

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
BUREAU OF SPECIAL EDUCATION APPEALS**

In re: Zeke<sup>1</sup>

BSEA # 2200246

**RULING ON PARENT’S MOTION TO WITHDRAW IEP CLAIM AND CONTINUE  
WITH FUNCTIONAL BEHAVIOR ASSESSMENT CLAIMS AGAINST PEMBROKE  
PUBLIC SCHOOLS**

**AND**

**PARENT’S MOTION TO JOIN EVERGREEN CENTER, INC. SCHOOL**

This matter comes before the Hearing Officer on two motions filed by Parent on July 7, 2022 in a matter pending before the Bureau of Special Education Appeals (BSEA): a *Motion to Withdraw IEP Claims and Continue with Functional Behavior Assessment Claims Against Pembroke Public School District (sic) (Motion to Withdraw Certain Claims)* and a *Motion to Join Evergreen Center, Inc. School (Motion to Join)*. Neither Pembroke Public Schools (Pembroke, or the District) nor Evergreen Center, Inc. School (Evergreen) filed a written response to Parent’s Motions, but I heard arguments from all entities during a Conference Call that took place July 19, 2022.

For the reasons below, Parent’s *Motion to Withdraw Certain Claims* is hereby ALLOWED. Parent’s *Motion to Join* is hereby DENIED.

**PROCEDURAL HISTORY**

On or about July 9, 2021, Parent filed a twenty-one page *Hearing Request* against Pembroke alleging that the District’s transitional and functional behavioral assessments had been inadequate, resulting in insufficient transition planning, services, and goals for Zeke. As a remedy, she requested a minimum of two years of compensatory services, including Intensive Behavior Analysis treatments in the school, residential, and community settings, involving task analysis procedures, to be developed, implemented, and monitored by a Board Certified Behavior Analyst (BCBA), after the completion of a Functional Behavior Assessment (FBA). She specified that the “effective treatment” she sought would “include a detailed FBA, identified target behaviors, interventions used, baseline data typical prior to the implementation of the intervention and a graph demonstrating the differences between the baseline and when the intervention is provided.” Parent also requested a behavior support plan that includes a definition of the target behavior, a description of how the plan will be implemented, and a statement of who will be monitoring the plan and training the staff; and an order that Pembroke conduct a number of assessments in multiple areas, such as transition planning and interest inventories, personality

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<sup>1</sup> Zeke is a pseudonym chosen by the Hearing Officer to protect the student’s identity in public documents.

and preference tests, career development measures, job training evaluations, self-determination assessments, and parent and student interviews and questionnaires. Finally, Parent requested that the Hearing Officer issue an order outlining the District's obligations with respect to data collection and reporting and discussion of evaluations, among other things. The Hearing was scheduled for August 13, 2021.

Pembroke filed a *Response to Parent's Request for Hearing* on July 20, 2021. The District indicated that it was funding Zeke's attendance at Evergreen, a Department of Elementary and Secondary Education (DESE)-approved program, as a full-time residential student on a fully accepted Individualized Education Program (IEP). According to Pembroke, Zeke receives a free appropriate public education (FAPE) at Evergreen, the District provided a transition assessment for him as part of his three-year evaluation in January 2020, and Evergreen conducts behavior assessment and analysis and communicates the results to Parent on an ongoing basis, both formally and informally. Pembroke also asserts that Zeke has not been denied services, assessments, or special education procedures, and that no compensatory services are owed. Also on July 20, 2021, Pembroke waived the resolution session and requested that the Hearing be postponed one month, as neither Counsel nor school personnel would be available. Parent assented, and the Hearing was postponed for good cause to September 13 and 14, 2021.

Following a Conference Call that took place on August 19, 2021, Parent requested a further one- month postponement to allow for the completion of additional assessments, and to permit the Team to consider those assessments at a meeting. The District assented, and I issued an Order allowing the postponement for good cause. The Hearing was rescheduled for October 18 and 19, 2021.

