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: C. L.
Date of Birth: [redacted]

Dates of Hearing:

December 16, 2015
January 21, 2016
February 1, 2016
February 8, 2016
February 22, 2016
April 5, 2016
April 12, 2016
April 13, 2016

CLOSED HEARING

ODR Case # 16696-1516AS

Parties to the Hearing:	Representative:
Parent[s]	John Corcoran, Jr., Esquire 411 Seventh Avenue Suite 1200 Pittsburgh, PA 15219
Mars Area School District 116 Browns Hill Road Valencia, PA 16059	Thomas Breth, Esquire 128 W. Cunningham Street Butler, PA 16001
Date Record Closed:	May 25, 2016
Date of Decision:	June 21, 2016
Hearing Officer:	Jake McElligott, Esquire

INTRODUCTION

Student[1] is an elementary school age student residing in the District. The parties' dispute arises out of an intricate factual background, centering on the beginning of the 2014-2015 school year (the student's 1st grade year) and particularly focusing on a behavioral incident in October 2014, which is set forth in the *Findings of Fact* section below.

In terms of the parties' positions, the student's mother[2] claims that the student is eligible as a student with a disability under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEA")[3], and that the District, through various acts and omissions, denied the student a free-appropriate public education ("FAPE"), specifically in terms of how, in November 2014, it handled discipline of

[1] To protect the confidentiality of the student, the generic use of "student", rather than a name or gender-specific pronouns, will be employed, and will be substituted in direct quotes, throughout the decision.

[2] The complaint which led to these proceedings was filed by the student's mother. Through a power of attorney, the student's maternal grandparents share decision-making authority in educational matters related to the student. Both the student's mother and grandparents attended the hearing sessions, although at various points in these events parent, or grandparents, or both together, were involved in communications and interactions with the District. In terms of findings of fact, the exact individual(s) involved will be specifically identified in terms of those communications and interactions. But reference to "the family" was regularly employed by the Hearing Officer throughout the hearing, as all educational decision-makers were in attendance at the sessions. The student's father did not attend the hearing and has not played any role in the proceedings.

[3] It is this hearing officer's preference to cite to the implementing regulations of the IDEA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 ("Chapter 14") wherein Pennsylvania education regulations explicitly adopt most provisions of 34 C.F.R. §§300.1-300.818.

the student as a thought-to-be-eligible student who was in the midst of an evaluation process. As a result, parent asserts, she undertook a unilateral private placement of the student in December 2015. Parent seeks tuition reimbursement for that private placement, in addition to compensatory education for the period of November and December 2014, when the parent claims the student was wrongfully excluded from school by the District.

Additionally, parent asserts that the District has not met its obligations to the student under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").[4] The parents seek a finding that the District discriminated against the student on the basis of the student's disability, in violation of Section 504.[5]

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[4] It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 ("Chapter 15") wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61.

[5] In her complaint, the parent also makes claims for remedy, including compensatory monetary damages, punitive damages, injunctive relief in the form of directives to the District regarding its policies/procedure and termination of employees. In a prehearing ruling, the Hearing Officer ruled that he did not have authority to award monetary damages; as such, and to the extent parent required finality, any such claim for damages was dismissed for lack of hearing officer authority to grant the requested relief. As set forth below in the *Procedural History* section, the complaint in this matter was filed following the vacating of a prior special education due process hearing decision by order of Senior Judge McVerry of the federal District Court for the Western District of Pennsylvania ("Court"). The parties were further informed that, should any claim be implicitly brought forward as the result of pleadings filed with the Court, any claim that lay outside of a denial-of-FAPE claim under IDEA (with authority granted to these proceedings through 22 PA Code §§14.102(a)(2)(xxx)-(xxxi), 14.162) or Section 504 (with authority granted to these proceedings through 22 PA Code §§15.1, 15.8) were dismissed for lack of subject matter jurisdiction. (Hearing Officer Exhibit ["HO"]-2, HO-3, HO-4, HO-5). Finally, parent requested to amend the complaint to include as a remedy that the District be ordered to expunge certain disciplinary indications from the student's records at the District. The Hearing Officer ruled that he did not have jurisdiction or authority to order the District to amend a student record; as such, this request for amendment was denied. (HO-6).

The District counters that, at all times, it met its obligations to the student under IDEA and Section 504. The District asserts that nothing in its work with the student in the period August-November 2014 supports any finding that it did not meet its legal obligations to the student. As a result, the District argues that parent is not entitled to any remedy.

For the reasons set forth below, I find in favor of the parent.

ISSUES

1. Did the District fail to meet its obligations to the student under IDEA, thereby denying the student FAPE?

2. Did the District fail to meet its obligations to the student under Section 504, thereby denying the student FAPE?

3. If the answer to either question #1 or #2, or both questions, is/are answered in the affirmative, is the student entitled to compensatory education?

4. If the answer to either question #1 or #2, or both questions, is/are answered in the affirmative, is the parent entitled to tuition reimbursement?

