

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

Student's Name: S.B.

Date of Birth: [redacted]

ODR No. 13159-1213KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Student

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Date of Hearing: March 22, 2013

Record Closed: April 17, 2013

Date of Decision: May 1, 2013

Hearing Officer: Brian Jason Ford

INTRODUCTION

This matter concerns the educational rights of a Student who is incarcerated in the State Correctional Institution – Pine Grove (SCI-Pine Grove). More specifically, the Student is confined to the Restricted Housing Unit (RHU), a “prison within a prison” for inmates placed in disciplinary custody. The Student is confined to the RHU as a result of frequent misconduct in prison, including assaulting other inmates and guards. As discussed below, the Student spends 23 hours per day in a solitary prison cell. It is expected that the Student will remain in the RHU for the remainder of the current school year (2012-13), and very likely longer. In fact, it is quite possible that the Student will age out of IDEA eligibility before leaving the RHU.

This matter arises under the Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.* Both parties agree that the Student is IDEA-eligible; the Student has a disability recognized by the IDEA and, by reason thereof, requires special education. The novel question posed in this case is whether SCI-Pine Grove must provide a free appropriate public education (FAPE) to the Student, or whether any denial of FAPE may be excused under the IDEA’s penological exception, found at 20 U.S.C. § 1414(d)(7)(A),(B).

PARTIES

Special education decisions typically do not contain a “Parties” section – the parties are usually obvious. In this case, there was some confusion as to who the parties are.

This due process hearing was requested by the Student. Despite some language in the Complaint, and some statements by the Student’s attorney, the Student’s parents are not parties to this matter and have no standing. Under the IDEA, “all rights accorded to parents under... [the IDEA’s procedural safeguards] transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.” 20 U.S.C. § 1415(m)(1)(D). This distinction makes no substantive difference in this case.

There was greater confusion as to what entity is the Student’s local educational agency (LEA). There was some suggestion that the Pennsylvania Department of Corrections (DOC) is the LEA. The DOC was represented in the hearing, some witnesses work for the DOC (as opposed to SCI-Pine Grove), some documents indicate that the DOC is the LEA, and the DOC was referred to as the respondent in this matter throughout the Student’s closing brief. Despite this, on the record, both SCI-Pine Grove and the DOC argued that SCI-Pine Grove is the Student’s LEA, and I accept that argument. (NT at 62-64)

There was some suggestion that SCI-Pine Grove’s status as the Student’s LEA (as opposed to the DOC) has some substantive implications. *Id.* Such concerns are unwarranted. This decision, like all special education due process decisions, is student-specific.

ISSUES

1. What obligations does SCI-Pine Grove have to the Student pursuant to the IDEA?
2. Was the Student denied a FAPE and, if so, is the Student owed compensatory education as a remedy?
3. Is the Student entitled to an independent educational evaluation (IEE)?

STATUTORY FRAMEWORK

At the outset of this hearing, the parties suggested this is the first time in the history of the IDEA that a student has challenged an IEP while incarcerated in a Pennsylvania state prison. (See, e.g., NT at 16). Whether or not that is the case, the circumstances are extraordinarily unusual, and I am unaware of any similar cases in Pennsylvania or the Third Circuit. Consequently, I deviate from the typical style of due process decisions to discuss the statutory framework of this case before delving into the facts.

IDEA Provisions Applicable to Incarcerated Students

The IDEA and its federal implementing regulations contain explicit provisions concerning students who are incarcerated in state prisons. IDEA-eligible state prisoners have rights under the IDEA. The IDEA is explicitly applicable to “state and local juvenile and adult correctional facilities.” 34 CFR 300.2(b)(1)(iv).

IDEA provisions relating to participation in general assessments, transition planning, and transition services do not apply to students who are convicted as adults under State law and incarcerated in adult prisons. 20 U.S.C. § 1414(d)(7)(A)(i), (ii). Moreover:

“If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child’s IEP Team may modify the child’s IEP or placement notwithstanding the requirements of sections 1412(a)(5)(A) of this title and paragraph (1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.”

