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

DECISION

Child's Name: E.W.

Date of Birth: [redacted]

ODR No. 00787-0910 KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
Harrisburg City School District Special Education Department 2101 North Front Street, Bldg #2 Harrisburg, PA 17110-1081	Shawn D. Lochinger, Esquire Rhoads & Sinon, LLP One South Market Square, 12th Floor P.O. Box 1146 Harrisburg, PA 17108-1146
Date of Resolution Session	Waived
Date of Hearing:	May 7, 2010
Date of Ruling:	May 23, 2010
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a preteen-aged eligible student; Mother (Parent) indicates that the Student now lives with Student's grandmother in [another school district]. (NT 17-5 to 18-19.) At all times relevant to this matter, the Student was in the fifth grade in the [redacted] Elementary School of the Harrisburg City School District (District). (NT 39-15 to 19.) The Student is identified with a Specific Learning Disability in reading and mathematics. (NT 18-5 to 19.) The hearing in this matter was completed on one day, May 7, 2010.

The Parent requested due process on March 8, 2010. (HO-1.) In her Complaint Notice, on an ODR form, the Parent requested an expedited hearing to obtain Extended School Year (ESY) services for the Student. Ibid. At the hearing, however, the Parent abandoned her request for an expedited hearing, because she wanted the hearing to focus on the District's alleged failure to provide FAPE and on the Parent's request for compensatory education. (NT 18-21 to 22-20.)

The Parent requested an amended special education program - including protection from bullying, a behavior plan and ESY[1] - and compensatory education for an alleged failure to provide a FAPE to the Student during the 2009-2010 school year; she also asserted that the District had brought charges against the Student for assaulting a teacher, and she requested that all such charges be dropped. (NT 330-6 to 17.) The Parent complained that the Student was failing Student's courses and that the District's IEP was not helping the Student to succeed. (NT 10-11 to 24, 19-14 to 20-7, 25-17 to 27-19.) The District asserted that it had provided a FAPE and that the Student had made meaningful progress; it asserted that any failures on the Student's report card were due to non-attendance. (NT 34-23 to 35-20.)

The Parent asserted that she had complained also in a written document to the District that the Student had not received FAPE from the date of Student's registration with the District in 2009. (NT 77-13 to 14.)

[1] The Parent offered no evidence or argument with regard to why the Student was entitled legally to ESY; therefore, I find no basis to enter an order with regard to ESY. The Parent essentially abandoned this claim.

The District subsequently found and forwarded this document to me and it is dated November 2009; it is marked received – presumably by the District - on February 2, 2010. (HO-2.) This was admitted into evidence on May 11, 2010 and made a part of the record.[2] The transcript was received on May 12, at which time the record closed.

ISSUES

1. Did the District provide the student with a free appropriate public education, from February 2009 to May 7, 2010, in the areas of reading, mathematics and behavior?

2. Did the District provide the Student with an environment safe from bullying, sufficient to permit the Student to make meaningful educational progress in the areas of reading, mathematics and behavior?

3. Did the District provide services in an appropriate location, sufficient to permit the Student to make meaningful educational progress in the areas of reading, mathematics and behavior?

4. Should the hearing officer order the District to convene an IEP meeting to amend the IEP for the purpose of providing appropriate services to the Student with respect to protection from bullying, behavioral control, academics and ESY?

5. Should the hearing officer order the District to pay compensatory education for the period from February 2009 to May 7, 2010?

FINDINGS OF FACT

INDIVIDUALIZED EDUCATION PLAN AND IMPLEMENTATION

1. The Student was not identified with a disability with regard to emotional or behavioral control, but Student had a long history of behavioral problems, both in the District and in other districts. The

[2] I admit this document on my own motion to complete the record.

District was aware of this history shortly after the Student enrolled in the District in 2009. (NT 165-17 to 166-1, 168-2 to 9; 170-8 to 19, 171-15 to 25; S-6 pp. 4 to 8, S-9 pp. 13 to 15.)

