

No. 26-

IN THE
Supreme Court of the United States

CHICHESTER SCHOOL DISTRICT,

Petitioner,

v.

S.M., THROUGH HIS PARENTS,
MICHAEL C. AND DANIELLE C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As a question of exceptional importance and matter of first impression, whether the IDEA's exhaustion requirements under 20 U.S.C. §1415(f)(3)(B), (i) permits a party to pursue claims of a denial of a free and appropriate education ("FAPE") and/or compensatory education through a district court during an appeal of a state administrative hearing officer's opinion, where those claims were not presented at that same administrative proceeding?

As a question of exceptional importance and matter of first impression, whether awards for compensatory education under the IDEA require considerations beyond the exact hours of a deprivation of a free and appropriate education such as a school district's reasonable efforts to rectify the denial of FAPE; the equities of the parties; the needs to of student to recover from the deprivation in; or reliance on court order including decisions of the administrative process?

As a matter of exceptional importance and matter of first impression, whether an award for compensatory relief requiring a student's permanent prospective placement in a residential educational facility, without consideration of the comprehensive IEP process, violates the statutory language of the IDEA and the due process rights of all parties, as established by the IDEA.

PARTIES TO THE PROCEEDING

Petitioner is Chichester School District, located in Delaware County, Pennsylvania. Chichester School District is a non-natural party and does not have a stock ticker symbol.

Respondent is S.M., by and through his parents, Michael C. and Danielle C.

CORPORATE DISCLOSURE

I hereby certify that upon the date of filing this herein Petition, and at all relevant times hereto, Chichester School District does have a parent corporation, is not a publicly held company, and does not have a publicly held company which holds more than 10% stock in Chichester School District.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

S.M., by and through his parents Michael C. and Danielle C. (appellees), v. Chichester School District (appellant), No. 22-1612 (3rd Cir.), March 24, 2022 Judgment, Doc 163

S.M., by and through his parents Michael C. and Danielle C. (appellees), v. Chichester School District (appellant), No. 24-2727 (3rd Cir.), February 28, 2025 Opinion, Doc 52

Chichester School District v. S.M., by and through his parents, M.C. and D.C., No. 25-2750, (3rd Cir.), judgment entered May 18, 2025, *en banc* denied June 15, 2026.

S.M., by and through his parents, Michael C. and Daniel C., No. 2:21-cv-04266, (E.D. Pa.), judgment entered September 4, 2024

S.M., by and through M.C. and D.C., v. Chichester School District, ODR No. 24373-2021-KE, Final Decision and Order August 27, 2021

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The opinion of the Final Decision and Order of the Pennsylvania Special Education Due Process Hearing Officer, *S.M., by and through M.C. and D.C., v. Chichester School District*, ODR No. 24373-2021-KE, Final Decision and Order, August 27, 2021 is not found within a reporter, nor does it have a Westlaw or Lexis citation, but is located at App. H, 82a.

The opinions of the district court are found at *S.M., by and through his parents, Michael C. and Danielle C., v. Chichester School District*, 2022 WL 875232 (E.D. Pa. March 24, 2022) App. G, 68a; *S.M., v. Chichester School District*, 2024 WL 6989472, (E.D. Pa., Jan. 26, 2024) App. F, 65a; *S.M. v. Chichester School District*, 2024 WL 6989471, (E.D. Pa., Feb 29, 2024); *S.M., by and through his parents, Michael C. and Danielle C., v. Chichester School District*, 2024 WL 4438472, (E.D. Pa., Oct. 7, 2024) App. D, 42a; *S.M., v. Chichester School District*, 2025 WL 2404383 (E.D. Pa., Aug. 19, 2025), App. B., 9a.

The opinions of the circuit court are not reported in the Federal Reporter but found at *S.M., by and through his parents Michael C. and Danielle C. (appellees), v. Chichester School District (appellant)*, 2024 WL 4262788 (3rd. Cir. Sept. 23 2024) App. E, 61a; *S.M., by and through his parents Michael C. and Danielle C. (appellees), v. Chichester School District (appellant)*, 2025 WL 649894 (3rd. Cir. Feb. 28, 2025), App. C, 36a; *S.M., by and through his parents Michael C. and Danielle C. (appellees), v. Chichester School District (appellant)*, 2026 WL 1383301 (3rd. Cir. May 18, 2026), App. A, 1a; *S.M., by and through his parents Michael C. and Danielle C. (appellees), v.*

Chichester School District (appellant), 2026 WL 1723465,
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JURISDICTION

The judgment of the court of appeals was entered on June 15, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

24 Pa. Cons. Stat. §1306(a):

(a) The board of school directors of any school district in which there is located any orphan asylum, home for the friendless, children's home, or other institution for the care or training of orphans or other children, shall permit any children who are inmates of such homes, but not legal residents in such district, to attend the public schools in said district, either with or without charge for tuition, textbooks, or school supplies, as the directors of the district in which such institution is located may determine. When any home or institution having for its purpose the care and training of children and having non-resident children under its care, is located in more than one school district, educational facilities may be provided by either district as though the institution were located wholly in that district. If the district or districts in which the institution is located does not have facilities to accommodate the children in its schools or in a joint school of which it is a member, the board of directors shall so notify

the Superintendent of Public Instruction 1 not later than July 1. If the Superintendent of Public Instruction, after investigation, finds that neither the school district nor the joint school board, if any, can accommodate the non-resident inmates of the institution during the ensuing school term, he shall direct the district and the joint school board, if any, to enter into an agreement with another school district or joint school board to accept them on a tuition basis.

24 Pa. Cons. Stat. §1306(c):

(c) Except as provided in subsection (d), whenever a student described in this section is a suspected or identified eligible student as defined in 22 Pa. Code Chs. 14 (relating to special education services and programs) and 342 (relating to special education services and programs), the school district in which the institution is located is responsible for:

(1) providing the student with an appropriate program of special education and training consistent with this act and 22 Pa. Code Chs. 14 and 342; and

(2) maintaining contact with the school district of residence of the student for the purpose of keeping the school district of residence informed of its plans for educating the student and seeking the advice of that district with respect to the student.

20 U.S.C. §1415(f)(3)(B):

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

20 U.S.C. §1415(l):

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

STATEMENT OF CASE**A. Legal Background**

The Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.* sets forth requirements of tax-payer funded school districts to identify and provide students with disabilities a free and appropriate education

(“FAPE”). 20 U.S.C. § 1414; *see also Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 580 U.S. 386 (2017). Within its framework, both schools and students may bring claims for violations of the IDEA through a due process scheme administered by individual states. 20 U.S.C. § 1415. Claims must be exhausted during due process prior to same being presented to the state or federal district courts. 20 U.S.C. § 1415(l). IDEA also requires specific substantive information to be included in a student’s evaluation and individualized educational program (“IEP”) with the goal of educating student in the least restrictive environment; *i.e.* with non-disabled peers. 20 U.S.C. § 1412(a)(5); 20 U.S.C. § 1414(d)(1)(A); 34 CFR §300.320. IDEA also requires that the student’s educational program, inclusive of LRE requirements, be examined, *at minimum*, on a yearly basis by the IEP team. 20 U.S.C. § 1414(d)(4)(A). Indeed, should a school district fail to hold an IEP meeting which contemplates the placement and program of a student at least once annually, the district has violated the IDEA both procedurally. *Id.* It is well settled that an IEP cannot merely be a regurgitation of previous programs; the IEP must continue to be updated and provide meaningful educational benefit to students in light of their disabilities. 20 U.S.C. § 1414(d)(3). While a district is not responsible for curing a disability, nor responsible for ensuring each student academically reaches the same level as their general education peers, the district must provide an annually reviewed IEP program and placement, in the LRE, which enables the student to achieve meaningful educational progress. 20 U.S.C. § 1414(d)(4)(A); *see also Endrew F. v. Douglas County School Dist.*, 580 U.S. 386 (2017).

B. Factual and Procedural Background

This matter developed over a period of time where public education is in crisis due to inequitable funding and increasing expenditures solely funded through a taxpaying constituency. The Commonwealth Court of Pennsylvania acknowledged same through their ruling that Pennsylvania's funding system is unconstitutional disparately impacting all children in less affluent Districts, such as Chichester.¹

In September of 2020, Parents moved to Chichester School District while Student was living in a residential medical facility as a result of medical necessity which was funded by the state mental health system.² Parents had requested that District secure a residential educational

1. *See Generally, William Penn Sch. Dist. et al. v. Pa Dep't of Educ. et al.*, 294 A. 3d 537, 962 (Pa. Commw. Ct. 2023). Importantly, despite the Commonwealth Court's finding that funding to public school districts is inequitable, no real plan to remedy this injustice has been presented to date. Therefore, less affluent districts, such as Chichester, are continuing to function and abide by all the requirements under the IDEA, without the necessary funding to support it.

2. A residential medical facility differs drastically from a residential educational placement. A residential medical placement occurs through medical necessity and thereby determines a student's residence for purposes of 24 Pa. Cons. Stat. §1306. Conversely, a residential educational placement is not considered for purposes of 24 Pa. Cons. Stat. §1306 and thus, the student's parent or guardian's address dictates residency. 24 Pa. Cons. Stat. §1302. This distinction is critical as S.M. was consistently placed at a residential medical facility which is not governed by the IDEA or other educational regulations. A medical discharge is required before a district can determine educational placement.

placement though Student had not been discharged from his medical placement. Accordingly, the District had not yet had an opportunity to evaluate Student's needs. Rather, the District inherited a student with a significant medical and educational history in September 2020 and was asked to program for said student immediately, despite no actual discharge of a medical placement being imminent. Through due process, filed in December 2020, Parents sought a "contingent IEP" for private placement upon Student's discharge from the medical placement. Importantly, there is no such concept as a "contingent IEP" in IDEA; it is the result of the Honorable Joel H. Slomsky opinion in *L.T. v. North Penn Sch. Dist.* 342 F. Supp. 3d 610 (E.D. Pa. Dec. 14, 2018) interpreting 24 Pa. Cons. Stat. §1306.

As a "contingent IEP" is precisely what Parent requested, the Hearing Officer had no authority to decide any matters outside of the contingent IEP request. *See* 20 U.S.C. § 1415(b)(7)(A)(ii)(III), (f)(3)(B). On August 27, 2021, the Hearing Officer determined Student was not owed either a FAPE or contingent IEP from Chichester in accordance with 24 Pa. Cons. Stat. § 1306. During the due process hearing, neither party presented or defended a request for any residential educational facility or private placement, nor did Parents assert that any specific school was available to accept the student. Therefore, the question of whether any specific program was appropriate and constituted a FAPE was not addressed with the Hearing Officer.³ Indeed, the Hearing Officer's analysis

3. In fact, at the time of the due process hearing, neither party had explored any specific residential educational placement as it was agreed that the hearing officer would *solely* determine whether District owed a FAPE and contingent IEP.

was limited to ripeness whereupon he “assumed” all of Parents’ assertions of fact as true and concluded that no contingent IEP was required. While the Hearing Officer did opine that if a contingent IEP was owed, a residential placement was required, he did not provide any direction as to whether a specific program would be appropriate. Rather than remanding the matter to the Hearing Officer for proper consideration and exhaustion of deciding specific programming, the District Court assumed jurisdiction.

Parents appealed the Hearing Officer Decision on September 28, 2021, to the United States District Court for the Eastern District of Pennsylvania, again requesting a “contingent IEP.” Parents further requested that the District Court determine that Student was denied a FAPE and that the District must provide a residential educational school placement. On March 24, 2022, the Honorable Anita B. Brody entered a Preliminary Injunction requiring the District, in collaboration with Parents, to locate a residential educational program, opining that this was the only appropriate program that would provide Student with a FAPE. While the District immediately complied with the injunction, it had no obligation to do so beforehand as a lawful administrative order was in place for nearly seven months that did not order residential FAPE.

Per the District Court, District and Parents identified and applied to more than 15 residential placements over the course of approximately one year with only three initial acceptances and two of those rescinding. Until August 2024, Elwyn’s residential educational facility was the only available placement that accepted Student.

The District issued a NOREP⁴ for Elwyn in March 2023, immediately upon notice that the referral was accepted, so that placement could take effect. Parents refused Elwyn despite no other facility being available. Neither District nor Elwyn withdrew the offer of placement to Student. The District Court did not remand the matter to the administrative process for determination of the appropriateness of Elwyn, nor did it hold any process to determine whether Elwyn's residential educational placement was a FAPE. Despite failing to determine that Elwyn was not a FAPE, the District Court instead required the District to continue to search for placements until Parents' preferred Melmark School became available in August 2024. The District's request for remand to the administrative hearing officer was denied. The District maintains that remand to the administrative process was required because the Hearing Officer never addressed the District's private placement offer.

Instead, the District Court undertook to decide these matters itself and, recognizing that it lacked the special education expertise to do so, directed the District to fund an expert to assist in the Court in the factfinding process. The expert was supposed to evaluate the Elwyn FAPE offer; however, she did the opposite. Unbeknownst to the District, she evaluated Melmark, while also admitting she could give no opinion on Elwyn's appropriateness because she had not evaluated it. The District Court proceedings focused on whether Melmark was an appropriate

4. A Notice of Recommended Educational Placement ("NOREP") is required under the IDEA as the official document issued by a school district to identify a student's recommended educational programming and describe alternative programming which was discussed by the IEP team but ultimately rejected.

educational placement, not the District’s yearlong offer at Elwyn. The first hearing regarding appropriate placement was not until August 2024, despite the injunction from March 2022, where the Court determined that Melmark was a *better* placement for Student.⁵ But whether the Parents’ preferred placement was “better” is not the FAPE standard set forth by the IDEA.⁶ *See Ridley School District v. MR and JR ex rel. ER*, 680 F.3d 260, 277-79 (3d Cir. 2012) (“the IDEA does not require an IEP to provide the optimal level of services”). Following the hearing, the District was ordered to pay compensatory education for the period of time when Melmark was not available, and when the District had continuously offered Elwyn, the only available placement.

Rather than addressing whether Elwyn was appropriate under IDEA’s FAPE standards, the District Court’s analysis was based on her judgments of the placement she believed to be better. In its supporting Memorandum dated October 7, 2024, the District Court erroneously based its rejection of Elwyn’s residential school on its opinion that Student “ha[d] languished for the past three years” at Elwyn’s *separate* residential *medical* treatment facility. Even if the District Court’s opinion that

5. Melmark had not accepted Student until two weeks prior to the August 2024 hearing.

6. The District Court based its decision on the report of an independent evaluator who was ordered by the District Court to be funded by the District through the Court’s appointment order. Crucially, that evaluator never evaluated and therefore gave no opinion on the appropriateness of Elwyn’s residential educational facility. Further, the Hearing Officer at the due process hearing never evaluated the proffered placements of either party. There was not a singular finding of fact with regard to any specific FAPE placement at the state administrative level.

the Student “languished” is given full credit, whether the separate medical placement was effective simply did not inform the issue of whether the residential educational school was FAPE.

To provide legal finality to the case, Student filed a Motion for Judgment on the Administrative Record seeking relief as to Count I of their Complaint: Appeal from Administrative Decision.⁷ The District Court entered a final Memorandum and Order on August 19, 2025 finding that (1) the hearing officer erred in determining that Chichester was not obligated to provide a FAPE to student; (2) the hearing officer erred in determining that Chichester did not owe Student a contingent IEP; and (3) the hearing officer correctly determined that Student required a residential educational placement, further ordering placement at Melmark. The District Court ordered prospective placement at Melmark for approximately three additional years as “compensatory education,” representing the time period of August 27, 2021 (the date of the Hearing Officer’s final decision and order) through September 4, 2024 (the date of the District Court’s final order). Placement was required at Melmark until Student turned 21-years-old absent a withdrawal by Parents or recommendation of new placement by Melmark. The District Court’s final Order did not provide any consideration for the IEP process set forth in the IDEA. In rendering its final compensatory award, the District Court ignored the period in which the District properly relied on the due process order where neither FAPE nor an IEP were owed; its efforts to secure placement pursuant to the injunction in March

7. Appellees agreed to dismiss Counts II through VI. *See* Aug. 19, 2025 Order, No. 2:21-cv-04266-AB, *Doc. 186*.

2022; its continuous offer of a residential placement at Elwyn through August 2024; and its immediate funding of Melmark upon receipt of court order to do so in September 2024. In other words, not only did the District offer FAPE at all times beginning in March, 2022, it offered the only placement available to Student, only to now be charged again to pay compensatory education for that same period. District timely appealed the August 19, 2025 Order which was affirmed by the Third Circuit Panel on May 18, 2026. Rehearing was denied by the Third Circuit despite a strong dissenting opinion regarding the overreach of the District Court in this six year case.

ARGUMENT

- I. As a question of exceptional importance and matter of first impression, whether the IDEA’s exhaustion requirements under 20 U.S.C. §1415(f)(3)(B), (i) a party to pursue claims of a denial of a free and appropriate education (“FAPE”) and/or compensatory education through a district court during an appeal of a state administrative hearing officer’s opinion, where those claims were not presented at that same administrative proceeding?**

The IDEA requires administrative exhaustion of claims before said claims may be litigated in federal district courts or a designated state court. *See* 20 U.S.C. § 1415(f)(3)(B), (i). This Court has only addressed the scope of the IDEA’s exhaustion requirements under §1415(l) once in *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154 (2017).⁸

8. This Court has also addressed exhaustion requirements as it applies to suits that seek relief also available under the IDEA

In rendering its decision, this Court opined that where the gravamen of a complaint pertains to a student’s education, said claims must be exhausted under IDEA procedures, rather than bypassing the IDEA, and presenting educational claims through Title II of the Americans with Disabilities Act (ADA) or § 504 of the Rehabilitation Act. Accordingly, this Court confirmed that educational (“FAPE”) claims must be properly exhausted in accordance with IDEA’s exhaustion clause. *See* 20 U.S.C. § 1415(l). The issue of what constitutes adequate exhaustion of IDEA “FAPE” claims has not been addressed by the Supreme Court and presents a matter of first impression. The IDEA specifically states, “a party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.” *See* 20 U.S.C. §1415(f)(3)(B)(“subject matter of hearing”). However, this Court has not addressed the scope of “subject matter of hearing,” requiring lower courts to apply the exhaustion principles of *Fry* to their analysis. With *Fry* presenting distinct issues related to “other claims” outside of the IDEA, the undersigned submits that its holding provides limited direction regarding the subject matter of broad “FAPE” claims and § 1415(f)(3)(B) of the IDEA.⁹

but presented in different claims. *See Luna Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, (2023). However, the *Luna* decision also fails to address the question presented in this matter.

9. For example, a FAPE claim could be limited to whether a school district is required to offer an IEP (contingent or otherwise). A FAPE claim could also be whether a school district is required to offer an IEP **and**, if a school district is required to offer an IEP, what programming belongs in that IEP. A FAPE claim could also be that

What neither *Fry* nor the statute tells us is whether a district court may retain jurisdiction over one case that presented a distinct, initial claim at the administrative level -- here, for a “contingent IEP” -- instead of remanding the matter to the original state administrative process for additional assessment as to the type of programming required in an IEP. Parents’ due process complaint sought a determination that the District is obligated to provide Student a FAPE via a contingent IEP. The Hearing Officer did not determine whether **any** specific program and/or placement constituted FAPE. Nor did a hearing officer make any findings of fact or draw conclusions of law with regard to Elwyn or Melmark and their ability to provide a FAPE. Simply put, the subject matter of the administrative due process proceeding was purely the procedural question as to the District’s obligations to provide a contingent IEP, and not the substantive determination as to any particular program. *Fry* categorized the IDEA as addressing “FAPE” claims in the broadest sense. Yet, as this case illustrates, “FAPE” claims comprise various distinct issues which require separate analysis and determination. Thus, *Fry* does not answer the question presented here as to whether a District Court may assume permanent jurisdiction over all FAPE claims, which may develop over a period of years, when only one procedural claim was initially presented.

the district’s evaluation was improper. It could be that the evaluation was improper **and** the IEP is improper. A FAPE claim could also be that a school district’s programming is not adequate to meet the needs of a child and must fund a private placement generally. But it could also be that the school district’s programming is inappropriate and a specifically identified facility must be funded. Accordingly, “FAPE” claims can be incredibly broad or incredibly limited. This Court has not addressed this concern and instead, left lower courts to opine on the matter.

