

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

# PENNSYLVANIA SPECIAL EDUCATION HEARING OFFICER

## DECISION

Child's Name: S.F.

Date of Birth: [redacted]

Date of Hearing: August 19, 2014

## CLOSED HEARING

ODR File No. 14872-1314AS

### Parties to the Hearing:

Parent[s]

Tidioute Community Charter School  
241 Main Street  
Tidioute, PA 16351

Date Record Closed:

Date of Decision:

Hearing Officer:

### Representative:

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September 8, 2014

September 19, 2014

Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a pre-teenaged student attending the Tidioute Community Charter School (hereafter School) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parent filed a due process complaint against the School in April 2014, asserting that it violated the IDEA and Section 504 of the Rehabilitation Act of 1973,<sup>3</sup> as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing which convened over a single session,<sup>4</sup> at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the School failed to provide Student with FAPE throughout the time period in question, and that it discriminated against Student on the basis of Student's disability in contravention of Section 504. The School maintained that its special education program was appropriate for Student, and that it did not engage in prohibited discrimination.

For the reasons set forth below, I find in favor of the Parent and Student on some of their claims, and in favor of the School on one of the claims.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

<sup>2</sup> 20 U.S.C. §§ 1400-1482.

<sup>3</sup> 29 U.S.C. § 794.

<sup>4</sup> This matter was conditionally dismissed, then reinstated by Order of July 13, 2014. The Order of reinstatement is marked as Hearing Officer Exhibit (HO-) 1 and hereby admitted. It also merits mention that this hearing officer stated an incorrect due date for this decision at one point in the transcript (N.T. 225) but sent an email message to counsel on August 20, 2014, confirming that date to be September 19, 2014 (*see* N.T. 223). That decision due date was again confirmed by this hearing officer's email message of September 9, 2014, following receipt of the parties' written closings. The email messages from this hearing officer to counsel on August 20 and September 20, 2014 have been marked collectively as HO-2 and that exhibit is hereby admitted. References to other exhibits will be made as follows: Joint Exhibits (J-), Parent Exhibits (P-), and School Exhibits (S-). Citations to exhibits which contain duplicative information will not necessarily be made to all such exhibits.

## **ISSUES**

1. Whether the School denied Student FAPE during the 2012-13 and 2013-14 school years;
2. Whether the actions of the School against Student on February 27, 2014 amounted to discrimination on the basis of, and deliberate indifference to, Student's disability; and
3. If either of the above are answered in the affirmative, is Student entitled to compensatory education and/or declaratory or other relief.

## **FINDINGS OF FACT**

### **Background**

1. Student is a pre-teenaged student who is eligible for special education on the basis of Attention-Deficit/Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). (Stipulation, Notes of Testimony (N.T.) 28, 30)
2. Student's disabilities are manifested through, among other characteristics, impulsivity, a desire for attention, anger and agitation, an inability to control Student's behavior particularly in an escalated state, and defiance when given directions from someone else, especially an adult. (N.T. 148, P-33, P-38 pp. 23-24 (pages 92-93)<sup>5</sup>).
3. Student entered the School from a school district which had identified Student as eligible for special education in September 2008 (first grade) on the basis of an Emotional Disturbance. That district developed an Individualized Education Program (IEP) for Student, which was the IEP implemented for Student upon the transition to School. (N.T. 33-34, 161; J-2; P-17)
4. The IEP from the school district was dated April 26, 2012 and noted that Student exhibited behaviors that impeded Student's learning or that of others, and described those behaviors in detail. Specifically, Student was noted to display verbal and physical aggression toward peers, disrespect toward peers and adults, and unsafe behaviors (running from adults, and climbing on equipment and structures). (J-2)
5. The April 2012 IEP included a single annual goal: "[Student] will demonstrate appropriate school behavior across all educational setting [sic] 80% of the time." (J-2 p. 12) Program modifications and specially designed instruction provided for access to the emotional support classroom, use of a points system, use of an escort as needed, supervised study as needed, Crisis Prevention Intervention (CPI) as needed, small group testing, and extended time for assignments. (J-2)

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<sup>5</sup> See n. 7, *supra*.

