

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 Due Process Hearing Officer Final Decision and Order

ODR No.

24373-20-21

CLOSED HEARING

Child's Name:

S.G.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

Nancy Ryan, Esquire
238 West Miner Street
West Chester, PA 19382

Local Education Agency:

Chichester School District
401 Cherry Tree Road
Ashton, PA 19014

Counsel for the LEA:

Gabrielle C. Sereni, Esquire
19 W Third Street
Media, PA 19063

Hearing Officer:

Brian Jason Ford

Date of Decision:

August 27, 2021

Introduction

This special education due process hearing includes issues that are rare in special education litigation: “contingent” IEPs and the rights of students placed in residential settings outside of their school districts. While I write for the parties, this longer-than-usual introduction is intended to help readers who may not be familiar with these issues.

This hearing concerns a student with disabilities (the Student).¹ The Student’s parents (the Parents) live within the Chichester School District (Chichester or the District). Magellan Behavioral Health of Pennsylvania (Magellan) is the Medicaid managed care company contracted to provide behavioral health services for persons with qualifying disabilities. Magellan is not a party to this hearing and Magellan personnel did not testify. Magellan manages the Student’s behavioral health services.

Magellan has authorized funding for the Student to attend a Residential Treatment Facility (RTF). At the time of this decision, the Student is hospitalized while waiting for space at the RTF. The purpose of the RTF placement is to manage and stabilize the Student’s behavioral health. Both the hospital and the RTF are in Pennsylvania but outside of the District.

Pennsylvania law divides responsibility for educating children with disabilities who, like the Student, are residentially placed outside of their local school districts for non-educational purposes. That law, 24 Pa. Cons. Stat. § 13-1306 (Section 1306), has been interpreted by the Pennsylvania Department of Education through a Basic Educational Circular issued on July 1, 1999,

¹ Except for the cover page of this decision, identifying information is omitted to the extent possible in order to maintain the Student’s privacy. References to the notes of testimony (the transcript) are “NT #,” the joint exhibits are “J-#,” the Parents’ exhibits are “S-#,” and Chichester’s exhibits are “S-#.”

titled “Nonresident Students in Institutions” (the BEC).² The BEC provides terminology used throughout this decision. The school district in which the RTF is located is the “host” district and the school district in which the family lives is the “resident” district. Chichester is the resident district as of date of this decision. Discussed in more detail *infra*, Chichester has no current obligation to provide a free appropriate public education (FAPE) for the Student. Rather, the host district has that obligation.

The Parents are afraid that Magellan will terminate funding for the RTF placement before the Student is ready to come home. The Parents demanded a “contingent IEP” from Chichester. An IEP, or Individualized Education Program, is the document that explains what special education a student with a disability will receive and designates the student’s special education placement. The Student’s host district is currently responsible for the Student’s IEP. Nevertheless, the Parents demanded a contingent IEP from Chichester that includes a residential placement. With that in place, the Student will remain in a residential placement at Chichester’s expense if Magellan terminates funding for the RTF.

In April 2020, Chichester issued a contingent IEP but refused to include an RTF placement in the contingent IEP. The Parents initiated this hearing in December 2020 to demand the inclusion of an RTF placement in the contingent IEP.

² <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/NonresidentStudents.aspx>. Last visited 25 August 2021.

For reasons discussed below, I find that the Student is not entitled to a contingent IEP from Chichester, and I dismiss the Parents' claims on that basis. This is the sole basis upon which I deny the Parents' claims.

However, I also acknowledge that my interpretation of the scant case law on point is novel and not entitled to deference should the Parents appeal.

Therefore, to avoid leaving the parties in limbo (a concern of courts and hearing officers in the few cases on point), I exercise my discretion to resolve the question that the Parents presented. Assuming that the Student is entitled to a contingent IEP, the legal requirement for a residential placement depends upon the standard for evaluating contingent IEPs. That standard is unresolved. I believe that the analysis should concern what can reasonably be projected to the time that the contingent IEP will most likely be implemented. The inherently speculative nature of that standard underscores the difficulty with this case and gives added credence to an argument that Chichester has made from the outset concerning ripeness.

Findings of Fact

In nearly every due process decision, I confirm that I reviewed the record in its entirety but explain that I make findings of fact only as necessary to resolve the issues before me. That customary explanation is insufficient in this case.

The record of this hearing is very large, and I reviewed all of it. After a careful review, I am hard pressed to find any fact in dispute. While I commend the parties and their attorneys for doing the hard work of preparing a substantial volume of joint exhibits, I cannot understand why this matter was not submitted on a mostly stipulated record, supplemented

with a small amount of opinion testimony. There is simply no dispute about what happened. Rather, the parties reach different conclusions about what the facts mean. Some opinion testimony was surely warranted, but an evidentiary hearing is the least efficient way to present facts that are *not* in dispute.

A large part of the record is a comprehensive documentation of the Student's educational and behavioral/medical history. I do not discuss most of that evidence because, under the analysis below, the Student's current medical needs and the inextricability of those needs from the Student's educational needs are not outcome determinative. Instead, I make assumptions based on the Parents' averments. I assume that the Student's medical and educational needs are inextricably intertwined, and I assume that the Student's upcoming RTF placement is currently a medical necessity. For reasons discussed below, those assumptions do not change the outcome of this case. However, accepting the core of the Parents' argument as true removes the need for extensive findings about the Student's current need for an RTF placement.