20 U.S.C. § 1414(d)(7)(B) emphasis added.

In Section 1414(d)(7)(B), the reference to “section 1412(a)(5)(A)” relates to placement in the least restrictive environment (LRE). The reference to “paragraph (1)(A)” is to Section 1414(d)(1)(A), which establishes the mandatory content of IEPs. The parties stipulate that it is SCI-Pine Grove’s burden to establish a “bona fide security or compelling penological interest” in order to claim the § 1414(d)(7)(B) exemption. If, however, SCI-Pine Grove can meet that burden, then the Student is neither entitled to placement in the LRE nor to an IEP that satisfies ordinary IDEA requirements.

Free Appropriate Public Education

At its most fundamental level, the IDEA ensures that students with disabilities receive a free appropriate public education (FAPE). A FAPE is provided by identifying and evaluating eligible students, drafting and executing an individualized educational program (IEP) that is reasonably calculated to provide a meaningful educational benefit, and placing the Student in the least restrictive environment (LRE). 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

Section 504 prohibits discrimination on the basis of disability, and ensures equal access to educational programs. All students who are IDEA-eligible are also protected by Section 504. See 29 U.S.C. § 701. However, when students are protected by both the IDEA and Section 504, coextensive claims and remedies are resolved under the IDEA's framework. See, e.g. *Derrick F. v. Red Lion Area Sch. Dist.*, 586 F. Supp. 2d 282 (M.D. Pa. 2008)

Compensatory Education

Hearing Officer Skidmore has provided the best distillation of current compensatory education jurisprudence in Pennsylvania:

It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); see also *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.))

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990)

M.J. v. West Chester Area Sch. District, ODR No. 01634-1011AS (Skidmore, 2011)

IDEA Reevaluations

The IDEA establishes procedures and criteria for evaluations and reevaluations at 20 U.S.C. § 1414. See *also* 34 C.F.R. § 300.303. Reevaluations are specifically addressed at 20 U.S.C. § 1414(a)(2), which establishes when reevaluations must take place and requires reevaluations to conform to the procedures and requirements set forth at 20 U.S.C. § 1414(b) and (c). Those sections, in turn, set forth parental notice and consent requirements and a number of substantive elements.

When conducting reevaluations, LEAs must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum... .” 20 U.S.C. § 1414(b)(2)(A).

Consistent with the obligation to use a “variety of assessment tools,” an LEA may “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child...” 20 U.S.C. § 1414(b)(2)(B). Further, the assessment tools must be “technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.” 20 U.S.C. § 1414(b)(2)(C).

LEAs must select assessment tools that will yield information about each student’s disability or suspected disability that can be used by the IEP team for making programming decisions. See 20 U.S.C. § 1414(b)(3); see *also* 20 U.S.C. § 1414(c)(2). At the same time, the assessment tools must account for linguistic and cultural differences, and must be used in a non-discriminatory way. See 20 U.S.C. § 1414(b)(3).

“As part of any reevaluation... [the multidisciplinary team] shall (A) review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers” to determine the student’s present academic achievement and needs. 20 U.S.C. § 1414(c). For reevaluations, this information should enable the team to determine “whether the child continues to have such a disability and such educational needs” that warrant continued IDEA eligibility. 20 U.S.C. § 1414(c)(1)(B)(i). If the evaluation yields insufficient information to make these determinations, more data should be collected. See 20 U.S.C. § 1414(c)(1)(B).

Pennsylvania regulations concerning reevaluations essentially adopt the federal regulations, but set faster timelines under some circumstances. See 22 Pa Code § 14.124.

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 their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

FINDINGS OF FACT

Upon unopposed motion of SCI-Pine Grove, I toured the prison at the start of the due process hearing. Facts below that describe the facility and educational options therein are taken in part from what was observed during the tour.

