

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

ODR No. 14662-1314 AS

Child's Name: Y.B.

Date of Birth: [redacted]

Dates of Hearing: 2/27/14

CLOSED HEARING

Parties to the Hearing:

Parents

Parent[s]

Local Education Agency

Eastern University Academy
Charter School
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Representative:

Parent Attorney

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Date Record Closed:

February 27, 2014

Date of Decision:

March 10, 2014

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student in this case enrolled in the Charter School at the beginning of the 2013/2014 school year with IDEA eligibility established and a current IEP from the school district where Student was previously enrolled and in which the family continues to reside.

In mid-January, Student received a disciplinary referral for a classroom incident resulting in injury to another student from a small [sharp object] that Student was holding. After discussion of the incident with a School staff member and Student's Father, Mother signed a form withdrawing Student from the School. Subsequently, she contacted an attorney who filed due a process complaint for an expedited hearing due to the School's failure to conduct a manifestation determination review, alleging that the School coerced Parents to withdraw Student by threatening expulsion and police action.

The School submitted a motion to dismiss and a sufficiency challenge, arguing that it has no IDEA obligations to a dis-enrolled Student. The motion and the sufficiency challenge, insofar as it related to the discipline claim, were denied based on the need for a factual record of the circumstances surrounding Student's leaving the School.

The record compiled at the brief hearing session established that the School did not fully and accurately inform Parents of the IDEA disciplinary process it would be required to implement if Student remained enrolled at the School, or that police notification of the incident was required regardless of the withdrawal. Based on the lack of complete and accurate information before they acted, Parents' withdrawal of Student from the School was not voluntary. Consequently, the School must reinstate Student, at least until a manifestation determination review is completed, as well as provide compensatory services as required by the

IDEA regulations relating to “stay put” placement during IDEA due process proceedings, and educational services required during a disciplinary change of placement.

ISSUES

1. Did Parents voluntarily withdraw Student from the Charter School, thereby terminating the School’s status as Student’s Local Educational Agency (LEA), and the Charter School’s IDEA obligations to Student?
2. If not, is Student entitled to compensatory services at any time from January 17 to the present and, if so, for what period, in what amount and in what form?

FINDINGS OF FACT

1. Student, a pre-teenaged child born [redacted], has been identified as IDEA eligible in the disability categories of Emotional Disturbance (ED) and Other Health Impairment (OHI), in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(4), (9); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 13, 14)
2. Student was enrolled in the LEA, Charter School, from the beginning of the 2013/2014 school year until January 16, 2014. (N.T. pp. 14, 15 (Stipulation), 23; J-7, J-10)¹
3. At the time Student enrolled in the Charter School, Student’s Mother provided a copy of Student’s IEP from the prior LEA, dated April 9, 2013. (N.T. p. 24; P-1)
4. On January 16, 2014, Student and three peers were referred to the School’s Director of School Climate and Restorative Practices (Director)² after an incident in which one of the students sustained a shallow, accidental cut to the hand from a [sharp] object. (N.T. pp. 78—80, 96—98, 117; J-8)
5. Although written accounts of the incident from the students differed in some details, notably with respect to which of the students brought the [object] to school, all accounts, including Student’s, were consistent in placing the [object] in Student’s hands at the time of the incident. (N.T. pp. 79, 99, 100; J-8, J-9)

¹ Commendably, the parties agreed to submit primarily joint exhibits in this matter, which provided a streamlined, non-repetitive documentary record. The joint exhibits are designated by the letter “J” followed by the exhibit number. Additional exhibits submitted by each party separately are designated “P” for Parent and “S” for School District followed by the exhibit number.

² Among other duties, the Director handles discipline matters. (N.T. pp. 91, 93)

6. The code of student conduct/discipline section of the School's Student & Family Handbook includes a "no tolerance" policy with respect to possession of a weapon.³ The Handbook provides that a student in possession of a weapon is subject to expulsion ("break from the community") for not less than 1 year and that the police would be notified. (N.T. pp. 63, 64, 66, 120; J-11 pp. 51, 52)
7. An IDEA eligible student subject to a such a lengthy exclusion receives an immediate 10 day break to provide an opportunity for a manifestation determination review. The manifestation determination participants include an administrator, parents, the student, special education staff, a school psychologist, the Director and anyone else the family wishes to bring. The modification to the School's discipline policies applicable to special needs students is not included in the Handbook. (N.T. pp. 64, 66, 67; J-11)
8. The School sends a letter to the parents of IDEA eligible students subject to expulsion that includes the reason for the exclusion and a date for a Manifestation Determination IEP. The letter states that the purpose of the manifestation determination meeting is to review the behavior, the IEP and to determine whether the behavior is related to the disability. The letter further notes that the manifestation determination meeting "will inform you of your child's rights and any possible consideration to continue the educational process within [the Charter School]/or other placements." (N.T. pp. 65, 66; J-12)
9. After the Director investigated the January 16 incident, he called Student's Mother and asked her to come to the School for a meeting. Mother notified Student's Father of the meeting, and he immediately went to the school. Although Mother also participated in the meeting, Father arrived first and began discussing the matter with the Director, who read the weapons section of the Handbook, emphasized the very serious nature of Student's violation of the code of student conduct, informed Father that Student would receive an immediate 10 day suspension ("break from the community"), and that Parents would receive a letter about a meeting with the CEO/principal of the school concerning further discipline, which would likely be expulsion from the School. (N.T. pp. 27, 28, 39, 75—77, 80, 102, 105, 106, 123, 125)
10. Father was extremely concerned about the police notification provision in the Handbook Section that the Director read to him, and feared that Student would be arrested, resulting in a police record. Father questioned why the police would be notified, since the injury to the other child was accidental. The Director told Parents that the Handbook procedures had to be followed in all cases involving possession of a weapon. (N.T. pp. 29, 80, 81, 105, 106)
11. When Father persisted in asking whether there was a way to avoid the School's disciplinary procedures, including police involvement, the Director told him that parents sometimes elected to withdraw students from the School rather than proceed with the disciplinary process, noting that once a student is withdrawn, the School would no longer