5. Did the District discriminate against the student on the basis of disability, in violation of Section 504?

PROCEDURAL HISTORY

A. Following a sequence of events in the beginning of the 2014-2015 school year, and particularly focusing on a behavioral incident in October 2014 (the details of which is set forth in the *Findings of Fact* section below), the District conducted a manifestation determination review. The student was in the midst of an evaluation process and, finding that the behavior incident was not

a manifestation of the student's potential disability, the District proceeded to implement discipline against the student. (HO-1).

B. Pursuant to 34 C.F.R. §300.532 the parent filed a special education due process complaint, challenging the findings of the manifestation determination review. A hearing was conducted on the mandated expedited timeline and was concluded in one session. (HO-1).

C. On November 24, 2014, Hearing Officer Anne Carroll issued a decision at ODR file number 15488-1415AS, finding that the manifestation determination review was inappropriate. Hearing Officer Carroll ordered a range of remedies related to the finding, remedies which all centered on the student's status and programming at the District. (HO-1).

D. Subsequent to the hearing however, in December 2014/January 2015, the parent dis-enrolled the student from the District and undertook a unilateral placement at a local private school. (Notes of Testimony ["NT"] at 1332-1334).

E. After the issuance of the decision at ODR file number 15488-1415AS, both the parent and the District filed separate complaints with the Court. The parent sought further remedies against the District, and named individuals affiliated with the District, related to the events of the fall of 2014. The District filed a complaint, challenging the findings and order in the decision.

F. On June 30, 2015, the Court issued a memorandum opinion as to parent's complaint, finding that the parent was asserting claims that had not undergone administrative exhaustion because those particular claims had not been part of the evidentiary process in the hearing at ODR file number 15488-1415AS. In so finding, the Court dismissed those claims without prejudice. Additionally, because the student was complaining about the manifestation result and the student was no longer attending the District, the Court ruled that the parent's complaint about the manifestation determination result was mooted and so vacated the decision at ODR file number 15488-1415AS. (HO-2).

G. On August 14, 2015, parent field the complaint that led to these proceedings, including an amendment of that complaint on November 6, 2015. (HO-3, HO-4, HO-5).

H. The Hearing Officer in the instant case engaged in extensive prehearing planning with counsel, including the effect of the

vacating of the decision at ODR file number 15488-1415AS. (NT at 4-45).

FINDINGS OF FACT

1. In August 2014, the student entered 1st grade from a community kindergarten program. (Parent's Exhibit ["P"]-26, School District Exhibit ["S"]-7).

2. The District's enrollment document included handwritten notes at the bottom of the page including [redacted], "sp needs" and abbreviations related to mental health diagnoses and services. It is unclear who at the District made the notations or when the notations were made. (P-26 at page 1; S-7 at page 1; Parent's Closing Statement at Appendix C).

3. Early on, the student's maternal grandmother communicated with the District regarding a power of attorney that had been granted to her and the parent's step-father to make educational decisions in the absence of, or in place of, the student's mother. (P-9; S-1 at page 4).

4. In August 2014, the District was also provided with two academic/cognitive functioning reports, showing that the student had high levels of intelligence. At that time, however, the student was being seen in a community agency for support due to "emotional regulation and self-control within the school environment" in kindergarten and had behavior supports in the kindergarten classroom. (S-1 at pages 1, 7-15, S-16 at page 2).

5. Initially, there were plans to continue the community agency behavior supports in the District, but the agency denied the request. (S-1 at pages 37, 87; NT at 1388-1390).

6. On September 5th, the student was involved in a classroom incident that involved [redacted]. The student was referred to the principal's office, but there was no out-of-school discipline implemented against the student. (P-18, P-20 at pages 1-2; S-4, S-9 at pages 7-8).

7. On September 15th, a District employee who happened to engage the student emailed the school counselor indicating about the student "If you have not met (the student) yet, you may want to

(the student) on your 'radar'. In the few minutes I met (the student), I learned (the student) is very defiant". On the same day, the District received a complaint from the parent of a classmate of the student that the student had [redacted] during lunch. (S-1 at pages 53, 55-56).

8. On September 16th, the student was involved in a hallway incident with a classmate [redacted]. (P-20 at page 3, P-18).

9. On September 17th, a multi-disciplinary team met, including the District school psychologist, the director of special education, the principal, the parent, the student's grandmother, and the director of the student's kindergarten program. The District requested, and the parent granted, permission for the student to be evaluated. At the meeting, the District discussed an out-of-district placement in a program for students with severe needs. (S-1 at pages 59-62; NT at 1518-1523).

10. The director of the student's kindergarten program had provided documentation to the District prior to the September 17th meeting regarding the student's behavior at the kindergarten. The student's behavior in kindergarten included behaviors similar to those being exhibited by the student at the District. (P-6; NT at 1490-1507).[6]

11. On September 18th, the student was involved in a series of behavior incidents over the course of the day. In the classroom, the student [redacted], causing a disruption and ultimately [redacted]. Later, in a school bathroom, the student [redacted]. The student was referred to the school office where the student [redacted]. (P-18; S-1 at pages 73-74, 79-81).

12. As a result of the September 18th incident, the student was suspended out-of-school for six school days (September 18th, 19th, 22nd, 23rd, 24th, 25th). (S-9 at page 5).