The question presented to this court is the level of exhaustion required for subject matter disputes of “FAPE” claims and the extent to which an appellate court may rule on subject matter disputes not addressed at the administrative proceeding. As already suggested in this Petition, permitting subject matter disputes to be heard on appeal where they were not heard at the administrative level is in direct contravention to the statutory language of the IDEA and the standard of review established for appellate courts reviewing an administrative decision.

District courts (and certain designated state courts) operate as a quasi-appellate forum for administrative due process hearings under the IDEA. *See generally, S.H. v. State–Operated Sch. Dist. of Newark*, 336 F.3d 260, (3d Cir. 2003). While the district court may conduct a plenary review of a hearing officer’s application of legal standards and conclusions of law, the court is simultaneously bound to a modified *de novo* review of the hearing officer’s factual findings, *i.e.* the factual findings of the hearing officer must be presumed true.¹⁰ In conducting such hearings, the “IDEA further provides that. . . ‘the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.’” *Hunter v. Mount Lebanon School Dist.*, 95 F.3d 272, 278

10. In the present matter, the District Court accepted as true all purported factual findings set forth by the Hearing Officer. Because he conducted only a ripeness analysis, the Hearing Officer accepted all factual averments of the Parents as true. The District’s factual offerings have thus been totally disregarded since the very inception of this case.

(3rd Cir. 1996) *citing* 20 U.S.C. § 1415(i)(2)(c).¹¹ Because the appellate court is bound by the factual findings of the hearing officer, the subject matter of those factual findings must remain consistent at both the administrative and appellate level.

In *Hunter*, the student filed a due process complaint alleging his district did not provide him with a FAPE pursuant to the IDEA. *See Hunter*, at 274. After pursuing relief through due process proceedings, the student subsequently filed a complaint in the United States District Court for the Western District of Pennsylvania specifically seeking the school district be excluded from evaluating or programming for student. *See Id.*, at 277. Mount Lebanon sought dismissal of the student's complaint for failure to exhaust administrative remedies, which was granted in full by the district court. *See Id.* The student appealed to the United States Court of Appeals for the Third Circuit. *See Id.* In assessing whether the student exhausted administrative remedies regarding his request to exclude the school district from evaluation or programming, the Court specifically held:

11. Pursuant to *Dudley* “[a] court may elect to supplement the record based on a variety of circumstances, including gaps in the administrative transcript... unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing,” among others.” *Dudley v. Lower Merion Sch. Dist.*, Civil Action No. 10-2749, 2011 WL 5525343, *1 (E.D. Pa. Nov. 14, 2011). Consistent with the foregoing and in light of the IDEA's subject matter requirements, supplementing the record is permitted in order to fully address the claims brought at the administrative and is not intended to permit litigation of entirely new claims.

We find that it would be appropriate for this claim to be exhausted before it is examined in the district court. . . .

A principal purpose of IDEA’s administrative procedure is to permit ‘state and local education agencies[,] in cooperation with the parents or guardian of the child,’ to take ‘primary responsibility for formulating the education to be accorded a handicapped child,’ thus, we find that it is appropriate to permit the Commonwealth to address this issue before it is considered in the district court.

Id., at 284 (internal citations omitted) (emphasis added). Administrative exhaustion requirements pursuant to the IDEA “allows a school district to bring its expertise to bear and affords the state an opportunity to correct its own mistakes.” *McKellar v. Com. of Pa. Dept. of Educ.*, No. 98–4161, 1999 WL 124381, *2 (E.D.Pa. Feb.23, 1999)¹²*citing McKart v. United States*, 395 U.S. 185, 193–95 (1969)).

12. *McKellar* recognized that issues not raised at the administrative hearing cannot be presented in the district court. *See McKellar*, at *2. The student attempted to address the terms of his IEP including its sufficiency as he had ultimately regressed into residential placement at DICU despite the IEP not providing for such placement initially. *See Id.* The court refused to hear same on grounds of administrative exhaustion because the due process hearing was limited to whether an IEP should be implemented and not whether the specifics of the IEP were compliant with FAPE – which was the relief sought in the Eastern District Complaint. *See Id.*

Here, the District was not presented an opportunity to bring its expertise to bear, nor was the state afforded an opportunity to correct its mistakes. Appellee's due process complaint specifically sought a "contingent IEP" as properly summarized in the Hearing Officer's final order: "[t]his 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." In resolving Student's due process complaint, the Hearing Officer determined that District did not owe a FAPE to Student. The Hearing Officer did not address the substance or merits of Student's then existing IEP, nor did he address the merits of whether any specific IEP or school could meet the needs of Student. Those issues had not arisen at the time of the Hearing Officer decision because the point of contention was solely whether a contingent IEP was owed; *not* whether any particular private placement complied with the District's FAPE obligations.

Despite a specific offer of placement not being at issue at the administrative hearing, five years after the initial due process complaint was filed and based on a stale record, the District Court made its own analysis as to whether the District's offer was more or less appropriate than Parents' preferred placement.¹³ In further error,

13. Critically, even if this Court determined that the District Court could assess the respective placements identified by each party, the manner in which the Eastern District did so is inconsistent with the IDEA. The sole question to be answered by the District Court was whether the District's offer, on its own and independent of the placement offered by Parents, complied with FAPE. Instead, the District Court inserted its own opinions and judgments as to which program was "best".

the District Court did not rely upon the administrative factual findings rendered in the Hearing Officer's final order. Rather, the District Court directed the District to fund an outside "independent" evaluator to assist in her "fact finding." This is in direct contravention to IDEA administrative principles and solidifies the fact that the issues presented to the Hearing Officer were not the issues being decided by the District Court. Had the Hearing Officer actually assessed the private placement dispute, the District Court could and should have relied on those findings of fact pursuant to *Hunter*. But no such facts existed because the issue was not presented during the administrative proceedings and had not even arisen at that time. As none of these facts were presented in front of the Hearing Officer, the District Court could and should have remanded the case back to the administrative hearing officer.

Ultimately, the District Court punished the District by ordering compensatory education for the same period it refused to remand. However, in rendering its compensatory award, the District Court admitted that "the Hearing Officer had no occasion to craft a compensatory remedy." Omitted from that sentence is the reason why compensatory relief was not awarded -- because a specific offer of placement or the District's IEP was never presented to the hearing officer for consideration, and therefore the hearing officer could not award said relief. Because the issue of specific placement and compensatory relief were not subject matters presented to the Hearing Officer, the District Court *sua sponte* created a record despite lacking jurisdiction to do so.

This Honorable Court has "rejected the view that the IDEA gives 'courts *carte blanche* to impose upon the

States whatever burden their various judgments indicate should be imposed.” *Endrew F.*, 580 U.S. 386, 393 (2017) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206 (1982)). This Honorable Court was also clear that, “[c]ourts are not permitted ‘to substitute their own notions of sound educational policy for those of the school authorities which they review.’ *Rowley*, 458 U.S. 176, 190 (1982). Here, a state hearing officer was never permitted the opportunity to opine upon whether S.M. was offered a FAPE at Elwyn or at Melmark. The court made this determination entirely on its own, and entirely on a record it developed, despite having been petitioned for proper remand. The court did not merely substitute its own notions for that of a hearing officer; the court single-handedly made each and every FAPE determination, in a matter which started with a purely procedural hearing officer decision.

Similarly, the Parents’ District Court complaint contained several counts, including but not limited to Count I, Appeal from Administrative Decision; Count II, Failure to Offer FAPE; and Count VI, Injunctive Relief for private placement. Procedurally, Student’s preferred private placement was somehow awarded through the District Court’s final Order and Memorandum ruling on the Motion for Judgment on Administrative Proceedings even though: the specific claims for private placement and injunctive relief were voluntarily dismissed; the Parties had not participated in an IEP meeting with an IEP team to assess the appropriateness of private placement; and the District Court did not conduct an evidentiary hearing as to the District’s proposed placement until more than a year after it was secured (and only after Parents also secured a preferred placement), without hearing from the

IEP team, and without the Court's expert *having actually reviewed it*. This was pure procedural gamesmanship. Significantly, the District Court could not have additional or alternative jurisdiction to hear Parents' claim for private placement where they voluntarily dismissed said claims.

With Parents and Student voluntarily dismissing all counts of their complaint but for "Count I, Appeal of the Administrative Record," this matter began as the District not owing a FAPE and inexplicably morphed over years into the District immediately owing private placement at the Parents' preferred facility and paying years of compensatory education and attorneys' fees (exceeding four million dollars in the aggregate). Frustratingly enough, Parents' own complaint supports the proposition that the District was never afforded an opportunity to *actually* program for this student and consider a private placement prior to the District Court's involvement. Per that Complaint, "[the hearing officer] committed reversible error by failing to require CSD to plan for and offer an appropriate residential FAPE that will be available upon [Student's] physical return to the District." ¹⁴ Plaintiffs'

14. Parents' concession established another critical component of residential medical placements. Here, Parents acknowledge that the Student had not yet been discharged from the residential medical facility which was located outside of Chichester School District. The date of Student's discharge was delayed by more than three years, occurring in 2024, despite the due process proceeding occurring in 2021. District had absolutely no involvement in the medical placement. Rather, its involvement in this matter solely resulted from Parents move into District boundaries despite Student residing elsewhere. Accordingly, because Student was residing in a facility located outside of District, District's sole obligation to program for

Student was not based upon the IDEA, but rather was based upon one Pennsylvania specific case. *See generally, L.T. v. North Penn School District*, 342 F. Supp. 3d 610 (E.D. Pa. 2018) *interpreting* 24 Pa.C.S. §13-1306. Generally, the school district in which a parent resides is required to provide FAPE to eligible IDEA students. *See* 24 Pa. C.S. §13-1302. Section 1306 is the exception to this general rule, triggered when the student resides in a facility outside of the parents' school district. *See* 24 Pa.C.S. §13-1306. When differing residency occurs, the district in which the student's facility is located (host district) is required to provide FAPE to the student, not the district in which parents reside (resident district). *See Id.*, see also Pa. Dept. of Educ. Nonresident Students in Institutions, BCE 24 P.C. 13-1306, Sept. 1, 1997, Revwd. Aug 2026. The *L.T.* court was concerned that a student would be left in limbo where he was expected to be discharged from placement and return to the parents' district, but said district would be delayed in providing a FAPE to Student because as written under §1306, the parents' district was divested of their FAPE obligations absent students return. Thus, *L.T.* extended the requirements of §1306 and required a parents' district to offer a "contingent IEP" asserting that doing so was not the same as offering a student FAPE. *See L.T.*, at 621 ("Here, North Penn argues that it is under no obligation to provide Student with a FAPE through a contingent IEP because, as Student's resident district, it is not Student's current LEA. But this position is contrary to the remedial nature of the IDEA and ignores the distinction between a FAPE and an IEP, as articulated in *I.H. v. Cumberland Valley Sch. Dist.*, 842 F.Supp.2d 762, 771 (M.D. Pa. 2012)"). While the undersigned recognizes the purpose of *L.T.*, its opinion has created significant complications for students and districts alike, where the student is placed outside of a parents' district for non-educational reasons (i.e. medical, behavioral, emotional, or substance abuse). With *L.T.* clearly distinguishing a contingent IEP from a FAPE obligation, compensatory relief cannot be awarded as it is the sole remedy for a denial of FAPE. *See* 20 U.S.C. § 1415(e)(2). Accordingly, the District Court's award of compensatory relief in this matter is inconsistent with *L.T.* as Student was never actually discharged from his medical placement back to District and thus, District's FAPE obligations

Eastern District Complaint at ¶1. Parents' averment is nothing short of a concession that the School District had no opportunity to "plan for and offer" FAPE prior to the appeal to the District Court because, again, specific programming was not the issue at hand. The averment is also nothing short of definitive that remand was required. The issue, as framed by the Student, and as argued by the

were not triggered. Pennsylvania's Hearing Officer Ford recently addressed the complications and confines of contingent IEP's under §1306 opining as follows: "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." *See S.G. v. Chichester School District*, PA ODR No. 24373-20-21, Aug. 27, 2021 (emphasis added). Conveniently, Hearing Officer Ford rendered his opinion and gave credence to the school district's concerns which is the same school district as this appeal, represented by the same counsel herein who is positioned against the parents' counsel, who is the same as it was in *S.G. v. Chichester*. All to say, District's arguments herein are not frivolous disputes to avoid private placement as suggested by Judge Brody in the Eastern District of Pennsylvania. Rather, the District has legitimate concerns regarding the scope and consequences of contingent IEP's and subjecting District's to FAPE obligations for Student's outside of their geographical bounds.. Said concerns have not only been recognized by Pennsylvania Hearing Officers assigned to handle IDEA due process claims; but the Hearing Officers have also adopted the District's position. *See S.G. v. Chichester*, (holding that a contingent IEP was not owed); *See also, S.M., by and through M.C. and D.C. v. Chichester School District*, ODR No. 24373-2021-KE, Final Decision and Order August 27, 2021 (holding that a contingent IEP was not owed).

District throughout this Petition herein, was not that the District's programming was inappropriate, but instead was whether programming was required *at all*. The question of whether specific placement is appropriate is thereby distinct from the question of whether a FAPE or contingent IEP is owed. Each question requires subject matter exhaustion as set forth in the IDEA. *See* 24 Pa.C.S. § 1415(f)(3)(B). But exhaustion never occurred.

It is equally indisputable that the Hearing Officer issued an enforceable order which was properly relied on by the District until receipt of the District Court's Order for injunctive relief. It is unfathomable that in relying on that Order, the School District was subsequently deprived of their right to program for a student based upon the IEP team's decision making process and instead was obligated to immediately privately place that student where 1) the administrative proceeding never determined whether the School District did offer a FAPE through its proposed programming; and 2) private placement was decided without an evidentiary hearing.

Through their appeal of the administrative decision and the petition for injunctive relief, and upon both encouragement and endorsement by the District Court, Parents and Student usurped the administrative process and flouted administrative exhaustion requirements set forth by the IDEA. *See* 20 U.S.C. § 1415(b)(7)(A)(ii)(III), (f)(3)(B). The District was deprived of its due process rights where the opportunity to program for the student and convene IEP meetings as set forth by IDEA were squashed through the District Court's injunctive ruling and again through the District Court's final order. In abiding by a lawful administrative order, the District is

now excessively penalized by the District Court through the immediate order for private placement and the subsequent compensatory relief to Student. Both the legal and practical system created by this decision cannot be lost on this Court. Where there is even a marginal risk of parents appealing a hearing officer decision, school districts are forced to concede to private placement, despite an administrative order stating otherwise, because the potential costs of litigation, including both its own and parents' attorneys' fees, in addition to compensatory relief, will result in bankruptcy.¹⁵ Public education is then dismantled serving only as a pipeline for private schools at the expense of taxpayers. Further, additional consequences of this matter will require District's to file due process complaints at the administrative level, while federal litigation is already active, in order to determine whether its proposed private placement is appropriate. At current, the District Court's Order invites consistent invocation of bifurcated litigation, where a statute is clear with regard to mandates for exhaustion of subject matter disputes.

The court's decision will have lasting, significant impacts on IDEA claims. Specifically, where litigation has ensued, the court's decision strips school districts of a meaningful ability to assess a student's current needs and create programming to address same. Instead, even where a team of qualified professionals such as educators, service providers, doctors, and the like assert specific programming is proper, school districts will be required

15. The undersigned does not use this term for dramatic or persuasive effect. The Eastern District's decision is likely to bankrupt Chichester School District.

to ignore the statutorily required IEP process and instead assess the insurmountable financial repercussions of claims for specific relief that were not raised and/or exhausted at the administrative proceedings.

IDEA matters were intentionally left by Congress to an administrative process where the factfinder is entrenched in IDEA disputes daily and allow states the ability to rectify any potential mistakes. Here, however, the court has permitted a convenient bypass to the administrative process, in direct contravention to the IDEA's subject matter requirements, where only a limited issue needs to be presented administratively before the state and federal appellate courts may adjudicate all possible grievances developed by parents over years. Importantly, pursuant to the procedure established by this matter, the federal court can flatly ignore the hearing officer's ultimate decision – the district did not owe student a FAPE – and award the most significant form of relief a district could face – a multi-year private placement without IEP team considerations -- without ever obtaining factual findings on the appropriateness of the placement from a hearing officer.

II. As a question of exceptional importance and matter of first impression, whether awards for compensatory education under the IDEA require considerations beyond the exact hours of a deprivation of a free and appropriate education such as a school district's reasonable efforts to rectify the denial of FAPE; the equities of the parties; the needs to of student to recover from the deprivation in; or reliance on court order including decisions of the administrative process?

The Third Circuit's decision deepens a preexisting conflict among the federal courts of appeals concerning the standard applied in calculating compensatory relief. Specifically, a number of courts have determined that compensatory relief should be calculated based upon an hour-to-hour calculation (*i.e.* if a student did not receive six hours of services, she is entitled to six hours of compensatory relief.) See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005) summarizing *M.C. v. Central Regional School District*, 81 F.3d 389, 391-92 (3rd Cir. 1996); *Westendorp v. Indep. Sch. Dist. No. 273*, 35 F. Supp. 2d 1134, 1135-36, 1137 (D. Minn. 1998) (both of which have adopted the hour-for-hour approach). Conversely, *Reid* has set forth a standard consistent with other IDEA principles, where compensatory education is an equitable decision that must be based upon the equities of the parties. See *Reid*, at 526.

While the Third Circuit has instituted an hour-for-hour approach, it sets forth an exclusion: "only the time reasonably required for the school district to rectify the problem" may be considered in awarding compensatory relief. See *M.C. v. Central Regional School District*, 81 F.3d

389, 391-92 (3rd Cir. 1996). Before this court is a dispute regarding the lower court's hour-for-hour calculation as set forth in Third Circuit. The District Court awarded hour-for-hour compensatory relief to Student as set forth by *M.C.* but ignored the other requirements of *M.C.* and *Reid*, including "the reasonable efforts" of District to rectify the problem, the equities of the parties, or the actual needs of the student. *See M.C.*, at 391-92; *Reid*, at 526.

Specifically, the District Court determined that the School District owed years of compensatory education (*i.e.* prospective private placement) beginning the date of the Hearing Officer's final order until the District Court finalized its injunctive relief decision on September 4, 2024 (a roughly 36-month period). But the District Court wholly ignored several critical factors that would have reduced the ultimate compensatory award. First, during the pendency of the litigation, student was placed in a *medical* residential facility. Thus, the District could not place student in an educational facility. Further, the District had absolutely no control regarding the Student's reoccurring medical placement. Those decisions were left to Parents and third-party providers. In fact, Student was never actually medically discharged.

The District Court also ordered compensatory education from the period of the Hearing Officer's final decision to the date of the District Court's Injunction Order. However, compensatory relief for this period is wholly unjust where, during this period, (1) District had no obligation to provide a FAPE and therefore, no compensatory relief could be owed and (2) District

had no opportunity to assess the student's then-current educational needs and create the appropriate programming in accordance with the IDEA. By the very terms of the Third Circuit precedent, compensatory relief only accrues from the point in time that a district knows or should know of an IEP's failure. *See M.C. v. Central Regional School District*, 81 F.3d 389, 391 (3d Cir.1996). At that time, the District could not have known of any IEP failure where 1) the hearing officer determined that it did not owe student a contingent IEP, let alone a FAPE; and 2) the offer of FAPE and IEP ultimately offered by the District were never assessed by the hearing officer at the due process hearing.

Finally, the District Court awarded compensatory relief for the period from the Injunction Order through the period of the District Court's final Opinion and Order. In doing so, the District Court disregarded that the District immediately complied with the Injunction Order to procure residential placement. Again, by the very terms of Third Circuit precedent, "[a] disabled child is entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem. . . . *The school district, however, may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem.*" *See M.C. v. Central Regional School District*, 81 F.3d 389, 391-92 (3d Cir.1996) (emphasis added). Residential placement is rarely a simple undertaking, as it is generally necessary for students with a myriad of complex medical and educational diagnoses and needs. Placement requires a rigorous application process by the school district, which determination is made solely at the discretion of the facility. Lastly, many

institutions often focus on a singular or limited number of disabilities, resulting in reduced options for complex cases. Thus, locating and applying to a specific institution that would address a student's educational needs as set forth in an evaluation and/or IEP is not immediate and requires significant time and effort by the school district as contemplated by *M.C.* Here, that effort resulted in one school to accept Student after approximately a year of searching.