I find as follows:

Background and Context

1. There is no dispute that the Student is currently hospitalized awaiting availability at an RTF. There is no dispute that the hospital is, or that the RTF will be, funded by Magellan. *Passim*.
2. There is no dispute that the Student's behavioral health needs are a function of the Student's disability. *Passim*.

3. For purposes of analysis, I accept the Parents' claim that the Student's medical, social, behavioral, and educational needs are inextricably intertwined.³
4. There is no dispute that the Student is IDEA-eligible as a function of severe Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder, speech and language delays, and an Intellectual Disability. *See, e.g.* J-26.
5. The Student lacks safety skills, requires assistance for all activities of daily living, is not fully toilet trained despite multiple efforts, exhibits PICA (attempts to ingest non-food items), needs a high and consistent level of direct prompting, does not understand boundaries, destroys property, and, through a combination of frustration and an inability to communicate, has hurt or has tried to hurt adults, other children, and animals. *See, e.g.* J-40, P-16, NT 49, 96, 196-183, 205-206, 215-216, 256, 300, 306.

Placements Before the RTF

6. The Student received Early Intervention services at a young age and school-age special education services thereafter. There is no dispute that the Student has always qualified for and received special education. *Passim*.

³ This assumption is typically viewed as a mixed question of fact and law. *See Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3d Cir. 1981) – discussed *infra*.

7. Before 2017, the Student and Parents lived in a different school district (SD-1). SD-1 placed the Student in a non-residential private school for children with disabilities. Undisputed testimony establishes that the Student did not make progress in that placement. NT 198-200, 400, 649-652, 668-669.
8. In 2017, the Student and Parents moved into another school district (SD-2). For the 2017-18 school year, SD-2 placed the Student in different non-residential private school for children with disabilities. Documentary evidence and undisputed testimony establishes that the Student saw (at best) only a small amount of inconsistent progress at this non-residential private school. *See, e.g.* J-11, J-13, P-18, NT 505-506.⁴
9. In July 2018, the Student's behaviors began to become unmanageable, especially at home. After an incident of severe aggression towards the Student's mother (the Mother), the Student was taken to crisis intervention and then admitted to a residential psychiatric facility for children in crisis (the Crisis Hospital). The Student remained in that facility for 16 days. J-79, J-91.
10. After discharge from the Crisis Hospital, the Student returned to SD-2's private day placement. The Student then returned to the Crisis Hospital for 10 days in September 2018 to address increased aggression, which occurred primarily at home. *See, e.g.* J-107.

⁴ Discussed below, actual progress is not evidence of the appropriateness of a special education placement at the time it is offered, but failure to achieve progress is usually a sign that some change is required. Perhaps more importantly, progress is never measured in absolute terms, but always relative to the Student's abilities. I make no determination about whether the quantum of progress that the Student achieved while placed by SD-2 was meaningful *for the student*. That issue is not before me.

11. After the second discharge from the Crisis Hospital, the Student again returned to SD-2's private day placement. At this time, the Student continued to act aggressively toward the Mother and pets. This resulted in a third admission to the Crisis Hospital. *See, e.g.* NT 656-658.
12. The Student's third admission to the Crisis Hospital started on October 24, 2018. During this admission, the Crisis Hospital recommended placement in an RTF as a medical necessity to address the Student's behavioral health needs. Magellan, which had funded each admission to the Crisis Hospital, agreed. Consequently, the Student remained in the Crisis Hospital for about two and a half months until placement was secured at an RTF. *See, e.g.* J-122; NT 133, 658-659.

RTF Placement – January 2019 to March 2020

13. The Student was admitted to the RTF on January 10, 2019. *See, e.g.* J-40.
14. There is no dispute that the RTF is in Pennsylvania but outside of Chichester.
15. Magellan reviewed the Student's need for an RTF placement every 90 days. *See, e.g.* J-30. This is not unique to the Student. Magellan periodically reviews every funded child's placement, consistent with its own practices and legal obligations.

16. After admission to the RTF, the Student continued to attend the private day school placement but lived at the RTF. *See, e.g.* J-30. The record is clear that Magellan funded the RTF as a medical necessity. Despite some ambiguity in the record, SD-2 funded the private school (the Parents still lived within SD-2).

RTF Placement – March 2020 to October 2020

17. In March 2020, the private day school discontinued in-person instruction as a result of the COVID-19 pandemic and shifted to remote instruction via video conferencing. *See, e.g.* NT 678.
18. After the day school closed, the RTF personnel attempted to implement some of the Student's IEP goals and day school personnel attempted to collect progress data. *Id.*
19. For the most part, the Student was not able to participate in or benefit from remote instruction.⁵ *See* NT 413-414, 678.

Chichester Enrollment and Planned Transition to Home

20. By the summer of 2020, the RTF had recommended discharge. The transition plan called for an extended overlap between the RTF and a Magellan-funded step-down program. The step-down program was to include significant staffing and time from Behavioral Health and Rehabilitative Services (BHRS) in the home and community, and extensive Parent training. *See, e.g.* J-63.

⁵ There is some evidence that the Student was occasionally able to attend to small amount of remote instruction. Take as a whole, the record establishes that the Student was not able to benefit from remote instruction.