In that Order, I also scheduled a Pre-Hearing Conference for September 14, 2021 and requested that Parent, through her Advocate, submit a one-page summary clarifying the issues for Hearing. Parent did so on August 26, 2021. She clarified that she was seeking a decision as to whether Pembroke had impeded Zeke's right to a FAPE; significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Zeke; or caused a deprivation of educational benefit. Specifically, Parent contends that the District denied Zeke a FAPE by failing to complete an adequate transition assessment to determine Zeke's "needs, preferences and interests under his unique circumstances" and failed to consider the results of that assessment "for possible additional transitional services or supports given the results of the transitional assessment." She requested that I order Pembroke to conduct a proper transition assessment "to include all areas of suspected disability pursuant to the student's needs, strengths, preferences, and interest and all other daily and independent living skills given his unique circumstances," within 30 days of the date of the decision, and provide a copy of the assessment to Parent "with all data collected 2 days prior to the team meeting to discuss the transitional assessment results and the team must determine whether measurable, goals and objectives are needed in the IEP and whether the student would need additional services and supports to meet these goals." Parent also asserted that Pembroke had committed procedural violations by failing to conduct a three-year FBA, and/or by "merely reus[ing] or modif[ying]" a 2017 FBA from a previous placement rather than conduct a new one. Specifically, Parent requested that the BSEA order Pembroke to include, as part of the FBA, "the identification of any decreased or any deficits or lack of any age-appropriate daily living skills,

vocational, and independent living skills and that the behaviors identified become a part of the IEP with measurable goals and objectives and a modified behavior intervention plan is developed and monitored by a BCBA monthly.” Finally, Parent requested that the BSEA order Pembroke to provide Zeke with two years of compensatory services for the denial of a FAPE, to include 40 hours per week of applied behavior analysis (ABA) by a licensed BCBA in the home, school, and residential settings.

On August 31, 2021, in accordance with my earlier Order, Pembroke filed its *Response to Parent’s Succinct Statement of Issues*, denying that it had violated Zeke’s and/or Parent’s procedural or substantive rights. Pembroke asserted that Zeke’s assessments and IEP goals address his disabilities and areas of deficit appropriately, are appropriate for him to make effective progress, and ultimately provide him with a FAPE. Zeke has a fully accepted IEP and placement. Moreover, Parent has been afforded opportunities to participate in planning Zeke’s education, including multiple attempts to include her in Team meetings she has declined to attend. Specifically, Pembroke contends that it has provided Zeke with a transition assessment that includes all areas of suspected disability and addresses all needs listed by Parent.

Following the Pre-Hearing Conference, on September 14, 2021, the parties jointly requested that the Hearing be postponed two more weeks to allow for the completion of additional assessments. I allowed this request for good cause and the Hearing was rescheduled for November 1 and 2, 2021. Following a virtual check-in, on October 19, 2021, the parties jointly requested further postponement for two months, as the assessments had not yet been completed. I allowed their request for good cause, scheduled a further check-in call, and postponed the Hearing again to January 19 and 20, 2022.<sup>2</sup>

On January 7, 2022, the parties requested further postponement of the Hearing until early March, as scheduling conflicts had interfered with the convening of a Team meeting to discuss evaluation results. The Hearing was postponed to March 4 and 8, 2022, for good cause, and a Conference Call was scheduled for February 9, 2022. Parent’s Advocate failed to appear for the call, and it was rescheduled for February 23, 2022. Following the Conference Call, on that same date, Parent, through her Advocate, requested that the Hearing be postponed for an additional ten weeks to permit her to amend her *Hearing Request* to incorporate claims regarding the new assessments. The District assented, and the Hearing was postponed for good cause until May 23, 24, and 25, 2022.