While the District Court did not apply the *M.C.* or *Reid* standard, creating its own preferred path for relief, this Court has never addressed the proper standard for compensatory relief. The facts of this case highlight the critical importance of considering the circumstances underlying any compensatory relief decision. The District was not obligated to provide student a FAPE pursuant to the hearing officer's final decision and pursuant to *L.T.* Fifteen months passed before a court-imposed obligation manifested through the District Court's injunction. The District immediately complied with the injunction by applying to multiple placements on behalf of Student. For reasons outside of the District's control, placement could not be approved for Student. Nevertheless, the District continued to locate and apply to institutions on behalf of Student until he was ultimately accepted and placed. After placement, the student's level of needs was immediately reduced. The District immediately notified the District Court of this information to further evidence that a multi-year prospective placement, modifiable solely by Student's Parents or the private institution and not the IEP team, is a windfall to student without any consideration to his actual needs or the District's ability to rectify the circumstances.

The District Court's final Order effectively creates duplicative relief: Student was offered a FAPE during the majority of the litigation period but was also awarded compensatory relief for that same period of time. This is a direct contradiction to both the IDEA and established caselaw that provides compensatory education as a remedy solely for the *deprivation* of a FAPE.

Moreover, while the District asserts that it offered FAPE and its actions were reasonable, the District Court's final Order lacked analysis regarding how its compensatory award was determined and whether the District made reasonable efforts to rectify the problem. Rather, it opined that neither party presented evidence on District's efforts. This was simply untrue, and the District Court's final opinion *directly contradicts* its own conclusions in the October 7, 2024 Memoranda, determining, in sum, that the District sought placement at 15 facilities; four facilities ultimately accepted Student – one withdrew (Shorehaven), one the court rejected (Shrub Oak), one accepted Student beginning March 2023 to September, 2024 (Elwyn), and the final, Melmark, was not available until August 2024, less than two weeks prior to a prescheduled hearing on the issue of placement.

Despite the foregoing, an impossible standard has been imposed upon districts that is incongruent with appellate precedent that compensatory education relief should exclude the time **reasonably** required for the school district to rectify the problem or the equities of the parties. *See Id.* By the very terms of the District Court's final Order, where a student requires placement in a residential educational facility, a district will owe compensatory education for the very same period of time that it offered

the only available appropriate residential facility in accordance with FAPE obligations or the contingent IEP, until parents find a placement that they not only prefer but will also accept student, even if that takes *years*.

The calculation and methodology of compensatory relief have never been addressed by this Court but requires significant guidance as circuits are split as to whether hour-for-hour compensation is appropriate or whether equitable considerations must be considered. The calculation and methodology of compensatory relief benefits the student regardless of this court's decision. The hour-for-hour approach establishes the maximum amount of money a student would receive for a violation of FAPE, regardless of any reasonable and justifiable explanations for not programming accordingly (*i.e.* an administrative order that did not find a FAPE obligation is subsequently overturned on appeal). Conversely, the equitable approach considers relevant factors including: the district's efforts to rectify noncompliance; legal and procedural limitations imposed on the parties; and the amount of programming actually necessary to restore the student's deprivation. The hour-for-hour approach is punitive towards school districts. Accordingly, the undersigned encourages this Court to recognize the magnanimous consequences of sweeping compensatory relief orders, especially those requiring prospective placement, and requests same to intervene in this dispute amongst the circuits.

III. As a matter of exceptional importance and matter of first impression, whether an award for compensatory relief requiring a student's permanent prospective placement in a residential educational facility, without consideration of the comprehensive IEP process, violates the statutory language of the IDEA and the due process rights of all parties, as established by the IDEA.

This Court has unquestionably determined that a child's educational needs, including determinations as to what constitutes a FAPE, should be left to the IEP process:

“The ‘free appropriate public education’ required by the Act is tailored to the unique needs of the handicapped child by means of an ‘individualized educational program’ (IEP). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child, consists of a written document containing (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation

procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.”

Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176,182 (1982). Since *Rowley*, courts have further defined what constitutes a FAPE, including requirements that students be educated in a classroom with nondisabled students as much as possible and if not possible, making sufficient efforts to include students in school programs with nondisabled children whenever possible. See *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1207 (3d Cir. 1993)(emphasis added). The school district bears the burden of ensuring these requirements and providing FAPE irrespective of which party filed the claim. See *Id.* The IEP is the means of ensuring that each eligible child receives FAPE, and administrative due process is the means by which a school district can meet its burden imposed by *Oberti*.

Notably, *Rowley* recognized the tension that may exist where a court reviews FAPE compliance, ultimately holding:

[T]hat a reviewing court base its decision on the ‘preponderance of the evidence’ **is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. . .**

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable

educational methods upon the States. **The primary responsibility** for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, **was left by the Act to state and local educational agencies in cooperation** with the parents or guardian of the child.

Rowley, at 206-208 (emphasis added). *Rowley* neither holds nor permits a parent or guardian to retain exclusive decision making over a student's educational needs.

Nevertheless, the District Court opined in its final Order relief that Student shall remain in his residential educational placement until 2028 unless "(i) Plaintiffs ask Chichester for a different placement, program, or school; or (ii) Melmark notifies the parties its residential educational program can no longer meet [Student's] educational needs." The District and IEP team have zero voice. Yet the Panel upheld this provision, opining that the Order somehow does not dictate future IEP deliberations and does not curtail District's prospective obligations. But the Order does prevent any meaningful future IEP process because it completely leaves all decision making in the hands of the Parents and a third-party private school, with the actual District – a recognized party under IDEA – having no ability to provide input. The Order thus completely dismantles the IEP process and further disregards the strongly supported positions in *Oberti* and *Rowley* that students should be educated with nondisabled children as much as possible, which, per the clear letter of the IDEA, is an IEP team decision inclusive of the District.

Here, in complying with the Court's final Order, the IEP team's legally mandated identification of Student's goals or programming is irrelevant because the court has predetermined that residential educational placement at a particular third-party school is the sole available educational placement to comply with FAPE. *See* 20 U.S.C. §§ 1414(d)(1)(A)(i)(II), (IV). Concerningly, while Melmark is *one part* of Student's IEP team, its opinion regarding placement of Student based upon Student's needs is, at best, strictly limited to whether it desires to disclaim services, and at worst, tainted with its unequivocal, significant financial support from the District. Such a result is wholly inconsistent with the IDEA and Third Circuit law requiring the least restrictive placement through IEP procedures. *See Id.*

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT,
FILED MAY 18, 2026**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-2750

S. M., BY AND THROUGH HIS PARENTS,
MICHAEL C. AND DANIELLE C.; MICHAEL
CIAVARELLI; DANIELLE CIAVARELLI

v.

CHICHESTER SCHOOL DISTRICT,

Appellant.

(Opinion Filed May 18, 2026)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

D.C. No. 2:21-cv-04266

District Judge: Honorable Anita B. Brody

Submitted Under Third Circuit L.A.R. 34.1(a)

May 12, 2026

Before: SHWARTZ, MASCOTT, and McKEE,

Circuit Judges

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Appendix A

McKEE, *Circuit Judge*.

Chichester School District (“Chichester”) appeals the District Court’s Order granting S.M.’s Motion for Judgment on the Administrative Record on Count I (Appeal from Administrative Decision), entering judgment in favor of S.M., and ordering Chichester to fund S.M.’s residential educational placement at the Melmark School through August 2028.

The District Court concluded that Chichester violated S.M.’s right to a free and appropriate public education (“FAPE”) by failing to offer him residential educational placement, determining that “appropriate relief must ensure that S.M. can receive the residential educational programming he was denied for the roughly 36 months between the Hearing Officer’s erroneous August 27, 2021 decision and the District Court’s September 4, 2024 order” and requiring Chichester to secure and fund placement at the Melmark School.¹ Because Chichester has made clear that it will persist in challenging S.M.’s residential educational placement, notwithstanding prior rulings, “relief will only be appropriate if it protects S.M.’s ability to continue receiving the special education and related services he is long owed at the Melmark School without fear of displacement by Chichester.”²

We can add little to the District Court’s fine opinion. We will affirm for the reasons below.

1. *S.M. v. Chichester Sch. Dist.*, No. CV 21-4266, 2025 U.S. Dist. LEXIS 160251, 2025 WL 2404383, at *9 (E.D. Pa. Aug. 19, 2025).

2. *Id.* 2025 U.S. Dist. LEXIS 160251, at *10 (citation modified).

*Appendix A***I.**³

“We review the District Court’s award of an equitable remedy under the [Individuals with Disabilities Education Act (“IDEA”)⁴] for abuse of discretion.”⁵ “An abuse of discretion occurs when a district court’s decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.”⁶

Chichester argues that the District Court’s ordered relief “is a prospective FAPE Order formed as a compensatory education award when no compensatory education is due,”⁷ that (1) violates the IDEA and (2) strips the individualized education program (“IEP”) team of authority to change or challenge S.M.’s educational placement while also failing to place him in the least restrictive environment (“LRE”). We are unpersuaded.

The IDEA requires states that receive federal funding to provide a FAPE to all students with disabilities.⁸ The IDEA’s remedial provision expressly authorizes courts to

3. The District Court had jurisdiction under 20 U.S.C. § 1415(i) and 28 U.S.C. § 1331. We have jurisdiction to review a final order of the District Court under 28 U.S.C. § 1291.

4. 20 U.S.C. §§ 1400-1482.

5. *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 716 (3d Cir. 2010) (citing *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990)).

6. *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 852 (3d Cir. 2006) (citation modified).

7. Appellant’s Opening Br. 4.

8. 20 U.S.C. § 1412(a)(1)(A).

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“grant such relief as the court determines is appropriate.”⁹ Compensatory education is a retrospective, equitable remedy that “aim[s] to place disabled children in the same position they would have occupied but for the school district’s violations of [the] IDEA” without intruding on an IEP’s team’s prospective authority.¹⁰ Here, the District Court’s award was individually crafted to remedy S.M.’s specific FAPE deprivation.¹¹ It carefully calculated the period of deprivation when Chichester “knew or should have known” that S.M. was not receiving FAPE and awarded placement that S.M. would have received but for the violation.¹² This Court has consistently upheld similar compensatory education awards, including where educational placement and intensive services were necessary to remedy FAPE denials.¹³ Our sister court

9. 20 U.S.C. § 1415(i)(2)(C)(iii).

10. *Ferren C.*, 612 F.3d at 717-18 (quoting *Reid v. Dist. of Columbia*, 401 F.3d 516, 518, 365 U.S. App. D.C. 234 (D.C. Cir. 2005)).

11. *See Reid*, 401 F.3d at 526 (stating that “the parties must have some opportunity to present evidence regarding [the child’s] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits”).

12. *M.C. v. Cent. Reg’l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

13. *See Lester H.*, 916 F.2d at 873 (concluding that “Congress . . . did not intend to offer a remedy only to those parents able to afford an alternative private education” and “granting 30 months of compensatory education to [a disabled student] beyond age 21” was not an abuse of discretion); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 (3d Cir. 1999) (“An award of compensatory education allows a disabled student to continue beyond age twenty-one in order to make up for the earlier deprivation of a free appropriate public education.”), *superseded by statute on other grounds as recognized by P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009).

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of appeals has also upheld a private school placement compensatory award.¹⁴ Refusing to award compensatory education after a substantiated denial of FAPE would violate the IDEA’s requirements and guiding principles.¹⁵

We reject Chichester’s assertions that the compensatory education award contradicts the IDEA or eliminates annual IEP review and violates the LRE requirement. An IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”¹⁶ Compensatory education is meant to support, not supplant, the IEP process. It neither dictates future IEP deliberations nor curtails Chichester’s prospective Local Education Agency (“LEA”) obligations. When, as here, the record supports a student’s required residential educational programming to receive FAPE, compensatory education in the form of multi-year residential educational placement prevents displacement by the school district.¹⁷ The District Court’s order requires

14. *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1290 (11th Cir. 2008) (awarding compensatory education in the form of private school placement for a period of roughly five years or until the student obtained his high school diploma, whichever came first).

15. The IDEA’s six core principles include (1) FAPE, 20 U.S.C. § 1400(d)(1)(A); (2) appropriate evaluation, 20 U.S.C. § 1414(a)(1)(A); (3) an IEP, 20 U.S.C. § 1414(d); (4) instruction in the LRE, 20 U.S.C. § 1412(a)(5); (5) parent/student participation, (e.g., 20 U.S.C. §§ 1414(a)(1)(D), (b)(2)(A), (b)(4)(A), (c)(3), (c)(4)(A), (e)); and (6) procedural safeguards, 20 U.S.C. § 1415(b)(3).

16. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386, 403, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017).

17. *See S.M. v. Chichester Sch. Dist.*, 2025 U.S. Dist. LEXIS 160251, 2025 WL 2404383, at *10 (citing *S.M. v. Chichester Sch. Dist.*,

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Chichester to fund Melmark unless “(1) [S.M.’s parents] ask Chichester for a different placement, program, or school; or (2) Melmark notifies the parties that its residential educational program can no longer meet S.M.’s educational needs.”¹⁸ Melmark and S.M.’s parents are members of the IEP team responsible for collaboratively developing and annually reviewing his IEP.¹⁹ The District Court’s order, which adequately protects IEP team deliberations from Chichester’s unilateral control, is consistent with the IDEA. The record also establishes that Melmark is the LRE for S.M.²⁰

No. 24-2727, 2025 U.S. App. LEXIS 4711, 2025 WL 649894, at *2 (3d Cir. Feb. 28, 2025)) (“Chichester has ‘litigated [S.M.’s] placement’ at every possible turn.”).

18. *Id.* 2025 U.S. Dist. LEXIS 160251, at *9.

19. *See* 20 U.S.C. § 1414(d)(1)(B) (“‘IEP Team’ means a group of individuals composed of—(i) the parents of a child with a disability; (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child; (iv) a representative of the local educational agency . . .; (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi); (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability.”).

20. *See M.C.*, 81 F.3d at 394 (concluding a residential educational program was the LRE where “any attempts to reduce [the student]’s severe self-stimulatory behavior or improve his toileting, eating, and communication skills would succeed only in the intense atmosphere of a round-the-clock residential setting where a consistent educational program could be enforced throughout all of [his] waking hours”).

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Chichester also argues that Appellees failed to administratively exhaust their claims, and the independent expert process was tainted by ex parte conduct evidencing insurmountable bias in violation of the District Court’s direction which amounts to reversible error. We disagree. Two prior panels have concluded that the exhaustion requirement was satisfied,²¹ and one of those panels held that the District Court’s reliance on the expert report was proper.²²

Thus, the District Court did not abuse its discretion.

II.

For the foregoing reasons, we will affirm the District Court’s August 19, 2025 Order granting Appellee’s Motion for Judgment on the Administrative Record on Count I (Appeal from Administrative Decision), entering judgment in favor of Appellees, and ordering Appellant to fund S.M.’s residential educational placement at the Melmark School through August 2028.²³

21. *S.M. v. Chichester Sch. Dist.*, No. 22-1612, 2024 U.S. App. LEXIS 24182, 2024 WL 4262788, at *1 (3d Cir. Sept. 23, 2024); *S.M.*, 2025 U.S. App. LEXIS 4711, 2025 WL 649894, at *2.

22. 2025 U.S. App. LEXIS 4711, *S.M.*, 2025 WL 649894, at *2.

23. When this case was last before us, we noted: “This matter has a contentious procedural history. Barring a negotiated settlement, we trust that the District Court will soon decide the final merits of the case.” *S.M. v. Chichester Sch. Dist.*, 2025 U.S. App. LEXIS 4711, 2025 WL 649894, at *3. The District Court has now decided the matter on the merits but the tragically long and “contentious procedural history” continues. *Id.* Delay is particularly

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regrettable in cases such as this. We can only hope that delay and obfuscation are not part of a deliberate litigation strategy to extend this dispute until the issue of what can be done for S.M.'s welfare becomes moot because of his age. Although we acknowledge that the District Court's order imposes a financial burden on Chichester, "[t]he IDEA works because each school district bears the obligation to educate special needs students, often at substantial cost." *D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 497 (3d Cir. 2012).

**APPENDIX B — MEMORANDUM OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA,
FILED AUGUST 19, 2025**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 21-4266

S.M., BY AND THROUGH HIS PARENTS,

Plaintiffs,

v.

CHICHESTER SCHOOL DISTRICT,

Defendant.

Filed August 19, 2025

MEMORANDUM

Before the Court are Plaintiffs’ Motion for Judgment on the Administrative Record on Count I and the parties’ proposed final orders. For the reasons that follow, the Court will grant Plaintiffs’ Motion and likewise order “appropriate” equitable relief under 20 U.S.C. § 1415(i)(2)(C)(iii).

I. BACKGROUND

As Special Education Hearing Officer Brian Ford observed in his August 27, 2021 due process decision, *see infra* subsection E, “there is simply no dispute about what

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happened. Rather, the parties reach different conclusions about what the facts mean.” Hearing Officer Decision 5, ECF No. 9-3 (“H.O. Decision”). Accordingly, unless otherwise noted, the facts set forth in subsections A, B, C, and D are taken from the Hearing Officer’s findings of fact.¹ Subsections E and F set forth an overview of the Hearing Officer’s decision and subsequent proceedings at the District Court and appellate levels.

A. S.M.’s Disabilities and Special Educational Needs

S.M. is a now 18-year-old boy² who has severe autism, attention deficit hyperactivity disorder, speech and language delays, and an intellectual disability. H.O. Decision 6. He “lacks safety skills, requires assistance for all activities of daily living, is not fully toilet trained despite multiple efforts, [] 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 tried to hurt adults, other children, and animals.” *Id.* His “behavioral health needs are a function of” his disabilities; indeed, his “medical, social, behavioral, and educational needs are inextricably intertwined.” *Id.* at 5-6. Because of his

1. His findings have been supplemented with cites to undisputed evidence (testimonial and nontestimonial) from the administrative record.

2. S.M. was 13 when his parents first initiated due process proceedings in December 2020.

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disabilities, S.M. has “always qualified for and received special education” under the Individuals with Disabilities Education Act (IDEA). *Id.*

**B. S.M.’s Educational and Medical Placements:
Pre-2017 to September 2020**

Before 2017, S.M. and his parents lived within the School District of Philadelphia. *See id.* at 7; *see also* Danielle Civarelli Dep. Tr. 650:3-7, ECF No. 9-7 (S.M.’s mother’s deposition testimony regarding S.M.’s educational history). The School District placed S.M. at a nonresidential private school for children with disabilities. H.O. Decision 7. S.M. did not make progress in that placement. *See id.* (citing “[u]ndisputed testimony”); *see also* Civarelli Dep. Tr. 650:3-652:10 (testimony regarding S.M.’s progress, or lack thereof, at Philadelphia placement).

In 2017, S.M. and his parents moved into the Interboro School District. *See* H.O. Decision 7; Civarelli Dep. Tr. 652. For the 2017-2018 school year, Interboro placed S.M. at the Elwyn Davidson School, another non-residential private school for children with disabilities. *See id.* “Documentary evidence and undisputed testimony establishes that [S.M.] saw (at best) only a small amount of inconsistent progress” at Elwyn Davidson. *See id.*

At the beginning of the 2018-2019 school year, S.M.—after exhibiting aggression toward his mother and pets—was admitted to a residential psychiatric crisis hospital on three separate occasions. *See id.* 7-8. During his third

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admission in October 2018, the hospital recommended that S.M. be placed in a residential treatment facility (RTF)³ “as a medical necessity[.]” *Id.* at 8. S.M. was admitted to Melmark’s RTF⁴ in January 2019 and lived there full time while continuing to attend school at Elwyn Davidson. *Id.* at 8-9. In March 2020, Elwyn Davidson “discontinued in-person instruction” because of the pandemic. *Id.* at 9. Despite the RTF staff’s best efforts, S.M. was largely unable “to participate in or benefit from” Elwyn Davidson’s remote instruction. *Id.*

**C. S.M.’s Educational and Medical Placements:
September 2020 to August 2021**

In September 2020, S.M.’s parents moved into Chichester School District. *Id.* at 10. At that time, S.M.