21. The Parent training had started as early as the summer of 2019. That included training on how to implement the Student's behavior plan, parent visitation at the RTF, and community outings assisted by RTF or BHRS personnel. *See, e.g.* P-3. Several overnight visits to the Parents' home were attempted between June and December 2019. All of those failed as a result of the Student's unmanageable behavior at home. *Id.*
22. Parent visitation at the RTF and community outings were reduced or canceled completely from March 2020 onward as a result of COVID-19. *See id.* The extended transition plan with significant BHRS support were put in place, at least in part, to account for the reduced in-person training immediately prior to the RTF discharge. *See id.*
23. The Parents moved into Chichester in September 2020. At that time, the Student had an IEP from SD-2 drafted in April 2020, was receiving ineffective remote instruction from the private day school, and was living in the RTF with a planned discharge to the Magellan-funded, BHRS-staffed step-down program. *Passim.*

Home – October 15 to 28, 2020

24. There is no dispute that the RTF discharged the Student on October 15, 2020. The Student lived in the Parents' home in Chichester for the next 13 days. *Passim.*
25. There is no dispute that, despite extensive preparation, BHRS's contracted provider failed to staff the Student's step-down program as planned. This left the Parents with the Student in their home without

the professional services and supports that everyone involved deemed necessary for a successful transition. *See, e.g.* NT 189-190, 594.

26. At the same time, the Parents were required to take on the additional obligation of enabling and facilitating the Student's remote learning from the private day school – a feat that the RTF staff were not able to accomplish. *See, e.g.* P-4.
27. At the same time, locks and gates that the Parents installed in their home in preparation for the Student's return home proved ineffective. *See, e.g.* NT 672-676.
28. On October 27, 2020, Chichester convened an IEP team meeting. At that meeting, the IEP team discussed placement in a non-residential autistic support program run by the Delaware County Intermediate Unit (DCIU).⁶ The Student had been accepted into the DCIU program but would need a full-time Personal Care Assistant (PCA) in order to participate. Chichester was attempting to staff that position when the IEP team convened. *See* NT 529, 536-537.

Return to Crisis Hospital – October 28, 2020, through Present

29. On or about October 28, 2020, the Student was admitted to the Crisis Hospital again [redacted]. NT 538, 566-67, 654.⁷
30. The Crisis Hospital is designed to be a short-term placement. However, the Student has remained in the Crisis Hospital from October 28,

⁶ Chichester is located within DCIU.

⁷ [redacted]. Functionally, the Student has been hospitalized since October 28, 2020.

2020, through at least the close of the evidentiary portion of this hearing. Based on the parties' written closing statements, it appears that the Student remains in the Crisis Hospital with no end in sight.

31. The Crisis Hospital is located outside of both Chichester and DCIU. While admitted to the Crisis Hospital, the Student receives two, 45-minute periods of education provided by the Intermediate Unit in which the Crisis Hospital is located. NT 193. The Student is not able to attend to instruction during the majority of that time. NT 302-303. Even more concerning, there is little coordination between the behavior programs implemented by the Crisis Hospital and the Intermediate Unit. NT 320.
32. In December 2020, the Crisis Hospital recommended an RTF placement. Magellan denied that recommendation. The Parents appealed that decision through Magellan's grievance process and prevailed. Since February 2021, the Student has been approved for a 30-day Magellan-funded RTF placement, subject to renewal upon review. See NT 211-214, 234-235, 646.
33. In March 2021, a different RTF program accepted the Student. This RTF program is connected to the private day school that the Student attended under SD-2's placement. However, while the Student has been accepted to the new RTF, the Student has not been admitted to the new RTF due to staffing shortages. *Id.* This is why the Student remains in the Crisis Hospital.

The Contingent IEP

34. On April 6, 2021, the District offered a contingent IEP to the Student. P-28.
35. The contingent IEP does not include a residential placement. *Id.*
36. The absence of a residential placement is the only basis upon which the Parents challenge contingent IEP. They agree that the IEP is otherwise appropriate.

Discussion and Conclusions of Law

Part I: 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 difference.

Part II: Special Education Laws

In this section, I review the more commonly presented principles of special education that apply in this hearing and Section 1306. The rare and unusual case law establishing a right to contingent IEPs is discussed in Part III. After fully explaining the applicable jurisprudence and my understanding of the same, my analysis begins in Part IV.

The Burden of Proof

The burden of proof, generally, 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 Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (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 F.* case 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* at 3015.

Third Circuit 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 (3d 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 F.* decision is no different.

A school district is not required to maximize a child's potential; 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 in terms of 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 F.*, 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). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id.* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute

indication of progress. Rather, I must consider the totality of a child's circumstances to determine whether the LEA offered the child a FAPE.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Least Restrictive Environment (LRE)

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

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), the Third Circuit held that LEAs must determine whether a student can receive a FAPE by adding supplementary aids and services to less restrictive placements. If a student cannot receive a FAPE in a less restrictive placement, the LEA may offer a more restrictive placement. Even then, the LEA must ensure that the student has as much access to non-disabled peers as possible. *Id.* at 1215-1218.

More specifically, the court articulated three factors to consider when judging the appropriateness of a restorative placement offer:

“First, the court should look at the steps that the school has taken to try to include the child in a regular classroom.” Here, the court or hearing officer should consider what supplementary aids and services were already tried. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216 (3d Cir. 1993)

“A second factor courts should consider in determining whether a child with disabilities can be included in a regular classroom is the comparison between the educational benefits the child will receive in a regular classroom (with supplementary aids and services) and the benefits the child will receive in the segregated, special education classroom. The court will have to rely heavily in this regard on the testimony of educational experts.” The court cautioned, however, that the expectation of a child making greater progress in a segregated classroom is not determinative. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216-1217 (3d Cir. 1993).