On March 30, 2022, Parent filed a *Motion for Production of Documents*, but the parties were able to resolve discovery disputes without BSEA intervention. During a Conference Call on April 7, 2022, Parent, through her Advocate, acknowledged that she had not amended her *Hearing Request* and requested an additional two to three weeks to do so. A Conference Call was scheduled for May 2, 2022. Parent failed to attend that call and, as of that date, had not filed an

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<sup>2</sup> In the meantime, on November 22, 2021, Parent filed a *Motion to Prohibit LEA from Participating in FBA Assessment Parent Interview (Motion to Prohibit)*. Pembroke filed its *Response* the following day. On November 23, 2021, Parent filed an *Emergency Motion for IEE Intelligence Testing and Motion for Production of Documents (Emergency Motion)*. The District filed an *Opposition to Emergency Motion* on November 30, 2021. During the Motion Session held December 9, 2021, Parent indicated that the parties had resolved the *Motion to Prohibit*, and that they were working together toward resolution of the *Emergency Motion* and, as such, no rulings were necessary.

amended *Hearing Request*. Later that day, her Advocate emailed to indicate that if she determined that the *Hearing Request* needed to be amended, she would do so by the end of the week.

On May 13, 2022, Parent filed a *Motion to Amend Due Process Hearing (Amended Hearing Request)* contending that Pembroke denied Zeke a FAPE for the last two years because his IEP was not reasonably calculated to address his unique needs and circumstances for transition from school to adult life. Although this claim is described broadly, the remainder of the *Amended Hearing Request*, including all factual allegations, focuses on evaluations conducted by Pembroke. Parent asserts that the District did not evaluate Zeke in all areas of suspected disability, specifically failing to administer preference and interest assessments, and did not administer evaluations properly, and as a result lacked an accurate picture of his educational and functional needs and deprived Parent of the opportunity to participate meaningfully in Team meetings regarding the evaluations. As such, Zeke was not provided appropriate services or supports and was therefore denied a FAPE.<sup>3</sup> Moreover, the parties had entered into an agreement regarding how and where an additional transition assessment would be conducted, which the District failed to follow. As such, Pembroke's evaluations were neither comprehensive nor appropriate. Finally, Parent asserts that Pembroke released confidential student records to the Pilgrim Area Collaborative (PAC) without her informed consent, as she was not provided with the name, credentials, address, or contact information of the individual at PAC who would receive them.<sup>4</sup>

On June 2, 2022, after requesting and receiving an extension, Pembroke filed its *Response to Parent's Amended Hearing Request*, asserting that Zeke had, as a residential student at Evergreen during the relevant time period, received (and accessed) comprehensive and appropriate special education services and received a FAPE; that Parent had fully accepted the IEP dated January 19, 2021 to January 18, 2022; that its last proposed IEP, dated January 26, 2022 to July 10, 2022, was reasonably calculated to provide Zeke with a FAPE; that it had provided comprehensive and appropriate evaluations for Zeke at all times during the relevant period, including an FBA dated June 2021; and that it had conducted the additional evaluations (specifically, the AFLS and an FBA) requested by Parent and reviewed them at a Team meeting on January 26, 2022, and that to the extent the FBA had not included observations of Zeke in the community, it was because Parent had appropriately cancelled the one doctor's appointment she had identified for observation during the 30-day evaluation window due to a COVID exposure.

The Hearing on the *Amended Hearing Request* was scheduled for June 21, 2022.<sup>5</sup>

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<sup>3</sup> Specifically, Parent alleges that the last proposed IEP failed to include goals or objectives aligned with Zeke's wishes and related to his preferences, interests, or future plans.

<sup>4</sup> In the meantime, Parent filed a separate *Hearing Request* against the Department of Developmental Services on May 6, 2021, which she then withdrew. On May 10, 2022, she filed a *Motion to Join the Department of Developmental Services* in the instant matter, which she withdrew on May 27, 2022.

<sup>5</sup> On May 16, 2022, Pembroke filed a *Request to Postpone Hearing*, as the Hearing was then scheduled for May 23, 24, and 25, 2022, but Parent had indicated she would be amending her *Hearing Request*, and as such, the issues for Hearing were unclear. It appears that Counsel for Pembroke was, at the time, unaware that Parent had in fact filed her *Amended Hearing Request*. Furthermore, the BSEA inadvertently scheduled the Hearing on the *Amended Hearing Request* for June 20, 2022, but later issued a Corrected Notice of Hearing specifying that it would take place on June 21, 2022 due to the Commonwealth's observation of Juneteenth.