³ The Handbook is available to students and parents online, but was not distributed to the students or parents in hard copy this school year. (N.T. p. 60)

- have responsibility for the Student, so there would be no disciplinary proceedings and the incident would need no follow-up. (N.T. pp. 32, 33, 77, 80—82, 86, 87, 107, 122, 123)
12. Because Father was very concerned about the possibility of Student being arrested and wanted, above all, to avoid involving the police, he agreed that the best course would be to withdraw Student from the School, and so informed Mother when she arrived. Father believed that in light of the Handbook section read to him and described by the Director, nothing could be done to avoid arrest and expulsion other than to withdraw Student from the School. (N.T. pp. 81—84, 86, 109)
 13. When Mother arrived, the Director gave her more details about the incident and discussed the School's zero tolerance weapons policy requiring that the police be contacted and likely expulsion from the School. The Director also informed Mother of the conversation with Father concerning withdrawing Student from the School, noting that it can be difficult to find a new school with an expulsion on Student's record. The Director repeated that if Student were withdrawn, the School would have no further dealings with Student. (N.T. pp. 29—32, 35, 46, 84, 85, 123, 125, 126, 128)
 14. Although Mother was very reluctant to withdraw Student, she was ultimately persuaded to do so, went to the administrative office to obtain the withdrawal form and returned to the Director's office with it. (N.T. pp. 33, 34, 47, 109, 110; J-7)
 15. Because Student is IDEA eligible, the Director called the special education teacher, who arrived in the Director's office after Mother returned from the administrative office with the withdrawal form. The special education teacher told Parents that they could apply for Student's readmission to the Charter School after a year and that he would advocate for Student's return at that time. (N.T. pp. 44, 81, 84, 104, 111)
 16. Immediately after the meeting, Mother called Student's behavioral health services therapist to inform her of the incident and Student's withdrawal from the School. Mother expressed misgivings about the withdrawal in that conversation and contacted an attorney the following day. (N.T. pp. 47, 48, 54)
 17. During the meeting with Parents, the Director did not inform them that prior to an expulsion hearing, the School was required to conduct a manifestation determination review. Although the Director mentioned the letter they would receive if the disciplinary procedures were followed, he did not provide it to Parents during the meeting, and the School did not provide Parents with a copy of the letter within a few days, as it would have had Parents not withdrawn Student on January 16. (N.T. pp. 31, 66, 121)
 18. The Director, who began working at the School during the current school year, has never been involved in a manifestation determination review. When asked directly to explain a manifestation determination review, the Director could not do so. He does not know the relationship between Student's disability and the manifestation determination review process, or how the process works. (N.T. pp. 31, 32, 91, 131; J-12)

19. Student has not attended classes at the Charter School or any other public or private school since Student's Mother completed and signed the School's form to withdraw Student on January 16. (N.T. pp. 36; J-7)
20. Behavioral issues with Student had occurred periodically from the beginning of the current school year, resulting in several calls to Student's Mother to discuss the issues, and on at least one occasion, to remove Student from school earlier than the normal dismissal time, but Student had not received an out of school suspension while enrolled in the Charter School. (N.T. pp. 42, 43, 49, 94)
21. Although Mother could not remember any out of school suspension in Student's prior placement, a two day out of school suspension in 2012 is listed on Student's cumulative record. Mother never attended a manifestation determination review for Student or any of her other children. (N.T. pp. 49, 52, 53; S-1)
22. In accordance with the requirements of the Safe Schools Act, the Handbook and its general policy, the School administration notified the police, the Board of Trustees and the Pennsylvania Department of Education about the January 16 incident because it involved possession of a weapon. At the time he met with Parents, the Director knew, but did not explain to Parents, that the School was required to file a report with the police even if Student were withdrawn. Parents were not contacted by police concerning the incident. (N.T. pp. 70, 71, 87, 88, 129; J-11 p. 52)

