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 Due Process Hearing Officer

Final Decision and Order
ODR Nos. 20584-17-18 & 20839-17-18 (consolidated)

CLOSED HEARING

Child's Name:
R. D.

Date of Birth:
[redacted]

Parent:
[redacted]

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Hearing Officer:
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Date of Decision:
01/04/2019

Introduction

This matter concerns the educational rights of a child with disabilities (the Student).[1] The Student's parent (the Parent) and the Student's Local Educational Agency (the District) are at impasse on several issues, all of which are addressed below. Their most pressing dispute is about the Student's placement following an incident in April 2018, in which the Student threatened a school shooting. The District has offered a specialized placement and the Parent claims that placement is too restrictive.

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*., Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*., and their federal and state implementing regulations.

For reasons discussed below, I find in favor of the Parent on some issues and the District on others.

Procedural History

On April 23, 2018, the Parent initiated these proceedings by filing a due process complaint against the District with the Office for Dispute Resolution (ODR). The Parent was *pro se* at that time, but ultimately retained counsel. The Parent's complaint was assigned to me and proceeded under ODR No. 20584-1718AS.[2]

On June 25, 2018, the District filed a counter-claim; technically its own due process complaint. The District's complaint was assigned to me and proceeded under ODR No. 20893-1718AS. I consolidated the matters.

On July 30, 2018, the Parent filed an amended complaint.

Multiple scheduling motions were made and granted. The parties presented evidence comprehensively but efficiently over two hearing sessions. The parties then submitted post-hearing briefs in lieu of oral closing statements on December 21, 2018.

Issues

The following issues were presented in the Parent's amended complaint:

1. Did the District deny the Student a FAPE between December 21, 2017 and June 15, 2018?

2. Did the District wrongly determine that the Student did not qualify for Extended School Year for the summer of 2018?

3. Did the District fail to follow the steps outlined in *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993) when proposing the more restrictive placement for the Student?

4. Did the District discriminate against the Student with deliberate indifference in violation of Section 504?

[1] Except for the cover page, identifying information is omitted from this decision to the extent possible.
[2] The Parent also filed a due process complaint concerning the Student's sibling on July 16, 2018. That matter was assigned to another hearing officer, and is reported at ODR No. 20972-1819AS.

For remedies, the Parent demands compensatory education from December 21, 2017 through June 15, 2018, additional compensatory education for the period during which the Student should have received ESY services in the summer of 2018, and declarations that the District's offered placement is inappropriate and that the District discriminated against the Student with deliberate indifference.

The following issue was presented in the District's due process complaint: Is the District's placement offer appropriate for the Student?

For remedies, the District demands an order putting the Student into its offered placement.

Findings of Fact

I commend the attorneys for both parties for their efficient presentations. I have carefully reviewed all of the evidence and both parties' post-hearing briefs, but make finding only as necessary to resolve the issues before me. Consequently, not all evidence entered into the record is cited below. Frankly, there is very little disagreement between the parties as to the underlying facts (what happened and when). Rather, the parties interpret the facts differently and come to different conclusions about what the law requires.

I find as follows:

Background

1. There is no dispute that the Student is a "child with a disability" as defined by the IDEA. The Student qualifies for special education as a child with an Other Health Impairment (OHI) resulting from Attention Deficit Hyperactivity Disorder (ADHD). *See, e.g.* P-1, NT 115.

2. The 2016-17 school year was the Student's 6th grade year.

3. During 6th grade, the Student exhibited aggressive behaviors such as hitting and kicking others, knocking items to the floor, grabbing, pushing, and fighting. *See, e.g.* S-23.

4. During 6th grade, the District provided a Personal Care Assistant (PCA) to help in class, but the Student would still get in trouble in unstructured settings. NT 91-92; P-2.