1. The Student is [late teenaged], and has been convicted of a crime as an adult.
2. The Student has been diagnosed with ADHD and an Emotional Disturbance, and received an IEP from the school district that he attended prior to incarceration. (J-1).
3. On November 17, 2009, the Student was committed to Lackawanna County Prison. There, services were provided in accordance with an IEP. (J-2).¹
4. On December 11, 2009, the Student was sent to the Pennsylvania State Correctional System's Diagnostic and Classification Center in Camp Hill, PA (SCI-Camp Hill). (J-12).²
5. Three weeks after the Student was sent to SCI-Camp Hill, the Student was placed in SCI-Camp Hill's RHU. (J-12).
6. On February 2, 2010, the Student was sent to SCI-Pine Grove. (J-12). It appears that the Student was transferred directly to SCI-Pine Grove's RHU.
7. The RHU at SCI-Pine Grove is a disciplinary custody level reserved for highly assaultive inmates. (NT at 23-24).

¹ The Student was committed to Lackawanna County Prison during the criminal trial, and then moved on to the State prison system subsequent to his conviction.

² The record concerning SCI-Camp Hill is small. It appears that most males who are incarcerated in the State prison system go to SCI-Camp Hill first. There, a determination is made as to which of the State prisons is the best match for the inmate.

8. SCI-Pine Grove houses young adult offenders. The prison contains a school, and special education services are provided. Students confined to the RHU, however, do not participate in the prison's school.
9. SCI-Pine Grove is made up of several connected buildings. One of the buildings contains the school, which consists of several typical-looking classrooms and a gymnasium. The RHU and the school are located in different buildings.
10. Inmates in the RHU are locked in their cells 23 hours per day. They are given exercise Monday through Friday for an hour, and showers throughout the week. (NT at 23-24).
11. Some inmates in the RHU have cellmates. The Student in this case does not have a cellmate. (NT at 24).
12. Inmates in the RHU may see visitors during designated hours, and are escorted to a visiting area using a protocol described below if they have visitors.
13. Inmates in the RHU are visited by clergy, and may request medical attention as needed. (NT at 24-25)
14. Some inmates in the RHU receive counseling services. Sometimes inmates are removed from their cells to receive counseling in a prison officer's office in the RHU. On such occasions, the inmates are removed from their cells using the procedure described below, and are accompanied by officers throughout the counseling session. (See NT at 45-46).
15. Cells in the RHU are approximately 8' by 10', with a cot, desk, chair, toilet, and sink. The furniture and fixtures are attached or embedded into the structure of the cell. (NT at 24).
16. Cells in the RHU close with a solid metal door. The door has a small window and a food tray aperture (sometimes referred to as a "pie slot"). (See NT at 45).
17. A specific protocol is used every time inmates in the RHU leave their cells. Specifically: two officers approach the cell, the inmate is handcuffed behind the back through the tray aperture, and the cell door is opened *after* the inmate is handcuffed. (NT at 28).
18. Prisoners confined to the RHU are escorted by two officers any time they leave their cells. (See NT at 28)
19. The Student in this case is confined to the RHU for several reasons. Although it is not clear why the Student was originally placed at the RHU at SCI-Camp Hill, the Student committed multiple assaults and other rule infractions while at SCI-Pine Grove. The Student is currently facing additional criminal assault charges for assaulting an officer while at SCI-Pine Grove.