“A third factor the court should consider in determining whether a child with disabilities can be educated satisfactorily in a regular classroom is the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom.” The court explained that a child's disruptive behavior may have such a negative impact upon the learning of others that removal is warranted. Moreover, the court reasoned that disruptive behaviors also impact upon the child's own learning. Even so, the court again cautioned that this factor is directly related to the provision of supplementary aids and services. In essence, the court instructs that hearing officers must consider what the LEA did or did not do (or could or

could not do) to curb the child's behavior in less restrictive environments. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217 (3d Cir. 1993)

There is no tension between the FAPE and LRE mandates. There may be a multitude of potentially appropriate placements for any student. The IDEA requires LEAs to place students in the least restrictive of all potentially appropriate placements. There is no requirement for an LEA to place a student into an inappropriate placement simply because it is less restrictive. However, LEAs must consider whether a less restrictive but inappropriate placement can be rendered appropriate through the provision of supplementary aids and services.

The "Inextricably Intertwined" Standard

Throughout this hearing, the parties used the terms "RTF" and "residential placement" interchangeably. That can be confusing because the terms are not completely interchangeable. Without care, the difference can be come more than semantic.

An RTF is a Residential Treatment Facility. By its nature, RTFs are not educational placements. They are medical placements, including behavioral health placements, prescribed non-educational personnel for non-educational purposes. In the context of an IDEA case, a residential placement – as opposed to an RTF – is part of the continuum of placements that LEAs must make available.

As noted above, residential placements can include hospitals and institutions, so why does the distinction between RTFs and residential placements matter? The answer is that when non-educational entities like

Magellan make RTF placements, they do so exclusively for medical purposes, and LEAs are never obligated to fund medical care. See *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3d Cir. 1981). In contrast, when an LEA offers a residential placement in a hospital or institution, it does so exclusively for educational purposes and must fund the non-medical residential services that are necessary for the student to receive a FAPE. *Id.*

The IDEA itself anticipates that, for some students, a residential placement in a hospital or institution may be the least restrictive environment in which the student can receive a FAPE. 34 C.F.R. § 300.115(b)(1). In those instances, the LEA is obligated to offer the residential placement regardless of the student's non-educational needs. The student's eligibility for an RTF under medical or behavioral health standards is not relevant to the inquiry if the student requires a residential placement in order to receive a FAPE.

In the Third Circuit, however, LEAs may become responsible for funding non-medical portions of placement that might be considered medical in nature when viewed as a whole. Paraphrasing the Parents' accurate summary in their closing: when a student's educational needs are "inextricably intertwined" with the student's social, emotional and mental health needs, and the student will not derive educational benefit without the therapeutic aspects of a residential program, such a placement is considered to be intrinsic to the student's education and therefore necessary for FAPE. *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3d Cir. 1981).

Section 1306

As discussed briefly in the introduction section of this decision, Pennsylvania law anticipates circumstances in which children who need special education are placed by third parties in RTFs outside of their resident districts.

Pennsylvania law at 24 Pa. Cons. Stat. § 13-1306 (Section 1306) divides responsibilities between the host district and the resident district. The host district is responsible for the provision of FAPE. The host district offers an IEP and is responsible for the IEP's implementation. Parents who disagree with such IEPs can request a due process hearing against the host district to demand appropriate IEPs and ensure the provision of a FAPE during the RTF placement. *See, e.g. In re: D.L., a Student in the Neshaminy School District*, ODR No. 19662-1718.

The resident district has no obligation to provide a FAPE to children who are placed by third parties into RTFs. *Id. See also L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610 (E.D. Pa. 2018). However, Section 1306 enables host districts to essentially bill resident district for the educational services that they provide during the Section 1306 placement.

In this case, as of this writing, the school district in which the Crisis Hospital is located is the Student's host district and Chichester is the Student's resident district.

Part III: Contingent IEPs

The IEP is the "blueprint" for the provision of FAPE. If a school owes a FAPE to a student, the IEP explains how the school will provide a FAPE to that student. It seems logical, therefore, that a school has no obligation to offer an IEP to a student if it has no obligation to provide a FAPE to that student.

But Federal district courts in the Third Circuit have rejected that logic when highly unusual circumstances compel a different conclusion.

Cases concerning contingent IEPs are rare; there are only a few cases on point. A review of the development of case law establishing the concept of contingent IEPs, and the expansion of that case law to Pennsylvania 13-1306 placements is unique to Pennsylvania. I review the jurisprudence.

Separating the FAPE and IEP Obligations

Ferren C. v. School District of Philadelphia

To my knowledge, the first Third Circuit case holding that a school must provide an IEP for a student even in the absence of a FAPE obligation is *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712 (3rd Cir. 2010). In *Ferren C.* a student (Ferren) was awarded compensatory education to remedy a denial of FAPE. Ferren's parents were using the compensatory education to pay tuition at a private school.⁸ Ferren aged out of IDEA eligibility before using all the compensatory education. The private school only served students with IEPs, but the school district would not give the Ferren an IEP because he aged out. Ultimately, the Third Circuit reasoned that the school district's refusal to issue an IEP left the student with no remedy for a FAPE violation. The Third Circuit ordered the District to issue an IEP, despite the lack of any current FAPE obligation, so that the Student could access all the previously awarded compensatory education.

⁸ Compensatory education typically cannot be used to pay private school tuition, but much about *Ferren C.* is unusual, to put it mildly.