5. On March 21, 2017, the Student's IEP team convened and drafted an annual Individualized Education Program (IEP) for the Student. The District proposed an IEP that included a positive behavior support plan (PBSP), which contemplated increased support from the PCA.[3] The proposed IEP also called for increased data collection to better understand the level and type of paraprofessional support that the Student required. P-2.

6. The IEP called for the Student to receive 18 group social work sessions, 30 minutes per session, over the term of the IEP, as well as one, 15 minute individual session with a guidance counselor per month. P-2.

The 2017-18 School Year (7th Grade)

[3] The PBSP was developed by a contracted behavior specialist, not by a District employee. For purposes of this decision, that distinction makes no difference.

7. Around the start of the 2017-18 school year, the Parent objected to PCA support and requested removal of that service. The District acquiesced, removed PCA support, and re-wrote the PBSP. P-2. The IEP documents this as a "Parent decision." P-2 at 32. As a result, the Student started 7th grade without PCA support.

8. There is no dispute that the Student's behaviors progressively worsened during the 2017-18 school year. *See e.g.* P-16, S-34.

9. On October 31, 2017, the Parent and the District agreed to reinstate one-to-one (1:1) paraprofessional support to escort the Student to and from classes, the bathroom, and the bus in the morning and afternoon. P-2 at 33.

10. The District conducted a new Functional Behavioral Assessment (FBA), which was completed on December 7, 2017. The FBA identified attention and escape as the functions of the Student's behaviors, and included a list of recommendations for the PBSP. P-14.

11. On December 20, 2017, the Student's IEP team met to review the FBA. The Parent and the District agreed to extend 1:1 paraprofessional support in classes as well. From this point forward, the Student received 1:1 paraprofessional support throughout the school day. P-2 at 33. No other substantive changes were made to the Student's IEP. P-2.

12. Despite the addition of full-time 1:1 support, the Student's behaviors did not improve and the Student regressed dramatically in progress towards IEP goals (88% to 37% on one and 71% to 35% on another). P-16, S-23. Regarding the regression, progress monitoring was based on the Student's self-reporting until the full-time PCA was put in place. The District attributes the sudden regression to an equally sudden improvement in the accuracy of the reports.

13. By February 2018, the Student's special education teacher felt that the Student was "a different kid." NT 91, 95.

14. The District retained a board-certified child and adolescent psychiatrist to evaluate the Student. The presenting problems were concerns about impulsivity, executive functioning, and ongoing behavioral problems. The psychiatrist reviewed records, evaluated the Student, met with the Parent, and had school personnel and the Parent complete rating scales. The psychiatrist then drafted a Diagnostic Psychiatric Evaluation Report (the Psychiatric Report). S-24.

15. The Psychiatric Report is not dated, but the parties agree that it was issued in March 2018, sometime after March 16, 2018. *See* S-24. The Psychiatric Report confirmed the ADHD diagnosis and made medical recommendations concerning medication, vitamins, sleep hygiene (the quality and consistency of sleep), and family therapy. S-24. The Psychiatric Report included no recommendations for educational placement or services. *Id*.

16. On March 15, 2018, the IEP team met again to review the Student's IEP. Teachers continued to express concerns about the Student's disruptive behavior, negative peer interactions, weak social problem-solving skills, and seeking attention through misbehavior. No changes were made to the PBSP or SDI sections of the IEP. S-23.

17. Regarding social skills instruction, the March 15, 2018 IEP substantively continued the same program that had been in place since the prior IEP. The Student and Guidance Counselor conducted "social autopsies" following behavioral incidents as a way to debrief and strategize about how to prevent similar behaviors in the future. *See, e.g.* P-2. There is no evidence that this reactive approach, in

conjunction with a modest amount of school-based counseling, yielded any benefit to the Student. *See* P-16.