20. More specifically, the Student engaged in assaultive behavior on January 2, 2010, July 27, 2010, November 2, 2010, and December 23, 2010. The Student engaged in other serious misconduct, including threatening prison personnel or their families, refusing to obey orders (misconduct that is far more serious in a prison than in a school), destruction of property, possession of contraband and the like on 25 separate occasions, each resulting in increased time in the RHU. (J-14).³
21. All inmates at SCI-Pine Grove are permitted to have paper and something to write with, unless providing such materials is a danger. The Student in this case is on a paper restriction because he has used paper to cover the windows of his cell and the food aperture, making it impossible for officers to see inside the cell.
22. It was explained through highly-credible testimony that opening a cell door without being able to see inside of the cell is one of, if not the most dangerous situations for prison officers.
23. The Student has also taken his tray aperture “hostage” by placing his arm through the slot, making it impossible for officers to secure the cell door. (NT at 37-38)
24. Some of the cells in the RHU are “observation cells.” These cells are equipped with tamper-resistant cameras that allow officers to see into the cell. On occasion, the Student has been placed into these cells. The Student has not been considered a suicide risk. Rather, the Student’s placement in the observation cells has been for the safety of officers, and in response to the Student’s efforts to prevent officers from seeing inside of his cell. (See NT at 45).
25. Students in the RHU are given educational services. Specifically, a teacher will circulate through the RHU, providing “self study packets” to the students. (NT at 27). Work packets are slid through the cell door without opening the door. The teacher will also stand at the cell door, speak with the students, and answer questions about the packets.⁴
26. Students in the RHU are not obligated to work on the packets or speak with the teacher.
27. The teacher will stand at the cell doors and speak with students for however long a student will engage. The Student in this case has never engaged with the teacher for more than a few moments, if at all. (NT at 44). The testimony in this case, as a whole, indicates that the Student does not work on the self study packets.
28. Although the record is somewhat cloudy on this point, I find that the self study packets are not individualized for the Student.
29. No other educational services are offered to any student in the RHU.

³ References to “disciplinary custody” throughout J-14 are to the RHU.

⁴ The teacher (or teachers) who provide this service did not testify. Regardless, the parties do not dispute that these educational services are offered in the RHU.

30. Inmates in the RHU typically stay up all night and rest during the day. Even during down times, the RHU is cacophonously loud.⁵
31. The record in this case does not establish a date on which the Student will likely return to the general prison population. However, the record as a whole, and exhibit J-14 in particular, establishes that the Student has engaged in a pattern of behaviors in which the Student will break prison rules or engage in assaultive behavior any time he may be eligible for release from the RHU to the general population. These behaviors have greatly increased the Student's time in the RHU.
32. Each inmate's confinement in the RHU is reviewed every 30 days by a Program Review Committee (PRC), which is made up of prison officials. (NT at 35-37). The PRC has reviewed the Student's case at least three times, and determined that the Student was properly confined to the RHU on each occasion. *Id.*
33. The Student has had two IEPs at SCI-Pine Grove. The first is dated June 8, 2010 and was drafted while the Student was confined to the RHU. (J-5). This IEP has one goal: "[The Student] will comply to [sic] all rules, regulations, and academic requests well in the restricted housing unit and/or transition." This goal has no baseline, and is not objectively measurable (unless the expectation is for the Student to be perfectly compliant 100% of the time). The IEP contains the following modifications and specially designed instruction (SDI): Feedback, Monitoring, and Modification to materials when needed.
34. The second IEP is dated February 14, 2012. (J-10). This IEP is substantively identical to the IEP of June 8, 2010.
35. Between the two IEPs, SCI-Pine Grove reevaluated the Student. The reevaluation report (RR) is dated December 27, 2010. The RR contains no new assessment data, and relies entirely on a single test that was administered while the Student was at SCI-Camp Hill. Recommendations to the IEP team are conclusory, generic, and have no bearing whatsoever on the actual services that the Student may have needed or was likely to have received at the time.

DISCUSSION

I. Application of the Penological Exception to the IDEA's FAPE Obligation

The threshold issue in this case is whether SCI-Pine Grove has established the exceptions at 20 U.S.C. § 1414(d)(7)(A) and (B).⁶ The exceptions at § 1414(d)(7)(A) are

⁵ This impression was formed while touring the facility, and is supported by highly-credible testimony. (e.g. NT at 27-28). It was explained that the tour went through the RHU during what is typically a quieter period, but the presence of strangers and women in the RHU prompted some agitation. Even so, it was credibly explained that the typical noise level in the RHU throughout the evenings is much greater than anything experienced on the tour.

triggered automatically upon incarceration, depending on the student's age. In this case, the Student will age out of IDEA eligibility before being released from prison. As a result, the SCI-Pine Grove is exempt from the IDEA's general assessments, transition planning, and transition services requirements – none of which are truly at issue in this case.