13. On September 22nd, in the midst of the suspension, the District director of special education updated the District superintendent on the student's situation. The director indicated to the superintendent that, out of concern for the safety of other students, she and the school psychologist were going to recommend a 45-school day interim placement at the out-of-

[6] The student attended not only private kindergarten but, two years prior to that, the student attended two years of preschool at the same facility, for a total of three years at the preschool/kindergarten facility. (NT at 1491).

district placement discussed at the September 17th multi-disciplinary team meeting. (P-10; S-1 at page 69).

14. On September 29th, the student was involved in a playground incident [redacted]. (P-18 at page 2, S-4).

15. On September 30th, the student was involved in a classroom incident [redacted]. (P-18 at page 3; S-1 at page 89, S-4, S-9 at pages 10-11).

16. As a result of the September 30th incident, the student was suspended out-of-school for three school days (September 30th, October 1st, 2nd). (S-9 at page 5).

17. On October 1st, the District received an evaluation from a treating psychologist, indicating that the student had been diagnosed with oppositional defiant disorder ("ODD"). The psychologist noted concerns with "tantrums, defiance, aggression, rigidity, and difficulty with peer interactions". (P-31; S-16 at page 4-5).

18. On October 1st, the District received input from the community-based behavior specialist consultant ("BSC") regarding the BSC's work with the student on problematic behaviors in the kindergarten year. The treatment concerns included aggression, non-compliance, coping skills, and transitions. Specific behaviors of concern included aggression with adults and peers, non-responsiveness to instructions, and [redacted]. (P-31; S-16 at pages 5-7).

19. On October 2nd, the District school psychologist created and circulated a behavior plan for the student. (P-16; S-1 at pages 94-104, S-14).

20. On October 5th, the behavior plan was revised by the school psychologist and again circulated. (S-1 at pages 107-113).

21. On October 8th, the student was removed from the classroom and engaged in de-escalation behaviors in the school counselor's office. This intervention was successful. (P-18 at page 4; S-4).

22. On October 9th, the student was removed from the classroom and went to the school counselor's office. The student [redacted]. (P-18 at page 4; S-1 at page 122-123, S-4).

23. On October 10th, the student was removed from the classroom and went to the school counselor's office. In the hallway and the counselor's office, in a series of interactions with the principal, the school counselor, and the school psychologist, the student [redacted]. (P-18 at pages 4-6; S-1 at pages 122-123).

24. As a result of the October 10th incident, the student was suspended out-of-school for four school days (October 10th, 13th, 14th, 15th). (S-9 at page 5).

25. On October 16th, the student was involved in a series of incidents that unfolded in the main hallway of the school, the school counselor's office, and a school hallway involving the principal and the school counselor. (P-18 at pages 6-7; S-4).

26. On Monday, October 20th, the student was involved in an incident that ultimately resulted in a call by the school to community police. The police officer looked to school employees for intervention, and the school counselor was the predominant school employee in the situation. Those interventions were unsuccessful. The District school psychologist asked the police officer to intervene, and the event became a police-directed event rather an educator-directed event. A one-on-one aide who had been assigned to work with the student on Friday, October 17th, and been instructed to take notes on working with the student and the student's behavior, felt uncomfortable with the course of events as those events were being handled by the police officer and fellow educators, and departed. (P-15, P-18 at pages 7-9; S-4, S-9 at pages 19-24, S-13 at pages 1-4; NT at 937-1054).[7]

27. The aide was reassigned after the October 20th incident. Upon request of the District, the aide prepared an extract of her notes related to the October 20th incident and provided that to the

[7] There were multiple individuals involved in the October 20th incident over a course of time—the student's teacher, the school counselor, the school psychologist, the police officer, and the student's aide—which led to various accounts of the events that day. Here, the accounts of the police officer and the aide are credited with heavy weight for multiple reasons: One, the police officer, by profession, is trained especially in observation and recall. Two, the aide was tasked with particularly recollecting and noting the student's behaviors, and did so in detail. And, three, importantly in the mind of the Hearing Officer, as of October 20th, neither witness had any deeply substantive experience with the student, therefore their engagement with the student that day was, in the case of the officer, entirely without previous context and, in the case of the aide who was working with the student on her second day, nearly so; this bolsters the credibility of the witnesses in the eyes of the Hearing Officer. Both witnesses were highly credible when testifying, and, as indicated, their testimony was accorded heavy weight. (NT at NT at 937-1054).

District. The District instructed her to turn over the original notes. The aide demurred, indicating that she felt the notes were her personal property. On October 24th, the District explicitly instructed the aide to provide the original notes or risk employment consequences. After receiving this directive, the aide provided the original notes to the District. In light of the aide's testimony at the hearing to this chain of events, counsel for the parent requested copies of the original notes. The notes could not be located by the District and, at the time the record closed, the original notes had not been located or provided. (S-9 at pages 19-24; HO-8; Parent's Closing Statement at Appendix C; NT at 1030-1034, 1042, 1044-1054).

28. As a result of the October 20th incident, the student was suspended out-of-school for one school day (October 21st). (S-9 at page 5).