18. On April 5, 2018, the Student threatened a school shooting. The Student made the threat to the paraprofessional during a writing assignment.

    a. The assignment was to write an argumentative letter. The Paraprofessional sat with the Student as the Student typed. S-26

    b. While typing, the Student complained about being hungry. The Paraprofessional replied that it was not yet lunchtime, but agreed that the Student could eat something after part of the assignment was complete. S-26

    c. After typing the letter, the assignment called for the Student to read the letter aloud. The Student read to the Paraprofessional. The letter was written to the federal government, and argued in favor of eliminating History as a subject in school. The Student's reason for removing history was that Students would not learn about negative aspects of United States history. S-26

    d. The Student's letter referenced the school shootings at Sandy Hook Elementary School in Newtown, Connecticut, and Marjory Stoneman Douglas High School in Parkland, Florida.[4] The Student's argument was that learning about past school shootings could inspire future school shootings. S-26, P-22.

    e. The Student's letter also referenced a book the class read that described the Ku Klux Klan in a historical context, and learning the history of slavery in the United States. The Student's argument was that this instruction could be offensive to the Student's African American peers.[5] P-22.

    f. The Student's letter also referenced the western expansion of the United States and the invention of the lightbulb. The Student's argument was that these aspects of history are irrelevant to modern life. P-22.

    g. The validity of the Student's position notwithstanding, the Student's letter complied with the assignment, and the Paraprofessional told the Student that the Student did well. S-26.

    h. After the Parkland shooting, District personnel received training on how to respond when children referenced school shootings in school. Based on that training, the Paraprofessional asked if the Student felt safe in school. This started a series of exchanges between the Student and the Paraprofessional. The Paraprofessional's series of replies were guided by the District's training. *See* NT 229.

    i. The Paraprofessional documented the exchange in writing the same day. There is no dispute that the Paraprofessional's documentation accurately captures the exchange, including direct quotations from the Student.

[4] A school shooting happened at Sandy Hook Elementary School, killing 20 children between six and seven years old and six adult staff members on December 14, 2012. Another school shooting happened at Marjory Stoneman Douglas High School, killing seventeen students and staff members and injuring seventeen others on February 18, 2018.

[5] The Student wrote that a teacher used an offensive slur while teaching about slavery. There is no evidence to support this contention. *See* P-22.

j. In response to the Paraprofessional's question about the Student feeling safe, the Student replied yes, but that the students in Parkland also thought they were safe. S-26.

k. The Student went on to say that everyone has guns or access to guns. In response, the Paraprofessional said that the school was fortunate to have a School Resource Officer (SRO) to keep the school safe. S-26.

l. In response to the Paraprofessional's remarks about the SRO, the Student shifted to the first person and said, "I will shoot [the SRO] through the head." S-26.

m. The Paraprofessional replied that the school practices lockdown drills. The Student replied that the Student would "bring a pick axe, smash through the glass on the doors, and shoot all the kids and teachers inside." S-26

n. The Paraprofessional pointed out that the school is only a block away from a police station. The Student replied, "They'll never get here in time." S-26.

19. The Paraprofessional reported the incident to the District and the SRO. S-26.

20. April 5, 2018, was a Thursday. Following the incident, the District contacted the Parent and the Student's grandparent. The Student and Grandparent met with the School Principal in the morning of Friday, April 6, 2018. During the meeting, the Student denied making the statements, and explained that someone could shoot the SRO in the head, but not necessarily the Student. S-28.

21. During the April 6, 2018 meeting, the School Principal requested that the Grandparent immediately take the Student to a local mental health center for an emergency evaluation. The Grandparent complied. S-28.[6]

22. Later on April 6, 2018, the Grandparent, School Principal, the District's Director of Pupil Personnel, the BCBA who wrote the Student's PBSP, and the Psychiatrist who drafted the Psychiatric Report spoke by phone and scheduled a meeting for the morning of Monday, April 9, 2018. S-28

23. On April 9, 2018, the Parent, Grandparent, and the District met to discuss the Psychiatric Report and the threatened school shooting. *See, e.g.* NT 100. The District agreed to fund an independent educational evaluation (IEE) of the Student.[7] The Parent and District agreed to an independent, doctoral level psychologist to conduct the report. The IEE resulted in a Neuropsychological Evaluation Report dated May 18, 2018, discussed below. S-30.