DISCUSSION AND CONCLUSIONS OF LAW

Substantive Legal Standards/ Disciplinary Authority, Changes of Placement

According to the federal regulations implementing IDEA, an LEA is permitted to remove a child with a disability from his/her regular education setting for violation of a code of student conduct to the same extent as nondisabled students for a period of no more than 10 consecutive school days within the same school year. 34 C.F.R. §300.530(b). In addition, an LEA is permitted to implement disciplinary removals for separate incidents of misconduct for fewer than 10 consecutive school days, provided that such removals do not constitute a "change of placement." §300.530(b) A "change of placement" based on disciplinary removals from the regular education setting is defined as removal for more than 10 consecutive school days, or a series of removals during the same school year that a public agency determines constitutes a "pattern" §300.536(a)(1),(2) The federal regulations list several factors that an LEA should use

to determine on a case by case basis whether a series of disciplinary removals constitutes a pattern and, therefore, a change of placement, *i.e.*, removals for more than 10 non-consecutive school days, or for conduct substantially similar to the conduct that precipitated prior removals, or additional factors, such as the length or proximity of other removals and the total amount of time the student has been removed. §300.536(a)(2), (b). Pennsylvania law explicitly defines one “pattern” that constitutes a disciplinary change of placement as exclusion from the regular educational setting that exceeds fifteen (15) days in the same school year. §300.536(a)(2)(i), 22 Pa. Code §14.143(a)

If an LEA’s disciplinary procedures for a violation of the code of student conduct provides for more than 10 consecutive school days of removal, or a series of disciplinary removals of a student within the same school year would effect a change of placement, the LEA must conduct a manifestation determination review to determine whether the violation of the code of student conduct that led to the proposed discipline “was caused by or had a direct and substantial relationship to the child’s disability or ... was the direct result of the LEA’s failure to implement the IEP.” 34 C.F.R. §300.530(e)(1)(i), (ii). Such determination must be made within 10 school days of any decision to change an eligible child’s placement, and must be made by “the LEA, the parent, and relevant members of the child’s IEP team (as determined by the parent and the LEA).” §530(e)(1). The participants in the manifestation determination meeting “must 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.” §300.530(e)(1).

If, after conducting an appropriate review in compliance with the applicable regulatory standards, the IEP team concludes that the behavior at issue was not caused by the student’s disability, had no direct and substantial relationship to the student’s disability, and/or was not a

direct result of the LEA's failure to implement the IEP, the LEA may take the same type of disciplinary action that it would take with respect to a student without a disability, provided that if an eligible student is removed from his/her current educational placement, the school district must ensure that the Student is provided with a free, appropriate public education (FAPE), continues to participate in the general curriculum, although in an alternative setting, and continues to make progress toward achieving his/her IEP goals. §300.530(c), (d)(1)

If the outcome of the manifestation determination review permits the LEA to proceed with a disciplinary change of placement, the student's IEP team determines appropriate services, as well the alternative educational setting for delivery of FAPE. §§530(c), (d)(5), 531 A parent who disagrees with the results of the manifestation determination, or with the alternative placement decision, is entitled to appeal by means of a due process hearing. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511, 532(a). If the hearing officer determines that the LEA violated the procedures required by §530 or that the behavior was a manifestation of the child's disability, the hearing officer may return the child to the original placement or order a change of placement to a 45 day alternative placement upon determining that "maintaining the current placement of the child is substantially likely to result in injury to the child or to others." §532(b)(1), (2)

Parties Positions/Range of Issues

This case is in a somewhat unusual procedural and substantive posture for an expedited case based upon a disciplinary change of placement. The primary issue to be determined here is not whether the LEA violated the IDEA disciplinary procedures, or whether the outcome of the procedures is supported by sufficient evidence, since the procedures were not implemented. Rather, the essential question is whether the Charter School is presently required to comply with

IDEA disciplinary procedures, beginning with a manifestation determination review, if it wants to exclude Student from the School for at least a year. Determination of that issue necessarily includes determining the extent of its responsibility, if any, for providing Student with educational services after January 16, 2014.

As alleged in the complaint, Parents contend that they were coerced into withdrawing Student from the Charter School. At the due process hearing, they further argued that the coercion occurred because the School saw an opportunity to divest itself of a difficult Student with significant special education needs, and, therefore, threatened dire consequences if Parents did not withdraw Student. Parents further contended that Student is entitled to immediate reinstatement to the Charter School without further disciplinary consequences resulting from the January 16, 2014 incident. Finally, Parents requested compensatory education.