2. The Student's in-school behavior did not interfere with Student's learning, and was not considered seriously problematic, in the beginning of the 2009-2010 school year. (NT 184-11 to 185-14, 279-9 to 20, 296-8 to 16; S-12, 13.)

3. The District instituted behavior controls that prevented the Student's behavior from seriously interfering with Student's learning during classroom time. (NT 212-11 to 217-7, 218-11 to 219-15, 237-4 to 25, 239-16 to 242-9; S-10 p. 4, S-11, 12, 13.)

4. The Student was late or absent often during the 2009-2010 school year. (NT 58-14 to 59-4, 64-6 to 66-3; S-6 p. 6.)

5. The District offered an IEP for the 2009-2010 school year that provided measurable goals in reading fluency and comprehension, as well as mathematics operations and computation. The goals established a reasonable program for meaningful educational progress in these areas. (NT 128-3 to S-6 pp. 12, 13.)

6. The IEP contained a goal addressing behavior, which was not based upon baseline data and was not measurable. (S-6 p. 14.)

7. The 2009-2010 IEP offered specially designed instruction that addressed the Student's needs with regard to specific learning disabilities and attention difficulties consistent with a diagnosis of ADHD. (NT 134-1 to 135-6; S-6 p. 15.)

8. The Student's teacher implemented all of the specially designed instruction set forth in the IEP. (NT 188-10 to 194-12.)

9. The IEP offered daily tracking of behavior which was reported daily to the Parent, counseling, and extracurricular activities. (NT 134-17 to 135-6; S-6 p. 16, S-9 pp. 13 to 15.)

10. The regular education teacher implemented a behavior management plan that she used for designated students in her class.

The plan had some positive effect on the Student's behavior. (NT 212-11 to 217-7; S-11.)

11. The IEP did not offer ESY; the Student was found ineligible because Student did not exhibit problems with the retention or recoupment of information Student learned. (NT 135-7 to 136-9; S-6 pp. 16, 17.)

12. The IEP offered itinerant learning support placement in the neighborhood school, with services being delivered in the classroom. (NT 136-10 to 139-15; S-6 pp. 17, 18.)

13. During the 2009-2010 school year, the District provided push-in itinerant special education services through a co-teaching model. A special education teacher co-taught in the Student's classroom every day for reading and mathematics. Sixty percent of that teacher's time was directed to addressing the Student's needs to remain on task during academic subjects. (NT 179-20 to 184-10, 259-5 to 267-9.)

14. The District also provided the Student with extended day or after school services every day for guided reading and assistance with homework and mathematics. (NT 202-4 to 205-9.)

15. The Student demonstrated progress in reading and mathematics during the 2009-2010 school year. (NT 195-13 to 199-5, 200-9 to 201-23, 267-10 to 273-20, 276-22 to 278-23; S-10, S-18.)

16. Progress monitoring data showed that the Student was closing the gap in reading comprehension grade level while in the District's program. (NT 198-1 to 199-5.)

17. The Student's grades were poor during this school year, despite Student's progress in reading and mathematics achievement. This was due to Student's attendance problems and failure to complete assignments. (NT 199-7 to 200-5, 219-16 to 223-25, 267-19 to 273-20, 275-23 to 276-4; S-10, 14, 15, 16.)

18. The Student's attendance problems were not caused by altercations or bullying. (NT 235-11 to 237-25, 279-6 to 8, 306-4 to 307-2.)

19. The Parent did not participate in the IEP process, although she was invited. (NT 124-1 to 126-16, 139-17 to 140-25, 172-14 to 174-25; S-6 pp. 2, 7, S-7, 8.)

MANIFESTATION AND DISCIPLINE

20. In January 2010, it came to the attention of District personnel that the Student was frequently becoming involved in bullying incidents at school, sometimes as victim and sometimes as perpetrator. (NT 108-15 to 111-6, 185-12 to 186-20, 218-1 to 219-15, 245-8 to 246-20, 306-4 to 307-2; S-12 p. 7.)