29. On October 22nd, the student was removed from the classroom and went to the school counselor's office. The student was involved in property destruction in the school counselor's office with the school counselor and principal in attendance. The school counselor called community police, and a police officer (an officer different from the officer who responded on October 20th) responded. The student was de-escalated and went to the cafeteria, where the student again misbehaved, and the school counselor, principal, and police officer returned to the school counselor's office. The student [redacted] but eventually de-escalated and returned to the classroom. (P-18 at pages 9-10; S-4, S-13 at pages 5-7).

30. On October 23rd, the student began to take prescribed medication for behavior control. (S-1 at 148-149).

31. On October 24th, the District special education office began a scheduling process for an individualized education plan ("IEP") team meeting on November 21, 2014. On the same date, the District school psychologist revised the student's behavior plan and circulated it for review. (S-1 at pages 159-162, 185-189).

32. On October 27th, the student was in a class line and [redacted]. The student was moved by the school counselor and the principal to the school counselor's office where the student engaged in property destruction, de-escalated, and then escalated again, [redacted]. (P-18 at page 10; S-1 at pages 203-204, S-4).

33. As a result of the October 27th incident, the student was suspended out-of-school for two school days (October 28th, 29th). (S-9 at page 5).

34. On October 28th, the District initiated a regular education process for consideration of expelling the student. (P-3; S-1 at page 219-220).

35. With the suspensions of late October, the student had reached 15 days of out-of-school suspension. As a student potentially eligible under IDEA, and in the midst of an evaluation process, the District moved to conduct a manifestation determination ("MD") to see if the behavior which led to the student's discipline was a manifestation of a disability, or a potential disability. (P-11).

36. On the morning of November 3rd, both the MD and the expulsion hearing were held back-to-back. (P-11, P-29; NT at 1324-1325).

37. The MD found that the behavior for which the student was disciplined was not a manifestation of the student's potential disability. The student's family disagreed with this determination. (P-11).

38. At the MD, the parent shared additional reports from a treating psychologist and the student's pediatrician regarding diagnoses of attention-deficit hyperactivity disorder ("ADHD") and reaffirming the prior diagnosis of ODD. (P-11; S-16 at pages 7-8).[8]

39. Immediately after the MD, the District held the expulsion hearing. A committee of the school board (three members) decided "to expel the student for the remainder of the school year", pending completion of the evaluation and, should the student be found eligible, the IEP team meeting. (P-29; NT at 1324-1325).

40. It is unclear who scheduled the expulsion hearing on the same day, and immediately after, the MD. (NT at 1119-1120, 1145-1149).

41. Prior to making the decision to pursue an expulsion hearing, the District superintendent made the decision not to pursue an

[8] The MD worksheet (P-11) refers to a "Dr. [redacted]", but the reference is inaccurate. The treating psychologist is Dr. [redacted]. (P-1, S-16).

interim 45-school day placement and to pursue expulsion. (NT at 1115-1116, 1128).[9]

42. The student did not return to the District after being expelled. The family made arrangements for paid private tutoring through the remainder of November through mid-December. (NT at 1328-1331).

43. On November 12th, the District issued its evaluation report ("ER") for the student. The ER identified the student as having a health impairment as the result of ADHD and ODD. The ER recommended that the student qualify as a student eligible under the IDEA and recommended special education to be delivered through an IEP. (S-16).

44. In December 2014, the student's parent undertook a unilateral private placement for the student to attend a local parochial school to complete 1st grade. The school designed a transition plan for the student's acclimation to the school in January 2015. (NT at 1169-1174).

45. Initially, the student received behavior support in the private placement from a community agency. Based on the absence of non-problematic behaviors, it was determined that the student did not require such support. (NT at 1205-1206, 1211-1212).

46. The student participated in afterschool extracurricular programming as part of the transition. (P-37 at page 16; NT at 1184-1185).

47. Twice in the second half of the 2014-2015 school year, the student exhibited problematic behaviors at the private school. One incident, in April 2015, involved defiance of the student's teacher. The student de-escalated after the intervention of the school principal and did not exhibit additional problematic behavior with the teacher. A second incident involved a disagreement with classmates on the playground; the student left the group, and, after the other classmates had returned to class from recess, teachers worked with the student outside, de-escalating the

[9] At some point between late September and early October, the District superintendent who had held the position at the outset of the school year, and who had been copied on certain communications regarding the student, left the District and an interim superintendent (who was, himself, a former District superintendent) took his place. It was the interim superintendent who made the explicit decision not to pursue a 45-school day placement and to pursue expulsion instead. (NT at 1113-1114).

student and bringing the student into the building. (P-37 at page 16; NT at 1231-1232, 1449-1450).

48. At various times, the student indicated potential difficulties with using the restroom and engaging in swim class. The private placement employed modifications in both cases, and the student did not exhibit any problematic behaviors. The student had one behavioral incident in the 2015-2016 school year: Following student's consternation over a swim class, the student's behavior escalated; the student did not wish to go to the cafeteria for lunch. The principal offered to have lunch with the student in her office, and the student ate lunch with the principal. The student became agitated when return-to-class was proposed, and the student completed schoolwork in an office. (NT at 1226-1230, 1429, 1452-1455).