24. During the meeting on April 9, 2018, the Parent and District discussed the possible need for an alternative placement for the Student. The Parent and Grandparent became upset, and ended the meeting by leaving the school building. S-28.

25. Also on April 9, 2018, the Student returned to school with a note from the mental health center. According to the note, at the time of the evaluation, the Student was not a danger to self or others. S-28.

[6] Although the Student went to the mental health center, the Student was already scheduled for an all-day, in-school detention on Friday, April 6, 2018, resulting from an unrelated incident (destruction of school property). S-25.

[7] There is some ambiguity in the record about when the IEE was agreed to. The Neuropsychological Evaluation Report includes in-school observations of the Student from earlier in the school year.

26. When the Student returned to school, the District placed the Student on a three-day suspension from April 9, 2018 through April 11, 2018. S-27.

27. The Student returned to school on Thursday, April 12, 2018. On April 12, the Student told other students that that there would be no discipline because the Student had an IEP. S-28. The Student also attended school on Friday, April 13, 2018, without incident.

28. On Monday, April 16, 2018, the Parent and Grandparent met with the District's Superintendent and Assistant Superintendent. During the meeting, the Student's suspension was reinstated and extended for another four days. S-28.

29. On April 19, 2018, the District conducted a manifestation determination because the reinstated/extended suspension resulted in 10 cumulative days of suspension for the 2017-18 school year.[8] S-28.

30. The District determined that the Student's behavior (threatening a school shooting) was not a manifestation of the Student's disability. S-28.

31. On April 21, 2018, the District issued a Notice of Recommended Educational Placement (NOREP), proposing to continue the Student's program, but change the Student's placement to a full-time emotional support program run by the Intermediate Unit in which the District is located (the IU Placement). S-29; NT 113-115.

32. There is some evidence that the District also offered instruction in the home (sending a tutor to the Student at home) as an alternative. NT 172-173. Even if instruction in the home was discussed, there is no evidence that the District ever formally offered instruction in the home. There is, however, strong evidence that the Parent would have rejected instruction in the home. *Id.*

33. The IU Placement is not located in the Student's neighborhood school. The IU Placement provides academic instruction similar to what the Student received from the District, but in a specialized setting with a full-time, on-site behavioral specialist and a crisis team. NT 155-156.

34. On April 24, 2018, the Parent, Grandparent, Student, and District personnel met at the IU Placement for an intake meeting. NT 178. The IU Placement offered admission to the Student. NT 150.

35. On April 29, 2018, the Parent rejected the NOREP. S-29.

36. On May 18, 2018, the Independent Psychologist completed the Neuropsychological Evaluation. The report was comprehensive, including a review of existing data, observations of the Student, standardized assessments of intelligence, academic performance, executive functioning, behavior, emotional functioning, and adaptive skills. S-30.

37. The Independent Psychologist noted that she received and reviewed the writeup of the April 5, 2018 incident, as well as the letter that the Student wrote, but that those documents were not available when the report was written. She recommended consideration of those documents when reviewing the neuropsychological evaluation report. S-30 at 4.

[8] Typically, special education disciplinary protections require manifestation determinations when a child is removed for more than 10 consecutive days or 15 cumulative days.

38. The Independent Psychologist confirmed the ADHD diagnosis and also found that the Student met diagnostic criteria for Unspecified Disruptive Impulse-Control and Conduct Disorder. S-30 at 16.

