

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

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

**CLOSED EXPEDITED HEARING**  
**ODR File Number: 19860 17 18**

**Child's Name:** E.R.

**Date of Birth:** [redacted]

**Date(s) of Hearing:**

November 7, 2017

**Parent/Grandparent:**

[redacted]

*Counsel for the Family*  
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**Local Education Agency:**

Khepera Charter School  
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**Hearing Officer:** Linda M. Valentini, Psy.D.  
Certified Hearing Official

**Date of Decision:** 11/12/17

## Background

Student<sup>1</sup> is an elementary-school-aged student enrolled in the Charter School (hereinafter School) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the current classification of specific learning disability.<sup>2</sup>

The Parent requested this hearing because she believes that the School's putting Student on "indefinite suspension" was inappropriate, and seeks Student's immediate reinstatement. The School maintains that it has done everything it can to manage Student's behaviors, but that Student currently requires placement in an alternative educational setting of Parent's choice, and acknowledges its obligation to fund such a placement.

Based upon the preponderance of the evidence before me, I find that Student requires a placement other than the School. At the conclusion of the hearing session, the School was ordered to take certain steps to ensure that Student receives a free appropriate public education (FAPE) until a transfer can be effected. The School fully acknowledged its special education obligations to Student.<sup>3</sup>

## Issues<sup>4</sup>

1. Should the School be ordered to reinstate Student?
2. If Student is reinstated must Student have a one-to-one aide?
3. Should Student receive compensatory education for any of the days that Student was suspended?

## Findings of Fact<sup>5</sup>

1. Student was placed on "indefinite suspension" following an October 17, 2017 incident involving a physical assault [on certain School staff], and [other adults] intervening on the scene also could not control Student's behaviors. [NT 62, 98-99, 129-130, 224; P-12]

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14) 29 U.S.C. § 794.

<sup>3</sup> Both counsel are here commended for their conduct and cooperation during this expedited hearing given the very brief time they had for preparation.

<sup>4</sup> This decision addresses the expedited issues. A second hearing is scheduled for late November at which time non-expedited issues will be addressed.

<sup>5</sup> Numbered Parent exhibits are marked "P", numbered School exhibits are marked "KSC", and NT references the Transcript.

2. Student exhibited behavior problems in school as early as 1<sup>st</sup> grade, the 2014-2015 school year, and received suspensions. [NT 28, 40; P-10]
3. Behavior problems continued into 2<sup>nd</sup> (2015-2016) and 3<sup>rd</sup> (2016-2017) grades. [NT 30-31]
4. Physically and verbally aggressive behaviors included [redacted]. [P-10]
5. Behaviors disruptive to instruction and the school climate included [redacted]. [P-10]
6. In 3<sup>rd</sup> grade, from the beginning of December 2016 through the end of April 2017 Student received two blocks of out of school suspensions. [P-11]
7. Student was evaluated in February 2017 and found eligible for special education under the classification of specific learning disability. An IEP for learning support was issued on March 15, 2017 to reflect the needs that the IEP team identified at that time. [NT 32, 162; P-15]<sup>6</sup>
8. In April 2017 the family obtained home-based behavioral supports for Student through a private behavioral health agency to address Student's anger issues and lashing out at home. The School was not made aware that Student was receiving this support until September 2017, and the administration was not aware that Student had behavioral issues at home although the grandmother was confiding in one of the teachers. [NT 51, 74-78, 82, 85-87, 194]<sup>7</sup>
9. Student was diagnosed with Attention Deficit Hyperactivity Disorder through the behavioral health agency and was recently prescribed medication. [NT 51]
10. In 4<sup>th</sup> grade, on September 12, 2017 the School placed Student on a behavioral contract because issues were already starting to arise. [NT 34-37, 216-219; P-8]
11. In 4<sup>th</sup> grade from September 5, 2017 through the end of September 2017 Student was cited for behaviors including physical altercations with peers, class disruption, refusing to follow teacher's directions, throwing objects on the bus, bothering peers while teachers were trying to teach, calling out in class while teacher was talking, [other redacted behaviors], and bullying a peer. [KSC-7<sup>8</sup>]
12. Whereas previously when Student was fighting School staff were able to help Student calm down, in 4<sup>th</sup> grade it became progressively more difficult to calm Student and Student was physically fighting at least twice a week. [NT 119-121, 206-207, 214]

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<sup>6</sup> No ER was introduced into evidence, and there is some question as to whether a stand-alone ER was written or whether portions of evaluation findings were simply incorporated into the IEP. The School was directed to search further and to produce the ER to its counsel and in turn to Parent counsel if indeed an ER document is found.