6. The April 2012 IEP did not appear to include a Positive Behavior Support Plan (PBSP) or other specific behavior intervention plan for Student.<sup>6</sup> Student was to receive supplemental learning support (20-80% of the school day). (J-2)

#### 2012-13 School Year

7. After Student began attending the School at the beginning of the 2012-13 school year, it conducted an evaluation of Student and issued a Reevaluation Report (RR) in January 2013 with the consent of the Parent, sought and obtained in early November 2012. The RR included a review of information and previous assessments, reflecting Student's overall average cognitive ability. Classroom performance and teacher input from the school district indicated general passing grades in spite of significant problematic behavior. (N.T. 31-32; J-5; S-7, S-12)
8. The School administered the Woodcock-Johnson-Third Edition Test of Achievement (WJ-III-ACH), and Student achieved scores in the average range on all composites and subtests, with the exception of a below average score in spelling. Student's scores were generally in the average range, with reading skills slightly below grade level.<sup>7</sup> (J-5 pp. 9-10; S-7 pp. 9-10)
9. The RR also summarized Student's "[b]ehaviors of concern" at the School:
  - History of not listening to adults, tantrums, out of control behaviors
  - Safety issues in school setting (left classroom without permission and flight from building; adults had to chase and subdue [Student])
  - Does not always follow classroom rules
  - Running in the Lunch room
  - Hit a classmate and lied about it to the teacher
  - Does not like to admit [Student] is wrong, assume the blame or apologize
  - Can become upset when directed to comply with teacher directives
  - Argues with adults and peers
  - Seeks attention from peers; it is reported that [Student]'s classroom peers are afraid of [Student, who] can become verbally aggressive with peers
  - Wants to always be the leader during group work and wants things to go [Student's] way
  - Tells stories about [Student's] self that are blatantly untrue
  - Doodles instead of attending or doing work (it is reported that doodling was used as a replacement behavior in [Student's previous school])

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<sup>6</sup> The School's version of the former school district's April 2012 IEP does include a 5-page "Emotional Support Behavior Intervention Protocol." However, although this document has Student's name throughout those 5 pages, each time the name appears it is run together with another word such as "when" or "will"; *i.e.*, the document states throughout "[Student]will" with no space between the name and the following verb or other part of speech. These pages also use gender pronouns different from Student's gender. The Functional Behavior Assessment Summary similarly uses incorrect gender pronouns. It is unclear to what extent, if at all, these pages are individualized for Student rather than a plan for all students in the classroom.

<sup>7</sup> The RR references the Wechsler Individual Achievement Test – Third Edition (J-5 p. 9) but the discussion of that instrument appears to be an error, as the scores correlate with the WJ-III-ACH.

(J-5 pp. 4-5; S-7 pp. 4-5)

10. Student's then-current fifth grade teachers at the School reported several strengths for Student for the RR, including a willingness to help and work on tasks; needs and weaknesses were similar to those set forth in the previous finding of fact (FF) 8. It was also noted that Student had more behavioral difficulties in unstructured settings without supervision. (J-5 pp. 5-6; S-7 pp. 6-7)
11. The RR identified Student as a student with a disability under the disability category of Emotional Disturbance. Needs were noted for learning: how to focus and concentrate in the classroom; social skills and study skills; how to deal with frustration and anger; and how to express Student's self appropriately at school. The RR recommended "specially designed instruction ... in order to improve academic and behavioral skills" (J-5 p. 11). (J-5 pp. 10-11; S-7 pp. 10-11)
12. The School conducted a form of a Functional Behavioral Assessment (FBA) on February 6, 2013. The behaviors of concern were identical to those in the RR, noted above in FF 8. Skill deficits identified as related to the behaviors were participation, social, communication, self-regulation, study, and play skills. The hypothesis generated by the FBA was that during unstructured times and transitions, Student "will run, hit/kick, and yell" to gain attention. (J-6)
13. A PBSP was developed on the same day as the FBA. The PBSP contained one goal: "[Student] will demonstrate appropriate school behaviors (keeping hands/feet to self (stay inside personal space), not yelling, not running) during unstructured/transitional times, 80% of the time, on weekly data collection charts." (J-7 p. 4) Antecedent strategies were to have Student walk at the front of classroom lines, be escorted at all times, have access to music in learning support, and have preferential seating. In addition to test taking accommodations, Student was to have access to the learning support classroom, and appropriate social skills and behaviors were to be modeled twice weekly. Consequences for behaviors that were appropriate (replacement behaviors) and inappropriate were also identified. (J-7; S-11)
14. The School developed an IEP on February 6, 2013. Information from the RR was included in this IEP, and Student's then-current grades were reported to range between a low of 65% (reading) to a high of 85% (English/writing). The single goal in the IEP was identical to that in the PBSP. Program modifications and specially designed instruction were the PBSP, testing accommodations, and having directions read, repeated, and clarified. Student would be in regular education with itinerant learning support and emotional support. (J-9; S-8)
15. The Parent signed a Notice of Recommended Educational Placement (NOREP) for itinerant learning support on February 6, 2013. (J-8; S-10)
16. Student was not provided with a PBSP from the beginning of the 2012-13 school year until the one developed on February 6, 2013. (N.T. 37)