39. The Independent Psychologist made several recommendations, some related to the academic environment and some related to home. The school-based recommendations included:

    a. Direct specially designed instruction (SDI) for academics, executive functioning, social skills, and positive behavior support. The Independent Psychologist recommended provision of this SDI through a "high level of structure, classroom modifications, hands-on/multi-sensory teaching, individualized 1:1 instruction/mentoring (and PCA) as needed, close teaching supervision/monitoring, low student-teacher ratios, … and self monitoring practice." S-30 at 16.

    b. "[Student] requires a higher level of emotional support, supervision, positive behavior programming and crisis intervention. [Student] is clearly at risk for additional behavioral problems and associated disciplinary measures; [Student] is also at risk for residential placement or possible psychiatric hospitalization." S-30 at 16.

    c. Direct instruction in study skills, organization, self-monitoring, and executive control. The Independent Psychologist gave several examples of how such instruction can be provided. S-30 at 16.

    d. Frequent behavioral data collection. S-30 at 16.

    e. Instruction in paragraph-writing skills. S-30 at 16-17

    f. An assistive technology evaluation. S-30 at 17

    g. Review of math skills (not due to a math learning disability, but rather due to the Student's ability to focus in math without some supports). S-30 at 17

    h. Small group social language instruction. S-30 at 17.

    i. Strategies for positive coping and frustration reduction. S-30 at 17.

    j. A comprehensive, individualized transition plan. S-30 at 17.

    k. Accommodations for all tests and assignments, teacher copies of notes, preferential seating, use of a calculator, hands on teaching, and chunking new information. S-30 at 17-18.

40. Friday, April 13, 2018 was the Student's last day in school for the remainder of the 2017-18 school year. *See, e.g.* NT 176-177. The last day of the 2017-18 school year was June 15, 2018. During this time, the District took no action in regard to the Student's education and did not pursue truancy charges. *See* NT 177.

41. As described above, the Parent initiated these proceedings on April 23, 2018.

Extended School Year (ESY) 2018

42. The District found that the Student qualified for ESY in the previous summer, the summer of 2017. The purpose of ESY for the Student was to "maintain positive social and behavioral goals, without the use of a PCA." P-2 at 34.[9]

43. During an IEP team meeting on March 13, 2018, the District found that the Student did not qualify for ESY in the summer of 2018. *See, e.g.* S-23 at 43.

44. The Parent sent a letter to the District on March 22, 2018, requesting ESY in the summer of 2018. The District received the letter on March 26, 2018, and did not reply. P-19.

The 2018-19 School Year (8th Grade)

45. The Student returned to the District at the start of the 2018-19 school year under the March 13, 2018 IEP pursuant to a pendency agreement.

46. The March 13, 2018 IEP is substantively similar to prior IEPs. It continues the full time, 1:1 paraprofessional support, and includes modest increases in support from the guidance counselor and meetings with an emotional support teacher. S-23.

47. From August 31, 2018 through September 18, 2018, the Student received four disciplinary referrals, two of which were for assaulting other students, and one of which was for using sexually and racially inappropriate language in the cafeteria. S-34.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

All witnesses testified credibly. Again, the underlying facts are not truly in dispute. To the small extent that testimony between witnesses was contradictory in any way, the witnesses were giving their honest opinions and recollections.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392

[9] A box on the IEP at P-2 is checked to indicate that the Student was not eligible for ESY in the summer of 2017. That box was checked in error.

(3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent the party seeking relief and must bear the burden of persuasion.

In this case, the Parent must bear the burden for the issues that the Parent raised and the District must bear the burden for the issue that the District raised.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. § 1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'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). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Historically the Third Circuit has interpreted Rowley to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

LEAs are not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). S*ee also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimus" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-

level work. *Id*. Education, however, encompasses much more than academics — as is clearly evident in this case.

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Least Restrictive Environment (LRE)

The IDEA requires LEAs to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a). That continuum must include "instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(b)(1); see also 34 C.F.R. § 300.99(a)(1)(i). LEAs must place students with disabilities in the least restrictive environment in which each student can receive FAPE. See 34 C.F.R. § 300.114. Generally, restrictiveness is measured by the extent to which a student with a disability is educated with children who do not have disabilities. *See id*.