First Case Regarding Contingent IEPs

I.H. v. Cumberland Valley School District

Later that same year, the first due process hearing specifically concerning contingent IEPs was decided. *In re: I.H., a Student in the Cumberland Valley School District*, ODR Nos. 1481-1011-KE, 1589-1011-KE (consolidated, 2010). In that case, I.H.'s guardian and Cumberland Valley had an intense disagreement about the district's proposed special education placement. Fearing that the proposed placement was dangerous, the guardian withdrew I.H. from Cumberland Valley and placed him in a cyber charter school. Under Pennsylvania law, the cyber charter school became I.H.'s LEA upon enrollment. From that point forward, the FAPE obligation moved from the school district to the cyber charter school. Despite that, the guardian continued to demand an IEP from the school district. The school district issued an IEP very shortly after the Student enrolled in the cyber charter school, but the guardian disagreed with that IEP as well. The guardian then requested a due process hearing.

In the *I.H.* due process hearing, the hearing officer found that Cumberland Valley violated I.H.'s right to a FAPE while I.H. was enrolled there. But the hearing officer distinguished the *I.H.* case from *Ferren C.* The hearing officer reasoned that the cases were different because no prior order created an obligation for Cumberland Valley to offer an IEP after its obligation to provide a FAPE ended. I.H.'s entitlement to a FAPE did not depend on the Cumberland Valley providing an IEP because the charter school was I.H.'s LEA. I.H. did not need a Cumberland Valley IEP to access a prior compensatory education award because no such award existed. The hearing officer concluded, therefore, that Cumberland Valley had no obligation to offer an IEP to I.H. after his enrollment in the cyber charter school and

declined to adjudicate the appropriateness of the IEP that Cumberland Valley offered after that point in time.

On appeal to the Middle District, the court agreed that I.H.'s enrollment in the cyber charter school terminated Cumberland Valley's obligation to provide a FAPE. *I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 771 (M.D. Pa. 2012). The court recognized, however, that parents may request special education evaluations from their public school districts even if their children are not enrolled. *Id* at 772 citing *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 2011 U.S. Dist. LEXIS 104744, *41-42 (D.N.J. Sept. 15, 2011) and *A.Z. on behalf of M.Z. v. Mahwah Twp. Bd. of Educ.*, 2006 U.S. Dist. LEXIS 22305 (D.N.J. Mar. 30, 2006). In addition to this, the court was persuaded by the logic of cases from other jurisdictions holding that public school districts must offer IEPs to students who are not enrolled so that parents can know what will happen to their children upon enrollment. The court held:

Thus, we find that the Hearing Officer erred in holding that Plaintiff is not entitled to an IEP from the Defendant School District. Pennsylvania statutory law does not, and cannot, limit the responsibilities of a public school district under the IDEA as contended by the Defendants, and the case law relied upon by the Defendants does not persuade us otherwise. On the facts as pled in Plaintiff's Complaint, the school district of residence cannot be relieved of its responsibility to provide a requested IEP under the IDEA simply because the student has not enrolled in the school district, especially where the school district's previous failure to provide an adequate IEP is the reason for the student's unenrollment in the first place. Accordingly, we deny Defendants'

Motion to Dismiss Plaintiff's claim requesting an IEP from the Defendant School District.

I.H. v. Cumberland Valley Sch. Dist., 842 F. Supp. 2d 762, 773 (M.D. Pa. 2012). See also *I.H. v. Cumberland Valley Sch. Dist.*, No. 1:11-cv-00574, 2012 U.S. Dist. LEXIS 201138 (M.D. Pa. Mar. 5, 2012) (further addressing defendant's arguments in a motion for reconsideration).

The court remanded the matter back to the hearing officer to resolve the appropriateness of the IEP that Cumberland Valley offered after I.H. enrolled in the cyber charter school. *I.H. v. Cumberland Valley Sch. Dist.*, No. 1:11-CV-574, 2012 U.S. Dist. LEXIS 101056 (M.D. Pa. July 20, 2012). Resolving the narrow question presented in the court's remand order, the hearing officer examined the appropriateness of the IEP at the time it was offered and found the IEP to be appropriate in part and inappropriate in part. *In re: I.H., a Student in the Cumberland Valley School District*, ODR No. 3485-1213-KE. The hearing officer's decision on remand was not appealed (to my knowledge) and stands as one of the only decisions at any level resolving the appropriateness of a contingent IEP.

Contingent IEPs in Section 1306 Cases

L.T. v. North Penn School District

In 2018, the Eastern District extended the logic of *I.H. v. Cumberland Valley* to cases involving Section 1306 placements when it *decided* *L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610 (E.D. Pa. 2018). In the *L.T.* case, the parent (L.T.) lived in the North Penn School District. Magellan placed the student (referred to as R.J. by the court) into an RTF outside North Penn. L.T. demanded an IEP from North Penn, and North Penn refused. L.T. then

requested a due process hearing against North Penn. The hearing officer dismissed the complaint without reaching a decision on the merits, finding that North Penn was not R.J.'s LEA, did not have an obligation to offer a contingent IEP under Section 1306, and that claims against North Penn were not ripe. L.T. appealed to the Eastern District. While the matter was pending in court, Magellan gave notice that it would cut funding for R.J.'s RTF placement. It is noteworthy that Magellan said that it would cut funding on December 24, 2018, and the court issued its decision on December 14, 2018. *Id.*

The court reviewed the applicable federal and state regulatory framework, and then addressed the ultimate issue. The court concluded that, as the resident district, North Penn had no FAPE obligation to R.J. *L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610, 618-19 (E.D. Pa. 2018). North Penn did not place R.J. in the RTF, and R.J. had an IEP from the host district. Even so, the court extended the logic of *I.H. v. Cumberland Valley* into Section 1306 cases. The fact that Magellan was cutting funding for the RTF was a factor in the court's decision. Upon rejecting North Penn's argument that *I.H. v. Cumberland Valley* should not apply to Section 1306 cases, the court held:

Similarly, in a case involving a 1306 student, requiring actual residency as a prerequisite for an IEP is an anathema to the Act's remedial purpose. Here, North Penn is not Student's current Local Education Agency, or LEA. But if Magellan cuts funding for Student's ... RTF placement on December 24, 2018, Student will move to Parent's home in the North Penn School District, at which point North Penn will regain LEA status over Student.