3. The terms “RTF” and “residential educational placement,” both of which are used frequently throughout the course of this memorandum, are not interchangeable. *See* H.O. Decision 19. An RTF is a medical placement “prescribed by non-educational personnel for non-educational purposes” and is funded either by a child’s parents or, as was true in S.M.’s case, social services agencies. *Id.* By contrast, a residential educational placement is one of the “continuum of alternative placements” a school district must offer qualifying students under the IDEA. 34 C.F.R. § 300.115.

4. Melmark offers both an RTF and a residential educational program. S.M. lived at Melmark’s RTF from January 2019 to October 2020 and—as explained below, *see supra* subsection F—is currently enrolled in Melmark’s residential educational program. *See S.M. by & through Michael C. v. Chichester Sch. Dist.*, No. CV 21-4266, 2024 U.S. Dist. LEXIS 182471, 2024 WL 4438472, at *6 n.11 (E.D. Pa. Oct. 7, 2024) (outlining S.M.’s history at Melmark), *aff’d*, No. 24-2727, 2025 U.S. App. LEXIS 4711, 2025 WL 649894 (3d Cir. Feb. 28, 2025).

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was (1) approved to return home from Melmark's RTF; and (2) still "receiving ineffective remote instruction" from Elwyn Davidson. *See id.* at 9, 10. Accordingly, S.M.'s parents asked Chichester to add a residential educational placement to his individualized education program (IEP). *See* Chrissy Melville Dep. Tr. 528-29, ECF No. 9-8 (deposition of Chrissy Melville, supervisor for special education in Chichester) (colloquy between Hearing Officer and counsel establishing there was "no dispute" that parents requested a residential educational placement); ECF No. 9-15 at 8-12 (September and October 2020 emails from S.M.'s counsel conveying requests for residential programming).

On October 7, 2020, Chichester convened an IEP meeting to discuss S.M.'s upcoming discharge from Melmark's RTF, his "current programing, [his] need for in-person instruction, and [a] potential change in placement to accommodate [his] in-person instruction while [Elwyn Davidson] remain[ed] virtual." ECF No. 9-14 at 167 (summary of October 7 meeting included in S.M.'s IEP). Chichester recommended that S.M. be placed at a non-residential autistic support program at the Delaware County Intermediate Unit (DCIU) and also agreed to refer S.M. to other day program placements. *See* Melville Dep. Tr. 529:20-530:13, 539:21-540:10 (testimony regarding October 6 IEP meeting). Chichester did not, however, agree to refer S.M. to any residential educational placements. *See id.* at 543:8-11.

On October 15, 2020, Melmark's RTF discharged S.M. with a "step-down" in-home support plan staffed

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by Behavioral Health and Rehabilitative Services (BHRS) and funded by Magellan. H.O. Decision 10. Unfortunately, BHRS “failed to staff [S.M.’s] step-down program as planned[,]” leaving S.M.’s parents “without the professional services and supports that everyone involved deemed necessary for a successful transition.” *Id.* at 10-11. BHRS’s failure also “required” S.M.’s parents “to take on the additional obligation of enabling and facilitating [S.M.’s] remote learning from the private day school—a feat that [even] the RTF staff were not able to accomplish.” *Id.* at 11.

On October 27, 2020, Chichester convened a second IEP meeting. *Id.* At that meeting, Chichester rejected S.M.’s parents’ request for a residential educational placement because, in its opinion, S.M.’s educational and medical needs were not inextricably intertwined. *See* Melville Tr. 535:11-536:21 (testimony regarding October 27 IEP meeting). In lieu of a residential educational placement, Chichester again offered to place S.M. in the DCIU’s non-residential autistic support program. H.O. Decision 11. There was one caveat: S.M. “would need a full-time Personal Care Assistant [] in order to participate” and Chichester had not yet been able to staff that position. *Id.*

One day later, S.M. was admitted to a crisis hospital located within Central Bucks County School District after he attempted to harm his mother and a pet. *Id.* at 29. As a result, Central Bucks became S.M.’s “host district” and assumed responsibility for S.M.’s free appropriate public education (FAPE), while Chichester, as S.M.’s “resident

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district,” only retained responsibility for funding it. *See* H.O. Decision 21; *see also* 24 P.S. § 13-1306(c) (outlining respective responsibilities of host and resident school districts under Pennsylvania law). In November 2020, the Bucks County Intermediate Unit (BCIU) thus began giving S.M. two 45-minute blocks of education a day. *See* ECF No. 9-13 at 692 (noting revision to S.M.’s then-operative IEP); Janae West Dep. Tr. 193-94, ECF No. 9-10 (deposition testimony of Janae West, therapist at crisis hospital, regarding BCIU). For the majority of each of those blocks, S.M. was not able to attend to instruction. H.O. Decision 12; *see also* West Dep. Tr. 303:9-10 (reviewing S.M.’s data and confirming that S.M.’s “non-compliance” was “substantially impacting his day,” meaning S.M. was “not attending to the instruction” for 56 percent of each block). “Even more concerning,” there was “little coordination” with regards to “behavior programs implemented by the crisis hospital and the [BCIU].” H.O. Decision 12; *see also* West Dep. Tr. 320-321 (testifying to same).

In December 2020, the crisis hospital recommended S.M. be discharged and placed in an RTF. H.O. Decision 12. In March 2021, after S.M.’s parents successfully appealed Magellan’s denial of funding, S.M. was accepted to Elwyn’s RTF.⁵ H.O. Decision 12. His admission was delayed due to staffing shortages, leaving his parents no choice but to keep him at the crisis hospital. *See id.*

5. Elwyn’s RTF is different from but “connected to” the Elwyn Davidson School (the private day school S.M. attended from 2017 up until his hospitalization in October 2020). H.O. Decision 33.

*Appendix B***D. The Due Process Proceedings and Chichester's Issuance of S.M.'s New IEP: December 2020-August 2021**

On December 1, 2020, S.M.'s parents filed an administrative due process complaint against Chichester. Due Process Compl., ECF No. 9-19. They alleged that Chichester had denied S.M. a FAPE by failing to offer him a residential educational placement before he was hospitalized, and asked for an order requiring Chichester to (1) facilitate and fund such a placement as soon as practicable, or (2) fund an independent evaluation of S.M. for purposes of determining whether he needs a such a placement to receive a FAPE. *See id.* at 1 (“This is a claim for prospective residential school placement . . .”), 5 (outlining requested relief); *see also* Parents’ Closing Argument 27, ECF No. 9-5 (asking “Hearing Officer . . . to order CSD to fund a residential educational placement for S.M.”).

On December 7, 2020—while the due process complaint was pending—Chichester issued a Notice for Reevaluation for purposes of reevaluating S.M.'s educational needs. *See* ECF No. 9-15 at 18. Separately, on December 16, 2020, Central Bucks and Chichester entered into a “Local Educational Agency Responsibility Agreement.” *See* December 2020 Agreement, ECF No. 10-5;⁶ *see also* 24 P.S. § 13-1306(d) (a student’s “school district of residence

6. The Hearing Officer did not address the December 2020 Agreement, but the Court must nonetheless consider it as part of the “expanded record.” *Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1220 (3d Cir. 1993).

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and the school district in which [an] institution is located may agree to an [alternative] arrangement of educational and procedural responsibilities[.]”). Per the terms of their agreement, Chichester again “assumed all responsibility” for S.M.’s education, “including all responsibility for the provision of a free appropriate education under state and federal law[.]” *Id.*

On April 6, 2021, Chichester issued a notice of recommended placement (“NOREP”)⁷ that would go into effect once S.M. was discharged from the crisis hospital and a contingent IEP that would go into effect once S.M. was discharged from Elwyn’s RTF. *See* ECF No. 9-15 at 48-51 (NOREP), 52-95 (contingent IEP). In both the NOREP and contingent IEP, Chichester (1) proposed that S.M. be placed at the DCIU non-residential program; and (2) rejected his parent’s request for a residential educational placement because “[i]nformation gleaned from team meetings, which included his educational and residential providers, showed that [S.M.] does not require educational services on a 24 hour basis” and “his medical and educational needs are not inextricably intertwined.” *Id.* at 49 (NOREP); *see also id.* at 92-94 (portion of contingent IEP discussing educational placement at

7. The IDEA requires that parents of a student with disabilities receive prior written notice before a school “proposes to initiate or change” the student’s educational placement. 20 U.S.C. § 1415(b)(3) (A). In Pennsylvania, the form used to provide this notice is called a NOREP. *T.R. v. Sch. Dist. of Philadelphia*, 223 F. Supp. 3d 321, 325 (E.D. Pa. 2016). A NOREP “is properly considered part of a [student’s] overall educational plan.” *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 275 (3d Cir. 2012).

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DCIU). S.M.'s mother timely rejected both the NOREP and contingent IEP. ECF No. 9-15 at 96-99.

E. The Hearing Officer's August 27, 2021 Decision

On August 27, 2021—after five days of evidentiary hearings and reviewing a “very large” record—the Hearing Officer dismissed the due process complaint in its entirety on one “sole basis.” H.O. Decision 4, 37-38. He reasoned that because Chichester was S.M.'s “resident district” and not his “host district” under 24 P.S. § 13-1306, Chichester had no current duty to provide S.M. with a FAPE, and likewise had no duty to provide S.M. with an IEP until S.M.'s return to Chichester was imminent. *See* H.O. Decision 3, 21, 34 n.14. However, to avoid trapping S.M. in limbo in the event of a successful appeal, the Hearing Officer also opted to evaluate the “appropriateness” of the April 6, 2021 IEP. *See* H.O. Decision. 30-31 (“If parents appeal this decision and prevail, [S.M.] will be . . . 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 [S.M.'s] contingent IEP is appropriate.”). In so doing, he found that if Chichester did owe S.M. an IEP based on his then-current needs, then that IEP must include a residential educational placement. *See id.* at 34-35.

F. District Court Proceedings: September 2021 to Present

In September 2021, S.M.'s parents (Plaintiffs) timely appealed the Hearing Officer's decision, giving rise to the

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instant case. *See* Compl., ECF No. 1.⁸ Around the same time, S.M. moved to Elwyn’s RTF and began attending school at the DCIU.⁹

In February 2022, Plaintiffs moved for a preliminary injunction requiring Chichester to secure and fund a residential educational placement for S.M. *See* Mot., ECF No. 10; Resp., ECF No. 18. In March 2022, the Court granted their motion, and ordered Chichester:

to make all necessary referrals for residential educational placement for purposes of S.M.’s [free appropriate public education], in full consultation with parents; make all necessary arrangements to secure such placement and authorize the necessary funding; and plan for and execute a reasonable and appropriate plan for transitioning S.M. from the [residential treatment facility] where he currently resides,

8. In addition to appealing the Hearing Officer’s decision (Count I of the Complaint), Plaintiffs also brought claims under the IDEA, Section 504 of the Rehabilitation Act, and 42 U.S.C. § 1983 (Counts II through V) and sought injunctive relief (Count VI). As noted *infra*, Plaintiffs have since agreed to dismiss Counts II-VI.

9. As Elwyn’s RTF is located within Rose Tree Media School District, Rose Tree Media would have ordinarily served as S.M.’s “host district” and would have been responsible for his FAPE while he lived there. However—just as it did with Central Bucks—Chichester entered into a “Local Educational Agency Responsibility Agreement” with Rose Tree Media in September 2021, thereby assuming responsibility for funding and furnishing S.M.’s FAPE. *See* September 2021 Agreement, ECF No. 10-5 (transferring host district responsibilities from Rose Tree Media to Chichester).

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to the residential educational placement the parties mutually select, as soon as practicably possible.

Order, ECF No. 22; *see also S.M. by & through Michael C. v. Chichester Sch. Dist.*, No. CV 21-4266, 2022 U.S. Dist. LEXIS 52872, 2022 WL 875232, at (E.D. Pa. Mar. 24, 2022) (accompanying memorandum), *clarified on denial of reconsideration*, No. CV 21-4266, 2022 U.S. Dist. LEXIS 105710, 2022 WL 2134165 (E.D. Pa. June 14, 2022). In the two-plus years that followed, Chichester unsuccessfully appealed that order, the parties failed to find a mutually agreeable placement, and S.M. did not receive the residential educational programming he needed. *See S.M. by & through Michael C. v. Chichester Sch. Dist.*, No. 22-1612, 2024 U.S. App. LEXIS 24182, 2024 WL 4262788 (3d Cir. Sept. 23, 2024) (affirming March 2022 order entering preliminary injunction); *see also S.M. by & through Michael C. v. Chichester Sch. Dist.*, No. CV 21-4266, 2024 U.S. Dist. LEXIS 182471, 2024 WL 4438472, at *2-4 (E.D. Pa. Oct. 7, 2024) (describing procedural history and parties' efforts to find a residential educational placement for S.M. from June 2022 to August 2024), *aff'd*, No. 24-2727, 2025 U.S. App. LEXIS 4711, 2025 WL 649894 (3d Cir. Feb. 28, 2025) (describing procedural history as "contentious"). Finally, in September 2024—after appointing an independent expert to provide an updated evaluation of S.M. and holding hearings on two proposed placements—the Court ordered Chichester to secure and fund S.M.'s residential educational placement at the Melmark School. *See Order*, ECF No. 154; *see also S.M. by & through Michael C. v. Chichester Sch. Dist.*, No. CV

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21-4266, 2024 U.S. Dist. LEXIS 182471, 2024 WL 4438472 (E.D. Pa. Oct. 7, 2024) (accompanying memorandum). In February 2025, following Chichester’s second appeal in this case, the Court of Appeals affirmed that order. *S.M. by & through Michael C. v. Chichester Sch. Dist.*, No. 24-2727, 2025 U.S. App. LEXIS 4711, 2025 WL 649894 (3d Cir. Feb. 28, 2025).

In March 2025, Plaintiffs moved for judgment on the administrative record on Count I of their Complaint, which Chichester timely opposed. *See* Mot., ECF No. 174; Resp., ECF No. 174. In May 2025, after a status conference at which Plaintiffs agreed to dismiss their five additional claims against Chichester, the parties submitted proposed final orders addressing what relief, if any, S.M. is owed. *See* Def.’s Proposed Final Order, ECF No. 183; Pls.’ Proposed Final Order & Br., ECF No. 184. The Court will address the motion for judgment on the administrative record and the parties’ proposed final orders in turn below.

II. MOTION FOR JUDGMENT ON COUNT I

A. Legal Standard

When a party appeals an administrative due process decision, the IDEA requires a district court to (1) “receive the records of the administrative proceedings”; (2) “hear additional evidence” when requested; and (3) “basing its decision on the preponderance of the evidence, [] grant such relief as the court determines is appropriate.” 20 U.S.C. §§ 1415(i)(2)(C)(i)-(iii). In reviewing a due process decision, a district court applies “‘modified de novo’

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review.” *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564 (3d Cir. 2010). In a case where a district court hears additional evidence, the court must give “due weight” to a hearing officer’s factual findings, but “is free to accept or reject [them] depending on whether those findings are supported by the new, expanded record and whether they are consistent with the requirements of the IDEA.” *Oberti*, 995 F.2d at 1220. A hearing officer’s legal determinations are subject to plenary review. *L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610, 615 (E.D. Pa. 2018); *Carlisle Area Sch. v. Scott P. By & Through Bess P.*, 62 F.3d 520, 528 n.3 (3d Cir. 1995).

B. Discussion**1. The hearing officer erred in holding Chichester was not obliged to provide S.M. with a FAPE.**

The Hearing Officer began by determining that Chichester, as S.M.’s “resident” district under 24 P.S. § 13-1306(c), was not responsible for S.M.’s FAPE. *See* H.O. Decision 3 (“Chichester has no current obligation to provide a [FAPE] for S.M. Rather, the host district has that obligation.”). As this Court has already explained, that was error. *See S.M. by & through Michael C. v. Chichester Sch. Dist.*, No. CV 21-4266, 2022 U.S. Dist. LEXIS 52872, 2022 WL 875232, at *2-3 (E.D. Pa. Mar. 24, 2022), *clarified on denial of reconsideration*, 2022 U.S. Dist. LEXIS 105710, 2022 WL 2134165 (E.D. Pa. June 14, 2022), *and aff’d*, No. 22-1612, 2024 U.S. App. LEXIS 24182, 2024 WL 4262788 (3d Cir. Sept. 23, 2024).

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It is true that, ordinarily, Central Bucks (as S.M.’s “host district”) would have been responsible for providing S.M.’s FAPE while he was hospitalized, while Chichester (as S.M.’s “resident district”) would have only been responsible for funding it. *See* 24 P.S. §§ 13-1306(c), 13-1309(2). However, Chichester and Central Bucks agreed to modify the status quo by entering into a “Local Educational Agency Responsibility Agreement” on December 16, 2020—a document that the Hearing Officer did not mention in his decision. *See* Local Educational Agency Responsibility Agreement, ECF No. 10-5; *see also* 24 P.S. § 13-1306(d) (a student’s “school district of residence and the school district in which [an] institution is located may agree to an [alternative] arrangement of educational and procedural responsibilities[.]”). Per the terms of their agreement, Chichester “assumed all responsibility” for S.M.’s education, “including all responsibility for the provision of a free appropriate education under state and federal law,” from that day forward. *Id.*

The Agreement between Chichester and Central Bucks speaks for itself: as of December 16, 2020, Chichester was no longer acting solely as S.M.’s “resident district” and was obliged to fund *and* furnish S.M.’s FAPE. The Court therefore reverses the Hearing Officer’s decision to the extent it concluded that Chichester did not owe S.M. a FAPE.

2. The hearing officer erred in concluding that Chichester did not owe S.M. an IEP.

The Hearing Officer reasoned that because Chichester was S.M.’s “resident district” and not his “host district”

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under 24 P.S. § 13-1306(c), it had no duty to give S.M. an IEP unless his “return to Chichester was imminent.” H.O. Decision 29; *see also id.* at 34 n.14 (“Chichester has no obligation to issue a current IEP for [S.M.] If Chichester owes the student any IEP at all, it is a contingent IEP.”). That too was error. As explained above, Chichester had stepped beyond the realm of responsibility ordinarily accorded to a “resident district” and into that of a “host district”—namely, “the provision of a [FAPE]” to S.M. *See* December 2020 Agreement. In assuming responsibility for S.M.’s FAPE, Chichester likewise became obliged to give S.M. an IEP “reasonably calculated to enable [him] to make progress appropriate in light of [his] circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017); *see also D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 499 (3d Cir. 2012) (“The IEP is the means of ensuring that each special needs child receives FAPE[.]”). That obligation was current, not contingent on S.M.’s return (imminent or otherwise) to Chichester.¹⁰ The Court therefore reverses the Hearing Officer’s decision to the extent it concluded that Chichester did not owe S.M. an IEP.

10. Because the Court finds that Chichester assumed both “resident” and “host” district responsibilities—as those responsibilities are set forth in 24 P.S. § 13-1306(c)—as of December 16, 2020, the Court need not and declines to address whether a resident district’s obligation to offer a contingent IEP is only triggered by a student’s “imminent” return to the district.

*Appendix B***3. The hearing officer’s finding as to S.M.’s need for a residential educational placement was correct.**

To keep S.M. from “be[ing] trapped in limbo” in the event of a successful appeal, the Hearing Officer decided to evaluate the appropriateness of the April 6, 2021 IEP—more specifically, the appropriateness of Chichester’s proposed placement at the DCIU. H.O. Decision 30-31. He found that if Chichester *did* owe S.M. an IEP based on his needs “at the time [the IEP was] offered,” then the IEP had to include a residential educational placement. H.O. Decision 34. More specifically—in a paragraph worth reprinting in full—the Hearing Officer found as follows:

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.

H.O. Decision 35. After independently reviewing the record but still affording due weight to the Hearing Officer’s findings of fact, the Court affirms his finding as to S.M.’s need for a residential educational placement. *See*

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S.M. by & through Michael C. v. Chichester Sch. Dist., No. CV 21-4266, 2022 U.S. Dist. LEXIS 52872, 2022 WL 875232, at *3 (E.D. Pa. Mar. 24, 2022) (explaining why “there is no reason to disturb [the Hearing Officer’s] conclusion”), *clarified on denial of reconsideration*, 2022 U.S. Dist. LEXIS 105710, 2022 WL 2134165 (E.D. Pa. June 14, 2022), *and aff’d*, 2024 U.S. App. LEXIS 24182, 2024 WL 4262788 (3d Cir. Sept. 23, 2024).