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), the Third Circuit held that LEAs must determine whether a student can receive a FAPE by adding supplementary aids and services to less restrictive placements. If a student cannot receive a FAPE in a less restrictive placement, the LEA may offer a more restrictive placement. Even then, the LEA must ensure that the student has as much access to non-disabled peers as possible. *Id* at 1215-1218.

More specifically, the court articulated three factors to consider when judging the appropriateness of a restorative placement offer:

"First, the court should look at the steps that the school has taken to try to include the child in a regular classroom." Here, the court or hearing officer should consider what supplementary aids and services were already tried. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216 (3d Cir. 1993)

"A second factor courts should consider in determining whether a child with disabilities can be included in a regular classroom is the comparison between the educational benefits the child will receive in a regular classroom (with supplementary aids and services) and the benefits the child will receive in the segregated, special education classroom. The court will have to rely heavily in this regard on the testimony of educational experts." The court cautioned, however, that the expectation of a child making grater progress in a segregated classroom is not determinative. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216-1217 (3d Cir. 1993).

"A third factor the court should consider in determining whether a child with disabilities can be educated satisfactorily in a regular classroom is the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom." The court explained that a child's disruptive behavior may have such a negative impact upon the learning of others that removal is warranted. Moreover, the court reasoned that disruptive behaviors also impact upon the child's own learning. Even so, the court again cautioned that this factor is directly related to the provision of supplementary aids and services. In essence, the court instructs that hearing officers must consider what the LEA did or did not do (or could or could not do) to curb the child's behavior in less restrictive environments. *Oberti v. Bd. of Educ*., 995 F.2d 1204, 1217 (3d Cir. 1993)

There is no tension between the FAPE and LRE mandates. There may be a multitude of potentially appropriate placements for any student. The IDEA requires LEAs to place students in the least restrictive of all potentially appropriate placements. There is no requirement for an LEA to place a student into an

inappropriate placement simply because it is less restrictive. However, LEAs must consider whether a less restrictive but inappropriate placement can be rendered appropriate through the provision of supplementary aids and services.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting Reid and explaining that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila*., Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.,*

438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist*., 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Extended School Year (ESY)

Pennsylvania regulations establish seven factors that IEP teams must consider when making an ESY eligibility determination. 22 Pa Code § 14.132(a)(2)(i)-(vii). This is an enhancement of federal ESY regulations at 34 CFR § 300.106. The factors are:

1. Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

2. Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

3. Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

4. The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

5. The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

6. The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

7. Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, [intellectual disability],[10] degenerative impairments with mental involvement and severe multiple disabilities.

[10] Pennsylvania regulations have not yet caught up to their federal counterparts in removing and replacing pejorative terms for Intellectual Disability.

Section 504

In Pennsylvania, Section 504 is implemented in schools through 22 Pa. Code § 15 (Chapter 15).

Before addressing LEAs' obligations under Section 504, I note that LEAs may completely discharge their duties to Students under Section 504 through compliance with the IDEA. Consequently, when a Student is IDEA-eligible, and the District satisfies its obligations under the IDEA, no further analysis is necessary to conclude that Section 504 is also satisfied. Conversely, all students who are IDEA-eligible are protected from discrimination and have access to school programming in all of the ways that Section 504 ensures.

"Eligibility" under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504. Section 504 protects "handicapped persons," and that term is defined at 34 CFR § 104.3(j)(1):

> Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

The definition is more specific in Chapter 15, which defines a "protected handicapped student" as a student who:

1. Is of an age at which public education is offered in that school district; and

2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and

3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

Chapter 15 goes on to delineate the substantive and procedural protections that LEAs must provide to protected handicapped students who are not IDEA eligible. In this case, both parties agree that the Student is IDEA eligible, and so those provisions are not applicable.

In this context, there is some question as to whether ODR hearing officers have authority to decide Section 504 intentional discrimination claims. ODR hearing officers have no direct authority to hear claims arising under Section 504 itself. Rather, ODR hearing officers have authority to hear claims arising under Chapter 15. For example, if a child is a protected handicapped student but not IDEA-eligible, an ODR hearing officer can resolve disputes concerning the child's Service Agreement (the plan through which regular education accommodations are provided to ensure access to the curriculum).