In response, the Charter School argued in its motion to dismiss (J-2) and sufficiency challenge (J-5) that once Parents withdrew Student, there was no basis for proceeding with IDEA discipline procedures, or even a due process hearing, in that the Charter School is no longer Student's LEA. The School contended, therefore, that Student's withdrawal not only divested it of responsibility for Student's educational services in any respect, but also divested the hearing officer of jurisdiction because Student and Parents were not entitled to proceed with a due process hearing under these circumstances. Both the motion to dismiss and the sufficiency challenge were denied for the reasons stated in the rulings on the motion to dismiss and the sufficiency challenge. *See* J-3, J-6.

At the hearing, the School also argued that it is aware of its obligation to follow IDEA procedures, beginning with a manifestation determination review as described in 34 C.F.R. §300.530(e) prior to implementing a change of placement for disciplinary reasons, and would

have done so had Parents not withdrawn Student.⁴ The School further argued that the hearing testimony established that Parents' decision to withdraw Student was voluntary, not coerced, and, therefore, no further proceedings are required.

The parties agreed to limit the issues and evidence at the hearing to a determination whether the circumstances surrounding Student's withdrawal supported reinstatement to the School, with the understanding that if the decision favored Parents, the School would reenroll Student and proceed with a manifestation determination.

The issues appear fairly simple, and indeed, the testimony very clearly established the essential facts to answer the threshold question, whether Parents voluntarily withdrew Student. The compensatory education question, however, is not as straightforward and involves legal issues that the parties did not consider, *i.e.*, the application and implications of the general IDEA "stay put" provision, as well as the requirements of the IDEA disciplinary provisions with respect to provision of services to an eligible student when a disciplinary change of placement occurs.

Here, as explained below, Student's withdrawal, regardless of circumstances, did not constitute an immediate IDEA violation. Once the due process complaint was filed, however, the IDEA "stay put" requirement arose, as modified by the disciplinary provisions of the IDEA regulations. Consequently, the Charter School was required to provide Student with educational services as soon as Student had been excluded from the School for more than 10 consecutive school days. Moreover, regardless of the outcome of the manifestation determination review that

⁴ The Charter School's general obligation to comply with IDEA requirements is not disputed. Because a charter school is an independent public school under Pennsylvania law, a charter school has the same LEA status as any other public school under both state and federal law. *See*, 34 C.F.R. §§300.28, 300.209(c); 22 Pa. Code §711.3. *See also*, *R.B. v. Mastery Charter School*, 762 F. Supp. 2d 745, 752—753 (E.D. Pa. 2010); *Aff'd.*, 532 Fed. Appx. 136; 2013 U.S. App. LEXIS 15594 (3rd Cir. 2013).

the School will be required to conduct if it wants to proceed with a longer change of placement, the Charter School must continue to provide services in accordance with the federal regulations until/unless Student enrolls in a different LEA.

Parents Did Not Voluntarily Withdraw Student from the Charter School

The testimony at the hearing did not support Parents' contention that the School administrator who met with Parents after the January 16 incident had an "agenda" that arguably resulted in an immediate violation of IDEA and/or §504 of the Rehabilitation Act of 1973, *i.e.*, to procure Student's withdrawal from the School in order to eliminate a Student with significant disabilities and special education needs, as well as to terminate the School's obligation to meet those needs and otherwise follow IDEA procedures. There was simply no evidence from which to draw any reasonable inference concerning intent, which, in any event, is irrelevant to determining an IDEA violation. The record did, however, establish that the School administrator strongly nudged Parents toward withdrawing Student, regardless of reason or motive for doing so.

The record also established, unequivocally, that the information Parents were given about the disciplinary process the School would follow if Student remained enrolled in the Charter School was incomplete and inaccurate. As a result, Parents' decision to withdraw Student was made without full knowledge, much less an understanding, of how the School's discipline procedures would be have to be modified by IDEA statutory/regulatory provisions relating to the discipline of IDEA eligible students potentially subject to a change of placement, *i.e.*, expulsion, for a violation of the code of student conduct. The withdrawal decision, therefore, was not voluntary because it was based upon inaccurate assumptions and conclusions that Parents

reasonably drew from the incomplete and unreliable information they received from the School administrator.

Facts Relating to the January 16 Incident & Meeting

Based upon the testimony and documents admitted into the record, there is no doubt that Student committed a serious violation of the School's code of student conduct that would very likely result in expulsion for a regular education student, and could result in Student's change of placement for disciplinary reasons even if the School follows all IDEA required disciplinary procedures.⁵ (FF 4, 5, 6) From the testimony of both Parents, as well as the Director of School Climate and Restorative Practices, the administrator who conducted the January 16 meeting, there is also no doubt that in discussing the potential consequences for Student, the Director emphasized the seriousness of the violation, the likelihood of expulsion and referred to the disciplinary process that would occur, as outlined in the School's Student Handbook, but never mentioned the manifestation determination process at all. (FF 9, 10, 13, 17)

According to the Director's testimony, he is not familiar with a manifestation determination, and does not know how it might affect the School's generally applicable discipline procedures with respect to IDEA eligible students. (FF 18) The Director, therefore, obviously could not have explained it to Parents, and based upon his own lack of knowledge, it is

⁵ Parents attempted to elicit testimony to establish that Student was not in possession of a "weapon" as that term is defined by Pennsylvania law. The evidence did unequivocally establish that because the weapon was a [sharp object with details redacted], Student's possession of it could not support a change of placement without regard to the outcome of a manifestation determination review. *See* 34 C.F.R. §300.530(g)(1)(providing for automatic removal to a 45 day interim alternative placement for possession of a weapon); (h)(i)(4)(defining the term "weapon" as a "dangerous weapon" under federal law); 18 U.S.C. §930(g)(2)(specifically excepting from the definition of "dangerous weapon" [certain objects].)