L.T. v. N. Penn Sch. Dist., 342 F. Supp. 3d 610, 620 (E.D. Pa. 2018). The court also cited positively to a pre-hearing order in a due process hearing in which the hearing officer held that resident school districts may owe contingent IEPs in Section 1306 cases despite significant differences from the underlying facts of the *I.H. v. Cumberland Valley*, *supra*. Quoting the hearing officer, the court held:

The logic of the *I.H.* case [applied in Section 1306 cases] keeps families out of legal limbo, protects students who face imminent transfer back into a resident district, and enable resident districts to plan for a student's return without assuming a FAPE obligation to the Student.

Id at 621 citing *In re: G.A., a Student in the Colonial School District*, ODR File No. 21018-1819-AS (August 22, 2018).⁹

The court also rejected North Penn's argument that Pennsylvania's intrastate student transfer regulations would protect R.J., finding that those regulations would still leave R.J. (at least potentially) in the sort of legal limbo that is inconsistent with the IDEA. *L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610, 620 (E.D. Pa. 2018).

Based on the above, students in Section 1306 placements may be entitled to contingent IEPs from their resident school districts. When a student faces imminent transfer back to their resident district, the resident district must offer a contingent IEP at the parents' request. The purpose of such an IEP is

⁹ The quoted language from ODR File No. 21018-1819-AS comes from a pre-hearing order. The parties resolve their dispute shortly after the hearing officer issued that order, and so there was no final decision on the merits. The case does not appear on the ODR website for that reason.

to plan for and explain how the resident district will provide a FAPE to the student upon return. Resident districts may offer contingent IEPs without prematurely incurring a FAPE obligation to the student, but contingent IEPs (or refusal to issue contingent IEPs) are challengeable at a due process hearing.

Part IV: The Student is Not Owed a Contingent IEP

A striking commonality between the *I.H.* and *L.T.* cases is that both students were poised to return to the defendant school district at any moment. In *I.H.*, the student was attending a cyber charter school only because the guardian concluded that the Cumberland Valley's offered placement was dangerous. The record clearly established that I.H. would return to Cumberland Valley's schools the instant that danger was clear. In *L.T.*, the family received a notice from Magellan that R.J.'s funding was ending. The Student was set to return to the District on Christmas Eve, just 10 days before the court issued its decision. The imminency of the transfer was a factor in establishing both students' right to a contingent IEP. In the *L.T.* case, which is more on point, the court found that imminency was a particularly important factor. A key purpose for extending contingent IEPs to students in Section 1306 placements is to protect "students who face imminent transfer back into a resident district" *L.T.*, *supra* at 621.

I find that imminency – a provable, imminent transfer or termination of third-party funds – is a necessary factor to establish entitlement to a contingent IEP in a Section 1306 case. Without the imminency factor, the applicable case law would encourage the sort of school shopping that has been prohibited by very well-established case law. *See, e.g. Paek v. Pen Argyl Area Sch. Dist.*, 923 A.2d 563, 567 (2007). For instance, any child with

a disability could transfer into any of Pennsylvania's cyber charter schools at any time. Surely, the *I.H.* and *L.T.* cases do not stand for the proposition that parents of children with disabilities can request contingent IEPs from any cyber charter school at any time. Even more to the point, parents of children with disabilities could move into any of Pennsylvania's 500 school district and establish residency at any time.¹⁰ Any Pennsylvania school district could become a child's LEA at any time. Surely, the *I.H.* and *L.T.* cases do not stand for the proposition that parents may request contingent IEPs from any school district at any time. The difference – the factor that makes the logic of *I.H.* and *L.T.* hold together – is the that the return to the resident district was imminent.¹¹

There is no preponderant evidence in the record of this case that the Student's return to Chichester is imminent. In fact, the record is to the contrary. Currently, the Student is approved for a Magellan-funded RTF for a 30-day period that has not yet started. The Student has been in the Crisis Hospital since October 28, 2020. In the 303 days between the start of the Student's current hospitalization and this decision, no one (including Magellan) has threatened to discharge the Student. Unlike *L.T.*, there is no notice that funding will be discontinued, let alone discontinued by a date certain. At a bare minimum, the Student might return to Chichester 30 days after some unknown point in the future.

The record establishes that the likelihood of that minimum condition is low. Historically, once the Student is placed in an RTF, Magellan's periodic

¹⁰ That is seen in this case. The family lived in three school districts since 2016. Further, residency, a lower threshold than domicile, is the applicable standard to determine LEA status.

¹¹ Imminency was also a factor in the cases from other jurisdictions that the court relied upon in *I.H.* The parents in those cases were planning to accept or reject an IEP from their LEAs when issued, not hold a contingent IEP until some unknown point in the future and then demand implementation.

reviews have kept the Student in the RTF. Further, once the Student starts the currently approved RTF, the Student will be protected by pendency rules that are part of the Medicaid grievance process both at the administrative and court levels should Magellan terminate funding. Yet even ignoring Medicaid's real-world operations, the only thing about the date of the Student's return to Chichester that the record enables us to predict with reasonable certainty is that it will happen no time soon.