Having considered the issue, other Hearing Officers have concluded that ODR hearing officers have authority to hear intentional discrimination claims arising under Section 504. *See e.g. C.L. v. Mars Area Sch. Dist.*, ODR No. 16696 (2016); *C.B. v. Boyertown Area Sch. Dist.*, ODR No. 16749 (2016); *J.C. v. Greensburg Salem Sch. Dist.*, ODR 19230-1617AS (2018). There is support for this conclusion in Chapter 15 itself, which is intended to ensure complacence with Section 504. *See, e.g.* 22 Pa. Code § 15.1, relating to 34 C.F.R. Part 104. I reach the same conclusion as my colleagues.

Intentional discrimination under Section 504 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). However, "deliberate choice, rather than negligence or bureaucratic inaction" is necessary to support such a claim. *Id.* at 263.

The knowledge element was absent in *S.H.* Consequently, the Court did not go on to discuss the alleged failure to act. *Id.* More recently, the Third Circuit addressed the failure to act element in *School District of Philadelphia v. Kirsch*, 71 IDELR 123, 722 F. App'x 215 (3d Cir. 2018). In *Kirsch*, a school district did not inform parents that it had a policy of not holding IEP meetings or responding to email in the summer. Parents claimed that the school district's failure to inform them of the policy constituted deliberate indifference. The *Kirsch* court found no evidence that the failure to inform was a deliberate choice, and so it rejected the claims.[11]

As such, I must determine if the District discriminated against the Student on the basis of the Student's disability in violation of Section 504. I must also determine if the District acted with deliberate indifference under the standards set forth in *S.H.* and *Kirsch.*

Discussion

I. December 21, 2017, through April 19, 2018

The District denied the Student a FAPE between December 21, 2017 and April 13, 2018. During this time, the District stood by while the Student's behaviors deteriorated, taking a reactive approach to the Student's behaviors. Nothing was done during this entire period of time to teach the Student the skills and strategies needed to reduce or eliminate the Student's serious behavioral and social problems.

The District's argument that the Parent made its job difficult at the beginning of the school year fails. The Parent demanded the removal of 1:1 support for reasons that are not satisfactorily explained on the record. But, more importantly, the District's acquiescence to the Parent's demand is beyond any logical explanation. The District removed a service that it believed was critical for the Student's success, and completely overhauled the Student's PBSP to accomplish that removal, simply because that is what the Parent wanted. Somehow, the District lost track of the *Student's* right to a FAPE. At the same time, the District attempted to cover itself, all but acknowledging its knowledge that it was doing something contrary to the Student's rights, by designating the removal of 1:1 support as a "Parent decision." It was not the Parent's decision to make — it was the IEP team's decision to make. There were a host of ways that the District could have said no. The District could have also come to an agreement outside of the normal IEP process to provide mutually agreed-to services in lieu of FAPE. The District chose neither of these paths, and denied the Student a FAPE in the process.

This is not to say that the District did nothing at all. The District proposed evaluations and ultimately persuaded the Parent to let the 1:1 paraprofessional come back. But even these actions were entirely reactionary. The paraprofessional's job was to help the Student focus and collect behavioral data. It was not the paraprofessional's job to provide the type of direct, explicit instruction in social skills and executive functioning that the Student unambiguously needed. No one else in the District provided that instruction either. As I have noted in other cases, and as the Parent highlights in her closing brief, simply

[11] Technically, the District Court found that there was evidence of negligence, not a deliberate choice. The Circuit Court affirmed this.

accommodating a student without teaching skills to compensate for the student's disabilities is necessary but insufficient. *See G.M. v. Carbondale Sch. Dist.*, ODR No. 16767-1516KE (2016).