The School, however, is entitled, indeed, obligated as much as possible, to assure a safe, non-threatening educational community for all students and staff. A broad "no tolerance" disciplinary policy with respect to weapons, which includes no distinction based upon the [size of the object in question], is certainly a reasonable choice as a means for achieving that goal.

unlikely that the Director considered information concerning the manifestation determination a relevant factor that might have influenced Parents' judgment as to the best course of action for Student. In addition, although the special education teacher spoke to Parents during the meeting, he was not there for the entire meeting, and there is nothing in the record that supports an inference that he explained a manifestation determination and its potential implications to them. (FF 15)

There is also no basis in the record for an inference that Mother might have been familiar with a manifestation determination review process and its implications with respect to the Student's violation of the code of student conduct in this instance, since she never participated in a manifestation determination review. (FF 21) Although Student's record discloses an out of school suspension before Student enrolled in the Charter School, it was for 2 days, and, therefore, did not amount to a change of educational placement that would have triggered a manifestation determination. (FF 21)

Finally, although the Director referred to a letter that Parents would receive to begin the disciplinary process, he did not give them a copy. (FF 17) In any event, the letter itself includes the words "manifestation determination" but provides no explanation of it. (FF 8)

In short, although it could have been inadvertent, no one informed Parents of the manifestation determination procedures or explained to them that it could affect the School's usual disciplinary process due to Student's IDEA eligibility. When Parents decided to withdraw Student, therefore, they were unaware that the School was obligated to consider whether Student's identified disabilities, or either of them, affected Student's conduct before implementing its usual discipline procedures. That relevant and important information may have had a substantial impact on the withdrawal decision.

Reasons for Parents' Decision to Withdraw Student

The testimony of Father, and most notably, the Director, established beyond doubt that it was the Director, not either of the Parents, who first broached the subject of Student's withdrawal from the School as a way to avoid the disciplinary consequences of the weapons incident. (FF 11)

There was some conflict in the testimony concerning whether the Director or Father insisted that withdrawal of Student from the School was the best course of action. Mother testified that the Director was adamant that only withdrawal would prevent Student from being expelled and arrested for the incident. Father's testimony and the Director's testimony, however, suggested that Father took the lead in persuading Mother to withdraw Student based on his belief and that it was the only way to assure that Student would not be arrested. (FF 11, 12, 13)

Mother's reluctance to withdraw Student and her inclination to proceed with the disciplinary process, even without knowing of Student's IDEA rights was confirmed by the Director's testimony. (FF 14) There is no doubt, therefore, that Mother signed the withdrawal only after considerable persuasion by someone, and otherwise would likely have allowed the disciplinary process to take its course. Had that occurred, Parents would presumably have been informed of the manifestation determination process, and the School would presumably have implemented it as provided in the IDEA regulations.

Parents' primary concerns with respect to avoiding the disciplinary process differed to some extent, with Mother appearing to be equally concerned about the effects of an expulsion on her ability to obtain another educational placement for Student, as well as the potential for an

arrest if the police were notified.⁶ Father, however, was most concerned about notification of the police. (FF 10, 11, 12) It was not absolutely clear from the testimony of either Parent or of the Director whether Parents assumed that Student would be arrested if the School notified the police of the incident, without either suggestion or confirmation from the Director. Regardless, Father's credible testimony conveyed his very high level of concern about a possible arrest, as well as his belief that withdrawal would avoid that consequence for Student. Even if equating police notification with arrest was an assumption by Father, who then conveyed it to Mother, it was certainly not an unreasonable inference. Moreover, the Director did not testify that he was unaware of Father's strong concerns about police involvement, or that he did not realize that Father equated notification of the police with an arrest. The Director also testified that he told Parents that the disciplinary consequences of the weapons incident would go away if Student were no longer enrolled in the School, but did not tell them that the School was obligated to proceed with notifying the police, whether Student was dis-enrolled or remained at the School. (FF 12, 13, 22) That information, however, would likely have had as substantial an impact on Parents' decision to withdraw Student as knowing that expulsion was not an absolutely certain consequence of the incident. Even assuming that it was Father, not the Director, who forcefully advocated for Student's withdrawal from the School, Father's insistence that withdrawal was the only reasonable course was obviously based on his belief that it was the only way to avoid Student's arrest. That belief was based on the Director's explanation of the effect of the withdrawal, which was incomplete and inaccurate.

