

*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**

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**Child's Name:**

A. B.

**CLOSED HEARING**

ODR Case #20601-1718KE

**Date of Hearing:**

June 19, 2018

**Parents:**

[redacted]

Phillip A. Drumheiser, Esquire – 2202 Circle Road  
Carlisle, PA – 17013  
*Counsel for Parents*

**School District:**

Wyoming Area School District – 20 Memorial Street – Exeter, PA – 18643

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**Date of Decision:**

August 10, 2018

**Hearing Officer:**

Michael J. McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student (“student”)<sup>1</sup> is a late-teen aged student residing in the District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”) and Pennsylvania special education regulations as a student with a health impairment.<sup>2</sup>

Parent’s complaint at this file number centers on allegations in a complaint filed by the student’s parent on April 3, 2018 that the student was denied a free appropriate public education (“FAPE”) in the 2017-2018 school year from approximately November 2017, when the student enrolled in the District, through March 2018, when the student was excluded from the District as the result of a disciplinary incident allegedly involving the student. (Hearing Officer Exhibit [“HO”]-1 – *April 3<sup>rd</sup> Complaint*).

The April 3<sup>rd</sup> complaint encompassed a variety of claims. For a complete understanding of those claims, and the consequent procedural tracks that have unfolded since the filing of the complaint, the claims in the April 3<sup>rd</sup> complaint can be understood broadly as follows:

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<sup>1</sup> 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.

<sup>2</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 24 PA Code §§14.101-14.163.

1. Allegations related to procedural denial-of-FAPE in the District's handling of the manifestation determination process held by the District after the March 2018 disciplinary incident.
2. Allegations related to substantive denial-of-FAPE in the manifestation determination process in light of the finding by school-based members of the student's individualized education program ("IEP") team that the behavior underlying the disciplinary incident was not a result of the student's disability.
3. Allegations that the student was denied FAPE over the period November 2017 – March 2018 while the student attended the District.

As indicated above, the decision at this file number addresses the denial-of-FAPE allegations for the period November 2017 – March 2018 (#3 in the above list). The procedural denial-of-FAPE allegations related to the manifestation determination process have not yet been placed at issue in the context of a hearing—those claims will be heard in a separate evidentiary process which has yet to convene under a separate ODR file number (#1 in the above list).

The allegations related to the substantive result of the manifestation determination process (#2 in the list above) have two

aspects. One, the hearing at ODR file number 20467-1718 was convened first in May 2018, but no result was reached on the merits. Neither party was prepared to present evidence in that hearing process as to the disciplinary incident underlying the student's alleged involvement. (For details as to the parties' positions in that hearing, and their mutual view that the evidence as to the underlying alleged behavior would not be produced, see HO-2 – *Decision at ODR file number 20467-1718*). Two, based on the decision of the District's school board thereafter to move forward in June 2018 with a formal hearing under 22 PA Code §12.8(b) and expulsion of the student, the District recommended that the student's educational placement be changed. The appropriateness of the District's proposed placement for the 2018-2019 school year is at issue at ODR file number 20828-1718. Evidentiary sessions were held on July 26, 2018 and August 8, 2018, and a decision is pending at that ODR file number regarding the appropriateness of the District's proposed placement of the student in light of expulsion from the District.

Therefore, the decision at this file number is one of a series of decisions— one already issued, one pending, and one yet to be convened— involving the student as the claims brought forward in the April 3<sup>rd</sup> complaint required different approaches (and involved different resolution timelines) as the claims encompassed retrospective,

contemporaneous, and forward-looking issues regarding the provision of FAPE across various educational placements.<sup>3</sup>

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

### **ISSUE**

Did the District meet its obligation to provide FAPE to the student over the period November 2017 – March 2018?

### **FINDINGS OF FACT**

#### 2015-2016 / 8<sup>th</sup> Grade

1. Based on District enrollment records, the student attended the District in the 2015-2016 school year, the student's 8<sup>th</sup> grade year. (School District Exhibit ["S"]-2).
2. In the midst of the 2015-2016 school year, the student withdrew from the District and began to attend a nearby school district. (Parent's Exhibit ["P"]-4; S-3).