On May 26, 2022, Pembroke requested that the Hearing be postponed due to the unavailability of Counsel. Parent assented, and the Hearing was postponed for good cause to July 19 and 20, 2022. On June 7, 2022, after a Conference Call during which Parent, through her Advocate, indicated that she would be withdrawing some claims on or before June 30, 2022 and that her Advocate was no longer available in-mid July, the parties jointly requested that the Hearing be postponed to August 2, 2022. In the Order I issued on June 8, 2022, I directed Parent to file a document identifying the claims she wished to withdraw at least one month prior to the Hearing, to provide adequate notice of the issues that remained. I also notified the parties that as the case had been filed during the summer of 2021, the Hearing would take place prior to the commencement of the 2022-2023 school year, in the absence of mitigating circumstances. Parent then filed her *Motion to Withdraw Certain Claims* on July 7, 2022; the District did not object to the late filing.

As to her *Motion to Withdraw Certain Claims*, Parent indicated that she wishes to withdraw “certain claims concerning the IEP allegations she has made against the school district [and to] continue to move forward in her complaint on the issues regarding the allegations made regarding the Functional Behavior Assessment that the district administered pursuant to the Parent’s signed consent form.”

As to her *Motion to Join Evergreen*, Parent alleges that Evergreen has denied Zeke a FAPE by failing to implement his behavior support plan (BSP) for two years; failed to conduct a three-year “reevaluation for a Functional Behavior Assessment in 2021 and fail[ed] to conduct the FBA in the environment settings” that had been agreed to; failed to provide Parent with data it had collected to develop the annual BSP; and modified the BSP without Parent consent or knowledge. Many of her allegations relate to Evergreen’s creation, implementation, and modification of BSPs over the past four years. She also asserts that Evergreen has physically restrained Zeke numerous times and has provided only incomplete reports to her regarding these restraints.

As remedies, Parent seeks two years of community- and home- based services, based on a detailed FBA to be conducted by an independent BCBA of Parent’s choosing, with experience or access to an experienced behavior analyst “trained in methods to deter, decrease, or eliminate sexualized behaviors in the home or community.” Specifically, she seeks detailed data collection, provided to Parent in a particular way, and detailed information regarding the training and licensing of individuals collecting data; a BSP with detailed monthly data collection and definitions of behavior; training of individuals directly involved with the implementation of Zeke’s BSPs for the next two years; accompaniment of Zeke by a BCBA to various outdoor activities in the community; and monthly meetings between the BCBA and Parent, among other things.

## RELEVANT FACTUAL BACKGROUND

The following facts are not in dispute and are taken as true for the purposes of this *Ruling*. These facts may be subject to revision in subsequent proceedings.

1. Although Zeke was 21 years old at the time the *Hearing Request* was filed, he turned 22 in July, 2022. At the time the *Hearing Request* was filed, he was attending the Evergreen Center, a DESE-approved program in Milford, Massachusetts, as a full-time residential student. He had been there for approximately four years, funded by Pembroke.
2. Evergreen assesses and analyzes Zeke's behavior on an ongoing basis as part of his program. These results are shared with Parent through quarterly reports and in other less formal ways.
3. On November 14, 2019, Parent signed consent for Zeke's three-year reevaluation. Assessments administered included Physical Therapy, Occupational Therapy, Psychological, Health, Motor Therapy, Speech and Language, and a Residential, Educational, Behavior and Family Services Update. Pembroke provided a VBMAPP assessment of Zeke in January 2020 to assess both behavior and transition. This assessment consisted of four parts, including a transition assessment. Educational and residential evaluations also assessed Zeke's behavior and independent living skills.
4. Pembroke convened Zeke's three-year reevaluation Team meeting on January 21, 2020. Parent declined to attend. At the meeting, Zeke was found to have continued eligibility for special education. Goals in the IEP proposed for the period from 1/21/20 to 1/20/21 included Behavior Reduction, Social Competence-school and residential, Functional Academics, Community Participation-school and residential, Vocational Development, Daily Living Skills-school and residential, Physical and Emotional Health, Personal Residential Maintenance, Communication, and Adapted Physical Education. A Transitional Planning form was included with the IEP.
5. Parent contends that rather than discuss a timely FBA regarding Zeke's current behaviors, Pembroke presented a summary of, and the Team reviewed, an FBA conducted by Amego, Inc. in 2017. The Team meeting did not include a BCBA.
6. Following the meeting, the District proposed an IEP and placement, which Parent accepted in full on June 1, 2020.
7. Zeke's Team attempted to schedule his Annual Review for January 11, 2021, but Parent did not attend. The meeting was rescheduled for January 19, 2021, but Parent declined attendance. An IEP dated 1/19/21 to 1/18/22 (2021-2022 IEP) was developed. Parent expressed concerns, at some point, to Pembroke and/or Evergreen, regarding behavioral support practices at Evergreen.