17. Student was involved in several significant behavioral incidents over the course of the 2012-13 school year which were entered in the School's discipline log system or into a written report. One occurred in the fall of 2012 when Student smacked another student in the face. Two occurred in February 2013: in one instance, Student made inappropriate comments to peers and a teacher; in the other, Student refused a bus driver's directive and argued with the driver and with peers. Only significant behavioral incidents are reported in the School's log system. (N.T. 65; P-6, P-25)
18. Progress reporting for the fourth quarter of the 2012-13 school year reflected "limited progress" with incidents noted during van transportation and at lunch, as well as arguing with peers and failure to comply with adult directives. (P-5 p. 1)

#### 2013-14 School Year

19. Student was involved in numerous significant behavioral incidents over the course of the 2013-14 school year beginning in September. Most involved physical or verbal aggression towards peers, refusal to comply with teacher directives, and throwing objects at others. (P-3, P-5, P-28)
20. Student's sixth grade English teacher reported disruptive behavior by Student in November 2013 wherein Student threw objects and injured the teacher's hand. This teacher wrote in an email message to administrators: "Once again, I cannot stress enough how [Student] disrupts the classroom, causes the other students to be afraid, and now has caused injury to myself. I am seriously fearful for the safety of the other students." (N.T. 76-78; P-6 p. 1, P-28)
21. Also in November 2013, the sixth grade English teacher reported that, "[m]any times a day [Student] disrupts the learning environment." (P-6 p. 1)
22. Student began spending more and more time in the emotional support classroom over the first half of the 2013-14 school year, because when Student engaged in problematic behaviors, Student was moved to that classroom. (N.T. 131-32)
23. School personnel utilized restraint techniques with Student on several occasions during the 2013-14 school year, during incidents which the emotional support teacher believed were safety risks for Student and other students.
  - a. On September 18, 2013, Student refused to follow a teacher direction, [redacted].
  - b. On November 14, 2013, Student was disruptive in the classroom and did not immediately comply with a teacher directive to go into the hallway. After Student did comply, [redacted].
  - c. On February 27, 2014, during the incident discussed in FF 38 below, the School used a two person escort to take Student to the quiet room.(N.T. 74-75, 88-90; J-1; S-13)