21. The District addressed these reports by meeting with the students involved, including the Student, meeting with parents and providing a lesson to the Student's class on bullying and how to deal with it appropriately. (NT 186-21 to 188-9, 306-4 to 307-2; S-9 p. 15.)

22. In March 2010, the Student was accused of pushing a teacher. (NT 141-1 to 142-3.)

23. On March 10, 2010, the District convened a manifestation meeting to determine whether or not the Student's behavior was a manifestation of disability or failure to implement the IEP. (NT 144-3 to 145-24, 147-21 to 149-20; S-9 pp. 1 to 3, 36 to 40.)

24. The District team members concluded that the Student's alleged behavior was not a manifestation of Student's disability or of the District's failure to implement the IEP, and recommended suspension of three to ten days. The District's reason for its determination was that the Student had never before displayed the intensity or kind of behavior that was seen in the incident of pushing the teacher. (NT 148-15 to 149-16, 162-4 to 9, 166-10 to 24; S-9 pp. 36 to 40.)

25. At the manifestation meeting, the District considered placement in an alternative disciplinary school, and disclosed that to the Parent as an option. The Parent rejected that suggestion, and the District

did not take any steps to move the Student to the disciplinary school. (NT 101-20 to 102-14, 104-10 to 105-19, 144-3 to 145-24.)

26. At the manifestation meeting, the District considered transfer to another regular education school, without change of special education placement, and disclosed that to the Parent as an option. The Parent rejected that suggestion, and the District did not take any steps to move the Student to the other regular education school. (NT 146-2 to 147-5.)

27. The District's personnel intended to transfer the Student to another regular education school as a result of the incident in which Student pushed Student's teacher and Student's teacher filed charges against Student. (NT 32-18 to 33-9, 42-6 to 25, 146-13 to 21, 176-1 to 11.)

28. The District revised the IEP to reflect the manifestation meeting, recommending further evaluation of the Student with regard to Student's behavior. The Parent objected to further evaluation at that time, and chose instead to confer with the District's director of special education. (NT 149-10 to 152-11; S-9 pp. 14, 15.)

29. The Parent is making arrangements to have the Student admitted into the [redacted] School District; she has filed in court an order to establish custody in her mother so that the Student will be eligible for admission in that school district. (NT 17-19 to 21, 30-1 to 31-2; 112-18 to 113-18.)

DISCUSSION AND CONCLUSIONS OF LAW

SCOPE OF HEARING – 2008-2009 SCHOOL YEAR

At the hearing, the Parent asserted that the relevant time period for compensatory education was from February 2009 to the date of hearing. (NT 39-7 to 22.) The District objected that the Parent's March 8, 2010 Complaint Notice did not address any time period before September 2009. (NT 75-10 to 77-7.) I find that the District was not notified by a sufficient written complaint that the Parent was asserting issues related to the period

from February 2009 to September 2010. Therefore, I will not consider any claims pertaining to that period of time.

The Parent argued that she had notified the District by giving them an ODR Complaint Notice form and a written document; these were different from the document that started the present proceeding. As noted above, I admitted this other document into evidence after it was sent to me by attachment to an email message from the District's attorney. (HO-2.)

The November 2009 document refers to the Student coming into the District in April 2009, but the remainder of the document addresses the Student's special education program in the District and requests changes to the program in the present tense. It does not allege any facts or problem specifically pertaining to the period of time from the Student's enrollment in the District in February to the end of the 2008-2009 school year. Without such clear notice, it is unfair to require the District to defend itself at the hearing, since they know nothing of what they will be defending about. The IDEA requires more specific notice in order to make the hearing fair to both parties.

Even if I were to consider the November 2009 document to be a Complaint Notice giving sufficient notice to the District regarding the time period at issue, a preponderance of the evidence shows that the District was not in fact told that the Student was having problems during that period[3]; thus, the District would not be liable for compensatory education for the period in question, since it had no notice of the problem of the Student. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3d Cir. 1996).