The record established that Mother's decision to withdraw Student was pressured, regardless of the source of the pressure, and was motivated by the misinformation provided by

⁶ Since the Director was unaware of the IDEA requirements relating to a manifestation determination, it is reasonable to infer that he was similarly unaware of the School's continuing obligation to provide services even if expulsion were ultimately permitted.

the Director concerning actions the School would take with respect to both the expulsion and police notification. There was no evidence, including the testimony of the Director, the only School administrator who met with Parents on January 16, to support the School's suggestion in its opening statement that Mother had mentioned withdrawing Student prior to that date. To the contrary, the Director testified to a major controversy between Parents over whether to withdraw Student, with Mother's reluctance to withdraw Student finally overcome by Father's insistence.

In light of the circumstances established by the record, Parents did not voluntarily withdraw Student. They did so to avoid the disciplinary process and what they believed to be the inevitable consequences of the weapons incident, but without full knowledge of that process because Parents' primary source of information, the Director, did not fully understand the process himself, and did not provide them with complete and accurate information.

Remedies

In an off the record conference to discuss the hearing parameters, the School's attorney acknowledged that if the outcome of the limited hearing was a decision that Parents did not voluntarily withdraw Student, the School would be obliged to reinstate Student and conduct a manifestation determination review before proceeding with any further discipline that could result in a change of placement, and that will be ordered.

Parents, however, requested that the School not be permitted to impose further discipline because Student has been without educational services since January 17, 2014, the first full day after the incident and Student's withdrawal from the School. Parents also request compensatory education from that time until Student is fully reinstated. The applicable legal standards do not support the breadth of the remedies Parents request. Even an IDEA eligible Student cannot entirely escape all consequences of a serious breach of the code of student conduct, and the

incident that precipitated the dispute between the parties in this case is certainly in that category. By agreement of the parties, no evidence was taken at the hearing with respect to whether the incident was a manifestation of, or substantially related to either of Student's disabilities, so there is no current basis for determining the full disciplinary consequences of the incident. Both the legal standards applicable to disciplinary removals from school and the factual record, however, support the School's right to impose an immediate suspension of ten consecutive school days. (FF 7, 8, 9) Since Student had not been previously suspended from the School, a suspension of 10 consecutive school days does not constitute a change of placement. (FF 20)

In addition, Parents did withdraw Student on January 16 and did not inform the School that they wanted to rescind the withdrawal for at least a week. Regardless of the decision that the withdrawal would not stand as a termination of the relationship between Student and the School, there was no way for the School to know that on January 16, or that Parents would later take the position that the withdrawal was not voluntary. There is, therefore, no basis for reinstating Student with no further threat of disciplinary consequences based upon the facts of the withdrawal. It is appropriate to "turn back the clock" by returning the parties to *status quo* as of January 17 and permit the manifestation determination process to occur.

Nevertheless, returning the parties to the situation as it existed on January 17, 2014 does have some additional consequence for the School, including the obligation to provide Student with educational services going forward, regardless of the outcome of any further disciplinary proceedings. In addition, an award of compensatory education is warranted to the extent that the amount of time Student has remained out of school with no services exceeds 10 consecutive school days. Both the IDEA requirement for providing educational services during a change of placement for disciplinary reasons, and its general "stay put" provision, require the School assure

that Student receives ongoing or compensatory services from the date Student completed a suspension of 10 consecutive school days after January 16 until Student's status is determined with finality, regardless whether the outcome of the manifestation determination is full reinstatement to classes at the School or a substantial period of exclusion as provided in the Handbook, and regardless of any further administrative proceedings or court proceedings.

Substantive Legal Standards/"Stay Put"

Generally, an IDEA eligible child's educational placement—the amount and type of educational services the child receives from his/her LEA—continues unless there is voluntary disenrollment of the child from the LEA by parents, a change brought about by an agreement between the parents of an IDEA eligible child and the LEA, or a change in placement is permitted by a hearing officer order after a due process hearing and decision. When there is a dispute over an eligible child's educational placement that results in a due process complaint, the IDEA statute and regulations provide that “unless the state or local agency and the parents of the child otherwise agree, the child involved in the complaint must remain in his or her current educational placement.” 34 C.F.R. §300.518(a). Further, “If the complaint involves initial application to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings. §300.518(b).

Although the IDEA statute and regulations do not define “current educational placement,” it is generally considered to be “the operative placement actually functioning at the time the dispute first arises.” *L.Y. v. Bayonne Board of Education*, 384 Fed. Appx. 58, 61 (3d Cir. 2010), quoting, *Drinker by Drinker v. Colonial School Dist.*, 78 F.3d 859, 867 (3d Cir.1996). In accordance with those decisions, the “operative placement” is governed by the child's IEP, but if there is no IEP in effect at the time the dispute arises, then the “operative

placement” is the placement where the child was actually receiving instruction. *L.Y. v. Bayonne Board of Education* at 61.