24. The Parent requested an IEP meeting after the November 2013 restraint. (J-1 pp. 10, 12)
25. Throughout the 2013-14 school year, regular education teachers would report to the emotional support teacher when Student engaged in problematic behaviors; however, there was no regular or systematic reporting of whether or when Student engaged in appropriate behaviors. (N.T. 133-34)
26. Student's IEP team developed a new IEP for Student in late January 2014. Student's behavior had been increasingly more difficult over the course of the school year. At that time, Student continued to demonstrate many of the same problematic behaviors as Student was exhibiting the prior school year, suggesting to the emotional support teacher that Student was not making significant progress in that area. (N.T. 70-71, 125-26, 139-40; P-5 pp. 1-2, P-30; S-2)
27. The Parent participated in the meeting by telephone and they discussed options including a full-time aide. The IEP team, including the Parent, agreed at that time to increase the level of emotional support to supplemental, which meant that Student would spend the majority of the school day in the emotional support room, with lunch and specials in regular education. (N.T. 90-91, 92-93, 125-26, 140-41, 144, 152, 167-69, 180)
28. The January 30, 2014 IEP included information on Student's then-current grades ranging from a low of 79% (reading) to 100% (library and physical education). Student's teachers reported that Student was capable in the curriculum, but exhibited an inability to be redirected, difficulty getting along with and interact with others, and continued to demonstrate difficulty with unstructured or unsupervised activities. Needs were identified in the areas of focus and concentration in the classroom setting, learning basic social skills and study skills, and learning to address frustration and anger and express Student's self appropriately. (P-30; S-2)
29. The single goal in the January 30, 2014 IEP was identical to the prior IEP except that the performance criteria was decreased from 80% of the time to 70% of the time. The program modifications and specially designed instruction were similar to the prior school year, with the addition of access to the quiet room and a seat at the front of the classroom. The level of support was increased to full-time emotional support. (P-30; S-2)
30. The School did not issue a NOREP for the change in placement after the January 2014 IEP meeting, but that change was implemented. (N.T. 129-32, 140-41, 169-70)
31. A new FBA dated January 30, 2014 was completed at that same time. This FBA mirrors the previous FBA with the following changes: Student was noted to be in full-time emotional support (not itinerant learning support); the quiet room was identified as an antecedent strategy; and Student was demonstrating the behaviors of concern in the classroom as well as during transitions and unstructured times. The hypothesis was identical to the previous FBA with the addition of the classroom setting to where and when the behavior occurred. (J-10; S-3)
32. The PBSP developed at the time of the January 30, 2014 FBA similarly mirrored the prior PBSP, with several minor changes to reflect the addition of the classroom setting to

the antecedents; the addition of “disrespect” to the behaviors of concern; access to the emotional support classroom (rather than learning support); and added use of the stress ball and quiet room as well as preferential seating. The goal was identical to the prior PBSP except that the criteria was decreased from 80% of the time to 70% of the time. (J-11; S-4)

33. Student had a medication change in early 2014 around the time that Student’s level of emotional support increased. (N.T. 127-28, 170)
34. There was no plan to transition Student back to a lesser level of emotional support after that IEP meeting, although the Parent understood it would be a temporary measure. Student’s behaviors did not improve with the increased level of support outside of a few weeks period of time. (N.T. 124, 126-28, 130, 146, 169-70, 177-78)
35. On March 7, 2014 following a manifestation determination meeting, the School provided a NOREP for the Parent to sign for increased emotional support. The Parent approved the NOREP on that same date. (N.T. 151-52; J-12; S-5)
36. Student’s IEP was also revised on March 7, 2014 to reflect the Parent’s concerns with Student’s contact with a classroom aide. The annual goal was revised to state:  
“[Student] will demonstrate appropriate school behaviors (keeping hands/feet to self, stay inside personal space, using kind voice and appropriate tone when talking to teacher and peers, walking down the hall, will comply with directives within two prompts) during the school day, 75% of the time, on weekly behavior charts for two consecutive quarters.”  
(P-30 pp. 12, 19)
37. Progress reporting for the second and third quarters of the 2013-14 school year reflected “moderate” progress for the second quarter with inconsistency; for the third quarter, Student reportedly had more days with appropriate behavior than not, with 93% accuracy toward the goal. However, Student had two incidents noted on the discipline log system, including the February 27, 2014 occurrence, during this time period. At the end of April 2014, Student continued to engage in disruptive behavior in the emotional support classroom on a daily basis. (P-5, P-6, P-38 p. 3 (page 10))

#### Incident of February 27, 2014

38. [FFs 38 through 43 redacted]
44. The Supervisor of Special Education went to the office to report the incident [redacted]. A Charter School official (hereafter CSO) had already been alerted by another School representative that [redacted] (N.T. 186, 187) and he called police. The CSO made that phone call before speaking with the emotional support teacher. (N.T. 56, 105, 185-87, 191-92)
45. The Supervisor of Special Education and the emotional support teacher separately gave statements to police. The next day, the CSO asked the emotional support teacher to provide a more detailed statement. (N.T. 59-61, 106, 193, 200-01, 203; P-31, P-38a)