SCOPE OF HEARING- DISCIPLINE, TRANSFER, CRIMINAL COMPLAINT

The Parent also raised objections to an alleged suspension and disciplinary transfer of the Student, asking at one point that the District be ordered to withdraw criminal charges previously filed against the Student. (NT 40-20 to 42-25, 45-24 to 49-9, 51-18 to 53-10.) The District clarified

[3] In fact, the Parent's testimony and the record, considered altogether, suggest that the District was not notified in the 2008-2009 year, regarding any complaint that the Parent may have had with the District's program, (FF 19, 20); District witnesses corroborated that they were not notified. (NT 54-9 to 55-2, 122-4 to 14.)

that there was a manifestation meeting but no change in placement, because the suspension was for less than ten days, a point acknowledged by the parent. (NT 41-6 to 9, 43-8 to 17.) There was no disciplinary transfer, and the District made it clear that the Student would be welcome to return to [redacted] School if the Parent so chose. (NT 43-19 to 45-20, 50-17 to 51-17, 326-22 to 327-20.) I therefore find that the District took no disciplinary action, and it did not attempt to transfer the Student to another school – a regular education school – contrary to the Parent's wishes. (FF 22, 23, 24, 25, 26, 27.) Thus, there is no basis for my ordering any relief regarding this series of events.

In reaching this conclusion, I rely upon the depiction of events by the District's special education facilitator, whom I found to be credible. The facilitator was straightforward in her answers, admitting fair points made by the parent, being careful not to present the charge against the Student as a fact, and not giving the District attorney answers that he obviously sought, when such answers would not be accurate or within her knowledge; she was also delicate in depicting things the Parent said about her that she perceived to be derogatory. Thus, she demonstrated objectivity and professionalism. Her depiction of events was also consistent with the documents admitted into evidence.

Regarding the Parent's request that I order the District to withdraw criminal charges, I have no authority or jurisdiction to do this. Indeed, the complaint was filed by an individual, not the District, (NT 102-25 to 103-6, 143-5), and I have no jurisdiction or authority over that person. Clearly, the IDEA confers no authority upon an administrative hearing officer to interfere with any ongoing criminal case.

SCOPE OF HEARING – ADMISSION TO OUT OF DISTRICT SCHOOL

The Parent made it clear that she was taking steps to have the Student transferred to the [redacted] School District, by filing in court to have custody transferred to her mother, the Student's grandmother. (FF 29.) The Parent complained that [redacted school district] was refusing to admit the Student without a signed court order, and that was because the District was "blackballing" the Student, (NT 59-17, 61-17 to 62-12), by disclosing to [redacted school district] that the Student had criminal charges against Student and was in special education. (NT 61-6 to 14.)

While there was much testimony about this, it was not one of the issues identified in this hearing. I cannot in fairness make a decision on it, because neither party was on notice that I would decide the issue. Moreover, I have no authority or jurisdiction to review decisions about enrollment in a school district. Therefore, I will not make any findings or reach any conclusions about this issue.

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[4] The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced a preponderance of evidence[5] to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student's Parents, who initiated the due process proceeding. If the evidence is in "equipoise", the Parent will not prevail.

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[4] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[5] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

APPROPRIATENESS OF EDUCATIONAL PROGRAM

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "de minimis" educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court's interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity" – it is not required to provide the "optimal level of services." Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

I find that the District offered and implemented an adequate educational program for the Student's identified academic needs. Its IEP

provided goals and specially designed instruction that addressed all of the Student's educational needs as identified in the present levels of academic achievement. (FF 5, 6, 7, 8, 9, 10.) The itinerant learning support placement permitted the Student to receive substantial direct support in the regular education setting, to keep the Student on track and to provide explicit teaching in small groups when necessary to address is needs in reading and mathematics. (FF 12, 13, 14.) Progress monitoring was performed, and showed that the Student made meaningful academic progress in reading and mathematics. (FF 9, 15, 16.)