As in the *I.H.* case, I decline to adjudicate the appropriateness of an IEP that Chichester had no obligation to offer. Regardless of its legal obligations, and despite some acrimony between the parties, planning for the Student's return is the right thing to do. I will not punish Chichester for exceeding its legal mandate to prepare for the Student's eventual return. I will also not alleviate Chichester's obligation to offer an appropriate contingent IEP as soon as it is reasonably possible to predict the Student's return. I dismiss the Parents' complaint on this basis.¹²

And yet, after seeing the aftermath of the *I.H.* and *L.T.* cases, additional analysis is necessary so that the Student will not be trapped in limbo if my analysis is in error.

Part V: Appropriateness of the Contingent IEP

I must recognize that my interpretation of *L.T. v. North Penn* is novel. My holding that imminency is a critical factor is not entitled to deference should

¹² I must note that from the very beginning of this due process hearing through its closing statement, the District has insisted that this matter is not ripe. In the end, the District is essentially correct. Under current case law, however, it would have been improper for me to dismiss this matter without an evidentiary hearing or significant stipulations. The Parents were entitled to an opportunity to establish all the elements that would entitle the Student to a contingent IEP.

the Parents appeal this decision. If the Parents appeal this decision and prevail, the Student will be in the same position as I.H.: entitled to a contingent IEP but without a determination as to whether the contingent IEP is appropriate. Therefore, in an abundance of caution, and at risk of issuing an advisory opinion, I will consider whether the Student's contingent IEP is appropriate. The Parents concede that the contingent IEP is appropriate but for the lack of a residential placement, and so the only issue to resolve is whether the contingent IEP must include a residential placement.

The standard for determining the appropriateness of contingent IEPs is not established. The only case I am aware of in which a hearing officer adjudicated the appropriateness of a contingent IEP is the decision on remand in the *I.H.* case. A single due process decision, limited by a narrow remand order, hardly establishes a definitive test. Even so, it is worthwhile to consider that single decision.

To determine the appropriateness of I.H.'s contingent IEP on remand, the District Court ordered the hearing officer to use the same standard that is applied when examining non-contingent IEPs. Specifically, the matter was remanded "to the Hearing Officer for a determination ... regarding the appropriateness of the IEP offered to the Student by the District *in September of 2010.*" *I.H. Remand Order* at 2 (emphasis added). The hearing officer had no choice but to determine the appropriateness of the contingent IEP at the time it was offered, not at the time it would be implemented. It was understood, however, that there would be only a short gap between those events.

Above, I find that the Parents have failed to establish the imminency factor and that Chichester is not obligated to issue a contingent IEP for this reason.

I now find that that the lack of imminency also requires a different standard to evaluate the appropriateness of the contingent IEP (assuming entitlement to a contingent IEP). The standard applied in the *I.H.* remand decision cannot apply in this case because of the predictable gap between a contingent IEP issued today and the implementation of that contingent IEP at some unknown point in the future.

If imminency is a factor, the time between the issuance and implementation of the contingent IEP should be short. Imminency was a factor in the *I.H.* case. The guardian removed I.H. to an inferior program only because of the parties' dispute. In *I.H.*, there would be little to no gap between the issuance of an appropriate contingent IEP and I.H.'s return to Cumberland Valley. That short amount of time is important because there can be no doubt that any child's needs are likely to change over time. An appropriate contingent IEP issued today will likely be inappropriate when it is implemented if enough time passes. It seems that without the likelihood of an imminent transfer back to the district of residence, school personnel would have to exercise a degree of prescience that the law cannot require.

The entire record of this hearing establishes that the Parents demand an IEP that will be implemented only after the Student's circumstances change in a specific way at some unknown point in the future. They do not demand a contingent IEP that will be implemented very shortly after it is issued. I will, therefore, evaluate the need for a contingent IEP to include a residential placement after the change that the Parents anticipate.

Magellan's current support of both the Student's current hospitalization and (post-grievance) the Student's upcoming RTF placement. The Parents demand an IEP that will be implemented only after Magellan stops funding

the RTF at some unknown point in the future. The record of this case establishes that once the Student starts an RTF placement, Magellan will fund that placement until the RTF itself recommends discharge and will further fund an extended transition program at that time. The Parents are rightly concerned that Magellan's past actions are not necessary prelude to how it will act in the future. Even so, any argument that Magellan will terminate the Student's currently approved RTF placement prematurely is unsupported speculation and ignores the Medicaid grievance process. Therefore, under the record of this hearing, it is more likely than not that the Parents demand an IEP that will go into effect only after the Student's needs significantly change.

The Parents argue that the Student's medical and educational needs are inextricably intertwined, and that a residential placement is necessary for the provision of FAPE. The Parents point to the substantial documentation of the Student's medical and educational history as proof. The same evidence also shows a long history of residential placements that are funded as long as necessary and ended only with substantial, carefully considered transition planning. The failure of the Student's most recent effort to come home is attributable to the BHRS contractor's failure to staff the planned services, not anything inherent in the plan itself. With this history in place, and nothing to suggest that Magellan or the RTF will act differently in the future, the evidence in this case yields a conclusion that the Student's intertwined medical and educational needs will be different by the time the contingent IEP becomes operational.