46. The Parent was also called and asked to go to School because of the incident. She was advised that the police had been contacted. (N.T. 162-63)
47. Upon the Parent's arrival at School, the police advised that criminal charges would be filed against Student.<sup>8</sup> (N.T. 163-64)
48. After the police left, the Parent met with the CSO, the Supervisor of Special Education, the emotional support teacher, and another School representative. The CSO advised the Parent a number of times at that meeting that he planned to expel Student because of the incident. (N.T. 164, 204-05)
49. The School held a manifestation determination meeting on March 7, 2014 regarding the February 27, 2014 incident. (N.T. 65-66)
50. Student served a five-day suspension as a result of the February 27, 2014 incident before the manifestation determination meeting. (N.T. 79-80, 164, 207-08; P-32)
51. The team participating in the manifestation determination concluded that Student's conduct on February 27, 2014 was a manifestation of Student's disability, and was a direct result of a failure to implement Student's IEP. The Parent agreed with the manifestation determination. (N.T. 66-68; P-33)
52. Student's emotional support teacher did not agree with the conclusion that Student's conduct was a direct result of a failure to implement Student's IEP. (N.T. 68-69)
53. The Supervisor of Special Education disagreed with the conclusion that Student's conduct was a direct result of a failure to implement Student's IEP, but made that notation on the manifestation determination worksheet because the Parent advised that she had not received the most recent IEP and PBSP. (N.T. 115, 145)

#### Behavioral Interventions

54. Student was not successful using a token economy system for improving Student's behavior. Student's emotional support teachers tried various strategies to address Student's behaviors throughout the time period in question, changing their approaches frequently because Student did not respond to incentives or interventions beyond a short period of time. They did not take data on the effectiveness of the various behavioral interventions. (N.T. 72-74, 84-86, 94-95, 124; J-1 p. 12; P-10)
55. Strategies that had some success in improving Student's behaviors included a special lunch, which was an incentive that worked for approximately one month just before the February 27, 2014 incident. (N.T. 84-85, 126)
56. Another approach used was a points-level system, wherein Student was rewarded for demonstrating appropriate behaviors during class periods. The points-level system was not at all successful for Student. (N.T. 85-86)

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<sup>8</sup> Student was found guilty of the summary offense of [redacted] by a juvenile court. (P-39 p. 37 (page 146)).

57. Student had the ability to use the quiet room when needed to calm Student's self, usually after a disruptive incident. Added in the January 2014 IEP, this intervention had limited success; similar to the February 27, 2014 incident, notes from Student's emotional support teacher in the spring of 2014 indicate that when Student was disruptive in the classroom, Student typically refused to leave the room. (N.T. 86; P-3, P-30; S-2)
58. The progress monitoring provided to the Parent did not include data, percentages, or other objective measurements of how Student was performing behaviorally. At times, the sixth grade emotional support teacher communicated about Student's behavior in writing, and at other times used text messages and telephone calls. Those communications were more frequent when Student's behavior was inappropriate and stopped completely in early March 2014. (N.T. 37-39, 45-46, 52-53, 83, 152-53, 172-73, 178, 179; P-5)
59. During the 2012-13 school year, and again in the following school year prior to February 27, 2014, Student would go to the School office to clean and perform minor tasks, often when Student was experiencing difficulty in the regular education classrooms. Student enjoyed working in the office. The CSO decided after the February 27, 2014 incident that the offer of time in the office should no longer be made available to Student. (N.T. 171-72, 184-85, 209-11)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that 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). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S.

Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). The testimony of the various witnesses was consistent and credible in many respects; credibility is discussed further below as necessary. It should also be noted that the Parent, as well as the School personnel, presented as dedicated individuals who care about Student and Student's education, despite their conflicting positions at the hearing.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

#### IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Local education agencies (LEAs) meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Nevertheless, “the measure and adequacy

of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

Also critical is the IDEA obligation for eligible students to be educated in the “least restrictive environment” which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. *Id.* In evaluating the first prong, the efforts the school has made to include the child, a comparison of the benefits to the child of placement in a regular classroom versus a separate special education classroom, and the effect on the other students, must be considered. *Id.*

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise

qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

*Ridgewood* at 253. Intentional discrimination requires a showing of deliberate indifference, which may be met by establishing “both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge. *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013).

Charter schools are required to comply with the federal regulations implementing the IDEA and Section 504. 22 Pa. Code §§ 711.1 – 711.62.

### The Parent’s Claims

#### I. FAPE

The first issue is whether the School provided FAPE to Student, particularly with respect to programming for Student’s significant behavioral needs. (Parents’ Closing at 22-26) The evidence of record demonstrates that when Student enrolled in the School in the fall of 2012, Student had already been identified as a child with an Emotional Disturbance and had an IEP developed by the former school district. (FF 3-6) The School did not initiate an evaluation of Student until early November 2012, by which time Student was demonstrating numerous significant problematic behaviors that unquestionably disrupted Student’s education as well as that of other students. (FF 7, 9) No behavioral interventions were provided until early February 2013, and the PBSP developed on that date was based upon a rather cursory FBA that lacked any data, was based on anecdotal, general comments, and resulted in a single hypothesis that did not encompass many of the reported difficult behaviors. (FF 9, 12, 13, 14, 16) The single goal in the resulting PBSP did not set forth the “clearly defined behavior”<sup>9</sup> that Student was expected to

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<sup>9</sup> The Pennsylvania Department of Education, Bureau of Special Education, has provided an annotated IEP form that offers guidance on completion of those documents. The Measurable Annual Goal section of that annotated IEP uses

perform. Although the emotional support teacher explained what she meant by “appropriate school behaviors” and why she used that term with examples instead of listing specific behaviors individually (N.T. 44-46, 50-51, 81-82), the targeted behavior was left to subjective interpretation, resulting in an inability to monitor all of Student’s behaviors (N.T. 42-44) and precluding meaningful progress reporting as discussed below. Additionally, this goal did not extend to behaviors in the classroom setting. Furthermore, and critically, neither the PBSP nor the IEP provided any form of teaching Student how to begin to manage Student’s behaviors. (J-9, S-8)

Student’s significant problematic behaviors continued into the 2013-14 school year, requiring use of restraints on several occasions; Student’s time in emotional support continued to increase and ultimately led to a change of placement to full time emotional support. (FF 19-23, 25-27, 29) The new IEP in January 2014 included the same unmeasurable annual goal with a decrease in the expected performance criteria, strongly suggesting that Student had made little or no progress toward that goal. (FF 29) The addition of several items of program modifications and specially designed instruction still lacked any instruction for Student in managing behavior. (F 29; P-30, S-2) This hearing officer also infers from the absence of a transition plan from full-time emotional support (FF 34) that the School personnel did not foresee or expect that Student would be moving toward a less restrictive setting through the end of the 2013-14 school year, a conclusion that the Supervisor of Special Education confirmed (N.T. 146). However, there was no evidence that any consideration was given to whether Student was included with typical peers to the maximum extent possible as required by the IDEA and *Oberti*.

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the term “clearly defined behavior,” an element of the goal that is required in order to ensure objective measurement of a student’s performance.

The extent to which Student's behavior impeded Student's education is unclear, since there was no systematic reporting. (FF 25, 58) The progress monitoring that does exist on Student's behavioral goals lacks any objective basis (FF 18, 37), and is not supported by other evidence. The numerous behavior interventions attempted were met with little to no success. (FF 54) The one incentive that was somewhat effective was removed. (FF 59) The record as a whole establishes that Student simply was not, throughout the entire 2012-13 and 2013-14 school years, taking meaningful strides toward management and improvement of problematic behaviors. Additionally, the drastic change of placement to full time emotional support, together with the candid testimony of the sixth grade emotional support teacher, provides preponderant evidence that Student did not make meaningful educational progress, and that lack of progress significantly impeded Student's learning throughout the time period in question. Further, that placement change also violated the principles of least restrictive environment, further denying Student FAPE.