8. On January 15 and March 3, 2021, Parent was sent Evergreen's Parent Handbook and its Behavior Support Policy, which explains Evergreen's programming, procedures/practices and policies regarding behavior and data.
9. In an attempt to address Parent's concerns, Pembroke proposed a Team meeting for April 9 and a facilitated Team meeting for May 24, 2021. Parent declined to attend both. On May 24, 2021, Parent accepted the 2021-2022 IEP in full.
10. In the meantime, on May 7, 2021, Kim Beckman, a BCBA at Evergreen, emailed Parent regarding data collection. She explained that data about Zeke, including antecedent-behavior-consequence (ABC) data, is collected and analyzed regularly to update his Behavioral Intervention Plan (BIP) and approaches to behavior, and to measure his progress toward goals. Ms. Beckman shared a "functional behavior analysis report" with Parent on that date, according to which attention was considered the function for Zeke's recent behaviors.
11. On June 4, 2021, Pembroke issued a Notice to Parent in which it explained that a formal FBA was not required to address Zeke's behavior and create Behavioral Intervention Plans.
12. On July 9, 2021, Parent filed the instant *Hearing Request*.
13. Parent was offered a Progress Review Meeting on August 26, 2021 but declined to attend. District representatives attended; quarterly progress reports were reviewed, and service providers shared that Zeke was progressing toward all goal areas.
14. During a Conference Call in the instant matter with this Hearing Officer on October 19, 2021, Parent, through her Advocate, communicated that she was concerned that Zeke's sexualized behavior, which he had demonstrated in previous settings but which Evergreen did not view as an ongoing issue, was continuing in the community. She indicated that she did not trust Evergreen to conduct an FBA focused on sexualized behaviors and requested that Pembroke contract with an independent agency. The parties agreed that PAC would conduct the FBA, and Parent signed a consent form on or about October 21, 2021 for both an FBA (including the F.A.S.T.) and the AFLS.
15. Pembroke, Parent, and Evergreen agreed that the FBA would include the community setting, and Parent subsequently communicated the dates of some appointments when Zeke would be out in the community.
16. Parent rejected an IEP that was proposed by Zeke's Team for the period from January 26, 2022 to July 10, 2022.

## DISCUSSION

I analyze each of Parent's *Motions* separately, in accordance with the relevant legal standards, below.

### I. MOTION TO WITHDRAW CERTAIN CLAIMS

Parent is essentially withdrawing from my consideration all claims unrelated to Functional Behavioral Assessments. I construe this *Motion* as Parent's request to amend her *Hearing Request* by narrowing its focus to allege substantive and procedural violations of Zeke's right to a FAPE arising from Pembroke's failure to timely and properly conduct FBAs during the relevant period. Pursuant to BSEA Hearing Rule I(G)(2), a party may amend her *Hearing Request* with the written consent of the opposing party or the permission of the Hearing Officer, which may be granted no less than five calendar days prior to the commencement of the Hearing.<sup>6</sup> By way of this *Ruling*, I am granting permission for Parent to amend her *Hearing Request* by withdrawing her remaining claims. As Parent raised her concerns about FBAs conducted, or not conducted, by Pembroke in both her initial *Hearing Request*, filed in July, 2021, and her *Amended Hearing Request*, filed in May, 2022, the date of the initial hearing request is controlling for statute of limitations purposes.<sup>7</sup>

Parent's *Motion to Withdraw IEP Claims and Continue with Functional Behavior Assessment Claims Against Pembroke Public School District* is hereby ALLOWED.