49. The private placement is a parochial school that includes an element of religious instruction and practice. The school day at the private placement is 7:40 AM – 2:40 PM. Of the 35 hours in the school week, two hours and forty-five minutes involve religious instruction (three classes of 45 minutes each), 50 minutes involve prayer (10 minutes per day), and one hour per week involves a religious service. The private placement required that the family transport student to the school. (NT at 1445, 1464, 1480).

50. The witnesses from the private placement—a counselor/special needs coordinator, the student's 1st grade and 2nd grade teachers, and the principal—all testified to the student's consistent academic and behavioral success with the supports and accommodations offered by the school. (NT at 1166-1218, 1220-1257, 1426-1439, 1441-1483).

51. Even though this fact-finding necessarily focused on the behavior incidents for the student as a matter of the legal issues presented, it is an explicit finding of fact that on this record, in its entirety, the student presents as a bright, engaging student. While at the District over the first few weeks of 1st grade, the student obviously engaged in highly problematic behaviors, the student did not present behavioral difficulties uniformly and consistently. The documentary evidence and testimony of multiple witnesses involved with the student's education, both in the District and outside of it, support a finding that, with appropriate supports, the student's behavior can be addressed in a regular education environment and is not problematic, and that the student engages successfully in learning in those environments. (P-37; S-1 at pages

225-226; NT at 620-621, 1027, 1166-1218, 1220-1257, 1426-1439, 1441-1483, 1507-1509).

WITNESS CREDIBILITY

i. The testimony of the student's mother, the community police officer, and the student's aide at the District were all accorded a heavy degree of weight.

ii. The testimony of the District school psychologist, the District principal, the student's teacher at the District, the District director of special education, the District central office administrator, the school board member, the interim superintendent, the private school counselor/special needs coordinator, the student's 1st and 2nd grade teachers at the private school, the private school principal, and the kindergarten director were all accorded a medium degree of weight.

iii. The testimony of the District school counselor was accorded less weight.

DISCUSSION AND CONCLUSIONS OF LAW

IDEA – Substantive Violations of FAPE

Under the terms of the IDEA/Chapter 14, an eligible child must be provided with FAPE. (34 C.F.R. §300.17). An eligible child is a child

identified with one or more disabilities who, as a result of that identification, requires special education. (34 C.F.R. §300.8).

If a child has been identified as a student with a disability, IDEA/Chapter 14 provide certain procedural protections before disciplinary action may be implemented against the student. (34 C.F.R. §§300.530, 300.532). Where an exclusion from school amounts to more than 10 consecutive school days in a school year, or more than 15 cumulative school days in a school year, a MD process must be undertaken to ascertain if the behavior which led to the exclusion(s) is a manifestation of the student's disability. (34 C.F.R. §300.530; 33 PA Code §14.143(a)). Where the behavior is determined to be a manifestation of the student's disability, the student's IEP team must take steps to understand and remedy any deficiencies in the student's programming and must return the student to his/her most recent educational placement. (34 C.F.R. §300.530(e)).

Importantly, if a student has not been formally identified as a student with a disability under IDEA/Chapter 14, the same protections related to MD processes apply to students "if the (school district) had knowledge …that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." (34 C.F.R. §300.534(a)). A school district is deemed to have such knowledge where an evaluation process has been requested or is underway. (34 C.F.R.

§300.534(b)(2)). A student in this situation is often referred to with the shorthand term 'thought to be eligible'.

Here, the record is clear that the MD result reached by the District—that the behaviors which led to the pattern of suspensions and ultimately an expulsion—was substantively wrong. Upon enrollment in late August 2014, the District was provided with a psychological report that indicated the student struggled with "emotional regulation and self-control within the school environment" and had behavioral support services in kindergarten. By mid-September, the District had been provided with details of difficulties, and successful programming, in the preschool/kindergarten facility, and District administrators were discussing an interim out-of-District placement because of the problematic behaviors. Parent consented to an evaluation process, and on October 1st, the District received notice of a psychological diagnosis of ODD and even more detailed information about behavioral understandings and interventions in the school environment in kindergarten.

In fact, to read those behavioral documents, especially in light of the input shared with the multi-disciplinary team by the kindergarten director at the September 17th meeting, and then to read accounts of the problematic behavior at the District, is to see the same student with the same challenges. This record could not be more clear that, as of the fall of 2014, the student had <u>always</u> manifested such behaviors in school

environments as a result of ODD (and, through a later diagnosis, ADHD). This Hearing Officer does not wish to engage in hyperbole, or to be flippant, but it is mind-boggling that District educators could review the information available to them over the fall of 2014, up to and including the MD meeting of November 3rd, and reach a conclusion that the student's behaviors were not a manifestation of the student's disability.

Based on the testimony of the District school counselor, school psychologist, and the student's classroom teacher, the position of the District appears to be that the student had some volition in the behavior. At certain times the student could not stop the behaviors, as they surfaced out of the ODD, and, at other times, the student simply misbehaved in a way that was entirely within the student's control. Moreover, those witnesses (especially the District school counselor and school psychologist) testified that they could tell the difference between the two instances. This is an untenable assertion.

Accordingly, by its acts and omissions in the fall of 2014, the District denied FAPE to the student under the terms of IDEA/Chapter 14 by expelling the student, who was in the midst of an evaluation process and was thought-to-be-eligible, through a wrongful manifestation determination.