All of the above discussion does not discount the qualifications and well-intentioned efforts of the emotional support teachers and the Supervisor of Special Education. Those professionals tried various forms of behavioral interventions, changing their approaches when it became apparent different strategies were not more than temporarily successful, if at all. Nevertheless, it is quite apparent that Student presented with such challenging behaviors that the School personnel did not have the necessary resources available to equip them to program appropriately for Student.

## II. Discrimination

The next claim is whether the School discriminated against Student on the basis of Student's disability. This hearing officer finds that the School did discriminate against Student

in failing to program appropriately for Student's behavioral needs, but that this claim has been thoroughly considered and addressed in the above discussion of FAPE under the IDEA, with the sole exception of the incident of February 27, 2014 and its aftermath.

The events on that day are extremely troubling. Although not technically an issue for the hearing, this hearing officer concurs with the manifestation determination made by the team on March 7, 2014. It is the decisions of the CSO to contact police and impose the five-day suspension, however, that are most disturbing, and will be evaluated under the deliberate indifference standard.

The CSO decided to call police before even speaking with the emotional support teacher. Despite his testimony to the contrary, two other witnesses testified, credibly, that he called police before the emotional support teacher even arrived at the office after the incident. (FF 44) The CSO conceded at the hearing that he had "the obligation of knowing as much as I can know about the incident in the school" (N.T. 202-03), but did not make the effort to do that on the day of incident. Moreover, his explanation for why he called police, not to file criminal charges but rather to have the officer talk with this emotionally charged child in an effort to "scare" Student,<sup>10</sup> is misguided and incomprehensible at best. Although the School argues, correctly, that it was not precluded from contacting authorities to report a crime, *see* 20 U.S.C. § 1416(k)(g); 34 C.F.R. § 300.536, the testimony of the CSO as to his intentions directly undermines that argument; and, having not yet spoken to the emotional support teacher involved, the call was at least premature.

This hearing officer also accepts the testimony of the Parent that the CSO stated, several times, his intention to seek expulsion of Student on the afternoon of February 27, 2014. The

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<sup>10</sup> *See* N.T. 195-96, 216, 217-19. The word "scare" was used by counsel for the Parent, not by the witness (N.T. 218-19), but the witness did not disagree with the term; and, that is the exact word that came to this hearing officer's mind during the hearing on what the witness intended.



testimony of the CSO and other witnesses is not inconsistent with this conclusion. (N.T. 110-11, 155-56, 204-05, 214-15) As explained above, this hearing officer concludes that the School did not have available to it the resources it needed to program appropriately for Student's behavioral needs, and it appears that the incident on that date was the last straw.

The Parent contends that the actions of February 27, 2014, including the five-day suspension, amounted to deliberate indifference, especially when considered with the continued disciplinary referrals throughout the two school years Student was at the School. After careful consideration, this hearing officer finds that the actions on February 27, 2014 did amount to discrimination against Student on the basis of Student's disability, but cannot conclude that the School acted intentionally, with the knowledge that a federally protected right was substantially likely to be violated and a failure to act despite that knowledge, when it imposed the five-day suspension for the February 27, 2014 incident. The testimony of the CSO as a whole reflects some misunderstanding of the School's IDEA obligations in disciplining a student with a disability, but there is insufficient evidence to support the conclusion that the decision to suspend Student at that time was made with the requisite knowledge and intent.

### III. Remedies

Having found a denial of FAPE, the last issue is what relief is warranted. It is well settled that compensatory education is an appropriate remedy where a school knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the school fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts

have endorsed a scheme that awards the “amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district’s failure to provide a FAPE.” *B.C. v. Penn Manor School 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. School 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 they would have occupied but for the school district's violations of IDEA.”)) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

The School contends that the record fails to establish a loss of educational benefit to Student. (School’s Closing at 3) There is some evidence that Student maintained passing grades. (FF 8, 14, 28) However, in addition to the IDEA principles set forth above, it is important to recognize that education is much more than academics. Nearly thirty years ago, the U.S. Supreme Court recognized that a child with a disability who is “advancing from grade to grade” is not necessarily a child who has been provided with an appropriate education. *Rowley*, *supra*, at 203 n.25; *see also* 34 C.F.R. § 300.101(c)(1) (“Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.”) An appropriate education, thus, encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (citing *M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir. 1996)). Moreover, a child’s educational performance can be

affected in ways other than achieving passing grades, such as by an inability to engage in appropriate social relationships with peers or to attend to tasks and instruction at school.