Application of § 1414(d)(7)(B) is not automatic, but is critically important to this case. I am unaware of, and the parties have not cited to, any case in this jurisdiction (Pennsylvania or the Third Circuit) or elsewhere that directly considers this exception. There is simply no jurisprudence that contemplates how this exception is triggered, or what this exception permits.

The § 1414(d)(7)(B) exception is triggered only if SCI-Pine Grove “has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.” Before determining whether the exception has been triggered, however, it is important to understand what IDEA obligations the exception negates.

The § 1414(d)(7)(B) exception, if triggered, excuses SCI-Pine Grove from two IDEA requirements. First, if the exception is triggered, “the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections 1412(a)(5)(A)...” The requirements of section 1412(a)(5)(A) are as follows:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

In short, if the exception at § 1414(d)(7)(B) is triggered, SCI-Pine Grove is relieved from the IDEA's LRE requirement. Neither party argues that the Student should be removed from the RHU, and so the IDEA's LRE requirement is inapposite in this matter.

The second exemption is broader and, if triggered, allows the IEP Team to “modify the child's IEP or placement notwithstanding the requirements of... [20 U.S.C. § 1414(d)(1)(A)].” That section, 20 U.S.C. § 1414(d)(1)(A), is lengthy and includes many sub-sections. The full text is included herein as Appendix A. In sum, § 1414(d)(1)(A) is the mechanism by which IDEA-eligible students receive a FAPE in substance, requiring IEPs to include:

- a statement of the student's present levels of academic achievement and functional performance;
- measurable annual goals;
- a description of how the student's progress towards goals will be measured and reported; and

⁶ These exceptions also appear in the IDEA's federal implementing regulations at 34 CFR § 300.324(d).

- “a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child.” 20 U.S.C. 1414(d)(1)(A)(III).

In the context of this case, the exception’s applicability to 20 U.S.C. 1414(d)(1)(A)(III) is of paramount importance. If the exception is triggered, the obligation to provide an IEP that includes special education and related services does not apply. As such, if SCI-Pine Grove can prove “a bona fide security or compelling penological interest that cannot otherwise be accommodated,” then it is exempt from its obligation to provide special education and related services to the Student.

As noted above, there is no case law that directly considers what an LEA must prove to establish “a bona fide security or compelling penological interest.” To advance its argument that the exception is triggered, SCI-Pine Grove cites to *S.H. v. Stickrath*, 2010 U.S. Dist. LEXIS 142321, 2010 WL 6463874 (S.D. Ohio Oct. 6, 2010). This case stands for the proposition that prisons can take safety and other penological interests into consideration when providing educational services, but says nothing about the exception upon which SCI-Pine Grove relies.⁷ SCI-Pine Grove also cites to *Handberry v. Thompson*, 219 F. Supp. 2d 525, 544-545 (S.D.N.Y. 2002), *reversed in part* 446 F.3d 335, 2006 U.S. App. LEXIS 8171 (2d Cir. N.Y. 2006), to support its contention that the type of educational services offered to the Student are appropriate. Neither the District Court, nor the Second Circuit on appeal, addressed the § 1414(d)(7)(B) exception. Moreover, if the exception is *not* triggered, the question in this case becomes whether the services that the Student received were appropriate *for the Student*, not whether the services could be appropriate in the abstract.

Conversely, to advance his argument that the exception has not been triggered, the Student cites to *Brian B., et al. v Commonwealth Department of Education et al.*, 230 F.3d 582 (3d Cir. 2000). *Brian B.* concerns the constitutionality of 24 Pa. Cons. Stat. § 13-1306(a), a statute which limits the education available to youths convicted as adults and incarcerated in adult *county* correctional facilities. In determining that the statute was constitutional, the court explicitly noted that IDEA-eligible students were exempt from provisions limiting educational services. *Id* at 585, 587, 590-92. The law in question in *Brian B.* applies to county, not State prisons, and does not concern the § 1414(d)(7)(B) exception.