In sum, the Court concludes that Chichester owed S.M. a FAPE,¹¹ and with it, a residential educational placement. The Court will therefore grant Plaintiffs’ motion for judgment on the administrative record on Count I and enter judgment in favor of Plaintiffs.

III. RELIEF

Having concluded that Chichester violated S.M.’s right to a FAPE by failing to offer him a residential educational placement, the Court must now determine the appropriate remedy. Plaintiffs seek what they call a “compensatory injunction”—more specifically, an order that would require Chichester to fund S.M.’s residential educational placement at the Melmark School until March 4, 2029 (i.e., until he turns 22). Pls.’ Br. 3, ECF No. 184-1; Pls.’ Proposed Order ¶ 2, ECF No. 184. Chichester

11. For clarity’s sake, Chichester was responsible for S.M.’s FAPE from (1) September 2020 to October 28, 2020 (i.e., from the date he enrolled in Chichester School District to the date he was hospitalized in Central Bucks); and (2) December 16, 2020 onward. For the period between October 28, 2020 and December 16, 2020, however, that responsibility lay with Central Bucks.

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opposes Plaintiffs' request for what it characterizes as a "permanent injunction" but otherwise offers no alternative. Def.'s Proposed Final Order 1, ECF No. 183.

What Plaintiffs request is not a permanent injunction, but rather, "appropriate" relief for Chichester's violation of the IDEA. Section 1415 of the IDEA permits a court to "grant such relief as the court determines is appropriate." 20 U.S.C. §§ 1415(i)(2)(C)(iii). The IDEA is silent as to what types of relief are "appropriate" or how relief should be crafted. The Supreme Court has clarified that (1) relief must "be 'appropriate' in light of the purpose[s] of the [IDEA]," and (2) "equitable considerations are relevant in fashioning relief." *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-374, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985); *see also Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717 (3d Cir. 2010) (equitable relief is appropriate if it "furthers" the purposes explicitly set forth at 20 U.S.C. § 1400(d)).

To that end, courts have consistently awarded "compensatory education" as a remedy to "replace [] educational services [a student] should have received in the first place." *Ferren C.*, 612 F.3d at 718 (quoting *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518, 365 U.S. App. D.C. 234 (D.C. Cir. 2008)); *see also Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1290 (11th Cir. 2008) (affirming award placing student at a private school for roughly five years as "compensatory, not punitive."). A student's "right to compensatory education accrues when the school [district] knows or should know that the student is receiving an inappropriate education." *Ridgewood Bd. of*

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Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 250 (3d Cir. 1999), *superseded by statute on other grounds as recognized by P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009). If the school district fails “to correct the situation,” then the student “is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” *M.C. on Behalf of J.C. v. Cent. Reg’l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

Courts within the Third Circuit have interpreted this standard in varying ways. Some have awarded “full days [of] compensatory education for the period of deprivation,” while others have crafted “more particularized” awards “based upon the quantity of services improperly withheld during the period of deprivation less the reasonable amount of time in which the school district should have addressed the deficiency.” *See Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 606-08 (M.D. Pa. 2014) (discussing and citing cases). Ultimately, no matter how an award is crafted, it “should aim to place [the student] in the same position they would have occupied but for the school district’s violation of IDEA.” *Ferren C.*, 612 F.3d at 718 (quoting *Reid*, 401 F.3d at 518).

In the instant case, the Hearing Officer had no occasion to craft a compensatory remedy. To the contrary: his erroneous conclusion that Chichester did not owe S.M. a FAPE was the catalyst for S.M.’s protracted FAPE denial. Even still, what he found “the record more than preponderantly establishe[d]” in August 2021 remained true throughout the course of this case: S.M. required a

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residential educational placement to receive a FAPE. H.O. Decision 35; *S.M. by & through Michael C. v. Chichester Sch. Dist.*, No. CV 21-4266, 2024 U.S. Dist. LEXIS 182471, 2024 WL 4438472, at *5 (E.D. Pa. Oct. 7, 2024) (finding that “the record . . . makes clear that S.M. still struggles with ‘basic selfhelp and social skills’ and ‘requires a residential educational placement now more than ever.’”) (internal citations and punctuation omitted), *aff’d*, No. 24-2727, 2025 U.S. App. LEXIS 4711, 2025 WL 649894 (3d Cir. Feb. 28, 2025). The Court finds that the record in its entirety—both “the records of the administrative proceedings” and “additional evidence” that has since been presented by the parties—preponderantly establishes the following: (1) Chichester knew at least as of August 27, 2021 that S.M. needed a residential educational placement; (2) S.M. continued needing such a placement throughout the course of the proceedings; and (3) S.M. only received what he needed when this Court ordered Chichester to fund and facilitate his placement at the Melmark School on September 4, 2024. 20 U.S.C. § 1415(i)(2)(C)(i)-(ii). Neither Plaintiffs nor Chichester identify any amount of time that Chichester spent “in a good faith effort to place [S.M.] in an appropriate program” that should be excluded for purposes of crafting S.M.’s award of compensatory education. *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865, 873 n.12 (3d Cir. 1990). After reviewing the record, neither can the Court.

The question thus becomes how much and what kind of compensatory education S.M. is owed. Plaintiffs seek an award of roughly 43 months at the Melmark School’s residential educational program, which (1) encompasses

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the roughly 36 months that passed between the Hearing Officer's August 27, 2021 decision and S.M.'s September 2024 arrival at Melmark, and (2) includes 7 additional months to ensure S.M. can stay at Melmark until his 22nd birthday. *See* Pls.' Br. at 2. They posit such an award is necessary to "redress the extensive FAPE violation [S.M.] has already suffered" and "protect [S.M.] and his family" from any future efforts by Chichester "to remove him from his placement and send him back to square [one]." *Id.* at 3, 6. Chichester opposes Plaintiffs' request wholesale on two grounds. First, they contend it conflicts with the IDEA insofar as "residential educational placements are not intended to be permanent" and "placement decisions must be made on an annual basis by an IEP team." Def.'s Proposed Final Order 1-2. Second, neither the "balance of equity" nor the "public interest" weigh in favor of keeping S.M. at Melmark given that S.M.'s mother reported he has "m[ade] gains" since his enrollment in September 2024. *Id.* at 2.

The Court is mindful that Section 1415(i) "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). Chichester's IDEA-based objections to Plaintiffs' request are thus welltaken. *See* Def.'s Proposed Order 1; *see also* 20 U.S.C. § 1412(a)(5) (children with disabilities must be educated in the "least restrictive environment . . . [t]o the maximum extent appropriate"); 34 C.F.R. § 300.114(a)(2)(ii) (specifying that "separate schooling" should occur

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“only if the nature or severity of [a student’s] disability is such that education in regular classes . . . cannot be achieved satisfactorily.”); 34 C.F.R. § 300.324(b)(1)(i) (IEP team must “[r]eview the child’s IEP periodically, but not less than annually[.]”). Even still, the IDEA “does not foreclose a compensatory award of [prospective] placement in a private school” when necessary. *Draper*, 518 F.3d at 1285 (rejecting proposition that the IDEA’s “structural preference for education in public schools” disempowered district court from awarding compensatory prospective placement in a private school). Moreover, although S.M. may be “making gains” at Melmark, Chichester offers no evidence that S.M. is already in the position he would have occupied but for Chichester’s years-long refusal to offer him a residential educational placement. Def.’s Proposed Order 2.

On balance, the Court finds that appropriate relief must ensure that S.M. can receive the residential educational programming he was denied for the roughly 36 months between the Hearing Officer’s erroneous August 27, 2021 decision and this Court’s September 4, 2024 order.¹² The Court will thus order Chichester to fund

12. The IDEA requires states to provide a FAPE to “all children with disabilities . . . between the ages of 3 and 21, *inclusive*[.]” 20 U.S.C. § 1412(1)(A) (emphasis added). Pennsylvania currently guarantees a FAPE to any student “with a disability to the end of the school term in which the student reaches his/her 21st birthday.” *Pennsylvania Sch. Boards Ass’n, Inc. v. Mumin*, 317 A.3d 1077, 1087 (Pa. Commw. Ct. 2024) (citing Sections 300.101 of the Pennsylvania Department of Education’s Model Policy and State Plan). Here, that means that S.M. must receive a FAPE until the end of the 2027-2028 school term. Although S.M. will turn 21 in

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S.M.’s residential educational placement at the Melmark School through August 2028,¹³ unless during that time (1) Plaintiffs ask Chichester for a different placement, program, or school; or (2) Melmark notifies the parties that its residential educational program can no longer meet S.M.’s educational needs. As outlined below, the Court finds that this relief both “furthers” the purposes of the IDEA and is equitable based on the specific facts of this case. *Ferren C.*, 612 F.3d at 717.

First, it will ensure that S.M. can receive the “free appropriate public education” the Hearing Officer found he was “entitled to” yet only began receiving in September 2024. 20 U.S.C. § 1400(d)(1)(A); H.O. Dec. 35 (finding that S.M.’s parents were “entitled to what they demand” if Chichester was obliged to provide an IEP “reasonably calculated to provide a FAPE based on [S.M.’s] current

March 2028—presumably before the 2027-2028 school term would ordinarily end—the Court’s order extends through August 2028 so that S.M. receives the compensatory education he is owed. *See* 22 Pa. Code. § 11.1 (defining “school term” as “a minimum of 180 days of instruction for students”); *see also Lester H.*, 916 F.2d at 872-73 (affirming that a court may award compensatory education beyond age 21). The Court declines, however, to award S.M. compensatory education until his 22nd birthday as Plaintiffs request.

13. Chichester will still be responsible for funding S.M.’s residential educational placement until August 2028 even if S.M.’s mother moves out of Chichester. *See D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 497-98 (3d Cir. 2012) (“To comply with the IDEA, a school district no longer responsible for educating a child must still be held responsible for its past transgressions . . . a claim for compensatory education is not rendered moot by an out-of-district move[.]”).

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needs”). Chichester, by contrast, will merely be “belatedly pay[ing] expenses that it should have paid all along . . .” *Burlington*, 471 U.S. at 370-71. Failing to account for the time that S.M. went without a residential educational placement would mean that his right to a “free” education was contingent on his parents’ “ability to ‘front’ its costs”—a proposition that courts have squarely rejected in endorsing awards of compensatory education. *Miener v. State of Missouri*, 800 F.2d 749, 753 (8th Cir. 1986); *see also Lester H.*, 916 F.2d at 873 (affirming 30-month award and concluding that “Congress, by allowing the courts to fashion an appropriate remedy to cure the deprivation of a child’s right to a free appropriate public education, did not intend to offer a remedy only to those parents able to afford an alternative private education”); *Jefferson Cnty. Bd. of Educ. v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988) (affirming two-year award because “[w]ithout it, the child’s right would depend upon his or her parent’s ability to fund the education during the years of administrative proceedings and federal court litigation.”).

Second—as the Court has already explained at length—the Melmark School’s residential educational program is tailored to S.M.’s “unique needs” and preparing him for “independent living[.]” 20 U.S.C. § 1400(d)(1)(A); *S.M. by & through Michael C. v. Chichester Sch. Dist.*, No. CV 21-4266, 2024 U.S. Dist. LEXIS 182471, 2024 WL 4438472, at *6-7 (E.D. Pa. Oct. 7, 2024) (explaining why “anything less uniform, consistent, and intensive than Melmark’s residential educational program is unlikely to confer a ‘meaningful educational benefit’ on S.M.”), *aff’d*, No. 24-2727, 2025 U.S. App. LEXIS 4711, 2025 WL

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649894 (3d Cir. Feb. 28, 2025). It also happens to be on Pennsylvania’s list of “approved private schools,” and as such, is “eligible to receive payments for tuition, or tuition and maintenance, from funds of the school district *or the Commonwealth, or both.*” 22 Pa. C.S. § 171.11 (emphases added); *see also* COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF EDUCATION, *Directory of Approved Private Schools & Chartered Schools for the Deaf and the Blind* 26-27 (May 2025), <https://www.pa.gov/content/dam/copapwp-pagov/en/education/documents/instruction/special-education/aps%20directory.pdf>. Weighing the interests of both parties, the Court finds that ordering Chichester to fund S.M.’s placement at Melmark—the costs of which can be defrayed by the Commonwealth—is equitable.

Finally, even though the record has always preponderantly established that S.M. needed a residential educational placement to receive a FAPE, Chichester has “litigated [S.M.’s] placement” at every possible turn. *S.M. by & through Michael C. v. Chichester Sch. Dist.*, No. 24-2727, 2025 U.S. App. LEXIS 4711, 2025 WL 649894, at *2 (3d Cir. Feb. 28, 2025). In light of what the Court of Appeals described as the “contentious” procedural history of this case, *see* 2025 U.S. App. LEXIS 4711, [WL] at *3, relief will only be appropriate if it “protect[s]” S.M.’s ability to continue receiving the special education and related services he is long owed at the Melmark School without fear of displacement by Chichester. 20 U.S.C. §§ 1415(i)(2)(C)(iii).

*Appendix B***IV. CONCLUSION**

For the foregoing reasons, the Court will grant Plaintiffs' Motion for Judgment on the Administrative Record on Count I, enter judgment in favor of Plaintiffs, and—as an exercise of its discretion under 20 U.S.C. § 1415(i)(2)(C)(iii)—order Chichester to fund S.M.'s residential educational placement at the Melmark School through August 2028.

/s/ ANITA B. BRODY, J. _____
ANITA B. BRODY, J.
August 19, 2025

**APPENDIX C — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT, FILED FEBRUARY 28, 2025**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-2727

S.M., BY AND THROUGH HIS PARENTS,
MICHAEL C. AND DANIELLE C.

v.

CHICHESTER SCHOOL DISTRICT,

Appellant.

Filed February 28, 2025

OPINION*

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2:21-cv-04266)
District Judge: Honorable Anita B. Brody

Submitted Under Third Circuit L.A.R. 34.1(a)
on February 27, 2025

Before: HARDIMAN, PORTER, and RENDELL,
Circuit Judges.

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Appendix C

HARDIMAN, *Circuit Judge*.

Chichester School District appeals the District Court's order requiring it to place a student, S.M., in a specific residential educational facility. We will affirm.

I

S.M. is a seventeen-year-old boy with severe autism and intellectual disabilities. His parents filed an administrative complaint against Chichester School District with the Pennsylvania Office for Dispute Resolution, asserting claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The parents alleged that Chichester denied S.M. a free appropriate public education (FAPE) by failing to offer him an individualized education program (IEP) that would, upon his release from a residential treatment facility, place him in a residential educational facility.

The special education administrative Hearing Officer dismissed the complaint. He reasoned that because Chichester was the “resident district” and not the “host district” under 24 Pa. Stat. § 13-1306, it had no duty to provide S.M. with an IEP unless his release from his residential treatment facility was imminent. The Hearing Officer alternatively concluded that if Chichester had to provide S.M. with an IEP, it had to offer to place him in a residential educational facility.

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The parents sued Chichester in federal court, arguing that the Hearing Officer's legal conclusions were erroneous. They moved for a preliminary injunction requiring Chichester to place S.M. in a residential educational facility. The District Court rejected the Hearing Officer's legal conclusions and held: (1) Chichester had assumed the responsibilities of a host district and (2) there was no imminency requirement in the IDEA. The District Court issued a preliminary injunction ordering Chichester to arrange for S.M. to move to a mutually agreeable residential educational placement. Chichester appealed, and we affirmed the District Court's order entering the preliminary injunction.

Chichester offered to place him in Elwyn's residential educational program to comply with the preliminary injunction, but S.M. argued that Elwyn's program was inadequate. While the litigation over the preliminary injunction continued, S.M. lost placements at two other facilities. Because so much time had elapsed, the District Court appointed an expert to evaluate S.M. The expert filed her report in July 2024, and she recommended that S.M. be placed in a residential educational facility.

In August 2024, S.M. received an offer, open for three weeks, from the Melmark School. The District Court heard argument and received evidence from the parties during two proceedings. The District Court agreed with the expert that S.M. still required a residential educational placement and found that it was unlikely he would make progress at Elwyn. Determined not to let another placement slip away, the District Court ordered

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Chichester to secure and fund S.M.'s placement at Melmark. Chichester timely appealed that order.

II¹

Chichester first argues that the District Court erred by declining to remand the case to the Pennsylvania Office for Dispute Resolution. We disagree. We previously held that the parents exhausted their claims, so no remand was necessary. The District Court properly determined which placement offers would satisfy its preliminary injunction by providing S.M. with a FAPE.

We are also unpersuaded by Chichester's argument that the District Court clearly erred by relying on the expert's opinion. After reviewing the Court's factual findings based in part on the expert report, we are not "left with the definite and firm conviction that a mistake has been committed." *United States v. Waterman*, 755 F.3d 171, 174 (3d Cir. 2014) (cleaned up). The record supports the District Court's factual findings.

The District Court did not abuse its discretion by hearing argument and taking evidence in the August 2024 proceedings on short notice. The placement offer at issue was set to expire in about one week, and S.M. had already twice lost a placement offer because it expired

1. The District Court had subject-matter jurisdiction under 20 U.S.C. § 1415(i)(3)(A) and 28 U.S.C. §§ 1331 and 1343(a)(3). We have jurisdiction to review the District Court's order effectively modifying its preliminary injunction under 28 U.S.C. § 1292(a)(1).

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while Chichester litigated the placement. In this context, the Court acted within its discretion.

Nor was the District Court required to include an age limit or a residency requirement in its order. The order instructed Chichester to “take all necessary steps to secure S.M.’s residential educational placement at the Melmark School for his immediate admission—including signing an enrollment contract and completing all related requirements—on or before September 5, 2024” and to “make all necessary arrangements to fund S.M.’s placement at the Melmark School.” App. 2. Nothing in this order suggests that Chichester must provide S.M. with a FAPE once he ages out under the law. Nor does it require Chichester to continue to fund S.M.’s placement if his mother moves out of the school district.

Chichester also argues that the District Court erred by requiring it to sign an enrollment contract on short notice. We are unpersuaded. It is true that Chichester must follow certain procedures before executing contracts under the Pennsylvania Sunshine Act, 65 Pa. Cons. Stat. § 701 *et seq.*, and the Pennsylvania Public School Code of 1949, 24 Pa. Stat. § 1-101 *et seq.* But Chichester was long aware that it would have to sign a contract to place S.M. in a residential educational facility on short notice, and it knew for nearly a month in advance that it might have to act quickly to place S.M. at the Melmark School. The District Court did not err by requiring Chichester to comply with a court order quickly even though it may have been difficult for Chichester to do so while complying with state law.

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Finally, the Court acted within its discretion when it declined to dissolve the preliminary injunction. *Sprint Commc'ns Co. L.P. v. CAT Commc'ns Int'l, Inc.*, 335 F.3d 235, 241 (3d Cir. 2003). Chichester argues that the circumstances had changed and that it had complied with the preliminary injunction. But the Court determined that S.M. still needed a residential educational placement to receive a FAPE and found Elwyn would not provide him one. And, in any event, S.M. is entitled to remain in his current placement at least until the proceedings have been completed. 20 U.S.C. § 1415(j); *Susquenita Sch. Dist. v. Raelle S.*, 96 F.3d 78, 85 (3d Cir. 1996); *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 119 (3d Cir. 2014).

III

This matter has a contentious procedural history. Barring a negotiated settlement, we trust that the District Court will soon decide the final merits of the case. For the reasons stated, we will affirm the District Court's order.

42a

**APPENDIX D — MEMORANDUM OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA,
FILED OCTOBER 7, 2024**

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 21-4266

S.M., BY AND THROUGH HIS PARENTS,
MICHAEL C. AND DANIELLE C.,

Plaintiffs,

v.

CHICHESTER SCHOOL DISTRICT,

Defendant.