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<sup>3</sup> In the morning of the June 19<sup>h</sup> hearing session, the District, through counsel, produced a letter from Luzerne County Office of Children & Youth Services ("CYS"), signed by a caseworker. It was dated June 15, 2018 and addressed "To whom it may concern". The letter indicated that the student was in the custody of CYS and that the student's grandmother had been appointed as an emergency caregiver. The letter indicated that the student's grandmother had authority to make educational decisions. The District declined to place on the record how it came into possession of the letter. To confirm that the educational decision-making authority of the student's mother had not been removed or limited by court order, the undersigned hearing officer, in the presence of counsel, contacted the caseworker by phone to ascertain the status of educational decision-making by the student's mother. The individual did not answer the telephone, and the hearing officer left a voicemail message with pertinent details and a request to return the call immediately. Over the course of the hearing day, there was no return call to the hearing officer. Given this, however, at the outset of the hearing, the hearing officer took the testimony of the student's mother, confirming that her educational decision-making authority had not been removed or limited by any court. (HO-3; Notes of Testimony ["NT"] at 6-30).

2016-2017 / 9<sup>th</sup> Grade

3. The student attended the nearby school district in the 2016-2017 school year, the student's 9<sup>th</sup> grade year. (P-4; S-3).
4. In the fall of 2016, the nearby school district evaluated the student for eligibility for special education. The evaluation was requested by the school district given concerns about the student's academic performance ("unsatisfactory or below average performance") in most academic areas. Concerns were also noted in terms of frequent absences and lack of assignment/project completion. (P-4; S-3).
5. In December 2016, the nearby school district issued an evaluation report ("ER"). (P-4; S-3).
6. The December 2016 ER included parental input. The parent reported that the student did not have difficulty with peer or adult relationships. The parent reported that the student's challenges included attention, impulsivity, immaturity, stubbornness, and potentially engaging in dangerous behavior. The parent reported that the student viewed school negatively. (P-4; S-3).
7. The December 2016 ER included input from the student's teachers. The teachers noted that the student had many strengths (including, among other qualities, being cooperative, courteous, and well-mannered, having good peer and adult relationships, and exhibiting good reasoning and communication skills). The teachers noted that the student might require support in certain areas (including, among other areas, declining grades which did not reflect the student's potential, being unprepared, and poor task-approach skills/work habits). (P-4; S-3).
8. An observation of the student in the classroom environment, and further teacher input, indicated that the student exhibited appropriate classroom behavior. The largest challenge, one teacher reflected, was not the student's intellectual ability or achievement but, instead, was work completion, attention, and focus. (P-4; S-3).
9. The December 2016 ER indicated that the student's poor school attendance and unsettled home life were factors potentially impacting on poor school performance. (P-4; S-3).
10. Intellectual testing in the December 2016 ER indicated that the student had an IQ of 113, in the high average range.

Achievement testing indicated scores consistently and solidly in the average range across all domains. (P-4; S-3).

11. There was some indication in the December 2016 ER from testing for attention-related challenges that the student may have issues related to sustaining attention, but overall scores on this assessment fell in the average range. (P-4; S-3).
12. The December 2016 ER contained testing for attention deficit hyperactivity disorder (“ADHD”). Parent’s scales indicated very elevated scores for inattention, hyperactivity/impulsivity, and executive functioning, and an elevated score for defiance/aggression. In terms of psychological diagnoses symptom scales, parent’s scales indicated very elevated scores for ADHD/inattentive-type, ADHD/hyperactive-impulsive-type, and oppositional defiant disorder. One teacher’s scales indicated a very elevated score in executive functioning and an elevated score in defiance/aggression and, in terms of the diagnoses symptom scales, a very elevated score for ADHD/inattentive-type. A second teacher’s scales indicated a very elevated score in peer relations and an elevated score in executive functioning and, in terms of the diagnoses symptom scales, a very elevated score in oppositional defiant disorder. (P-4; S-3).
13. Testing for executive functioning in the December 2016 ER revealed elevated scores in all domains on the parents’ scales. Both teachers’ scales were more moderated, although both consistently noted areas of concern in task initiation, planning/organizing, and self-monitoring behavior. (P-4; S-3).
14. The December 2016 ER found that the student was eligible for special education as a student with a health impairment and recommended that the student’s IEP team consider supports for organization, task-initiation, and task-completion. (P-4; S-3).
15. In January 2017, the student’s IEP team in the nearby school district met to craft the student’s IEP. (P-5).
16. The January 2017 IEP was in place at the nearby school district through the end of the 2017-2018 school year. (P-5, P-6).

