parties disagree over the educational placement of the student under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA"), specifically as to whether the District's most-recent individualized education program ("IEP") and placement, developed in December 2021, are reasonably calculated to provide the student with a free, appropriate public education ("FAPE") under the terms of the IDEIA.² Parent asserts that the IEP, and particularly the District's recommendation that it be implemented in a placement outside of the District, are not appropriate.

The District defends its IEP and placement recommendation, based on outsized behaviors in the District placement. The student began attending the District in October 2021, for the 2021-2022 school year, before being enrolled in an online educational program within the local intermediate unit ("IU") in March 2022. The student dis-enrolled from the District and began attending a cyber charter school for the 2022-2023 school year.

Even though the student no longer attends school in the District, in prehearing planning, both parties felt the issue of the appropriateness of the most recent IEP and proposed placement is active, should the student re-enroll in the District. Additionally and in a similar vein, in February 2022 and September 2022, the District sought to re-evaluate the student but the

¹ The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818 (*see also* 22 PA Code §§14.101-14.162).

family did not provide consent for any re-evaluation. Therefore, an additional issue is whether, upon re-enrollment in the District, it should be provided with hearing officer authorization to conduct a re-evaluation of the student.

For reasons set forth below, I find that the December 2021 IEP, and the District's proposed placement outside of the District, were an appropriate offer of FAPE. Additionally, the District will be provided with hearing officer authorization to conduct a re-evaluation of the student, should the student re-enroll in the District.

Issues

1. Are the December 2021 IEP and proposed placement appropriate to meet the educational needs of the student?
2. Should the District be provided with hearing officer authorization to conduct a re-evaluation of the student?

Findings of Fact

Exhibits of record and testimony were considered in their entirety in writing this decision. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue presented.

1. The student began to reside in, and enrolled in, the District in October 2021 for the 2021-2022 school year. (S-9, S-30; NT at 37-62).
2. The student formerly resided in a different state, and the District was provided with the most recent evaluation report ("ER") and IEP from the out-of-state school district. (School District Exhibit ["S"]-4, S-6; Notes of Testimony ["NT"] at 9-36, 63-98).

3. The District implemented the IEP from the out-of-state school district and immediately requested permission to evaluate the student for special education eligibility and programming at that District. Parent provided consent for the evaluation. (S-15; NT at 37-62, 63-98).
4. In October – December 2021, the student was involved in numerous behavioral and disciplinary incidents. (S-23, S-24; NT at 63-98, 99-122, 123-163, 181-212).
5. In November 2021, the District issued its ER. (S-5).
6. The District made multiple requests for parental input in the November 2021 ER but did not receive input from the parent. (S-5; NT at 37-62).
7. The November 2021 ER received input from the student's teachers. Those educators provided input that the student exhibited significant academic weaknesses. The educators also provided consistent input that the student exhibited problematic behavior in school, including inattention/lack of focus, leaving the instructional area, work refusal, class disruption, verbal and physical aggression toward staff and peers, and elopement from class. (S-5).
8. Many of these acting-out behaviors were reported in the most recent evaluation from the out-of-state school district, which was completed in January 2020. (S-4, S-5).
9. The November 2021 ER reiterated a medical diagnosis of attention deficit hyperactivity disorder ("ADHD") documented in the most recent evaluation from the out-of-state ER. (S-4, S-5).

10. The November 2021 ER contained cognitive assessment results from the most recent evaluation from the out-of-state ER. The student's full-scale IQ was in the very low range (76). (S-4, S-5).³
11. Based on academic achievement testing in the most recent evaluation by the out-of-state school district, the student showed significant deficits in basic reading, math calculation, math problem-solving, and written expression. (S-4, S-5).
12. The November 2021 ER contained behavioral assessment. The parent rated the student with clinically-significant scores in the hyperactivity, aggression, depression, and attention problems sub-scales, and the externalizing problems and behavioral symptoms index composite scores. The student's teachers rated the student with clinically significant scores in almost every sub-scale and the externalizing problems, school problems, behavioral symptoms index, and adaptive skills composite scores. (S-5; NT at 37-62).
13. The November 2021 ER contained emotional-regulation assessment. The student was rated as highly-indicative for emotional disturbance based on scores in inability to learn, relationship problems, and inappropriate behavior. (S-5; NT at 37-62).
14. The November 2021 ER contained a functional behavior assessment ("FBA") based on classroom observations. (S-5).
15. The FBA in the November 2021 ER identified three behaviors of concern: elopement from classrooms, verbal aggression with staff and peers (including fighting words, profanity, and name-calling), and