IDEA – Procedural Violations of FAPE

There is no doubt that the student's behaviors in the fall of 2014 were problematic. In fact, the District's concerns for the student's safety and the safety of other students/staff was, at times, rightly in the front of their minds. Where a student presents issues of safety, however, IDEA/Chapter 14 provide a clear path for changing the placement of the student.

Specifically in the context of this matter, where a student's placement may not be changed because the behavior is viewed as a manifestation of a student's disability but the school district believes that maintaining the current placement of the student is substantially likely to result in injury to the student or to others, the school district may utilize an expedited special education due process hearing to seek an interim 45-school day placement outside of the school district. (34 C.F.R. §§300.532(a),(b)(2)(ii)). In this case, the District should have determined that the student's behaviors were a manifestation of the student's disability (or, more precisely, thought-to-be-eligible status). But the District's hands are not tied at that point. Here, the District, having reached an inappropriate MD result, could have and should have filed for an expedited special education due process hearing, seeking through a hearing officer order an interim 45-school day out-of-District placement, based on its position that the student's behavior was "substantially likely to result in injury to the child or others". (34 C.F.R. §§300.532(a); *see,*

e.g., J.C. & Upper Dublin School District, 17254-1516AS (February 10, 2016)).[10]

The record reveals that the District was aware of this procedural option. In mid-September and again on the cusp of the expulsion in early November, the District raised the issue of an interim 45-school day out-of-District placement. Inexplicably, the option was not pursued. In September, the record is silent as to why the District did not pursue this option; in the run-up to the expulsion in November, the interim superintendent rejected that course of action.

Regardless of the roads not taken, in pursuing an expulsion of the student, the District prejudicially violated the student's procedural FAPE protections. (34 C.F.R. §300.513(a)(2)). Here, it must also be pointed out that the parties disagreed as to what, exactly, the result of the school board action was in substance and what that action should be called. Parent's counsel utilized the term "expel" (and its derivatives); District counsel disagreed that this term was accurate. Under the terms of Pennsylvania education regulations, the student's exclusion from school

[10] Furthermore, the District need not have waited until the 15th day of cumulative suspension, or its internal decision to expel the student, to hold the MD review. Those are automatic disciplinary triggers under IDEA/Chapter 14. But "(s)chool personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements (of disciplinary matters and MD processes), is appropriate for a child with a disability who violates a code of student conduct." (34 C.F.R. §§300.530(a)). In short, at any time the District could have acted on its knowledge of the student's thought-to-be-eligible status, engaged a MD process, and pursued special education due process to seek an interim 45-school day out-of-District placement where it felt it needed to act in the interests of the safety of the student or others.

based on the school board action of November 3rd was clearly an expulsion: "Expulsion is exclusion from school by the governing board for a period exceeding 10 school days and may be permanent expulsion from the school rolls." (22 PA Code §12.6(b)(2)).[11]

Accordingly, by engaging in a flawed manifestation determination process and pursuing a wrongful expulsion of the student, the District committed a prejudicial procedural violation of FAPE that adds another dimension to the finding that the District denied the student FAPE.

Section 504/FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).[12] The provisions of IDEA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504/Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards are, in most cases, be considered to be identical for claims of denial-of-FAPE.

[11] Any "expulsion" requires exactly the type of formal board-level hearing which took place here (22 PA Code §12.8). And the language of the School board's action itself utilizes the word "expel". (P-29).

[12] Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks.

(*See generally* P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009)).

Here, the conclusions above that the District denied the student FAPE under the terms of IDEA/Chapter 14 are adopted in finding that the student was analogously denied FAPE under the terms of Section 504/Chapter 15.

Remedy – Denial of FAPE

Compensatory Education. Where a school district has denied a student FAPE under the terms of the IDEA/Chapter 14 (and analogously under Section 504/Chapter 15—see Chambers v. School District of Philadelphia, 587 F.3d 176 (3d Cir. 2009)), compensatory education is an equitable remedy that is available to the student. Where a school district has denied FAPE to a student, the student is entitled to compensatory education from a point where the school district knew or should have known that the student was being denied FAPE, accounting for a period of time from that point for the school district to remedy the denial. (G.L. v. Ligonier Valley School Authority, 802 F.3d 601 (3d Cir. 2015), Ridgewood Board of Education v. N.E., 172 F.3d 238 (3d Cir. 1999), M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).[13]

[13] A student who is denied FAPE "is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." (M.C. at 397; cited and quoted in G.L. at 626).

Here, the District expelled the student after an inappropriate MD result. The District issued its ER nine days after the student had been expelled. The District collected work and sent it home for the student, although it made no arrangements for homebound instruction or in-home instruction.[14] Therefore, an award of compensatory education will be made accordingly.

A minimum school day for a 1st grader is five hours. (22 PA Code §11.3(a)). The District did make some effort to provide work to the student, but it left parent on her own to help the student through the work and did not provide educational services. Therefore, four compensatory education hours per school day will be awarded in recognition that the District met basic obligations to the student (i.e., supplying the work) but did not engage the student. Accordingly, the student will be awarded four hours of compensatory education for every school day from November 3, 2014 through the beginning of the District's holiday break in December 2014.