2017-2018 / 10<sup>th</sup> Grade

17. At the beginning of the 2017-2018 school year, the student's 10<sup>th</sup> grade year, the student continued to attend the nearby school district. (P-5, P-6).
18. The January 2017 IEP governed the student's educational programming at the nearby school district. (P-5).
19. In November 2017, the student enrolled in the District. (S-2).
20. Upon enrollment, the District utilized its intake procedures for a new student, reviewing the most recent ER and current IEP to see if that IEP can be implemented for a 30-day period while the District develops its own IEP. The District determined that it could implement the January 2017 IEP from the nearby school district. (P-8, P-15; S-8; NT at 50-54).
21. The District issued a notice of recommended educational placement ("NOREP") to accomplish this, and the parent approved the NOREP. (P-8).
22. In December 2017, the District developed its own IEP. (P-9).
23. The District's December 2017 IEP identified the student's needs as: grades not consistent with potential, poor study habits, poor organizational skills, and coming to class unprepared. (P-9).
24. The teacher input in the December 2017 IEP from District teachers indicated that the student was missing classes and had very poor grades due to non-completion of assignments. (P-9).
25. Even at the time of the December 2017 IEP, the student was often absent from, or tardy to, school. The District noted the absences in the December 2017 IEP and non-attendance protocols were initiated by the District. (P-9, P-12, P-15; S-8).
26. The December 2017 IEP contained two goals, one for the student to come to school daily and arrive by 8:45 AM each day, and one in math problem-solving. (P-9).
27. The December 2017 IEP contained program modifications and specially designed instruction as follows: Study guides in various classes ahead of tests/assessments, preferential seating, class notes upon request, cuing, extended time on tests, access to



- the resource room for test-taking and review of class material. (P-9).
28. There were no related services provided to the student through the December 2017 IEP. (P-9).
  29. Through the December 2017 IEP, the student received all classes, lunch, and physical education in the regular education setting with non-disabled peers, with the exception of time when the student might access the resource room. The student's educational environment calculation indicated that the student would spend 96% of the school day in regular education (6.50 out of 6.75 hours each school day). (P-9).
  30. The District issued a notice of recommended educational placement ("NOREP"), and parent approved the recommendation. (P-11; S-7).
  31. The student's absences continued and, in January 2018, the District notified the student's parent about the potential legal consequences of continuing absences. (P-26).
  32. In February 2018, a District school counselor contacted the parent, informing her that, based on second quarter grades, the student was failing various classes. (P-14).
  33. In February 2018, the student's parent met with various District employees regarding the student's failing academics. The District placed the student in learning support classes for English and mathematics. The student's IEP was not revised substantively to reflect the change nor was a NOREP issued to reflect the increased special education services. (P-22; NT at 157-166, 176-201).
  34. Two of the student's classes transitioned from regular education setting to a special education setting (learning support) but the student's educational environment calculation indicated that the student would continue to spend 96% of the school day in regular education. (P-9, P-22; NT at 176-201).
  35. The student's special education case manager testified that the District does not issue a NOREP when the level of support in a student's program (itinerant – less than 20% of the school day in special education, supplemental – 20-80% of the school day in special education, full-time – more than 80% of the school day in special education) does not change. (NT at 199-201).

36. In mid-March 2018, the disciplinary incident led to Student's exclusion from school thereafter. (HO-2).
37. The student's parent and grandparent were engaged and cooperative in attempting to work with the District to address the student's educational needs. (P-8, P-10, P-11, S-7, S-8; NT at 159-162, 181-182, 192-196).
38. In preparing this decision, all exhibits of record were reviewed and all testimony weighed. Lack of citation to any particular exhibit or page(s) of transcript does not mean that such evidence was not considered.

### **DISCUSSION AND CONCLUSION OF LAW**

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.163)). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her needs (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (Andrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

Moreover, both federal and Pennsylvania law require that the placement of a student with a disability be in the least restrictive requirement (“LRE”). Educating a student in the LRE requires that placement of a student with disabilities be supported, to the maximum extent appropriate, in an educational setting which affords exposure to non-disabled peers and regular education and that “separate schooling...occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” (34 C.F.R. §300.114(a)(2) and, generally, 34 C.F.R. §§300.114-120 ; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)).