In making these findings I rely upon the testimony of the District's regular education teacher, who was assigned to teach the Student in the 2009-2010 school year. I note that this witness was not present in the hearing room to hear the other witnesses, so she was not at all informed of what was transpiring at the hearing. Her demeanor was straight-forward and her tone of voice revealed a conviction of the truth of what she was saying. Her testimony was consistent with the documents admitted into evidence. Thus, I accept as true her assertions about the services provided to the Student in her classroom.

I also rely upon the testimony of the District's special education teacher. It was apparent from her demeanor that this witness was quite unhappy about having to testify in this hearing at a late time of day. Nevertheless, her testimony was professional, measured and forthright. I detected no defensiveness or attempt to persuade me of her point of view, though she did engage in repartee with the Parent on cross examination, showing an adversarial demeanor. On the whole, her way of answering questions, the cogency of her responses and her demeanor convinced me that she was a credible and reliable witness.

ABSENTEEISM AND LOW GRADES

The Student's grades were very low in reading and mathematics. (FF 17.) This seemed rightly to support the Parent's concerns that the Student was not making academic progress in these areas identified for special education. However, standardized testing and probes that appeared reliable showed different results. They showed that the Student was in fact making progress, and even closing the gap in reading between Student's grade level of performance and the grade in which Student was placed. (FF 15, 16.) Relying heavily upon the credibility of the witnesses, I conclude that bad

grades in this case do not show a failure to benefit, and that on the contrary, the Student did benefit.

The District's witnesses credibly presented a preponderance of evidence that the Student's bad grades were caused by serious absenteeism. (FF 17.) Student's absences were compounded by failures to make up work, leading directly to low marks in Student's regular education setting. Ibid. Thus, I find that even if Student had failed to make progress, Student would have failed because Student was not available for the adequate educational services the District provided to Student. Consequently, even a failure to progress would have not been reason to award compensatory education in this matter.

The Parent argued that the Student's tardiness and absences were caused by Student's fears because of being bullied in school. While I do not take such concerns lightly, in this case I find that bullying did not cause the Student's attendance problems. (FF 18.) I find that the Parent's factual assertions are not entirely reliable. I reach this finding based upon observing the Parent's demeanor and the way she answered questions and made statements at the hearing.

I do not question the Parent's sincerity in making these assertions, or that she fully believed them. However, the Parent tended to state the facts so emphatically that she tended to enlarge upon what she knew or saw without a firm basis of personal knowledge. Moreover, almost all of her information about the conflicts at school came from [Student], who did not testify. Her mother and Student both testified to corroborate her testimony, but both of these witnesses received all of their information (with one exception) from the Student. (NT 97-12 to 21, 108-15 to 111-6.) The Parent's perception of the intensity of the incidents, the potential danger and the duration of incidents over time – as well as her perception of whether or not the Student was entirely a victim – was based upon hearsay almost entirely. (NT 66-5 to 70-7.)

This hearsay went largely uncorroborated, though the Parent did credibly testify to two incidents that she observed, and that rightly caused her alarm – an incident in which other students were taunting the Student and threatened Student, (NT 70-9 to 71-11), and one in which she observed a security tape in which the Student was pushed and struck Student's head on

the wall, (NT 71-21 to 74-4)[6]. Nevertheless, for the reasons stated above, and especially in the face of contrary, credible testimony, (NT 302-2 to 309-7, 310-23 to 314-15), I cannot find that the conflicts the Student reported were as extensive and one-sided as the Parent claims.[7] (FF 20.)

The preponderance of the evidence in the record shows that the attendance problems were not caused by bullying. The attendance problems were occurring at a high rate from the beginning of the year, well before February, when the altercations emerged as a serious educational issue. Thus, the record does not support the idea that the altercations and bullying led to the attendance problems. (FF 18.)

SAFE ENVIRONMENT

I find that a preponderance of evidence demonstrates that the District did not fail to provide a safe environment to the Student. Contrary to the Parent's assertions, the District took several steps to address bullying and altercations involving the Student when these incidents came to its attention. (FF 3, 20, 21.)