³ The November 2021 ER also contained results from a 2017 evaluation from a different out-of-state school district. The student's full-scale IQ in the 2017 evaluation was reported to be in the very low range (78) with relative strength in listening comprehension (86).

physical aggression (including physical contact with peers, throwing or hitting objects/furniture). (S-5).

16. The FBA in the November 2021 ER recognized that the student's ADHD diagnosis might play a role in the student's behavior. The FBA recognized that physical and verbal aggression occurs with reprimand or request for task-completion, that elopement occurs with request for task-completion, and that verbal aggression with peers occurs when the student assumes peers are talking about the student. (S-5).
17. The FBA in the November 2021 ER recognized that problematic behavior is more likely to occur in the afternoon than in the morning. (S-5).
18. The FBA in the November 2021 ER indicated that the student often engaged in the behavior to obtain access to a cell phone, or to gain the attention of a school counselor, and/or a sibling in the school, and/or the student's [parent] by phone. (S-5).
19. The November 2021 ER identified the student as a student with specific learning disabilities in basic reading, math calculation, math problem-solving, and written expression. The ER also identified the student as a student with a health impairment (ADHD). The ER deferred any identification as a student with an emotional disturbance since indications of any emotional disturbance "have not been observed over a long period of time". (S-5).
20. In mid-December 2021, the student's IEP team met to consider the student's IEP. (S-7, S-10).
21. The December 2021 IEP contained eight goals, including three behavior goals in physical aggression, verbal aggression, and

elopement, as well as one goal each in math problem-solving, math computation, reading fluency, reading/sight words, and writing. (S-7).

22. The December 2021 IEP included specially-designed instruction and program modifications. (S-7).

23. The December 2021 IEP included a positive behavior support plan, based on the November 2021 FBA. (S-7).

24. The student's placement in the December 2021 IEP was in the general education setting, with co-taught classes in mathematics and English/language arts, two periods per week in learning support for support in reading, math, and written expression, and direct instruction periods for reading goals. The student would spend approximately 85% of the school day in general education settings. (S-7).

25. The December 2021 IEP included daily check-in with the District behavior support teacher and as-needed access to the school counselor. (S-7).

26. The parent approved the December 2021 IEP and recommended educational placement. (S-11).

27. The student's attendance at the District was sporadic, including many absences and tardy arrivals. (S-30; NT at 63-98, 99-122, 123-163, 181-212).

28. In mid-December 2021, after implementation of the December 2021 IEP, the student was often absent for the December 2021 school days after approval of the IEP and often absent in January 2022 (although three of those absences were excused for a family funeral). (S-30).

29. In January 2022, there were multiple, almost daily, behavioral incidents, some involving school discipline, including inappropriate use of a cell phone, disrespect to staff, refusal of redirection and non-compliance, elopement from class and school, fighting words with peers, and profanity. (S-23, S-24).
30. In January and February 2022, during the episodes of elopement from class or from the school building, the student was also involved in highly disruptive behavior in the school environment, including interrupting other classes. (S-23, S-24; NT at 123-163, 181-212).
31. At times, where the student engaged in fighting words or threats or where the student eloped from school, police were summoned for the student's safety. (S-23, S-24; NT at 123-163, 181-212).
32. The problematic behaviors often involved the inappropriate use of the student's cell phone or the involvement of a sibling who attended the same school. The student was also obsessed with the idea of wearing matching clothing as preferred peers; acting-out behavior was observed when preferred peers were not wearing the same clothing as the student or would not change clothing when presented with matching clothing. (S-24; NT at 123-163, 181-212).
33. Work-refusal and defiance in the context of instructional settings often involved the student's embarrassment at working with instructional materials and concepts that were below the grade-level of peers in the same setting (but at a grade-level that was appropriate for the student's achievement/instructional levels). The student responded well, however, to instruction which was in small group settings or one-on-one. (NT at 63-98, 99-122, 123-163).