<sup>7</sup> The transcript on page 87 is incorrect. Line 16-17 should read "She didn't talk to administration, correct?"

<sup>8</sup> Parent counsel objected to the introduction of the School's exhibits due to untimely production. The objection was overruled. [NT 91-92]

13. The school has a comprehensive behavior modification program for all the children. When the specific needs of a child are considered, the School increases or adds supports. [NT 119]
14. Following a September 20, 2017 incident of Student fighting and being unable to calm down and [redacted] the School convened an IEP team meeting on September 22, 2017 to consider whether the IEP was being implemented and provided sufficient support.<sup>9</sup> One of Student's home-based behavioral health team members attended the meeting with the family. The family was in agreement with the IEP and the outcomes of the meeting. [NT 121-122, 141, 155]
15. As a result of that meeting, a one-to-one aide specifically for Student was hired immediately and a re-centering process with appropriate adult role models was provided. [NT 38-39, 106, 122-125, 159, 176; P-9]
16. Student showed a positive response to these interventions for about one week, then something triggered Student. Student's behavior became worse and worse daily and staff was unable to calm Student down at all. Student's behavior was uncontrollable and the School feared for the safety of other students. [NT 126-129]
17. The aide's notes from October 2 through October 9 indicate that student was off task and noncompliant toward teachers and school staff, could only stay on task for 5 to 10 minutes before beginning disruptive behavior [redacted]. The aide noted that Student required constant redirection. [P-9]
18. Incidents cited by teachers in October 2017 included physical altercations with classmates, not cooperating in class, not completing school work in class, and inappropriate behavior described as [redacted]. [NT 95-97; KCS-6]
19. In addition to the incident causing Student to be suspended indefinitely, there were numerous occasions upon which Student's teacher had to intervene in physical altercations with peers, especially with one particular peer; Student fought almost daily with peers. [NT 99]
20. Although Student's behavior was somewhat better when the one-to-one aide was present, there were still occasions when the aide had to be asked to remove Student from the classroom. [NT 113]
21. Calling Student's grandmother so she could provide a pep talk, having the mother come to the school, and offering an incentive reward for appropriate behavior yielded only short-lived positive results. [NT 210-211; P-9]

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<sup>9</sup> The document KCS- 2 is incorrect. The meeting was an IEP meeting, not a manifestation determination meeting. This was explained and corrected on the record. [NT 154-155]

22. Following the October 18, 2017 suspension referenced above, on October 23, 2017 the school issued an invitation to the parent to attend a manifestation determination meeting to be held on October 31, 2017, a date which the grandparent participated in arranging. [NT 44-45, 69, 138-139; P-13]
23. Present at the manifestation determination meeting were the Parent, the grandparent, the principal, the school's CEO, and three teachers. No conclusions were reached at that meeting as to whether or not Student's conduct was a manifestation of Student's disability because the Parent became upset and left the meeting. [NT 45-46, 140-141, 189-190]
24. The following day the school gave the grandparent a packet of material for Student to complete while Student was out of school. At this time the principal raised the topic of an alternative school for Student and followed up with texts. [NT 47, 144, 147-148, 171, 191-192]
25. During the current suspension and during a previous suspension in October the teachers gave packets of work for Student to complete at home but no completed work has been returned. [NT 108, 114-116]
26. The principal gave the grandparent some material on a private school with which she was familiar, and encouraged the family to visit the school to see if they found that it would be an agreeable placement for student. The family has not yet visited the school. [NT 47-48]
27. The School offered instruction in the home but the family did not accept it because of the pending expedited hearing. [NT 148-149, 192-193, 239]
28. The School is in the position of offering academic support wherever Student is placed. [NT 148]
29. The School has tried to support Student and Student's family, but cannot continue to do so at the risk of other children in the School. [NT 162, 178]
30. At the present time Student requires a more restrictive placement to address behavioral needs than can be offered at the School. [NT 163, 167]

### Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in

“equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the Parent asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); The District Court “must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.” *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). I deemed each of the witnesses to be testifying truthfully to the best of their recollections. Although the grandmother’s testimony was marked by difficulties in recollection of chronological sequence this did not significantly affect the weight given to her testimony. I was particularly persuaded by the principal’s testimony, finding her to be forthright, and deeply concerned for Student and the other pupils under her charge.

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

FAPE: Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Recently, the U.S. Supreme Court concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017).

Manifestation Determination: Under the IDEA and its implementing regulations, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the local educational agency's failure to implement an IEP. 20 U.S.C. § 1415(k)(E)(i). *See also* 34 C.F.R. § 300.530(e). If it is determined that the conduct in question had either the causal relationship with the disability or was a result of the failure to implement the child's IEP, the conduct "shall be determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(E)(ii).