THE DISTRICT'S BEHAVIOR PLAN

I express concern with the educational plan offered in September 2009 in one respect: nowhere can I find the preparation – or even the consideration - of a Functional Behavioral Assessment (FBA) or a Positive Behavior Support Plan (PBSP); 20 U.S.C. §1414(d)(3)(B)(i); 22 Pa. Code §14.133 (a) and (f). Yet the Student's IEP asserts that the Student demonstrates behaviors that interfere with learning and the Present Levels of

[6] I am fully aware that the Student's grandmother corroborated the Parents' report of what she saw on the tape, (NT 98-1 to 25); however, more than one District witness credibly contradicted these reports. (NT 302-2 to 309-7, 310-23 to 314-15.)

[7] My credibility determination with regard to the Parent, where her testimony was contradicted by credible District witnesses, is also colored by my observation of her apparent attempt to manipulate the hearing setting. After several hours of testimony, the Parent suddenly announced that she was "overwhelmed" and needed to conclude for the day. (NT 205-16 to 212.) I observed her demeanor both as she announced being "overwhelmed" and after I denied that request. At all times the Parent was businesslike and courteous; however, she did not give any evidence of the emotional state that she described. In sum, I conclude that her initiative at that point was at least partly manipulative in nature.

Functional Performance recount a striking history of bad behavior both within and outside the classroom. (FF 1.) Since it failed to do an FBA or PBSP, I find that the District failed to address the Student's behavior in a data-driven way, raising some question as to the adequacy of its educational plan in that regard.[8] (FF 6, 9, 10.) However, I also find, by a preponderance of the evidence on this record, that this procedural omission did not prevent its plan for addressing the Student's behaviors from being in fact adequate, and that Student therefore did not fail to make meaningful behavioral or academic progress, at least in the classroom setting. (FF 3, 15, 16.) Because the Student made meaningful progress, no compensatory education is due. See, D.S. v. Bayonne Bd. Of Educ., 602 F.3d 553, 565 (3d Cir. 2010)(noting that compensatory education will be denied for procedural errors unless FAPE denied).

PROSPECTIVE RELIEF

The Parent requested prospective relief to require the District to offer greater or different special education services; however, this request is moot. The Parent has sent the Student to live with Student's grandmother outside the District. (FF 29.) She has stated that she will not return the Student to the District under any circumstances. (NT 326-21 to 330-25.) Therefore, there is no need to order prospective relief.

CONCLUSION

For the reasons set forth above, I decline to address the 2008-2009 school year due to lack of notice of these claims as required by the IDEA. I rule that I lack jurisdiction to address either the disciplinary action taken in March 2010 or any alleged interference with the Student's enrollment in another school district. I rule also that I lack jurisdiction to make any order with regard to the filing of any criminal charges.

I find that there was no transfer of the Student to a different regular education setting. I find that the program and placement offered by the District in the 2009-2010 school year was appropriate, and that the Student made meaningful educational progress. I find that the District did not fail to

[8] The District did offer to evaluate in March 2010, however, and the Parent declined. (FF 28.)

provide a safe educational environment to the Student. Consequently, the District is not obligated to provide compensatory education to the Student. I find that the request for prospective relief is moot, and will issue no order against the District for prospective relief.

ORDER

1. From the beginning of the 2009-2010 school year to March 10, 2010, when the Student was suspended and subsequently did not return to school, the District provided the student with a free appropriate public education in the areas of reading, mathematics and behavior.

2. From the beginning of the 2009-2010 school year to March 10, 2010, the District provided the Student with an environment safe from bullying, sufficient to permit the Student to make meaningful educational progress in the areas of reading, mathematics and behavior.

3. The District did not fail to provide services in an appropriate location, sufficient to permit the Student to make meaningful educational progress in the areas of reading, mathematics and behavior.

4. The hearing officer will not order the District to convene an IEP meeting to amend the IEP for the purpose of providing appropriate services to the Student with respect to protection from bullying, behavioral control, academics and ESY.

5. The District is not obligated to pay compensatory education for the period from February 2009 to May 7, 2010.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

May 26, 2010