34. The District school counselor—who was found to provide the most relevant, probative testimony, testimony which was accorded heavy weight— testified that other students in the school voiced fears for personal safety as a result of the student’s behavior and verbal/physical aggression. (NT at 123-163).
35. Through her affect at the hearing, the District school counselor—an experienced and dedicated educator— testified credibly that she felt that the District, even with much more intensive supports, could not address the student’s behavior in the educational environments provided at the District middle school. (NT at 123-163).
36. In February 2022, the student, parent, and school personnel entered into a behavior contract in attempt to improve the student’s behavior. Present levels of functional performance in the student’s IEP were updated to reflect the behavior contract as part of the student’s behavioral interventions. (S-8, S-18).
37. In late February 2022, the District requested permission to re-evaluate the student, specifically to perform an updated FBA in light of the escalation of the student’s elopement and defiance. The parent did not provide consent for the re-evaluation. (S-15).
38. In March 2022, the student’s IEP team considered out-of-District placements. The parent engaged in these conversations and indicated that she would tour potential placements but did not undertake those tours. (S-13, S-30; NT at 9-36, 123-163).
39. In early March 2022, the student’s parent withdrew the student from school attendance at the District, and the student began to attend online programming offered through the IU under contract with the District. (S-30; NT at 9-36, 63-98).

40. Evidence regarding the out-of-District placement which the District found to be the most appropriate for the student was introduced in the hearing through the testimony of the director of the placement. (NT at 164-180).
41. The out-of-District placement educates students from 1st through 12th grades, students who exhibit needs a variety of needs similar to the needs of the student. Approximately 20 students are educated at middle school grades, 5th – 8th, across two classrooms, each with a teacher and classroom aide. (NT at 164-180).
42. All students in the out-of-District placement have IEPs. (NT at 164-180).
43. Behavior support is a significant aspect of the out-of-District placement. The placement has two behavior support professionals available to any student. (NT at 164-180).
44. Many students at the out-of-District placement work below grade-level, even significantly below grade-level, and those students receive individualized one-on-one academic instruction both within the classroom and in a pullout setting. (NT at 164-180).
45. All students engage in group counseling for 30 minutes per day. A school counselor is available for individual counseling where an IEP requires it, or as-needed for any student in the placement. (NT at 164-180).
46. Students in the out-of-District placement do not have access to cell phones, which are turned in at the start of the school day and returned at the end of the day. The out-of-District placement employs a dress

code—all students wear a designated school uniform each day. (NT at 164-180).

47. In August 2022, the student’s IEP team met to consider the student’s placement. The District stood by its recommendation that the student should be educated in an out-of-District placement; at the meeting, the parent verbally disagreed with the recommendation. (S-10, S-14).

48. In early September 2022, the District requested permission to re-evaluate the student to determine whether the student should be identified as a student with an emotional disturbance and to conduct an updated FBA. Parent did not consent to the re-evaluation. (S-15).

49. In September 2022, the parent disenrolled the student from the District and enrolled the student in a cyber charter school. At approximately the same time, the parent filed the special education due process complaint which led to these proceedings.

Discussion

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis*, or minimal, or ‘some’ education progress. (Endrew F. ex rel. Joseph F. v. Douglas County

School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

A necessary aspect of the provision of FAPE requires that the placement of a student with a disability take into account the least restrictive environment (“LRE”) for a student. Educating a student in the LRE requires that the placement of a student with disabilities be supported, to the maximum extent appropriate, in an educational setting as close as possible to regular education, especially affording exposure to non-disabled peers. (34 C.F.R. §300.114(a)(2); 22 PA Code §14.102(a)(2)(xii); Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)).