### II. MOTION TO JOIN EVERGREEN

Pursuant to M.G.L. c. 71B, § 2A and 603 CMR 28.08(3), the BSEA has jurisdiction "to resolve differences of opinion among school districts, private schools, parents, and state agencies."<sup>8</sup> To determine whether to join a private school, such as Evergreen, in a pending case, I turn to BSEA *Hearing Rule I(J)*:<sup>9</sup>

"Upon written request of a party, a Hearing Officer may allow for the joinder of a party in cases where complete relief cannot be granted among those who are already parties, or if the party being joined has an interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its

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<sup>6</sup> See *In Re Student v. Brookline Public Schools*, BSEA #2202527 (Kantor Nir 2022).

<sup>7</sup> See BSEA *Hearing Rule I(G)*.

<sup>8</sup> *Cf. In Re Student v. Arlington Public Schools*, BSEA #211926, 27 MSER 31 (Figueroa 2021) ("It is clear that in Massachusetts, the BSEA has jurisdictional authority to resolve disputes involving private schools directly responsible for implementation of a FAPE, pursuant to the IDEA, M.G.L. 71B (*sic*) and Section 504").

<sup>9</sup> Cases involving joinder of state agencies require a two-pronged analysis, which takes into account whether joinder of the state agency is in accordance with the agency's rules, regulations, and policies, pursuant M.G.L. c. 71B, § 3. Joinder of local educational agencies and private schools, on the other hand, turns on the factors listed in BSEA *Hearing Rule I(J)* only. to M.G.L. c. 71B, § 3.

absence. Factors considered in determination of joinder are: the risk of prejudice to the present parties in the absence of the proposed party; the range of alternatives for fashioning relief; the inadequacy of a judgment entered in the proposed party's absence; and the existence of an alternative forum to resolve the issues.”

In her *Motion to Join Evergreen*, Parent contends that Evergreen is responsible, in part, for failing to implement Zeke's behavior support plans (BSPs) for two years; failing to conduct an FBA as part of Zeke's most recent three-year reevaluation, relying instead on an outdated FBA conducted by another entity; failing to include community settings in the FBA that was completed in 2022, in accordance with the consent form she signed; failing to provide Parent with data used to develop BSPs, and modifying those BSPs without Parent consent, in violation of the Behavior Analyst Certification Board Code of Ethics and the Massachusetts Licensing requirements for BCBA's; and providing incomplete physical restraint reports for the last four years.

During the Conference Call that took place on July 19, 2022, Parent supplemented her written submission with arguments that Evergreen should be joined as a party because Evergreen personnel wrote all BSPs for Zeke, without sufficient Parent involvement; because Evergreen's name appears on one of more of the FBAs in issue; because Evergreen's Director had participated in previous Conference Calls; and because she believed Evergreen personnel would provide testimony relevant to the issues before me. Evergreen, through its Director of Family Services and Admissions (Director), argued that Evergreen is not a necessary party because it did not conduct the FBA in issue and was acting as an agent of Pembroke when it implemented the services provided in Zeke's IEP. Pembroke objected to joinder of Evergreen as neither appropriate nor necessary, on the same bases, and added that it was appropriate for Evergreen's Director to participate in the Conference Calls, as staff from Zeke's placement had recent, relevant information regarding his progress and his evaluations.<sup>10</sup> Furthermore, according to Pembroke, the District had secured Evergreen personnel to testify at Hearing, in the absence of joinder.