A “change of placement” is determined by whether there was a ‘fundamental change in or elimination of a basic element of the education program.’” *R.B. v. Mastery Charter School*, 762 F. Supp. 2d 745, 757 (E.D. Pa. 2010); *Aff’d.*, 532 Fed. Appx. 136; 2013 U.S. App. LEXIS 15594 (3rd Cir. 2013) (*Citations omitted*). In *Mastery Charter*, the district court and the court of appeals concluded that a charter school’s unilateral disenrollment of a special education student constituted a change of placement that triggered the IDEA “stay put” provision and required the school to reenroll the student for the duration of the IDEA proceedings.

The very strict application of the “stay put” requirement was recently reaffirmed in *M.R. v Ridley School District*, 2014 U.S. App. LEXIS 3083 (3rd Cir 2014), *Aff’ng* 2012 U.S. Dist. LEXIS 113600 (E.D. Pa. 2012). In that case, which involved a claim for private school tuition reimbursement, the court of appeals required the public school district to fund the private school through the end of the appeal proceedings. Both the district court and the court of appeals concluded that the hearing officer’s decision requiring payment of the tuition for the private school parent had unilaterally selected made that placement the child’s pendent placement until all administrative and judicial proceedings concluded. The pendent placement “stay put” requirement was imposed notwithstanding prior decisions by both the district court and the court of appeals, in the same case, that the hearing officer’s decision was erroneous and, therefore, that decision was reversed.

Pendency/"Stay Put" for Student

Based on the foregoing legal standards, the Charter School is Student's pendent placement, and based upon the decision here, it will remain Student's "stay put" LEA through the conclusion of appeal proceedings, if any, regardless of the outcome of any such proceedings. In accordance with the principle of the *Mastery Charter* case in particular, Student's withdrawal from the School did not make the public school district where the family resides Student's LEA. The factual record of this case established that Student did not enroll in that district or elsewhere, and has not received educational services since leaving the Charter School. (FF 19)

Pendency in this case arose on the date Parents submitted the due process complaint, which commenced due process proceedings to challenge Student's status and the School's failure to proceed with IDEA disciplinary obligations, notwithstanding the School's position that it was no longer Student's LEA due to Student's withdrawal from the School on January 16.

Compensatory Education/Restoration of Educational Services

Compensatory education is an equitable "remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009) (internal quotation marks and citation omitted). It is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3rd Cir. 2010), citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education is awarded for a period equal to the deprivation and measured from the time that the LEA knew or should have known of its failure to provide FAPE. *Mary Courtney T. v. School District of Philadelphia* at 249; *M.C. v. Central Regional School District*, 81 F.3d at 395; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3d Cir.1995).

In this case, based upon both the IDEA disciplinary provisions requiring an LEA to provide educational services once an eligible student has been excluded from his/her educational setting for more than 10 consecutive school days, and the general pendency provisions that arose when the due process complaint was submitted, Student is entitled to an award of compensatory education beginning on the 11th consecutive school day that Student was excluded from the School or the date the School received the due process complaint, when pendency arose. Assuming the 11th school day of exclusion occurred on or before the date the complaint was received, the School became obligated to resume providing educational services to Student upon receiving the complaint. On the other hand, however, if the 11th school day of exclusion occurred after the complaint was received by the School, it became obligated to begin providing Student with educational services as of that date.⁷

The measure of compensatory education is not easily determined in this case. Ordinarily, an eligible student entitled to compensatory education might receive full days of compensatory education if no services were provided. Here, however, although the IDEA regulations provide for services during a disciplinary change of placement, they permit delivery of services in an alternative setting determined by the IEP team, and permit the IEP team to determine the appropriate services. 34 C.F.R. §§530(d)(5), 531. During the pendency of any appeals from disciplinary proceedings, the child is to remain in the alternative educational setting until expiration of the 10 day exclusion or decision of the hearing officer, whichever occurs first,

⁷ It is not possible to determine the date Student's right to begin receiving compensatory education arose on this record because there is no evidence to establish when the 10 consecutive school days of permitted exclusion ended. The IDEA regulations define "school day" as "any day, including a partial day, that children are in attendance at school for instructional purposes." 34 C.F.R. §300.11(c)(1).

Here, it cannot be determined whether the School was closed on 1/20, Martin Luther King Day, or how many days between 1/17 and the date the School received the due process complaint it may have been closed for an entire day due to bad weather. All such days are excluded from the 10 consecutive school days the School was permitted to suspend Student for disciplinary reasons.

unless the Parents or the LEA otherwise agree. §533 Here, Student has surely served the 10 day suspension by now, but the manifestation determination review has not yet occurred, as it would have during the permitted period of suspension without Student's withdrawal from the School. In addition, the IEP team did not meet to determine the appropriate level of services/appropriate alternative setting. Finally, the "decision of the hearing officer" contemplated by the regulations, determining whether the School is permitted to impose a change of placement, *i.e.*, a longer period of exclusion, cannot be made on this record since the issue was limited to determining whether the School is currently Student's LEA. Nevertheless, an equitable restoration of services is required until Student's status is determined through the IDEA disciplinary process and any appeals.