Also, where a parent declines to provide permission for a re-evaluation for a student who is already receiving special education, a school district may utilize special education due process to seek authorization from a hearing officer to allow the re-evaluation to move forward. (34 C.F.R. §§300.15, 300.300(c); 22 PA Code §§14.102(a)(2)(iii),(xxiv), 14.162(c)).

December 2021 IEP & Out-of-District Placement. First, the December 2021 IEP, in light of the information that the District had available to it from the January 2020 out-of-state ER, the most recent out-of-state IEP, its own November 2021 ER, and its experience with the student over the period October-November 2021, the December 2021 IEP is appropriate. Almost immediately after the issuance of the December 2021 IEP, the student’s behavior—always problematic since entering the District—escalated markedly in January-February 2022. The District responded appropriately, requesting permission to re-evaluate the student with an updated FBA. In and amongst this period, the student was frequently not in school or was tardy to school, attendance issues which complicated the behaviors and interfered with the implementation of the IEP.

But, on its face, the December 2021 IEP is appropriate. Behavior programming is based on a FBA which is comprehensive and, notwithstanding the request for an updated FBA in February 2022, addresses many of the problematic behaviors which were evident throughout the student's enrollment at the District. The academic goals in reading, math, and written expression are all appropriate. As proposed in December 2021, the student's IEP was reasonably calculated to yield meaningful education benefit in light of the student's individual needs.

Chronologically, the student's education has moved on; but in terms of the student's needs at the time, and, critically, the student's needs the last time the student was educated in a physical school environment, the December 2021 IEP is appropriate as written. And, given the fact that the issue for determination through this decision is what the student's programming should look like upon a return to a physical school environment upon re-enrollment at the District, it is judged to be an appropriate upon re-enrollment.

Having found the December 2021 IEP to be appropriate, however, as of the date of this decision the student has not been in a physical school environment for schooling since March 2022. This is a primary concern of the parent (see September 6, 2022 Complaint and NT at 214-291) and rightly so. Therefore, should the student re-enroll in the District, the order below will address necessary short-term revisions to the December 2021 IEP.

Second, the District's proposed out-of-District placement is appropriate. The out-of-District placement is reasonably calculated to meet the student's significant behavioral needs as well as the student's academic needs.

It is significant, in the view of this hearing officer, that the student's acting-out behaviors seem to be centered on certain consistent elements: the student's access to, and use of, a cell phone; instigation by, or in

conjunction with, the student's sibling; and peer interaction related to matching clothing. All three of these elements would not be present at the out-of-District placement. Also significant is the fact that much of the student's defiance in instructional settings is rooted in frustration and embarrassment with grade-level work that is far below the work of classmates; this concern will diminish in the out-of-District placement, where many fellow students are also learning below, and in many instances well below, grade-level.

Academically, the out-of-District placement provides small-group and individualized instruction, which the student responds to. And group counseling support is a daily element of programming and, as at the District, individual counseling is available when needed.

Overall, in terms of the student's behavioral and academic needs, the out-of-District placement is appropriate. The restrictiveness of the out-of-District placement, however, must be addressed. Clearly, as a placement where all students have an IEP, the out-of-District placement is very restrictive and certainly much more restrictive than the placement envisioned by the District in the December 2021 IEP. But the record taken in its entirety leads to a conclusion that (a) the District's initial placement recommendation in the December 2021 IEP was overly optimistic—the student simply required that more programming be delivered outside of the general education setting and (b) the student's behavior overmatched District resources. In this latter regard, the testimony of the District school counselor was quite persuasive. So even though the out-of-District placement is highly restrictive, it is a placement which is reasonably calculated to yield meaningful education benefit for the student where a District-based placement would not.

In sum, then, the December 2021 IEP is appropriate, as written, and the out-of-District placement which was made part of the evidence in this matter

is also appropriate. The order below will address necessary revisions and timelines related to that IEP and placement, should the student re-enroll in the District.