There is no evidence as to what position Student would have been in if FAPE had been provided. The question, then, becomes what Student should have received for FAPE. This hearing officer concludes that at least by the time the School sought permission to conduct an evaluation of Student in early November 2012, it knew or had reason to know that Student required implementation of behavioral interventions in order to provide Student with an appropriate education. The School will, thus, be given a reasonable rectification period from the first day of school to the end of November 2012 to have developed a plan to address Student's behavior. The next question is how to calculate the hours of compensatory education. The first IEP developed for Student contemplated itinerant support (up to 20%), and this hearing officer concludes that this level of support provides a starting point for the award for the time period that Student had this level of support. Assuming a 6-hour school day, 20% of support would equate to 72 minutes per day. This amount shall be rounded up to two hours per day to account for the substantial time in regular education when Student should have been, but was not, receiving the emotional and behavioral support necessary to succeed in those classes. The award shall be for every day that school was in session from December 1, 2012 through the end of the 2012-13 school year, and for every day that school was in session throughout the 2013-14 school year until January 30, 2014. For the time period of January 30, 2014 through the end of the 2013-14 school year, when Student was in full time emotional support, the award shall be six hours per day for every day that school was in session. This award shall continue for the 2014-15 school year until an appropriate IEP and PBSP is developed and implemented for Student. There will

be no deduction for days that Student was out of school for any reason, including disciplinary suspension.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's social/emotional goals and skills. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the School through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18).

There are financial limits on the parents' discretion in selecting the compensatory education; the costs to the School of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the School professionals who did and would have provided social/emotional services to Student during the period of the denial of FAPE.

To remedy the School's inability to date to provide appropriate programming for Student, the School will be ordered to engage the services of a behavior specialist to assist the IEP team in developing an appropriate educational program, with a PBSP, with a placement determination in the least restrictive environment. The School will have the discretion in determining the behavior specialist to be engaged.

Finally, to remedy the discriminatory actions relating to the February 27, 2014 incident, the School will be precluded from imposing strictly disciplinary measures against Student that remove Student from the classroom or school without first convening a meeting of Student's IEP team to discuss the conduct and appropriate consequences.

### **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the School denied Student FAPE and Student is entitled to compensatory education; that the School did not act with deliberate indifference toward Student; and that specific directives to the IEP team are necessary for future programming.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The School failed in its FAPE obligations to Student.
2. The School shall provide Student with compensatory education, to address Student's social/emotional needs for every day school was in session, subject to the conditions and limitations set forth above, as follows:
  - a. Two hours per day from December 1, 2012 through the end of the 2012-13 school year, and from the first day of school of the 2013-14 school year through January 30, 2014;
  - b. Six hours per day from January 31, 2014 through the end of the 2013-14 school year and continuing from the beginning of the 2014-15 school year until an appropriate IEP with a PBSP is developed and implemented.
3. Within ten days of the date of this order, the School shall engage the services of a behavior specialist to assist the IEP team in developing an appropriate educational program for Student, with a PBSP, with a placement determination in the least restrictive environment. The School shall have the discretion in determining the behavior specialist to be engaged.

4. Within thirty days of the date of this Order, or within such time as the behavior specialist determines, the School shall convene a meeting of Student's IEP team to revise the IEP and PBSP.
5. The School shall not impose any strictly disciplinary measures against Student that remove Student from the classroom or school without first convening a meeting of Student's IEP team to discuss the conduct in question and appropriate consequences.
6. Nothing in this Order precludes the parties from mutually agreeing to alter any of the directives regarding the timelines or the form of compensatory education set forth in this decision and Order.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: September 19, 2014