In order to permit the disciplinary procedures to occur without unduly disrupting the operation of the School, it will not be required to immediately reinstate Student to the regular educational setting. Rather, the School will be required to restore services immediately in the form of one to one instruction in core academic areas and/or other services provided in Student's IEP, or that Student was receiving on January 16. The parties are, however, free to agree to an alternative arrangement for providing ongoing services, including readmitting Student to classes immediately pending the manifestation determination review.

In addition, because the School was permitted to litigate its position that Student's withdrawal terminated its obligations to continue educational services, including IDEA disciplinary proceedings, and because the outcome of the manifestation determination cannot be determined, it will not be ordered to provide full days of compensatory education from the date of the 11th consecutive school day of exclusion until the date of this decision. Instead, the School

will likewise be required to provide compensatory education in the form of one to one instruction in core academic subjects or other services.

Generally, in situations when either homebound instruction is provided on a temporary basis or instruction in the home is an eligible student's special education placement, the instructional hours are reduced from a full school day, since one to one instruction is more intensive than classroom instruction. Accordingly, the School will be required to provide two hours/day of one to one instruction as both compensatory and ongoing services, unless the parties agree to a different arrangement.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Charter School is hereby **ORDERED** to take the following actions:

1. Immediately reinstate Student to the Charter School's list of enrolled students.
2. Initiate a manifestation determination review in accordance with IDEA statutory/regulatory requirements if the Charter School wishes to proceed with a disciplinary consequence that will result in a change of placement for Student, including expulsion, and/or an additional suspension from school of five (5) days or more.
3. Immediately begin providing Student with educational services to enable Student to participate in the general education curriculum and to progress toward meeting the goals in Student's IEP in accordance with the following:
 - a. The educational services shall continue until such time as (1) Student's disciplinary status is resolved via a manifestation determination review, including throughout any additional period of suspension or expulsion, and appeal(s); or (2) Student returns to attending classes at the Charter School; or (3) Student enrolls in another LEA or in a private educational facility, or (4) Parents and the Charter School agree to another arrangement.
 - b. Unless Parents and the Charter School otherwise agree, or educational services are delivered in an alternative educational setting by agreement of the parties or a hearing officer order, the services shall be provided via 1:1 instruction for not less than 10 hours/week. The Charter School may determine how to provide the replacement instruction/services, *e.g.*, via tutoring by School staff or private

tutors, at the school building, in a community setting such as a public library, in Student's home.

- c. Student shall also be provided with assignments from the regular education academic classes, *e.g.*, English/reading/language arts, math, science, social studies in which Student was enrolled, or would be enrolled, from January 16 to the present. Student shall also be provided with any other services, such as, *e.g.*, counseling that the Charter School was providing on January 16 as part of Student's educational program or as related services.
4. Provide Student with two (2) hours/day of compensatory education from February 7, 2014 until the date services ordered in ¶3 begin. The compensatory education award is subject to the following limitations and requirements:
 - a. Because the Charter School would have been permitted to impose a ten (10) school day out of school suspension without providing services as a result of the incident on January 16, 2014 had Student not been withdrawn, if school was in session for fewer than 10 days between January 17, 2014 and February 7, 2014 due to holidays, weather or any other reason, the School is permitted to reduce the number of hours of compensatory education by the number of days, if any, needed to impose a full 10 school day suspension without services;
 - b. The compensatory education award may be used for academic instruction in any of the classes in which Student was enrolled on January 17, or would have been enrolled after that date and/or for other special education services, that will address Student's disability-related needs, whether or not Student would have received such services pursuant to Student's IEP, *e.g.*, counseling, social skills training. Parents may designate the type of instruction/services that should be provided via the compensatory education award, but the School may determine how to provide the instruction/services, *e.g.*, via tutoring by School staff or private tutors, school-based or outside counseling/psychological, behavior, social skills training or other services requested by Parents.
 - c. The compensatory education shall be in addition to, and shall not be used to supplant, educational services that should appropriately be provided by the School through Student's IEP to assure meaningful educational progress. Compensatory education services may occur after school hours, on weekends and/or during the summer months when reasonably convenient for Student and Parents. The hours of compensatory education may be used at any time from the present through the end of the 2014/2015 school year, unless the time is extended by agreement of the parties.

It is **FURTHER ORDERED** that the Charter School shall implement whatever steps necessary, including additional training, to assure that all School staff fully understand, accurately inform parents of IDEA eligible students of, and follow the requirements relating to placement and discipline for an IDEA eligible student found in 34 C.F.R. §§300.518 and 300.530—536.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

March 10, 2014