Proposed Re-Evaluation. Even by February 2022, the District recognized the need to re-assess the student's behavior in the school setting by performing an updated FBA. Given the behavior which the student was consistently manifesting over the entire period October 2021 – February 2022, and especially in January – February 2022, this was warranted. But, as indicated above, chronologically the student's education has moved on and has been exclusively in online learning environments. And while not inappropriate at all, the District's November 2021 ER was based to a degree on the January 2020 ER from the out-of-state school district which the student attended prior to enrollment in the District.

All of these factors—the consistent outsized behavior throughout the student's attendance at the District, the passage of time since the student's last comprehensive educational evaluation (including a full battery of assessments), and the student's absence from in-person instruction in a physical school setting—combine to warrant not only a re-evaluation of the student but a comprehensive re-evaluation. Additionally, the parent, both in [the parent's] complaint and testimony, indicated that the student's psychiatric care and medication have stabilized the student's behavior in the home setting. Such an assertion should be made part of a formal re-evaluation process. Finally, should the student re-enroll in the District, under the terms of the order below, the student will be educated at the out-of-District placement. This change in placement should be accompanied by a comprehensive re-evaluation of the student, including input from educators at the out-of-District placement.

Accordingly, the order below will authorize and direct a comprehensive re-evaluation of the student, should the student re-enroll in the District.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, should the student re-enroll in the York Suburban School District ("District"), the student will be educated under the terms of the December 2021 IEP in the out-of-District placement which was made part of the evidence in this matter. Should that placement not be available, the District shall arrange expeditiously for a reasonably similar placement for the student.

The "implementation date" in the December 2021 IEP shall be revised to reflect the date that the student is scheduled to begin attending the out-of-district placement. Within 10 calendar days of the implementation date, baselines for the student's academic goals shall be updated with current baseline data obtained from the out-of-District placement.

The District shall provide daily door-to-door transportation to/from the student's home to the out-of-District placement.

The goals in the December 2021 IEP shall remain the same and the specially-designed instruction shall be delivered as outlined in the IEP. The student's positive behavior support plan shall be in place and shall be followed as closely as possible, although the specialized nature of the out-of-District placement, and its experience with students with behavioral needs, shall allow for adjustments of the plan, and implementation of any placement-wide behavior approaches/strategies/interventions, as the placement deems necessary.

The placement data in the December 2021 IEP shall be revised to reflect a full-time emotional support placement outside of the District, with 100% of the student's day spent in a special education setting.

Approximately 30 calendar days after the implementation date, and again approximately 60 calendar days after that date, the student's IEP team—including a representative from the out-of-District placement— shall meet to review academic and behavioral data for the student in the out-of-District placement and revise the IEP as the team feels it may be appropriate. The IEP team may meet more frequently, or at different times, as members of the IEP team—including the parent—deem it necessary.

Should the student be re-enrolled in the District, the parent is urged to make sure the student is available for daily transport to the out-of-District placement and to participate in any IEP meeting.

Additionally, should the student re-enroll in the District, this order shall serve as authorization for the District to undertake a comprehensive re-evaluation of the student, including cognitive ability, academic achievement, behavioral, social, and emotional assessment, as well as parental input, teacher input, observation, and any other assessment/input/observation that the evaluator may feel is necessary. The District shall, with the written consent of the parent, make part of the re-evaluation input from the student's private psychiatrist or psychologist.

To allow for the student's transition and adjustment to the out-of-District placement, the District shall consider the date of consent for the re-evaluation to be 14 calendar days after the implementation date; accordingly, the re-evaluation shall be issued within 74 calendar days after the implementation date (if necessary, depending on the implementation date, accounting for the suspension of the re-evaluation timeline during any summer break in accord with 22 PA Code §14.124(b)).

Should the student be re-enrolled in the District, the parent is urged to provide any input, assessment instrument, and/or consent to contact private providers requested by the District as part of the re-evaluation process.

Following the issuance of the re-evaluation report, the student's IEP team shall meet forthwith for a comprehensive revision of the student's IEP in light of the re-evaluation report.

Nothing in this order should be read to limit the parties' ability to agree to proceed differently, so long as that agreement between the parties is clearly set forth in writing.

Any claim not addressed in this decision and order is denied.

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

01/31/2023