I find Evergreen's and Pembroke's arguments persuasive. As the local educational agency, Pembroke ultimately bears responsibility for Zeke's education.<sup>11</sup> Pembroke is responsible for providing, and/or contracting for, all services Zeke requires to receive a FAPE, and it is Pembroke that must conduct, or contract for, all necessary evaluations – including FBAs.<sup>12</sup> Should I find that FBAs were not conducted in a timely, comprehensive manner, resulting in a deprivation of FAPE that entitles Zeke to compensatory services, I may order

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<sup>10</sup> I note for the record that Parent did not object to Evergreen's participation in Conference Calls at the time they occurred.

<sup>11</sup> See 603 CMR 28.10(1) (“School districts shall be programmatically and financial responsible for eligible students based on residency and enrollment”); see also *Koehler v. Juniata Cnty. Sch. Dist.*, No. 1:07-CV-0117, 2008 WL 1787632, at \*7 (M.D. Pa. Apr. 17, 2008) (According to the IDEA and its implementing regulations, “[e]ach public agency in the State is responsible for ensuring that the rights and protections [of the IDEA] are given to children with disabilities . . . [r]eferred to or placed in private schools and facilities by that public agency”) (internal quotation marks and citations omitted).

<sup>12</sup> See *Koehler*, 2008 WL 1787632, at \*7 (“Thus, even when a private entity is the means of effectuating the mandate of the IDEA, public agencies retain responsibility for ensuring that IDEA standards are upheld.”)

Pembroke to provide and fund those services.<sup>13</sup> As such, an adequate judgement in the form of complete relief may be granted among those who are already parties. Because of this, and because Evergreen personnel will participate in the Hearing as witnesses, Parent bears no risk of prejudice in the absence of Evergreen as a party. Moreover, Evergreen's status as a party would not provide me with additional alternatives for fashioning relief, as Pembroke could elect to contract with Evergreen to provide any compensatory services I may award. Finally, should I determine that compensatory services are due to Zeke for Pembroke's failure to provide timely, comprehensive FBAs that resulted in a deprivation of FAPE, and Pembroke believes such failure is attributable to Evergreen, an alternative forum is available to adjudicate that dispute.<sup>14</sup> Particularly for this reason, and because Pembroke opposes joinder, I find that the District bears minimal risk of prejudice in the absence of Evergreen as a party.

For these reasons, Evergreen is not a necessary party in this matter. Parent's *Motion to Join Evergreen Center, Inc. School* is hereby DENIED.

### CONCLUSION AND ORDER

- 1) Parent's *Motion to Join Evergreen Center, Inc. School* is hereby DENIED.
- 2) Parents *Motion to Withdraw IEP Claims and Continue with Functional Behavior Assessment Claims Against Pembroke Public School District* is hereby ALLOWED. The issues remaining for Hearing are as follows:
  - (A) Whether Pembroke was obligated to conduct one or more FBAs of Zeke between July 9, 2019 and July 2022, when Zeke turned 22, and failed to complete those FBAs in a timely, comprehensive manner, resulting in a substantive deprivation of a FAPE;
  - (B) Whether Pembroke committed procedural errors in connection with FBAs it conducted that amounted to a deprivation of a FAPE because they impeded Zeke's right to a FAPE; significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Zeke; or caused a deprivation of educational benefits;
  - (C) If the answer to (A) and/or (B) is yes, what is the appropriate remedy?

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<sup>13</sup> See *id.* To the extent evidence at Hearing demonstrates that the failure to conduct timely, comprehensive FBAs resulted in inappropriate programming for Zeke at Evergreen, including the application of physical restraints and/or insufficient documentation thereof, such failure would be Pembroke's responsibility.

<sup>14</sup> Should this occur, Pembroke may elect to take appropriate action with respect to Evergreen through termination of the contract, arbitration, or in a court of competent jurisdiction or some other forum, as may be set forth in the contract between them.

- 3) The Hearing will take place via Zoom on August 2, 2022, beginning at 10:00. Exhibits and witness lists are due July 28, 2022, with a copy to the Court Reporter. To the extent Parent wishes to rely on the District's Exhibits, she may indicate as much in her Exhibit Book, rather than provide duplicate documents.

By the Hearing Officer:

    /s/ Amy M. Reichbach

Dated: July 21, 2022