Placement: A placement decision is a determination of where a student's IEP will be implemented. Placement decisions for children with disabilities must be made consistently with 34 CFR 300.116. The IEP team, including parents, makes placement decisions. Like the formulation of an IEP, a placement decision is not a unilateral matter for school district determination. 34 CFR 300.116(a)(1) however, is also clear that parental preference cannot have been the sole nor predominant factor in a placement decision. The IDEA merely mandates parental participation in the placement decision, 34 CFR 300.116(a)(1), but does not suggest the degree of weight parental preference should be given.

Compensatory Education: Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990) to compensate for past violations. "Appropriate remedies under IDEA are determined on a case-by case basis." *D.F. v. Collingswood Bd. of Educ.*, 694 F.3d 488, 498 (3d Cir. 2012).

## Discussion

This was an expedited hearing in response to an amended complaint filed by Parent counsel on the same day that the original complaint was filed. The issues raised in the original complaint will be addressed in a hearing at the end of this month.

If a disciplinary action constitutes a change in placement, the child's IEP team must conduct a manifestation determination. The function of a manifestation determination is to determine "if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or ... if the conduct in question was the direct result of the local educational agency's failure to implement the IEP." (*emphasis added*) 20 U.S.C. § 1415(k)(1)(E)(i)(I),(II).

The School convened a manifestation determination meeting in accord with statutory requirements but a conclusion was not reached because the Parent left the meeting. The participants had the child's current classification, specific learning disability, and an IEP for learning support with some behavioral supports, created in March 2017 and reviewed in September 2017, with which to work. Not without sufficient reason, the Parent raises potential additional IDEA classifications, emotional disturbance and/or other health impairment due to

ADHD, for my consideration. However, like the manifestation determination team, I can only work with what is, not with what could have been or might be in the future. Looking at Student's behaviors that gave rise to this hearing, I cannot reach the conclusion that these were a manifestation of a learning disability. Likewise the Parent has challenged the appropriateness of the existing IEP. Although in a previous iteration the statute regarding manifestation determination called for an examination of whether an IEP was appropriate, in its most recent revision the IDEA only demands that the team examine the question of whether or not the existing IEP is being implemented. Therefore looking at the statute and the evidence I must consider, I hold that Student's conduct was not a manifestation of Student's disability as known at the time of the behavior in question.

The deep concern for this child was palpable across all witnesses – the grandmother as well as the school staff. Going beyond the legal analysis, a careful review of the testimony and documents leads me to agree with the School that it cannot program adequately for Student's current behavioral needs. The School put various individualized supports into place for Student, including hiring a one-to-one aide and providing adult mentors/role models with whom Student could process conflicts. Despite receiving added supports, over the few months of the current school year, unlike in the past years, Student's aggression escalated while at the same time Student's ability to respond to calming assistance decreased. Student's behavioral dyscontrol reached a crisis point when Student assaulted [redacted] female teachers who were attempting to intervene in a physical altercation; notably adult males were also ineffective in calming Student on this occasion. I cannot come to any other conclusion than that at this time Student requires an alternative educational setting.

### Order

It is hereby ordered that:

1. The School is not required to reinstate the Student.
2. Within 10 school days of the date of this Order, the School must send application packets for Student to appropriate alternative educational settings.
3. Student shall receive 6 hours of compensatory education per day for the number of suspension days, if any, exceeding 15 days for the period from the beginning of the current school year to the day the School offered, and the family did not accept, services in the home. If any compensatory education is due, the hours are to be used exclusively for educational, developmental and therapeutic services, products or devices that further the Student's IEP goals. The value of these hours shall be based upon the usual and customary rate charged by the providers of educational, developmental and therapeutic services in the county where the [School] is located and geographically adjacent

Pennsylvania counties. The compensatory services may be used after school, on weekends and in the summer until Student begins 5<sup>th</sup> grade.

4. As ordered at the close of the proceedings on November 7, 2017, beginning on Monday November 13, 2017 the School must provide a minimum of five (5) hours per week of instruction in the home while Student is awaiting admission to an alternative educational setting.
5. As ordered at the close of the proceedings on November 7, 2017 the School must, within 30 calendar days of November 7, 2017, have an evaluation of Student conducted by a certified school psychologist, specifically directed to the areas of social, emotional and behavioral functioning.
6. Within 15 calendar days of the completion of the evaluation the parties must hold an IEP meeting to make any revisions that follow from the results of the evaluation.

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

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

November 12, 2017

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