⁷ The Student also correctly notes in his closing brief that the case was “actually only part of a continuing class action litigation that resulted in a Settlement whereby juveniles in the justice system were provided with more services, so that the Defendant (Ohio Department of Youth Services) could achieve its mission to “encourage positive change in the lives of youthful offenders through collaborative partnerships and culturally relevant therapeutic and academic interventions that support public safety and prepare youth to lead productive lives.” ... This case is the result of a dispute resolution process whereby a Monitor made various recommendations to which the defendant agreed. Considerations were given to a balance of education and security interests. However, the Monitor’s recommendations specifically carved out exceptions to any limitations on education for special education students.”

Given the lack of jurisprudence for the issue at hand, for guidance I look to IDEA cases concerning how parties satisfy their burden of proof. It is SCI-Pine Grove's burden to prove "a bona fide security or compelling penological interest." The standard of proof in IDEA due process hearings is a preponderance of the evidence. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004); see also *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 389, 2006 U.S. App. LEXIS 1582 (3d Cir. N.J. 2006). Applying that standard to this issue, if the weight of the evidence supports SCI-Pine Grove's contention that there is a "bona fide security or compelling penological interest" that cannot otherwise be accommodated without the exemptions provided by the exception, the exception is triggered. If the weight of the evidence supports the Student's contention that security and penological interests can be accommodated, or if the evidence rests in equipoise, the exception is not triggered. See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

The evidence in this case clearly establishes that the Student is highly assaultive, and frequently creates highly dangerous situations for prison officers. The Student does not contest his placement in the RHU or the ongoing pattern of behaviors that warrant such placement. SCI-Pine Grove argues that the uncontested need for placement in the RHU is the security and compelling penological interest, and that interest cannot be accommodated if the prison were compelled to comply with the provisions of 20 U.S.C. § 1414(d)(1)(A).

The Student contests this claim by carefully examining the services that could be provided in the RHU. Testimony reveals that the primary reason why individualized special education is not provided in the RHU is that SCI-Pine Grove has adopted the self-study packet model. (See NT at 81, 135, 201, 203). Moreover, testimony reveals that it is theoretically possible, in an abstract sense, to provide special education inside of the RHU. Specifically, using the protocol for removing inmates from RHU cells, it is technically possible to escort the Student to an office in the RHU for special education services, including direct instruction in academics, social skills training, and anger management. (See NT at 28, 40, 135-136).

In some ways, the Student's argument is quite compelling. When inmates are too assaultive to remain in the general prison population, removal to the RHU satisfies the security and penological concerns. Further, to the extent that special education services must be provided outside of the cell, implementation of the procedure for leaving the cell (2-to-1 officer to guard support, behind-the-back handcuffs, etc.) is directly responsive to the security concern.

Going from the abstract to the specific facts of this case, the Student's argument is less persuasive. The evidence demonstrates that, despite the extreme precautions taken with all inmates in the RHU, the Student is a constant security risk. The Student is assaultive, even while confined to the RHU, and has managed to commit assaults even with the RHU protocols in place. Inmates in the RHU are confined to their cells to the greatest extent possible. Such confinement is directly responsive to the security threat

posed by those inmates, including the Student in this case. Providing a greater level of special education and related services in the manner suggested by the Student would compel SCI-Pine Grove to frequently remove the Student from his cell, increasing the security risk – not the security risk inherent with all RHU inmates, but the particular, documented, security risk posed by the individual Student in this case. The § 1414(d)(7)(B) exception exists so prisons need not create or compound a particular, student-specific security risk in order to comply with the IDEA.

SCI-Pine Grove's evidence concerning a compelling penological interest (as opposed to a bona fide security interest) is less compelling. It is not clear what evidence SCI-Pine Grove relies upon in this regard. Some testimony suggests that the Student is manipulative, and that SCI-Pine Grove has a penological interest in not rewarding manipulation. It is not manipulative, however, for the Student to assert his rights under the IDEA, or to demand a remedy if those rights are violated. SCI-Pine Grove's concern that other inmates will be encouraged to assert their rights if the Student prevails in this case is meritless. Consequently, I find that SCI-Pine Grove has not established a compelling penological interest by preponderant evidence. Even so, the § 1414(d)(7)(B) exception is triggered because SCI-Pine Grove has established a bona fide security interest that cannot otherwise be accommodated.