Here, the District’s December 2017 IEP was appropriate, and the District was addressing the student’s needs. In February 2018, however, the District materially changed the student’s placement by moving the student out of the regular education environment and into a special education environment for two periods (English and mathematics). This more restrictive placement was not documented in the IEP or processed through a NOREP. The result was that the student was receiving markedly more special education support in a special education setting without any substantive documentation or reflection of that change in placement.

Most importantly, however, the record does not support that this more restrictive placement was appropriate. The student clearly struggles

with school attendance and assignment-completion. Academic concerns, both in the nearby school district and in the District, were rooted in the student not preparing and turning in work—there was no indication that the student had learning difficulties. Even the math problem-solving goal in the December 2017 IEP was the result of curriculum-based assessment in the District, not any specified learning disability or identified need in mathematics. The need to place the student in learning support classes for English and mathematics isn't supported by the record and was an overly restrictive change in the student's placement.

The District's position, through the testimony of the special education teacher, that the level of support did not change and, thus, explicit documentation of the substantive change in the student's placement in the IEP, or notice of the change through the issuance of a NOREP, must be rejected.

First, comparing the December 2017 IEP (P-9) to the IEP that documented the meeting which led to the change in placement as a result of the February 2018 meeting (P-22),<sup>4</sup> nothing would indicate that the student's daily schedule was changed and that the student was now attending two periods of special education, compared to an entirely regular education placement with minimal support. And that is perhaps the best way to conceive of the significant change in placement the

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<sup>4</sup> And contrary to what District counsel tried to establish through cross-examination of the special education teacher, the IEP that resulted from the February 2018 meeting documents only the meeting itself, not the substantive change in placement. (P-22 at page 2; NT at 199-200).

District undertook—under the terms of the December 2017 IEP, the student was in regular education with occasional test-taking and assignment checking; after the February 2018 change in placement, the student was in a special education classroom for two periods per day. That is a material change in the student’s special education programming—a change in placement to a markedly more restrictive placement.

Second, to adopt the District’s position would be to deliver over to an arithmetic calculation the handling of the substance of the driving document of a student’s special education program (the IEP) and/or the mandatory prior written notice to parents (the NOREP) before changing a student’s placement. That is untenable under the nature and purposes of the IDEIA.<sup>5</sup>

Also, it must be pointed out that the District’s handling of the change in placement is not merely procedural. A procedural violation of IDEIA is not, in and of itself, grounds for a finding of a denial-of-FAPE. A procedural violation of IDEIA may be grounds for a finding of denial-of-FAPE only where the procedural violation impeded the student’s right to FAPE, or significantly impeded a parent’s right to participate in educational decision-making, or caused a deprivation of educational benefit. (34 C.F.R. §300.513(a)(2)). The District’s actions here are not

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<sup>5</sup> Here, the District cannot even assert that as a matter of fact, as the arithmetic re-calculation of the reduced time the student would spend in regular education was not included in the IEP. (P-9 at page 26, P-22 at page 26).

merely procedural—the student’s school day was changed, the student attended different classes, and those classes were special education classes not regular education classes. The student’s placement was inappropriately and substantively changed to a more restrictive placement.

Accordingly, the student will be awarded compensatory education as the result of a substantive denial-of-FAPE by moving the student to a more restrictive placement.

#### Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The award of compensatory education accrues from a point where a school district knows, or should have known, that a student was being denied FAPE, accounting for a reasonable rectification period to remedy the proven denial-of-FAPE. (Ridgewood; M.C.).

In this case, the District should have known even at the time that it inappropriately changed the student’s placement that the more restrictive placement was inappropriate. The February 2018 meeting took place on February 5<sup>th</sup>. Approximately six weeks later, in mid-March 2018, the student was excluded from school based on the disciplinary

incident. Therefore, the student was not in the inappropriately restrictive placement for an extensive period of time. This impacts the equities of the compensatory education award. Accordingly, as a matter of equitable remedy, the student is awarded 50 hours of compensatory education for the approximately six weeks that the student was in an inappropriately restrictive placement.

As for the nature of the compensatory education award, the parent may decide in her sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and otherwise as to any use of the compensatory education hours.

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### **ORDER**

In accord with the foregoing, the School District denied the student a free appropriate public education over the period of approximately

February through mid-March 2018 by inappropriately changing the student's placement to a more restrictive educational environment. The student is awarded 50 hours of compensatory education.

*Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

August 10, 2018