Also, with the District not providing instruction or educational services to the student, the family had to pay a private tutor to provide instruction to the student. The District must reimburse the family for documented out-of-pocket payments to the private tutor for services over the period from November 3, 2014 through the beginning of the District's holiday break in December 2014.

[14] See 34 C.F.R. §300.530(d).

Tuition Reimbursement. Long-standing case law and the explicit provisions of IDEA/Chapter 14 provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); *see also*, 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)).

A claim for tuition reimbursement for a denial of FAPE under IDEA/Chapter 14 is gauged through a three-step analysis, commonly referred to as a Burlington-Carter analysis, which has been incorporated into IDEA and Chapter 14. (34 C.F.R. §§300.148(a),(c),(d)(3)). A similar analysis will be utilized to gauge parent's claim in this case.

In the three-step Burlington-Carter analysis, the first step is an examination of whether the school district's programming has denied the student FAPE. (34 C.F.R. §300.17; Rowley; Ridgewood; M.C. v. Central Regional School District). In this case, the District has denied the student FAPE, both substantively and procedurally, as set forth above.

One factor that must be addressed is that the District issued its evaluation after the student had been expelled. There was no follow-on IEP team meeting. In defense of both parties in this regard, in November 2014 they were engaged with the expedited special education due

process hearing at 15488-1415AS. Then, in December 2014, the family began to investigate private placements for the student.

When the question is asked, 'is the student's programming appropriate', then, the answer is 'the parties never held an IEP team meeting'. In terms of remedy, does this blunt the family's claim, at step one of the Burlington-Carter analysis? On this record, the answer is that it does not blunt the claim. In short, the District reached a clearly erroneous conclusion at the MD review and then expelled the student just over two months into 1st grade, the student's first year with the District. This decision, both above and in the *Section 504/Discrimination* section below, placed the parent in an untenable position—the MD was wrong on its face, the student was expelled barely after the student's enrollment at the District had begun, and the District acted with deliberate indifference toward the student in both processes. The fact that the family chose to enroll the student in a private placement in the weeks following these events rather than work through an IEP team process is understandable. As a matter of equity, this Hearing Officer cannot consider this record and find that the District acted appropriately; an argument that there was no IEP, so the parent is frustrated at step one of the Burlington-Carter analysis is rejected. The student was denied FAPE by the District, and this legal hurdle is cleared by the family.

Having so found, as will be explained below, the parties are not in a position where their collaboration is irretrievably ruptured. The student and District, should the family remain residents of the District, will necessarily need to work together on the student's educational programming for years to come. There needs to be some working IEP document in place, and a process will be structured through the order that frames a process going forward.

When a school district program at step one is found to be inappropriate, and to have denied FAPE to a student, step two of the Burlington-Carter analysis is an examination of the appropriateness of the private placement which the parent have selected. In this case, the private placement is appropriate.

Like most private schools, the private placement which the student attends does not craft IEPs. But this is unnecessary—the question at step two of the Burlington-Carter analysis is not symmetry with a local education agency (*see* 22 PA Code §14.103) but a focus on whether or not the private placement meets the needs of the student, needs where the school district failed as established at step one of the analysis. Here, the private placement works with students, like the student in this case, that have individualized needs requiring accommodations. The entirety of the evidence related to the private placement—both the documentary evidence and, more so, the testimony of the private school witnesses—support a finding that the private placement serves the student's

behavioral needs when those needs arise. The accommodations are individualized and allow the student to focus on learning and progress academically. The private placement is appropriate at step two of the Burlington-Carter analysis.

Where a school district's program has denied FAPE to a student, and a parent's unilateral placement in a private setting provides an appropriate program, the third step of the Burlington-Carter analysis involves a balancing of the equities between the parties to see if those equities weight decidedly in the favor one party or another and, hence, might affect a potential award of tuition reimbursement. Here, the equities weigh in favor of the student and parent. While the denial-of-FAPE evidence speaks clearly to that issue, there are factors which, as set forth immediately below in the *Section 504/Discrimination* section, amount to a finding that, in certain acts and omissions, the District acted with deliberate indifference in handling certain aspects of this situation. Those findings are incorporated by reference here to support the conclusion that, at step three of the Burlington-Carter analysis, the equities favor the student and parent. Accordingly, tuition reimbursement will be awarded to the parent.

The award of tuition reimbursement, however, has contours and limits which must be explained here. Because the private placement is a parochial school with a religious element, the District cannot be required to reimburse the family for elements of the day that are geared to

religious education or practice. The record reveals that in a 35 hour school week at the private placement, 3 hours and 25 minutes per week are explicitly religious instruction or practice (religious education class, religious service, and prayer). To err on the side of caution, an additional 30 minutes per day will be accounted for because the religious milieu of the school leads to religion being a part of the school day even outside of these noted experiences. Therefore, as a matter of necessary equity related to the reimbursement which will be ordered, six hours per week of the 35-hour school week (approximately 17%) will be removed from the calculation. An order for compensatory education will be fashioned accordingly.