Filed October 7, 2024

MEMORANDUM

Anita B. Brody, District Judge

Over three years have passed since S.M.—a now-seventeen-year-old boy with severe autism and intellectual disabilities—and his parents brought this action against Chichester School District (“Chichester”). Over two years have passed since I held that his parents are likely to establish that S.M. is entitled to a residential educational

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placement when this matter is adjudicated on the merits and, in the meantime, will suffer irreparable harm without one. Mem. 6-7, ECF No. 21. Although Chichester has referred S.M. to fifteen different residential educational placements and S.M. has been accepted to four, the parties have yet to agree on any of them. With each day of delay, S.M. continues to be harmed and gets one step closer to aging out of his entitlement to a free appropriate public education. I have therefore ordered Chichester to secure and fund S.M.'s residential educational placement at the Melmark School. Order, ECF No. 154.

I. Background

S.M. is a seventeen-year-old boy whose autism and intellectual disabilities make it impossible for him to learn in a regular classroom. Decl. of Danielle Ciavarelli ¶¶ 3-5. He requires assistance to dress himself, shower, use the bathroom, and keep himself safe. *Id.* ¶ 4; Dep. of Kristen Lefevre 49, ECF No. 9-11. S.M.'s parents cannot provide for his needs by themselves, and when S.M. has lived at home, he has been hospitalized multiple times because of concerns for his safety and the safety of his family. Dep. of Danielle Ciavarelli 655-58, ECF No. 9-7. In the past, S.M. has made progress only while being educated in a residential facility. *Id.* at 659-61.

In August 2020, S.M.'s parents moved to Chichester School District and requested that Chichester provide S.M. with an individualized educational program ("IEP") that included a residential educational placement. Decl. of Danielle Ciavarelli ¶ 8-9. Instead, Chichester issued an

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IEP that provided S.M. only with a day program. *Id.* ¶ 10; Dep. of Danielle Ciavarelli 681, ECF No. 9-7. Accordingly, since September 2021, S.M. has (1) lived in a medical residential treatment facility (“RTF”)¹ at Elwyn; and (2) attended school at the Delaware County Intermediate Unit. Decl. of Danielle Ciavarelli ¶¶ 25, 28, 32, 34, 35. S.M.’s medical and educational programming are not coordinated; as a result, he has struggled to develop basic life skills. *Id.* ¶¶ 29-30. Although S.M.’s parents could remove him from Elwyn’s RTF at any time, they have not done so because without a residential educational placement, “this would only throw him back into a crisis situation.” *Id.* ¶ 31.

1. The terms “RTF” and “residential educational placement” are not interchangeable. *See* Hearing Officer Decision 19, ECF No. 9-3. An RTF is a medical placement “prescribed by non-educational personnel for non-educational purposes” and is funded either by a child’s parents or social services agencies. *Id.* By contrast, a residential educational placement one of the “continuum of alternative placements” a school district must offer qualifying students under the IDEA. 34 C.F.R. § 300.115. Residential educational placements can include “hospitals or institutions.” 20 U.S.C. § 1401(16). However, when a student requires such a placement, a school district is only obliged to pay for the costs associated with “non-medical care and room and board” that are “necessary to provide special education and related services.” 34 C.F.R. § 300.104; *see also Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981) (holding school district is responsible for “residential placement that is a necessary predicate for learning” but not “the provision of services that are unrelated to learning skills.”).

*Appendix D***II. Procedural History**

In September 2021, S.M.'s parents sued Chichester, alleging that Chichester had violated the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act by failing to provide S.M. a free appropriate public education. Compl., ECF No. 1. In February 2022, S.M.'s parents moved for a preliminary injunction requiring Chichester to secure a residential educational placement for S.M. Pls.' Mot. for Prelim. Inj., ECF No. 10. Chichester opposed the motion, arguing that S.M. did not need a residential educational placement to receive a free appropriate public education. Def.'s Resp., ECF No. 18. In March 2022, I granted S.M.'s motion and ordered Chichester:

to make all necessary referrals for residential educational placement for purposes of S.M.'s [free appropriate public education], in full consultation with parents; make all necessary arrangements to secure such placement and authorize the necessary funding; and plan for and execute a reasonable and appropriate plan for transitioning S.M. from the [residential treatment facility] where he currently resides, to the residential educational placement the parties mutually select, as soon as practicably possible.

Order, ECF No. 22; *see also* Mem. Regarding Mot. for Prelim. Inj., ECF No. 21. In April 2022, Chichester appealed and moved for a stay pending appeal. *See* Notice

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of Appeal, ECF No. 24; Mot. for Recons. or Stay, ECF No. 23.² In June 2022, I denied Chichester’s motion. *S.M. by & through Michael C. v. Chichester Sch. Dist.*, 2022 WL 2134165, at *2-3 (E.D. Pa. June 14, 2022).

In June 2022, Chichester sent a referral to the Shorehaven School in Elkton, Maryland, a nearby school that S.M.’s parents believed could meet S.M.’s needs. Def.’s Resp. to Mot. for Contempt Ex. C, at 2, ECF No. 37-3 (Chichester’s referral to Shorehaven); Ex. B, at 1, ECF No. 37-2 (email noting Shorehaven was “only 40 minutes away” from S.M.’s parents and “appear[ed] to be a high quality program.”). In September 2022, Shorehaven offered S.M. a residential educational placement. Pls.’ Resp. to Mot. to Dissolve the Prelim. Inj. Ex. A, at 2, ECF No. 46-1 (Shorehaven acceptance letter). On December 2, 2022—after Chichester refused to fund the placement because it was out-of-state—Shorehaven withdrew its offer. Pls.’ Resp. to Mot. to Dissolve the Prelim. Inj. 4, ECF 46; *see also* Ex. A, at 3, ECF No. 46-1 (email from Shorehaven’s Deputy Director of Programs withdrawing offer).

In late December 2022, S.M. was accepted to the Elwyn Children’s Residential Treatment and Learning Center, in Elwyn, Pennsylvania. Def.’s Mot. to Dissolve Prelim. Inj. 2, Ex. A, ECF No. 43. Chichester notified S.M.’s parents of the acceptance in early January 2023 and issued a Notice of Recommended Educational Placement

2. In September 2024, the Court of Appeals for the Third Circuit affirmed the March 2022 order issuing the preliminary injunction. *See S.M. by & through Michael C. v. Chichester Sch. Dist.*, No. 22-1612, 2024 WL 4262788 (3d Cir. Sept. 23, 2024).

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(“NOREP”)³ at Elwyn in March 2023. *See id.* After touring the proposed placement, S.M.’s parents objected to it on the ground that it was no different from Elwyn’s RTF “where he h[ad] been languishing.” Pls.’ Resp. to Mot. to Dissolve the Prelim. Inj. 2, ECF No. 46; *see also* Ex. C, at 7, ECF No. 46-3 (formal objection to NOREP).⁴ Notwithstanding S.M.’s parents’ objection, Elwyn’s offer remained open.⁵

In May 2023, Shorehaven indicated that it may be able to extend S.M. another offer. Pls.’ Emergency Mot.

3. The Individuals with Disabilities Education Act (“IDEA”) requires that parents of a student with disabilities receive prior written notice before a school “proposes to initiate or change” the student’s educational placement. 20 U.S.C. § 1415(b)(3)(A). In Pennsylvania, the form used to provide this notice is called a NOREP. *T.R. v. Sch. Dist. of Philadelphia*, 223 F. Supp. 3d 321, 325 (E.D. Pa. 2016).

4. The record shows that S.M.’s mother filed two complaints regarding the quality of care, programming, and staffing at Elwyn’s RTF: one in April 2022, and another in April 2023. *See* Pls.’ Resp. to Mot. to Dissolve the Prelim. Inj. Ex. B, at 2, ECF No. 46-2 (April 2022 complaint, explaining how S.M. returned home with a “broken skin and bruising” on his shoulder after another child bit him—an incident that Elwyn’s staff knew had happened but never reported to S.M.’s parents); *id.* at 5 (April 2023 complaint, detailing how S.M.’s mother came to pick him up at 1:00 pm and found him asleep and soaked in urine).

5. Chichester issued the same NOREP in March 2024, to which S.M.’s parents objected on the same grounds. Pls.’ Letter, Appx. Attachment A, at 1-5, ECF No. 152-2 (March 2024 NOREP); *id.* at 6 (objecting because “[t]his is the same RTF placement where [S.M.] has been residing since September, 2021”).

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to Enforce Prelim. Inj. Ex. A, at 1, ECF No. 49-2. In early August 2023, S.M.'s parents moved to enforce the preliminary injunction, requesting that Chichester be ordered to send an updated referral to Shorehaven. Pls.' Emergency Mot. to Enforce Prelim. Inj., ECF No. 49. Chichester opposed the motion. Chichester was "skeptical as to how all services [at Shorehaven could] be educational"—even though Shorehaven indicated they were—given that Shorehaven "only has educational programming for 220 days per year," and Chichester therefore disagreed to fund S.M.'s placement. Def.'s Resp. to Emergency Mot. 3, ECF No. 53. Shortly thereafter, Shorehaven retracted its potential offer, so I denied the motion as moot. Order, ECF No. 55.

As of August 2023, progress toward securing S.M.'s residential educational placement had stalled. The parties thus agreed to refer the case to an educational consultant who could find and pursue additional placement options. They mutually selected Mindy Goodman. Order, ECF No. 55; *see also* Joint Status Rep., ECF No. 65 (reporting that Goodman was "approved by the Chichester School District Board of Directors to complete an evaluation of [S.M.'s] placement needs[.]").

In November 2023, S.M. received an offer from the Shrub Oak International School in Mohegan, New York, which Goodman approved. *See* Nov. 15, 2024 Conference Tr. 2:12-17, ECF No. 96; Jan. 24, 2024 Conference Tr. 4:6-8, ECF No. 97. On January 26, 2024, I ordered Chichester to facilitate S.M.'s placement at Shrub Oak. Order, ECF No. 76. One week later, Chichester moved for reconsideration

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of that order and to remand the case to the Pennsylvania Office for Dispute Resolution, arguing that “critical new information” had come to light suggesting that S.M. no longer needed a residential educational placement. Def.’s Mot. for Recons. 4, ECF No. 88. S.M.’s parents opposed Chichester’s motion. Pls.’ Resp. to Mot. for Recons., ECF No. 89. After conferencing with the parties, I vacated the Shrub Oak order and appointed Dr. Mary Lazar to conduct an independent, updated evaluation of S.M. *See* Order, ECF No. 91 (placing Shrub Oak order in suspense); Feb. 20, 2024 Conference Tr. 4:1-8:9, ECF No. 119 (outlining efforts to identify and appoint an appropriate psychologist); Order, ECF No. 112 (appointing Dr. Lazar); Order, ECF No. 117 (granting Chichester’s motion for reconsideration, denying its motion for remand, and vacating the Shrub Oak order).

On July 17, 2024, Dr. Lazar filed her report, and I ordered the parties to meet and confer and submit a joint update in advance of a status conference set for August 20, 2024. *See* Report, ECF No. 132; Order, ECF No. 133. Meanwhile, on August 7, 2024, S.M. was offered a residential educational placement at Melmark, located in Berwyn, Pennsylvania. *See* Letter, ECF No. 138.⁶ After

6. Pennsylvania maintains a list of “approved private schools” that provide “specific special education program[s]” approved by the Secretary of the Department of Education and are “thereby eligible to receive payments for tuition, or tuition and maintenance, from funds of the school district or the Commonwealth, or both.” 22 Pa. Code. § 171.11. The Melmark School’s “7-day residential” program and Elwyn Davidson’s day school program are both included on the most recent list. *See* Commonwealth of

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learning of the offer, Chichester asked me to stay the status conference until after the Court of Appeals for the Third Circuit heard argument on their appeal of the March 2022 preliminary injunction order. Def.’s Letter, ECF No. 139. Because Melmark’s offer was set to expire on August 28, 2024, I declined to do so. *See* Pls.’ Letter 2, ECF No. 140 (noting deadline for Melmark offer); *but see* Order, ECF No. 154 (deferring further action until after September 4, 2024 argument).

On August 20 and 21, 2024, I held hearings to discuss Dr. Lazar’s report and—hopefully, finally—facilitate S.M.’s residential educational placement at Elwyn or Melmark. The parties presented testimony from S.M.’s mother, Dr. Lazar, Goodman, and representatives from both programs. Aug. 20, 2024 Hr’g Tr., ECF No. 148; Aug. 21, 2024 Hr’g Tr., ECF No. 149. The parties then informally briefed their respective positions. Def.’s Status Report, ECF No. 151; Pls.’ Letter, ECF No. 152.

Pennsylvania Department of Education, *Directory of Approved Private Schools & Chartered Schools for the Deaf and the Blind* 26-27 (May 2024) [hereinafter “APS Directory”], [https://www.education.pa.gov/Documents/K-12/Special% 20Education/APS% 20Directory.pdf](https://www.education.pa.gov/Documents/K-12/Special%20Education/APS%20Directory.pdf) (Melmark); *id.* at 9 (Elwyn). Goodman did not recommend either program, but only because they not have any openings at the time she was researching and compiling her recommendations. *See* Aug. 21, 2024 Hr’g Tr. 65:17-66:8, ECF No. 149 (Goodman testifying to the same).

*Appendix D***III. Discussion**

The Individuals with Disabilities Education Act (“IDEA”) “offers States federal funds to assist in educating children with disabilities.” *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390 (2017) (citing 20 U.S.C. § 1400 *et seq.*).⁷ In exchange for those funds, States pledge to provide every qualifying child a “free appropriate public education”⁸ through a uniquely tailored “individualized education program” (“IEP”). 20 U.S.C. §§ 1401(9), 1412(a)(1). “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 580 U.S. at 399. An IEP need not be “ideal,” *id.*, or “incorporate every program requested by the child’s parents,” *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 269

7. Pennsylvania receives these funds and thus is subject to the IDEA’s requirements. It has also adopted related federal regulations by incorporation by reference. 22 Pa. Code. § 14.102(a)(1)-(2).

8. A “free appropriate public education” includes both “special education” and “related services.” 20 U.S.C. §§ 1401(9) (defining “free appropriate public education”), (26)(A) (“related services”), (29) (“special education”). “Special education” is “specially designed instruction . . . to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.” *Id.* § 1401(29)(A); 34 C.F.R. § 300.39(a)(1)(i). “Related services” are the support services “required to assist a child . . . to benefit from” that instruction. 20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a).

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(3d Cir. 2012), to be satisfactory. Rather, an IEP must be “likely to produce progress, not regression or trivial educational advancement.” *K.D. by & through Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 254 (3d Cir. 2018) (quoting *Ridley*, 680 F.3d at 269); *see also T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (“[A] satisfactory IEP must provide ‘significant learning’ and confer ‘meaningful benefit.’”) (internal citation omitted).

A. S.M. still requires a residential educational placement.

Chichester maintains, as it has since day one, that S.M. does not need a residential educational placement to receive a free appropriate public education. *See* Def.’s Status Report 3, ECF No. 151. S.M.’s parents and Dr. Lazar disagree. Pls.’ Letter 2, ECF No. 152 (“S.M. requires a residential educational placement.”); Report 3, ECF No. 132 (concluding “[S.M.’s] needs would most appropriately be met by a residential educational placement specialized for students with developmental disabilities, including autism and intellectual disability.”).⁹ So too do I.

The record suggests that S.M.’s behavior may have improved since I issued the injunction in March 2022.

9. In affirming the March 2022 order granting a preliminary injunction, the Court of Appeals for the Third Circuit also concluded that “the record support[s] a finding that placement at a residential educational facility is necessary for S.M. to receive a [free appropriate public education].” *S.M. by & through Michael C.*, 2024 WL 4262788, at *1.

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See Report 2, ECF No. 132 (“[D]ata and anecdotal report[s] from both his school and residential placements consistently pointed to a pattern of reduced frequency of concerning behaviors (e.g., disruption, noncompliance, and sexualized behavior)”; *but see* Aug. 20, 2024 Hr’g Tr. 41:8-43:20 (S.M.’s mother explaining how his problematic behaviors “spike” when he comes home for longer than a night). Nonetheless, the record also makes clear that S.M. still struggles with “basic self-help and social skills” such as toileting, showering, brushing his teeth, dressing, feeding himself, and communicating. *Kruelle*, 642 F.2d at 693 (“[T]he concept of education is necessarily broad . . . Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point.”); Report 30-33, ECF No. 132 (S.M.’s test results). S.M. can only develop these skills in a program that provides “uniformity and consistency across school and residential settings.” Report 3, ECF No. 132. For these reasons, I find that S.M.—who only has four years left to learn how to function in everyday life—requires a residential educational placement now more than ever. *See, e.g., id.* at 2 (“Given that [S.M.] has four years remaining in school, it is absolutely essential to capitalize on his improved behavior and availability for an even higher level of intensive programming to meet areas of need in communication, adaptive skills, behavior, and transition planning.”); Aug. 20, 2024 Hr’g Tr. 86:12-87:10 (Dr. Lazar testifying to the same).

*Appendix D***B. Chichester’s proposed placement at Elwyn does not satisfy its substantive obligations under the IDEA.**

Assuming S.M. does require such a placement, Chichester contends that the Elwyn residential educational placement—under which S.M. would attend school at Elwyn’s Davidson School and live at Elwyn’s Residential Center—will provide a free appropriate public education. *See* Def.’s Status Rep. 12-19, ECF No. 151. S.M.’s parents disagree. They argue that Elwyn’s Residential Center “is the same” as the Elwyn residential treatment facility where S.M. has languished for the past three years; accordingly, Elwyn cannot provide a free appropriate public education no matter what services S.M. may receive during the day at Elwyn Davidson. Pls.’ Letter 3, ECF No. 152.

Based on the record, it is unclear whether Elwyn’s Residential Center and its residential treatment facility are, in fact, different.¹⁰ Chichester has explained that its

10. Elwyn’s website explains that the Residential Center “provides intensive therapeutic intervention services to children and adolescents ages 6-21 with autism spectrum disorder, experiencing acute behavioral challenges, and exhibiting resistance to treatment.” *Children’s Behavioral Health Services: Services Tailored for Autism Spectrum Disorder—Addison Hines Children’s Residential Treatment & Learning Center*, Elwyn, <https://www.elwyn.org/services/children-s-behavioral-health-services> (last visited Oct. 7, 2024); *see also* Def.’s Mot. to Dissolve Prelim. Inj. Ex. A, ECF No. 43 (acceptance letter from Crystal Iorizzo, the Director of Clinical Services at Elwyn’s Residential Center, noting that S.M. “meets the inclusionary

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proposed residential educational placement would involve “transitioning S.M. from the RTF in which he reside[s] to a different bed in the same facility but pursuant to a different program.” Def.’s Mot. to Dissolve the Prelim. Inj. 4, ECF No. 43; *see also* Def.’s Status Rep. 3, ECF No. 151 (“[T]he District has identified the Elwyn residential educational 24/7 IEP placement (**not** the current Elwyn residential treatment facility, a medical placement) as an offer of a free appropriate public education (FAPE) . . .”).

Even assuming Chichester’s proposed residential educational placement is different from S.M.’s current medical placement, nothing in the record suggests that Chichester’s proposed placement at Elwyn is reasonably calculated to enable S.M. to make appropriate progress. To the contrary: in the two NOREPs Chichester issued recommending S.M.’s placement at Elwyn, Chichester all but admitted that it procured the placement only to satisfy the March 2022 preliminary injunction—not because it believed that Elwyn could meet S.M.’s unique needs. *See* Def.’s Mot. to Dissolve Prelim. Inj. 2, Ex. A, ECF No. 43

clinical requirements for acceptance” and describing the Center as a “treatment facility specifically designed to treat children/adolescents on the autism spectrum”). A prior version of Elwyn’s website, excerpted in the administrative record, describes Elwyn’s RTF using identical language. *See* Administrative Record from the Office of Dispute Resolution Ex. 15, at 27, ECF No. 9-15. Likewise, when discussing S.M.’s proposed residential educational placement at Elwyn, Joseph Flynn—the Assistant Principal of the High School Program at Elwyn Davidson—and Chichester’s counsel focused on collaboration between Elwyn Davidson and the RTF and made no mention of the Residential Center. *See* Aug. 21, 2024 Hr’g Tr. 81:19-85:14, ECF No. 149.