Despite the fact that the exception has been triggered, the Student argues that SCI-Pine Grove is permitted to *modify* his IEP – not eliminate it. In a technical sense, the Student has an IEP. That IEP does not come remotely close to satisfying the § 1414(d)(1)(A) requirements but, since the § 1414(d)(7)(B) exception is triggered, it does not have to. Said differently, the Student argues that he is still entitled to a FAPE even if the § 1414(d)(7)(B) exception is triggered. As discussed above, however, the exception exempts SCI-Pine Grove from the requirement to provide an IEP that includes special education and related services. This is the foundation upon which FAPE stands. I must find that, as a matter of law, whenever an LEA is not required to provide an IEP, it is not required to provide a FAPE.⁸

For the foregoing reasons, I need not consider in particular detail whether the IEPs in question in this case were appropriate. Evidence overwhelmingly supports the conclusion that the Student's IEPs did not comply with IDEA standards and that the Student received *no* special education, specially designed instruction, or related services. SCI-Pine Grove's abject failure in this regard is a great disservice to the Student, but that failure does not violate the IDEA. The IDEA carves out an exception for prisons, and places the burden of proof on the prisons to establish the exception. In this case, SCI-Pine Grove has done just that.

⁸ There are some circumstances in which an LEA is required to provide an IEP even though it is not required to provide a FAPE. See *I.H. v. Cumberland Valley Sch. Dist.*, 2012 U.S. Dist. LEXIS 101056, 3, 2012 WL 2979038 (M.D. Pa. July 20, 2012). Some courts have increased an LEA's obligation to provide an IEP to satisfy an ongoing FAPE obligation, but no court has ever extended the FAPE obligation after the IEP obligation terminates. See *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 2010 U.S. App. LEXIS 14302 (3d Cir. Pa. 2010). It is simply not true that an LEA may be required to provide a FAPE even if it is not required to provide a substantively appropriate IEP, and no jurisprudence stands for that assertion.

II. Independent Educational Evaluation

Regarding remedies, the Student demands compensatory education for a denial of FAPE and an order to provide FAPE going forward. To the extent that the 1414(d)(7)(B) exception is triggered, that relief must be denied. The Student also demands an independent educational evaluation (IEE), including a Neuropsychological Evaluation, Functional Behavioral Assessment, and a Psychiatric Evaluation. SCI-Pine Grove did not respond to this demand directly.

The evidence shows that SCI-Pine Grove has failed in its obligations to evaluate the Student. The § 1414(d)(7)(B) exception **does not** negate SCI-Pine Grove's obligations to evaluate the Student in accordance with the IDEA. There is good reason for this. In the event that the security concern triggering the exception is quelled, SCI-Pine Grove will be obligated to provide *all* of the Student's rights under the IDEA. To satisfy this obligation, SCI-Pine Grove must be ready with a clear, comprehensive picture of the Student's educational needs. This can only be accomplished through up-to-date, comprehensive educational evaluations that comply with IDEA mandates.

As the Student notes, the first and only time that SCI-Pine Grove conducted a RR was in December of 2010. That RR failed to include any assessments of the Student's cognitive functioning, academic achievement, social/emotional functioning, behavior, input from teachers, input from Student's family, and an observation. (J-7; NT at 119-123). The more recent behavioral assessment of January 10, 2013 also falls well short of IDEA mandates.⁹ (J-18).