Section 504/Discrimination

In addition to the FAPE provisions of Section 504, its provisions also bar a school district from discriminating against a student on the basis of disability. (34 C.F.R. §104.4). A student with a disability who is otherwise qualified to participate in a school program and, as a result of that disability, has been denied access to school programming, was denied the benefits of school programming, or otherwise discriminated against, may have been discriminated against in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion School District, 729 F. 3d 248 (3d Cir. 2013); see also Chambers, *infra*.) A student who claims suffered disability discrimination in violation of the obligations of

Section 504 must show deliberate indifference on the part of the school district in the denial-of-access, denial-of-benefits, or other-discrimination. (S.H., *infra*).

Here, the District acted with deliberate indifference toward the student regarding the student's disability status. The District acted with deliberate indifference as follows:

- the inappropriate MD result in the face of clear, overwhelming evidence that the student's behavior was a manifestation of the student's ODD; and
- the District's pursuit of expulsion of the student based on a flawed MD process.

Before leaving the issue of Section 504 discrimination, there are two matters which must be explicitly addressed. First, a major thrust of the parent's disability discrimination claims involved alleged acts and omissions of the District building principal. It is an explicit conclusion that the principal did not act with deliberate indifference in his interactions with the student. Granted, one senses that the principal might approach things differently if he could. But the principal did not in any way act with deliberate indifference toward the student.

Second, an aspect of parent's Section 504 discrimination claim was an argument that due to acts and omissions of the District the student had allegedly developed post-traumatic stress disorder ("PTSD"); in-depth hearing planning centered around the issue, including the submission of

reports by parent and an opportunity to have an expert witness review those reports and potentially evaluate the student in light of those reports. The family chose not to engage in this process. At the time, the Hearing Officer was clear that this course of action might have consequences for the family's position in terms of choosing not to present evidence in pursuit of the claim which, consequently, might impact conclusions in terms of carrying the burden of proof on the issue. (P-35; NT at 847-857). The family chose not to present the evidence. Therefore, it is an explicit finding that the family affirmatively chose not to present evidence related to PTSD and has not carried its burden in terms of PTSD being a potential aspect of the Section 504 claim.

Accordingly, the order for this decision will include a declarative finding that the District was deliberately indifferent, as outlined above, to the needs of the student and discriminated against the student on the basis of disability.

Relationship Between the Parties

Even though the parties' relationship deteriorated markedly over the first few weeks of the 2014-2015 school year, this hearing officer is not convinced that the parties cannot engage in a productive relationship, built on mutual trust and respect, regarding the student's educational needs going forward. Therefore, the order will establish the student's pendent placement at the private school where the student has

attended since leaving the District. The order will contain directives to the student's IEP team, however, for continued collaborative planning for the student's education, including a potential return to the District under the terms of an appropriate IEP.

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By way of dicta, this Hearing Officer has deeply considered this record, and granular fact-finding and legal analysis are required. But here, at the end of the decision, a broader view can be taken.

The expulsion of any student from a school district is, thankfully, not a common event. When a student is thought-to-be-eligible, expulsion is a step that must be handled with extreme caution and with the safeguards for that student in mind. When that thought-to-be-eligible student is new to the school district in 1st grade with a known mental health diagnosis directly related to behavior, it is almost unthinkable that an expulsion would result, let alone eight weeks into that 1st grade year. Yet here we are. It is a singular result and record.

CONCLUSION

In the early fall of 2014, the District denied the student FAPE, both substantively and procedurally, in its handling of the manifestation determination process and in expelling the student. The student also acted with deliberate indifference to the student's status as a student

with a disability. An award of compensatory education, as well as tuition reimbursement, will be made, along with declarative findings related to disability discrimination.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District has denied the student a free appropriate public education.

The student is entitled to four hours of compensatory education for every school day from November 3, 2014 through the beginning of the District's holiday break in December 2014.

The family is entitled to reimbursement for out-of-pocket private tutoring expenses, supported by proof of payment, from November 3, 2014 through the beginning of the District's holiday break in December 2014.

The family is entitled to tuition reimbursement for 83% of out-of-pocket tuition at the private placement, supported by proof of payment, for the student's enrollment in the private placement in the 2014-2015 and 2015-2016 school years.

By acting with deliberate indifference, in the acts and omissions explicitly set forth above, the Mars Area School District has discriminated against the student on the basis of the student's disability.

Within 30 days of the date of this order, the student's IEP team shall meet to consider the student's programming needs through an IEP. The IEP team shall determine whether input, data, and other information is necessary to update the November 2014 evaluation report, and if so the form of such updated input, data, and other information. Regardless of the process in the foregoing sentence, within 60 days of the date of this order, the student's IEP team shall convene to draft an IEP for the student, for implementation in the 2016-2017 school year. Nothing in this order shall be read to limit any decision of the student's IEP team to the extent the members of the IEP team agree to proceed in some other fashion.

Until an agreed-to IEP for the student is in place, or a special education due process result speaks to the appropriateness of a disputed IEP, the student's pendent placement shall remain the private placement where the student has attended for the 2014-2015 and 2015-2016 school years. The tuition for the private placement shall be paid by the District during the duration of any such pendency.

Any claim not addressed in this decision and order is denied.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

June 21, 2016