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(March 2023 NOREP, explaining that Chichester was proposing a residential educational placement at Elwyn “[p]ursuant to a Court order dated March 24, 2022”); Pls.’ Letter, Appx. Attachment A, ECF No. 152-2 (March 2024 NOREP, stating same); *Ridley*, 680 F.3d at 275 (A NOREP is “properly considered part of [a student’s] overall educational plan.”).

Chichester’s lackluster justification notwithstanding, other evidence shows that Elwyn cannot provide the “special education” and “related services” S.M. requires under the law. 20 U.S.C. §§ 1401(26), (29). For example, Joseph Flynn—the Assistant Principal of the High School Program at Elwyn Davidson—testified that S.M.’s math instruction would be “focus[ed] on vocational math, meaning that we want him to understand place value, so he has a thorough understanding of money.” Aug. 21, 2024 Hr’g Tr. 81:14-16, ECF No. 149. As detailed in Dr. Lazar’s report, S.M. currently receives the same type of math instruction at the Delaware County Intermediate Unit, and it is a “poor match” for someone who has the problem-solving and language skills of a toddler between the ages of 2 of 3. Report 5, ECF No. 132; *see also id.* at 25 (S.M.’s personal care assistant explaining that S.M. “doesn’t understand anything” in math class so “he mostly sits on a beanbag chair, and she does the math for him”), 26-27 (describing math class where S.M. struggled to distinguish coins and failed to complete a place value worksheet). Giving S.M. more of the same will at best produce “trivial educational advancement,” and at worst, “regression”—neither of which are countenanced under the IDEA. *K.D.*, 904 F.3d at 254 (internal citation omitted).

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And though Flynn explained that “life skills” would “really [be] the focus” of S.M.’s programming at Elwyn’s Residential Center, no one from Elwyn could testify as to what that would look like in practice. *See* Aug. 21, 2024 Hr’g Tr. 84:22-85:14, ECF No. 149. S.M.’s Residential Center admission letter says that the Center’s “focus w[ould] be on giving both [S.M. and his parents] strategies for managing problem behavior,” but as discussed above, S.M. requires more from the residential component of his placement. Def.’s Mot. to Dissolve Prelim. Inj. Ex. A, ECF No. 43; *see also* Report 3-4, ECF No. 132 (explaining how S.M.’s current programming “is directed decreasing problematic behaviors” but should “apply broadly to all of [S.M.’s] needs, including language/communication skills, improving attention/engagement in activities, increasing independence in daily living skills, and supporting social functioning.”).

For all these reasons, I find that Chichester’s proposed residential educational placement at Elwyn is unlikely to produce progress for S.M. and does not satisfy Chichester’s substantive obligation under the IDEA.

C. The record shows that Melmark will enable S.M. to make appropriate progress in light of his circumstances.

Although Elwyn’s residential educational programming will not enable S.M. to make appropriate progress, Melmark’s will.

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As noted above, S.M. needs “uniformity and consistency across school and residential settings” to make appropriate educational progress. Report 3, ECF No. 132. Krystina Shellmire, Melmark’s Director of Children’s Residential Homes, described Melmark’s residential educational program as a “packaged program” where children work on the same academic and behavioral goals at the Melmark School and residential homes. Aug. 21, 2024 Hr’g Tr. 22:10, ECF No. 149; *see also id.* at 22:17-23:7, 22:2-15 (describing cross-collaboration between Melmark’s school and residential settings). She testified that in S.M.’s case, those goals would be geared toward improving self-care, communication, and daily living skills. *See id.* at 28:3-5.¹¹ Christiana Skinner-Walker,

11. Chichester asserts that S.M. was previously “enrolled in Melmark’s residential program for two years[.]” Def.’s Status Rep. 7, ECF No. 151. This warrants clarification. As Shellmire explained, S.M. “was in a different residential program” on Melmark’s campus (Melmark’s medical residential treatment facility) from 2019 to 2020. Aug. 21, 2024 Hr’g Tr. 34:14-25, ECF No. 149. Nonetheless, the record shows that S.M. received consistent support—and as a result, made substantial progress—when he lived at Melmark’s RTF. *See* Dep. of Danielle Ciavarelli 659:19-22, ECF No. 9-7 (“Q: What are some of the things that he received at Melmark that he didn’t receive before then that helped him? A: He received consistent one-on-one care. He received consistent staffing. He received consistent schedules, consistent walking, consistent like life skills.”); *id.* at 660-61 (describing S.M.’s improved toileting and behavior, and how S.M. learned how to ride a bike); *id.* at 701:15-702:6 (noting how S.M. “was starting to strive in certain things [like] never [] before” because of Melmark’s “consistency” and “structure”).

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Melmark's Director of Educational Services, confirmed the same. *Id.* at 40:9-12; 43:19-44:3.

Furthermore, Dr. Lazar's report specifically recommends that S.M.'s "profile of severe cognitive deficits and [] limited repertoire of skills warrants intensive Applied Behavior Analysis ("ABA")"—a type of programming for students with autism that Chichester agrees is "critical" for S.M. Report 3, ECF No. 132; Def.'s Status Report 11, ECF No. 151 (stating that ABA "is a critical component of programming" for students like S.M.). Flynn explained that Elwyn staff employ ABA to address "behaviors that take [] away from learning." *See* Aug. 21, 2024 Hr'g Tr. 88:9-89:1, ECF No. 149; *see also id.* at 68:4-6 (Goodman testifying that ABA "is not ingrained in the same way [at Elwyn], and it's not consistent."). By contrast, multiple witnesses testified that ABA is the hallmark of Melmark's programming, and is used not only to address problematic behaviors, but also to teach and reinforce skills related to self-care and independence. *See id.* at 19:9-21:23, ECF No. 149 (Shellmire explaining how ABA is used at Melmark); *see also id.* 24:3-14 (additional Shellmire testimony); 51:18-52:7 (Skinner-Walker testimony); 67:12-17 (Goodman testimony).¹²

12. Separately, the APS Directory explicitly notes that Melmark's residential educational programming is "based on Applied Behavior Analysis," but makes no mention of Elwyn's residential educational programming, let alone whether it incorporates Applied Behavioral Analysis. *Compare* APS Directory 26 (Melmark) *with* APS Directory 9 (Elwyn); *see also* Fed. R. Evid. 201(b)(2) (allowing a court to take judicial notice of a fact that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

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The record evidence speaks clearly and with one voice: anything less uniform, consistent, and intensive than Melmark’s residential educational program is unlikely to confer “a meaningful educational benefit” on S.M. *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d at 577. I arrive at this conclusion not because I find Melmark “ideal,” or because S.M.’s parents prefer Melmark. *Endrew F.*, 580 U.S. at 399; *see also Ridley*, 680 F.3d at 269. Rather, I find that Melmark—but not Elwyn—will give S.M. the appropriate special education and related services he is long owed.

IV. Conclusion

For the above reasons, I have ordered Chichester to (1) take all necessary steps to secure S.M.’s residential educational placement at the Melmark School for his immediate admission—including signing an enrollment contract and completing all related requirements—on or before September 5, 2024; and (2) make all necessary arrangements to fund S.M.’s placement at the Melmark School.

/s/ Anita B. Brody
Anita B. Brody
United States District Judge

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**APPENDIX E — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT, FILED SEPTEMBER 23, 2024**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1612

S.M., BY AND THROUGH HIS PARENTS,
MICHAEL C. AND DANIELLE C.; MICHAEL
CIAVARELLI; DANIELLE CIAVARELLI

v.

CHICHESTER SCHOOL DISTRICT,

Appellant.

Argued September 4, 2024
Filed September 23, 2024

OPINION*

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2:21-cv-04266)
District Judge: Honorable Anita B. Brody

Before: JORDAN, HARDIMAN, and PORTER,,
Circuit Judges.

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

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HARDIMAN, *Circuit Judge*.

Chichester School District appeals from the District Court's order entering a preliminary injunction that requires it to place a student, S.M., in a residential educational facility. We will affirm.

I¹

S.M. is a seventeen-year-old boy with severe autism and intellectual disabilities. His parents filed an administrative complaint against Chichester School District with the Pennsylvania Office for Dispute Resolution, asserting claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The parents alleged that Chichester denied S.M. a free appropriate public education (FAPE) by failing to offer him an individualized education program (IEP) that would, upon his release from a residential treatment facility, place him in a residential educational facility. This type of IEP is sometimes called a “contingent IEP.”

The special education administrative Hearing Officer dismissed the complaint. He reasoned that because Chichester was the “resident district” and not the “host district” under 24 Pa. Stat. § 13-1306, it had no duty to provide S.M. with an IEP unless his release from

1. The District Court had subject-matter jurisdiction under 20 U.S.C. § 1415(i)(3)(A) and 28 U.S.C. §§ 1331 and 1343(a)(3). We have jurisdiction over the appeal of the preliminary injunction under 28 U.S.C. § 1292(a)(1).

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his residential treatment facility was imminent. *S.M. v. Chichester Sch. Dist.*, 2022 WL 875232, at *2 (E.D. Pa. Mar. 24, 2022). The Hearing Officer alternatively concluded that if Chichester had to provide S.M. with an IEP, it had to offer to place him in a residential educational facility.

The parents sued Chichester in the District Court, arguing that the Hearing Officer's legal conclusions were erroneous. They moved for a preliminary injunction requiring Chichester to place S.M. in a residential educational facility. The District Court rejected the Hearing Officer's legal conclusions and held: (1) Chichester had assumed the responsibilities of a host district; and (2) there was no imminency requirement in the IDEA. The District Court issued a preliminary injunction ordering Chichester to arrange for S.M. to move to a mutually agreeable residential educational placement.

II

Contrary to Chichester's arguments, the District Court had subject-matter jurisdiction. The parents exhausted their claims under the IDEA by filing an administrative complaint with the Pennsylvania Office for Dispute Resolution that raised the relevant issues. After the Hearing Officer rendered his final decision, the parents were entitled to file a civil action in the District Court seeking review of the decision and presenting their additional claims for damages under the Rehabilitation Act and 42 U.S.C. § 1983. *See* 20 U.S.C. § 1415(i)(2)(A) (allowing parties to seek judicial review of decisions made by State

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educational agencies); *see also Luna Perez v. Sturgis Pub. Sch.*, 598 U.S. 142, 147–48 (2023) (holding that the IDEA’s exhaustion requirement does not apply to claims brought “under another federal law for compensatory damages”). The parents’ claims were ripe because they alleged that they would accept a residential educational placement for S.M. and that he has been languishing in facilities unable to meet his needs.

As the District Court held, Chichester had to provide S.M. with a FAPE because it assumed that responsibility by entering “Local Educational Agency Responsibility Agreement[s]” with Central Bucks School District and Rose Tree Media School District. App. 191, 193. Nor did the District Court clearly err by finding that the parents are likely to establish that S.M. is entitled to placement in a residential educational facility when this matter is adjudicated on the merits. *See K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013). The Court’s decision was based on its independent examination of the record, with due weight given to the Hearing Officer’s findings of fact. The record supports its finding that placement at a residential educational facility is necessary for S.M. to receive a FAPE. Apart from its factual findings, the District Court did not commit any error of law. So it did not abuse its discretion by entering the preliminary injunction. *See id.* at 112–14.

III

For the reasons stated, we will affirm the District Court’s order issuing the preliminary injunction.

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**APPENDIX F — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA,
FILED JANUARY 26, 2024**

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 21-4266

S.M., BY AND THROUGH HIS PARENTS,

Plaintiffs,

v.

CHICHESTER SCHOOL DISTRICT,

Defendant.

Filed January 26, 2024

ORDER

For years, S.M.—a 16-year-old boy with complex educational needs that derive from his severe autism and intellectual disabilities—has been deprived of a free appropriate public education (“FAPE”) that meets his needs. On September 28, 2021, S.M. and his parents brought this action against Chichester School District (“Chichester”), alleging that Chichester failed to provide S.M. with a FAPE in violation of the Individuals with

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Disabilities Education Act (“IDEA”) and Section 504 of the Rehabilitation Act.¹

On March 24, 2022, I found that S.M. is entitled to a residential educational placement. *See* ECF No. 21 at 6. I granted Plaintiffs’ Motion for a Preliminary Injunction (ECF No. 10) and directed Chichester to “make all necessary referrals for residential educational placement for purposes of S.M.’s FAPE, in full consultation with parents” and to “make all necessary arrangements to secure such placement and authorize the necessary funding.” ECF No. 22. Chichester appealed the preliminary injunction pursuant to 28 U.S.C. § 1291, arguing in part that the court erred in how it evaluated and relied upon facts from an earlier decision issued by an Administrative Hearing Officer. *See* Appellant’s Concise Summary of the Case, *S. M., et al v. Chichester School District*, No. 22-1612, ECF No. 9 (3d Cir. Apr. 29, 2022).

S.M. continues to be harmed with each day of delay in securing him a residential FAPE. *See Blackman v. D.C.*, 277 F. Supp. 2d 71, 79 (D.D.C 2003) (“[E]ach day a child is denied a free appropriate education . . . he or she is harmed yet again.”).

Pursuant to discussion on the record at the November 15, 2023 status conference (ECF No. 67), the Court was informed that, fortunately, S.M. was granted acceptance at Shrub Oak International School. Mindy Goodman—an

1. S.M. also brings claims of discrimination under the IDEA, Section 504, and 42 U.S.C. § 1983. *See* ECF No. 1.

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independent evaluator hired by Chichester to complete an evaluation of S.M.'s placement needs pursuant to this Court's March 24, 2022, Order (ECF No. 22)—reported to the Court that Shrub Oak is an appropriate residential educational placement. S.M. and his parents also accept this placement. S.M. will begin at Shrub Oak on February 20, 2024.

AND NOW, this 26th day of January, 2024, it is **ORDERED** that Defendant Chichester School District take all necessary steps to secure the residential educational placement for S.M. at the Shrub Oak International School for an admission date of February 20, 2024, and to make all necessary arrangements to fund the placement and transfer of S.M. to Shrub Oak by that date.

/s/ Anita B. Brody
Anita B. Brody
United States District Judge

**APPENDIX G — MEMORANDUM AND ORDER
OF THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA,
FILED MARCH 24, 2022**

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 21-4266

S.M., BY AND THROUGH HIS PARENTS,
MICHAEL C. AND DANIELLE C.,

Plaintiffs,

v.

CHICHESTER SCHOOL DISTRICT,

Defendant.

Filed March 24, 2022

MEMORANDUM

S.M. is a fourteen-year-old boy with severe autism and additional intellectual disabilities who resides in Chichester School District (“Chichester”). S.M. and his parents bring suit against the school district, alleging that Chichester failed to provide S.M. with a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”) and Section 504 of the Rehabilitation Act (“Section 504”). S.M. also

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brings claims of discrimination under the IDEA, Section 504, and 42 U.S.C. § 1983.

On December 1, 2020, S.M.'s parents filed an administrative due process complaint against Chichester, alleging that the individualized education program ("IEP") provided by Chichester was inadequate because it did not include a residential placement. After a hearing, Special Education Due Process Hearing Officer Brian Jason Ford ("the hearing officer") held that Chichester had no duty to issue S.M. any IEP because the medical placement where he currently resides is outside of the district. S.M. appeals the hearing officer's decision and seeks a temporary restraining order or preliminary injunction mandating Chichester to provide him with a residential IEP. The parties argued their motion on March 17, 2022, at a hearing the Court designated as a hearing for a preliminary injunction. ECF No. 19. I exercise jurisdiction to review the hearing officer's decision under 20 U.S.C. § 1415(i)(2). Because S.M. is entitled to an IEP with a residential placement, I will grant S.M.'s motion for a preliminary injunction.

I. Background

S.M. is a fourteen-year-old boy whose autism and intellectual disabilities make it impossible for him to learn in a traditional educational setting. Decl. of Danielle Ciavarelli, at ¶ 3-5. He requires assistance to dress himself, shower, use the bathroom, and keep himself safe. *Id.* at ¶ 4; Dep. Of Kristen Lefevre, at p. 49. S.M.'s parents cannot provide for his educational or safety needs by themselves,

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and when living at home, he has been hospitalized multiple times because of concerns for his safety and the safety of his family. Dep. of Danielle Ciavarelli, at p. 655-58. In the past he has made progress only when provided education in a residential facility where he has both lived and learned. *Id.* at 659-61.

In August of 2020, S.M.'s parents moved to Chichester School District and requested that Chichester provide S.M. with an IEP that included a residential educational placement. Decl. of Danielle Ciavarelli, at ¶ 8-9. Instead, Chichester issued an IEP that provided S.M. only with a day program. *Id.* at ¶ 10; Dep. of Danielle Ciavarelli, at p. 681. Because Chichester only provided S.M. with a day program, he was home for thirteen days when he experienced a crisis and attempted to physically harm his mother and dogs. Decl. of Danielle Ciavarelli, at ¶ 13; Dep. of Danielle Ciavarelli, at p. 675. Because he was in crisis, S.M. was hospitalized at Foundations, a psychiatric hospital intended for short-term treatment. Decl. of Danielle Ciavarelli, at ¶ 13, 16. Although Foundations was located outside of the school district, Chichester signed an agreement retaining all responsibility for providing S.M. with a FAPE under the law. *See* App. #1 to Pl.'s TRO Mot., ECF No. 10-5. S.M.'s parents repeatedly requested that Chichester provide S.M. with a residential IEP, but Chichester continued to refer him only to day programs. Admin. Record, ECF No. 9-15, at p. 8-14; Decl. of Danielle Ciavarelli, at ¶ 19. Because S.M. had no other place to go, S.M. remained at the psychiatric hospital for almost a full year. Decl. of Danielle Ciavarelli, at ¶ 23.

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In September of 2021, S.M. was moved to a medical residential treatment facility (RTF) funded by the state for 30 days. *Id.* at ¶ 25. Since then, S.M. has remained at the RTF, and the state has extended his funding for short term periods of up to 90 days at a time. *Id.* at ¶ 28, 32, 34, 35. Currently, the funding is set to expire on April 11, 2022. *Id.* at ¶ 35. S.M.'s RTF program is not coordinated with his educational day program, and therefore he lacks consistent support and programming to help him progress in his treatment and his education. *Id.* at ¶ 29-30. Although S.M.'s parents could remove him from the RTF at any time, they have not done so because without an alternative residential placement, "this would only throw him back into a crisis situation." *Id.* at ¶ 31.

As a result of Chichester's failure to provide a residential IEP, S.M.'s parents brought an administrative due process claim to request an IEP that included a residential placement. After a hearing, the hearing officer found that Chichester did not have an obligation to provide S.M. with an IEP. Alternatively, the hearing officer found that if Chichester did owe S.M. an IEP at the time of the hearing, then that IEP must include a residential educational facility. *Id.* at 35.

II. Standard of Review

In determining whether to grant preliminary relief, such as a temporary restraining order or a preliminary injunction, a court must decide whether the party seeking the injunction has shown: "(1) a likelihood of success on the merits; (2) he or she will suffer irreparable harm if

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the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief.” *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010).

III. Discussion**a. S.M.’s appeal from the hearing officer’s decision is likely to succeed on the merits.**

In an appeal from an administrative decision under the IDEA, the burden of persuasion is on the party challenging the hearing officer’s decision: in this case, S.M. has the burden of persuasion. 20 U.S.C. § 1415(i)(2) (A). When reviewing a state administrative decision under the IDEA, the district court receives the records of the administrative proceedings, hears additional evidence if any party requests it, and “basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(c). A federal district court must give “due weight” to all factual findings of the administrative law judge in IDEA cases. *S.H. by State-Operated Sch. Dist. of City of Newark*, 336 F.3d 260, 269 (3d Cir. 2003). Due weight requires that the court take factual findings as prima facie correct and explain any departure from them. *Id.* at 270. The legal decisions of an administrative hearing officer, however, are subject to plenary review. *Downingtown Area Sch. Dist. v. D.S.*, 2022 WL 523563, at *7 (E.D. Pa. Feb. 22, 2022) (citing *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 528 n.3 (3d Cir. 1995)).