The right to an IEE at public expense is typically predicated upon explicit disapproval of an LEA's ER or RR at the time of, or shortly after, its development. See 34 C.F.R. § 300.502(b). However, it is within my authority to order an IEE under other circumstances.¹⁰ In light of SCI-Pine Grove's continuous and ongoing failure to evaluate the Student, I find it equitable to do so here. Testimony reveals that SCI-Pine Grove personnel, in the absence of evaluations, concluded that the Student has an antisocial personality disorder, as opposed to an emotional disturbance.¹¹ (NT at 98-100, 146, 164). Such sweeping generalizations in the absence of a formal evaluation and data give credence to the Student's claim that new evaluations must be completed by independent professionals.

CONCLUSION

For reasons set forth above, I find that the § 1414(d)(7)(B) exception is triggered, that the Student is not entitled to an IDEA-compliant IEP and, therefore, is not entitled to

⁹ The Student argues that the Behavior Assessment is inappropriate for its failure to examine the Student in a number of settings. Although the Behavior Assessment falls short of IDEA requirements in nearly every way, in context, there is only one setting - the RHU - in which to observe the Student.

¹⁰ See 34 CFR § 300.502(d); Perry A. Zirkel, *Independent Educational Evaluations at District Expense under the Individuals with Disabilities Education Act*, 38 J.L. & Educ. 323 (2009)

¹¹ Antisocial Personality Disorder is not recognized by the IDEA. Emotional Disturbance is.

compensatory education. I will not order SCI-Pine Grove to provide a FAPE to the Student for the same reason. Despite this, I find that the Student is entitled to an IEE at public expense.

Finally, a word of caution: students do not shed their rights under the IDEA at the prison gate. This decision does not imply otherwise. This decision is fact-specific. It does not stand for the proposition that incarcerated students are not entitled to a FAPE. It does not even suggest that other students in the RHU at SCI-Pine Grove are not entitled to the full protections of the IDEA. Rather, this particular Student at this particular time poses a security risk that cannot otherwise be accommodated.

An order consistent with the foregoing follows.

ORDER

And now, May 1, 2013, it is hereby ordered as follows:

1. SCI-Pine Grove shall fund an independent educational evaluation (IEE) of the Student.
2. The IEE will consist of a Neuropsychological Evaluation, Functional Behavioral Assessment, and a Psychiatric Evaluation. These evaluations may be obtained as separate IEEs, if necessary.
3. The Functional Behavioral Assessment must be completed in consideration of the Student's confinement to the RHU, and need not comply with aspects of the FBA process prescribed by the Pennsylvania Department of Education to the extent that the Student cannot be observed in multiple settings.
4. To secure the IEE, the following procedures shall be used:
 - a. The evaluator(s) shall have no affiliation with SCI-Pine Grove,
 - b. Evaluators shall be selected by the Student,
 - c. The parties may come to their own agreement as to whether SCI-Pine Grove will reimburse the Student (or the Student's agents or representatives, if any) for the evaluation or pay the evaluator(s) directly. If the parties cannot come to their own agreement, SCI-Pine Grove shall pay the evaluator(s) directly.
 - d. The evaluator(s) must agree to transmit any evaluation report to both parties. Both parties shall sign any releases to enable such transmission.

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

/s/ Brian Jason Ford
HEARING OFFICER

Appendix A

20 U.S.C. 1414(d)(1)(A)

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program

- (i) In general The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—
 - (I) a statement of the child’s present levels of academic achievement and functional performance, including—
 - (aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;
 - (bb) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and
 - (cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
 - (II) a statement of measurable annual goals, including academic and functional goals, designed to—
 - (a) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
 - (b) meet each of the child’s other educational needs that result from the child’s disability;
 - (III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
 - (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—
 - (aa) to advance appropriately toward attaining the annual goals;

- (bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and
 - (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;
- (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);
- (VI)
- (aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and
 - (bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—
 - (AA) the child cannot participate in the regular assessment; and
 - (BB) the particular alternate assessment selected is appropriate for the child;
- (VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and
- (VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—
- (bb) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;
 - (cc) the transition services (including courses of study) needed to assist the child in reaching those goals; and
 - (dd) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415 (m) of this title.
- (ii) Rule of construction Nothing in this section shall be construed to require—
- (I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and
 - (II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.