It is impossible to predict the future¹³, but the most likely scenario under the record of this case is that the same events triggering implementation of the contingent IEP will also signal that the Student's medical needs have changed. The Parents ask me to hold that the Student will require a residential placement as a result of intertwined medical and educational needs at the very moment that the entities responsible for the Student's medical needs conclude that an RTF placement is no longer necessary.¹⁴

In sum, the standard used by the hearing officer on remand after *I.H. v. Cumberland Valley, supra*, cannot apply because *I.H.* did not involve Section 1306 and because the imminency of the *I.H.* case is not present in this case. The same is true for the imminency of the *L.T.* case. Instead, in this case, the Parents demand a contingent IEP that will be implemented in the future when a specific contingency is triggered. At that point in time, even if the Student's medical and educational needs remain intertwined, the event triggering implementation of the contingent IEP will likely signal that the Student's medical needs have changed. As a result, the record does not support a finding that the Student's contingent IEP must contain a residential placement.

Finally, if Chichester owes the Student a contingent IEP, and the contingent IEP must be appropriate relative to the Student's needs at the time it is offered instead of the time it will be implemented, the contingent IEP must include a residential placement. The record very clearly establishes that all efforts to date to return the Student to the Parents' home have been

¹³ The impossibility of predicting the future is why non-contingent IEPs are not judged in hindsight but at the time they are offered. This impossibility is another reason why imminency must be a factor when assessing entitlement to a contingent IEP.

¹⁴ In their closing, the Parents argue that the Student requires and is entitled to an IEP with an RTF placement right now. That may or may not be true but, under Section 1306, Chichester has no obligation to issue a current IEP for the Student. If Chichester owes the student any IEP at all, it is a contingent IEP.

disastrous. The last effort included a thoughtful and well-resourced transition plan that simply was not implemented. The record more than preponderantly establishes that the Student cannot *currently* derive a benefit from education without the intensive behavioral support provided by a residential placement. All arguments to the contrary ignore the entirety of the Student's educational history. So, if the standard requires a contingent IEP that is reasonably calculated to provide a FAPE based on the Student's current needs – regardless of the most likely circumstances triggering implementation – the Parents are entitled to what they demand.

Any such IEP must also include a plan to transition the Student into a less restrictive environment when the Student is able to make such a transition. I do not believe that standard should apply because the Student is not in imminent risk of discharge from a residential placement and the contingent IEP will likely be implemented only after the Student's needs have substantively changed.

Summary and Conclusions

303 days and counting is a long time to wait for an RTF to become available. The Parents frustration with that and with Magellan's grievance process, and with the way BHRS bungled the Student's most recent transition attempt is entirely justified. I completely understand why the Parents look to Chichester to backstop the various behavioral health agencies involved in the Student's various placements. What makes this case different from other contingent IEP cases, however, is that the Student is not in imminent risk of losing funding or being discharged back to Chichester.

The commonality in both cases establishing the right to contingent IEPs is imminency. In both cases, the student's return to the school district of

residence was imminent. As a result, the expected time between the issuance and implementation of the contingent IEPs was small. In both cases, it was not necessary for school personnel to predict the unknown future to draft contingent IEPs. Rather, school personnel only had to see the road immediately before them.

The record of this case is markedly different in that the Parents have not established a similar imminency. Unlike *L.T. v. North Penn, supra*, Magellan has not terminated funding for the Student's RTF placement and has not threatened to do so. Rather, the record demonstrates that Magellan has approved the Student's RTF placement, and that placement has not even started. In the past, Magellan has evaluated the Student's RTF placement at regular intervals and has maintained RTF funding based on the Student's medical needs. There is no preponderant evidence that Magellan will act differently this time, and the Student will have certain Medicaid protections even if Magellan does what the Parents fear. Consequently, the Parents demand an IEP from the District in the absence of a FAPE obligation that will be implemented at some unknown but distant point in the future, and likely only after the Student's needs have changed. The Parents have not established the Student's right to a contingent IEP because they have not established the imminency – the short window between the issuance and implementation of the contingent IEPs – that was at the heart of the *I.H.* and *L.T.* cases.

In recognition that my interpretation is novel and not owed deference should the Parents appeal, I exercised my discretion by evaluating the appropriateness of the contingent IEP to avoid the post-remand circumstances of the *I.H.* case. The contingent IEP will be implemented after specific triggering condition is met. That condition, the Student's future

discharge from the currently approved RTF, likely will also signal a change in the Student's medical needs under the record of this case. Therefore, even assuming that the Student's medical and educational needs are inextricably intertwined, the record of this case cannot support a finding that the Student will require an RTF placement after the Student's medical needs change. The Student's contingent IEP need not include an RTF placement for this reason.

Lastly, for reasons noted above, 1) if the Student is owed a contingent IEP and 2) the contingent IEP must meet the Student's current needs even though it will be implemented only after the Student's needs change, then the Student's contingent IEP must include a residential placement with a transition plan to enable the Student to return to a less restrictive setting.

An order consistent with the above follows.

ORDER

Now, August 27, 2021, it is hereby **ORDERED** as follows:

1. The undersigned hearing officer declines to adjudicate the appropriateness of the contingent IEP because the Chichester School District had no obligation to issue the contingent IEP.
2. The Student is not entitled to a contingent IEP, and so the Parents' demand for a contingent IEP including a residential placement is **DISMISSED**.
3. To mitigate serious post-hearing challenges that have arisen in similar cases (be they few in number), the undersigned hearing officer's

assessment of the contingent IEP is included in the accompanying decision.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford

HEARING OFFICER