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The hearing officer in this case found first that Chichester had no responsibility to issue a contingent IEP because Chichester was only the “resident district,” not the “host district.” When a student is schooled outside of the district where he or she resides, traditionally the “resident district” provides for funding only, and the “host district” takes responsibility for providing a FAPE. 24 P.S. § 13-1306. When a student has separate host and resident districts, they are known as “1306 students,” because their rights are governed by 24 P.S. § 13-1306. The hearing officer assumed that Chichester was the “resident district,” not the “host district,” and therefore found that “Chichester has no current obligation to provide” a FAPE for S.M. H.O. Decision at p. 3.

However, a “resident district” can still take on responsibility for placement in addition to funding. Chichester signed a document called a “Local Agency Responsibility Agreement,” stating that it “formally assumed all responsibility” for S.M.’s education for the duration of his placement at the facility outside their district. Chichester concedes that they “served as both host and district of residence” because of the signed agreement. Def. Resp. to Mot. at p. 11. The hearing officer did not mention this document. H.O. Decision. The hearing officer’s entire opinion, therefore, is based on an error, because it assumes Chichester’s only obligations are those of a resident district. Because Chichester served as host and resident district, the hearing officer was incorrect that they have no obligation to provide a FAPE.

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The hearing officer also found that when a student has a separate host and resident district, the resident district is only obligated to provide a contingent IEP when the student's discharge from the facility in the host district is imminent. H.O. Decision at p. 28. Chichester relies heavily on this finding in their pending motion to dismiss and response to the motion for a temporary restraining order or preliminary injunction, arguing that S.M.'s appeal is not ripe because his discharge from his current RTF is not imminent. *See* Def. Resp. to Mot. at p. 12; Def. Mot. to Dismiss at p. 7. The caselaw relied on by the hearing officer and Chichester is inapplicable because it addresses students with separate resident and host districts. Additionally, the imminence requirement does not appear in the statutory framework or caselaw cited, and instead is based on an interpretation by the hearing officer. Imminency is not a requirement found in 24 P.S. § 13-1306, the IDEA, or Third Circuit precedent

Anticipating an appeal on the issue of Chichester's obligation to provide a FAPE, the hearing officer also evaluated whether S.M. required a residential placement at the time of his decision. H.O. Decision at p. 36. He did so to avoid the necessity of a remand. *Id.* The hearing officer found that 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." H.O. Decision at p. 35.

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Based on my independent review of the record, and affording due weight to the hearing officer's findings of fact, there is no reason to disturb his conclusion as to S.M.'s need for residential placement. The officer took sufficient testimony and reviewed all of the evidence presented by the parents and Chichester, including testimony from S.M.'s mother, his former teacher at Elwyn, his therapist at Foundations Behavioral Health, and his primary clinician at Melmark. Chichester had the opportunity to cross examine all witnesses and present any evidence to the contrary. The hearing officer found that if Chichester did owe S.M. a FAPE, it must include a residential placement, and the record supports this finding. S.M. is therefore likely to prevail on the merits of Count I of his complaint because Chichester has an obligation to provide a residential FAPE and has not done so.¹

b. S.M. will suffer irreparable harm if the injunction is denied.

A plaintiff seeking a preliminary injunction must prove that he is *likely* to suffer irreparable harm in the absence of preliminary relief. *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Numerous courts have found that denial of a FAPE automatically constitutes irreparable injury. *See, e.g., Olivia B. v. Sankofa Acad. Charter Sch.*, 2015 WL 379282, at *9 (E.D. Pa. Aug. 1, 2014) (noting that the "failure to provide a FAPE constitutes irreparable injury"); *Blackman v. D.C.*, 277 F. Supp. 2d

1. Because I find that S.M. is likely to prevail on the merits of Count I, I do not address the merits of his other claims at this juncture.

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71, 79 (D.D.C. 2003) (“[E]ach day a child is denied a free appropriate education . . . he or she is harmed yet again.”); *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 78 F. Supp. 2d 138, 143 (W.D.N.Y. 1999) (“The denial of a FAPE over an extended period does constitute harm, and the longer that denial continues, the more irreparable it becomes.”). Additionally, a child who suffers from disabilities like S.M. suffers even greater harm when they are not provided a FAPE. *See Massey v. D.C.*, 400 F. Supp. 2d 66, 75 (D.D.C. 2005) (noting that failure to provide a FAPE causes a child without disabilities harm, and “such harm is heightened for a disabled child with much greater need for daily structure and consistency”).

S.M.’s mother notes that a few weeks without residential placement erased all of the progress he made in a year and a half of his prior residential program. Decl. of Danielle Ciavarelli, at p. 5. Additionally, S.M. is not currently progressing at his RTF with regard to his behavioral, communication, and functional needs. Pl.’s TRO Mot. 17-18. He requires one on one staffing for his behavior, and exhibits all of the same behavior he did upon his admission. Decl. of Danielle Ciavarelli, at p. 6-7. While S.M.’s parents know that he is regressing and unable to progress at his RTF, the only alternative currently is to bring him home where his mother believes he would likely experience another crisis and be re-hospitalized. *Id.* His current placement is also temporary, requiring S.M.’s care to be in a constant state of limbo. S.M. is living “continually under threat of losing the residential services he needs to keep him safe, and entirely without the coordinated educational services he needs to gain needed skills to live

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more independently.” *Id.* at 8. S.M. has therefore met his burden to show that he is likely to suffer irreparable injury without the FAPE that Chichester owes him.

c. Granting a preliminary injunction will not result in even greater harm to Chichester.

After determining that the movant is likely to succeed on the merits and to suffer irreparable injury, the court must balance the parties’ relative harms and determine whether the non-movant’s harm is greater than that to the movant. *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 143 (3d Cir. 2017). Chichester argues that providing S.M. with a residential placement would harm Chichester’s ability to provide FAPE to other students because of the potential cost of the programs.² *Id.* at 22. Chichester argues also that a decision in line with the hearing officer’s findings as to S.M.’s need for a residential placement “could easily be the

2. Chichester also argues that providing S.M. with the FAPE that he is legally entitled to could be exposing themselves to liability for “state-created danger” because they would be “essentially remov[ing]” S.M. from his RTF. *Id.* at 21. S.M. is not incarcerated—he is in a medical placement that is entirely voluntary and from which his parents can choose to remove him at any point. Decl. of Danielle Ciavarelli, at p. 7. Additionally, Chichester has offered S.M. an IEP for DCIU day programs, which S.M. would theoretically enter if and when his mother removes him from the RTF. It is difficult to understand how offering S.M. a residential placement could be a state-created danger while offering only a day program could not, given that the crux of this complaint is the extent to which S.M.’s safety and the safety of those around him are in jeopardy when he is required to live at home.

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death knell of public education.” *Id.* This potential harm is speculative and insufficient in and of itself to overturn findings made within the hearing officer’s authority. *See Trefelner ex rel. Trefelner v. Burrell Sch. Dist.*, 655 F. Supp. 2d 581, 597 (W.D. Pa. 2009) (“Defendant’s argument that this order will open the floodgates and result in a large number of students that it will have to accommodate is speculation.”). Chichester is correct that “cost is not determinative,” and the cost to the school district does not outweigh the harm S.M. suffers when he is deprived of his legal right as a person with disabilities to a free and appropriate public education.

d. The public interest favors granting S.M.’s motion for preliminary injunctive relief.

Finally, granting a preliminary injunction requires a finding that the public interest favors doing so. This inquiry is “fairly routine,” because when a plaintiff has proven both success on the merits and irreparable harm, the public interest will “almost always” favor a preliminary injunction. *Issa*, 847 F.3d at 143 (citing *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 730 (3d Cir. 2004) and *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994)). But when a student is deprived of their legal right to an education under federal law, the public interest favors injunctive relief to enforce their rights. *See Issa*, 847 F.3d 121, 143 (upholding the lower court’s finding that “[i]t is undeniably in the public interest for providers of public education to comply with the requirements of the EEOA”); *Trefelner*, 655 F. Supp. 2d at 598 (“There is a strong public interest in protecting

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fundamental First Amendment rights”). Similarly, the public interest favors enforcing school district compliance with the IDEA.

Chichester argues that finding for S.M. would create “an immediate right for every single student currently placed by a third-party into an RTF . . . to be immediately removed from that medical placement and placed by their school district of residence into a different residential school placement at taxpayer expense.” Def. Resp. to Mot. at 23. This holding is not nearly so broad. Our procedural safeguards still require every student who wishes to challenge their IEP, contingent or otherwise, to bring and exhaust an administrative claim. 20 U.S.C. § 1415(f). At the administrative level, all students are entitled to present evidence that their district has not provided a FAPE—but the district is entitled as well to contest that evidence to show otherwise. This case is no different.

S.M. has satisfied the requirements for preliminary injunctive relief by showing a likelihood of success on the merits of Count I, that he will suffer irreparable harm if relief is not granted, that the school district’s harm does not outweigh his own, and that the public interest is favored by granting his requested relief. Therefore, S.M.’s motion for a preliminary injunction will be granted.

/s/ Anita B. Brody
Anita B. Brody
United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 21-4266

S.M., BY AND THROUGH HIS PARENTS,
MICHAEL C. AND DANIELLE C.,

Plaintiffs,

v.

CHICHESTER SCHOOL DISTRICT,

Defendant.

Filed March 24, 2022

ORDER

AND NOW, this 24th day of March, 2022, it is **ORDERED** that S.M.'s Motion for a Preliminary Injunction (ECF No. 10) is **GRANTED**. It is further **ORDERED** that Defendant Chichester School District's Motion to Dismiss Plaintiff's Complaint (ECF No. 4) is **DENIED**.

Chichester School District is **ORDERED** to make all necessary referrals for residential educational placement for purposes of S.M.'s FAPE, in full consultation with parents; make all necessary arrangements to secure such placement and authorize the necessary funding; and

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plan for and execute a reasonable and appropriate plan for transitioning S.M. from the RTF where he currently resides, to the residential educational placement the parties mutually select, as soon as practicably possible.

/s/ Anita B. Brody
Anita B. Brody
United States District Judge

**APPENDIX H — FINAL DECISION AND ORDER
OF THE PENNSYLVANIA SPECIAL EDUCATION
DUE PROCESS HEARING OFFICER,
FILED AUGUST 27, 2021**

**PENNSYLVANIA SPECIAL EDUCATION
DUE PROCESS HEARING OFFICER**

FINAL DECISION AND ORDER

ODR No. 24373-2021-KE

CLOSED HEARING

Child's Name: [REDACTED]

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
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Counsel for the LEA:

Gabrielle C. Sereni, Esquire
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Hearing Officer:

Brian Jason Ford

Date of Decision:

August 27, 2021

*Appendix H***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). [REDACTED] is the Medicaid managed care company contracted to provide behavioral health services for persons with qualifying disabilities. [REDACTED] is not a party to this hearing and [REDACTED] personnel did not testify. [REDACTED] manages the Student’s behavioral health services.

[REDACTED] 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 to manage and stabilize the Student’s behavioral health. Both the hospital and the RTF are in Pennsylvania but outside of the District.

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-#.”

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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. § 131306 (Section 1306), has been interpreted by the Pennsylvania Department of Education through a Basic Educational Circular issued on July 1, 1999, 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 [REDACTED] 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

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

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Chichester's expense if [REDACTED] 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.

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.

*Appendix H***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

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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 [REDACTED] . *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.* 3-26.

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*.

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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.* 3-40, 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.*
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

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inconsistent progress at this non-residential private school. *See, e.g.* J-11, 3-13, 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. 3-79, 3-91.
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.* 3-107.
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.

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.

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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. [REDACTED] 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.* 3-122; 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.* 3-40.
14. There is no dispute that the RTF is in Pennsylvania but outside of Chichester.
15. [REDACTED] reviewed the Student's need for an RTF placement every 90 days. *See, e.g.* 3-30. This is not unique to the Student. [REDACTED] 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.* 3-30. The record is clear that [REDACTED] 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).

*Appendix H****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 [REDACTED]-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.* 3-63.

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.

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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 [REDACTED]-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.*

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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.

6. Chichester is located within DCIU.

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***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 after attempting to harm the Mother and a pet. 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, 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. [REDACTED] denied that

7. The Student was first taken to a nearby emergency hospital and transferred shortly thereafter to the Crisis Hospital. The distinction makes no difference. Functionally, the Student has been hospitalized since October 28, 2020.

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recommendation. The Parents appealed that decision through [REDACTED] grievance process and prevailed. Since February 2021, the Student has been approved for a 30-day [REDACTED]-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.

*Appendix H***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); *AS. 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.

*Appendix H****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 (3d Cir. 2010), *citing Shore Reg? 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

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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-I*, 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 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v.*

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Newark, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Andrew 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 *Andrew 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." *Andrew 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

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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.*

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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 grater progress in a segregated classroom

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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.

*Appendix H**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 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 noneducational 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 [REDACTED] 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

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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 nonmedical 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

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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.

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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.

*Appendix H**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: LH., 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 *LH.* 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.

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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

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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 L.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. 1:11CV-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: L.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

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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. [REDACTED] 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, [REDACTED] gave notice that it would cut funding for R.J.'s RTF placement. It is noteworthy that [REDACTED] 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

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IEP from the host district. Even so, the court extended the logic of *LH. v. Cumberland Valley* into Section 1306 cases. The fact that [REDACTED] 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 [REDACTED] 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 *LH. v. Cumberland Valley*, *supra*. Quoting the hearing officer, the court held:

The logic of the *LH.* 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.

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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 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.

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.

*Appendix H****Part IV: The Student is Not Owed a Contingent IEP***

A striking commonality between the *LH.* and *L.T.* cases is that both students were poised to return to the defendant school district at any moment. In *LH.*, 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 [REDACTED] 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 *LH.* and *L.T.* cases do

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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 *L.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 [REDACTED]-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 [REDACTED]) 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

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.

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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, [REDACTED] periodic 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 [REDACTED] 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 *LH.* 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

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

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And yet, after seeing the aftermath of the *LH.* 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 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 *LH.* case. A single due process decision, limited by a narrow remand order, hardly establishes a

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.

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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*." *LH. 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 *LH.* 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 *LH.*, there would be little to no

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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.

[REDACTED] 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 [REDACTED] 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, [REDACTED] 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 [REDACTED]'s past actions are not necessary prelude to how it will act in the future. Even so, any argument

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that [REDACTED] 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 [REDACTED] 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

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.

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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 *LH.* did not involve Section 1306 and because the imminency of the *LH.* 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

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.

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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 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 [REDACTED] grievance process, and with the way BHRs bungled the Student's most recent transition attempt is entirely justified. I completely understand why

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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*, [REDACTED] has not terminated funding for the Student's RTF placement and has not threatened to do so. Rather, the record demonstrates that [REDACTED] has approved the Student's RTF placement, and that placement has not even started. In the past, [REDACTED] 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 [REDACTED] will act differently this time, and the Student will have certain Medicaid protections even if [REDACTED] 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

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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 *LH.* 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 *LH.* 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.

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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

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**APPENDIX I — OPINION DENYING PETITION
FOR REHEARING OF THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT,
DATED JUNE 15, 2026**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-2750

S. M., BY AND THROUGH HIS PARENTS,
MICHAEL C. AND DANIELLE C.; MICHAEL
CIAVARELLI; DANIELLE CIAVARELLI,

v.

CHICHESTER SCHOOL DISTRICT,

Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania.
(D.C. No. 2:21-cv-04266).

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, HARDIMAN,
SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER,
MATEY, PHIPPS, FREEMAN, MONTGOMERY-
REEVES, CHUNG, BOVE, MASCOTT, and MCKEE*,
Circuit Judges.

* Judge McKee's vote is limited to panel rehearing.

Appendix I

The petition for rehearing filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

Judge Mascott would have granted rehearing and will file a dissent from this order denying rehearing.

BY THE COURT,

/s/ Theodore A. McKee
Circuit Judge

Dated: June 15, 2026
Lmr/cc: All Counsel of Record

Appendix I

S.M. v. Chichester Sch. Dist., No. 25-2750
MASCOTT, *Circuit Judge*, dissenting sur denial of panel rehearing.

I dissent from the denial of rehearing. Here, the District Court plowed over the judgment of the local school district and administrative officials to order enrollment of appellee in one, and only one, specific private school.¹ That enrollment is to continue for a period of years, beyond appellee's twenty-first birthday and without any ongoing annual review or reevaluation of the best fit and outcome for the student as he continues to grow.²

This mandating of detailed, finely grained educational policy determinations is not the proper role of federal courts.³ And it is not consistent with the statutory

1. See *S.M. v. Chichester Sch. Dist.*, No. CV 21-4266, 2025 U.S. Dist. LEXIS 160251, 2025 WL 2404383, at *9 (E.D. Pa. Aug. 19, 2025) (explaining and delineating the District Court's order).

2. 2025 U.S. Dist. LEXIS 160251, [WL] at **1, 9-10.

3. See, e.g., *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017) ("Any review of an [Individualized Education Program] (IEP) must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." (emphasis in original)); *Hendrick Hudson District Bd. of Education v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) (observing that authorization of judicial review in the Individuals with Disabilities Education Act "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review"). See also *id.* (noting that congressional goals in IEP preparation "would be frustrated if a court were permitted simply to set state decisions at naught").

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command and textual purposes of the Individuals with Disabilities Education Act (IDEA).⁴

The matter before us has a long and tangled history. The best interests of appellee and his educational needs have hung in the balance. Even after the local school district achieved admission of appellee to a full-time residential educational facility and committed to fund the placement, the lower court on prior review rejected that determination, preferring placement in a different residential facility.⁵ In the most recent revisiting of this case, our courts' decisions have now, further, mandated this placement for numerous years without review.⁶

4. *See, e.g.*, 20 U.S.C. § 1400(d)(1)(C) (“The purposes of this chapter are . . . to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities”); *id.* § 1414(d)(4)(A) (“The local educational agency shall ensure that . . . the IEP Team—(i) reviews the child’s IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and (ii) revises the IEP as appropriate to address . . . any lack of expected progress . . . [;] the child’s anticipated needs; or . . . other matters.”).

5. *See S.M. v. Chichester Sch. Dist.*, No. CV 21-4266, 2024 U.S. Dist. LEXIS 182471, 2024 WL 4438472, at **5-7 (E.D. Pa. Oct. 7, 2024) (criticizing and rejecting, for example, the vocational mathematics educational instruction and technique at the facility at which appellant had orchestrated an offer of admission and would have provided funding). *Contra Rowley*, 458 U.S. at 207 (“[C]ourts must be careful to avoid imposing their view of preferable educational methods upon the States.”).

6. *See, e.g., S.M.*, 2025 U.S. Dist. LEXIS 160251, 2025 WL 2404383, at **9-10.

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Detailed educational policy determinations and close judgment calls are not within the best expertise of the judiciary.⁷ They are not even within the best expertise of federal policymakers.⁸ Which is why the text and structure of the IDEA embody a system where the federal government financially *supports*, and guarantees resources for, quality education for children with unique needs, but leaves on-the-ground efforts to state and local officials to establish, determine, and carry out those plans in coordination with parents.⁹

7. See *Endrew F.*, 580 U.S. at 393 (explaining that the U.S. Supreme Court has “rejected the view that the IDEA gives courts *carte blanche* to impose upon the States whatever burden their various judgments indicate should be imposed” (internal quotation omitted)); *Rowley*, 458 U.S. at 208 (“[C]ourts lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.” (internal quotation omitted)).

8. See, e.g., *Rowley*, 458 U.S. at 206 (finding that a reviewing court must give “due weight” to state administrative proceedings in administration of IDEA standards and programs); *id.* (reasoning that nothing in the Act suggests that “reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself”).

9. See, e.g., 20 U.S.C. § 1400(d)(1)(B)-(C) (describing the rights of children and parents and federal assistance for States and local educational agencies “to provide for the education of all children with disabilities”); *id.* § 1400(d)(2) (referring to assistance for States in implementation of an adjacent statewide interagency system for early intervention for infants and toddlers with special needs and their families); *id.* § 1400(d)(3) (describing a purpose of the IDEA as “ensur[ing] that educators and parents have the necessary tools to improve educational results for children with disabilities”); *id.* § 1417(b) (“Nothing in this chapter shall be construed to authorize

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I would reject the District Court's specific mandate here and order it to remand to local and state officials for their administration of appellee's Individualized Education Program under the IDEA.

an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction."). *See also Rowley*, 458 U.S. at 208 ("Congress'[s] intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped.").