Considering the nature of the Student's disability, and the pervasiveness of the Student's behaviors across all school settings (*see* P-16, S-34), I find that the denial of FAPE for the period between December 21, 2017 and April 4, 2018 created a harm that permeated the entirety of the Student's school day. Consequently, I award one hour of compensatory education for every hour that the Student attended school between December 21, 2017 and April 4, 2018. In addition, I award one hour of compensatory education for every hour that school was open but the Student was suspended between December 21, 2017 and April 4, 2018.

I do not award compensatory education for the period between April 5, 2018 and April 19, 2018 (the last day of the Student's suspension). As a technical matter, the propriety of the District's manifestation determination is not before me. It was entirely appropriate, however, for the District to take the Student's threat seriously and seek crisis intervention. Further, the cumulative days of the Student's suspensions within this period of time are permissible under the IDEA and 22 Pa. Code § 14 (Chapter 14). I will not penalize the District for taking legal actions necessary to maintain school safety.

II. April 20, 2018 through June 15, 2018

Between April 20 and June 15, 2018, the Student was in limbo. The Student's last suspension of the 2017-18 school year expired on April 19, 2018. The District offered the IU Placement on April 21, 2018. The Parent rejected the IU placement, but the Student did not come back to school to finish the school year.

The parties characterize this period of time differently. Paraphrasing, the District argues that the Parent simply withheld the Student or permitted the Student to stay home. Equally paraphrasing, the Parent argues that the IU Placement was inappropriate, the Student was *persona non grata* in school, and there was no other option (tutoring notwithstanding). I agree with the Parent.

The Student had no services whatsoever from April 13, 2018 through June 15, 2018. During that time, the Student was entitled to services from April 20, 2018 through June 15, 2018. Even expelled students are entitled to a FAPE, but the Student received nothing at all. The District's failure to initiate truancy proceedings during this period of time is striking.[12] The District was content to do nothing, provided the Student did not darken its door. This is as close to a *per se* violation of a child's right to a FAPE that I have ever seen.

I am not blind to the context of the District's action. There were a host of legal actions that the District could have taken if it believed that allowing the Student to attend school was dangerous. Options ranged from initiating a due process hearing to change the Student's placement over parental objection, to expulsion (if the manifestation determination was proper), and everything in between. I do not blame the District for its desire to maintain school safety. In fact, I applaud the District for taking the threat seriously. I cannot condone, however, the District's violation of the Student's rights during this time – especially when so many legal options were left unused.

I award one hour of compensatory education for every hour that school was in session between April 20 and June 15, 2018.

[12] As a technical matter, schools typically report but do not prosecute truancy.

III. The 2018 ESY Period

The Student qualified for, but did not receive, ESY services in the summer of 2018.

The Student received ESY in the summer of 2017 to maintain IEP goals. As described above, the Student regressed during the 2017-18 school year. The exact same logic that drove the decision to provide ESY in the summer of 2017 applied equally - and with stronger support - for the summer of 2018.

For its part, the District says that it reviewed all seven ESY factors when concluding that the Student did not require ESY in the summer of 2018. Giving the District the benefit of the doubt, its deliberations do not square with any of the evidence in this case.

I award compensatory education equal to the amount of ESY that the Student qualified for in the summer of 2017 to remedy the denial of ESY in the summer of 2018.

IV. Placement

The proposed IU Placement is appropriate for the Student.

Evidence in this case overwhelmingly indicates that the Student requires the type of program offered through the IU Placement. The services offered through the IU Placement comport with the program recommendations in the Neuropsychological Report. That report was comprehensive, logical, and carefully considered. It was prescient in terms of the Student's return to school in the 2018-19 school year.

Preponderant evidence establishes that the Student requires a full-time emotional support placement, with onsite psychological and crisis management services, where the Student can receive the interventions described in the Neuropsychological Report. Given the Student's age, I believe it will take a herculean effort to change the Student's pattern of behavior. I do not believe that change can be effectuated in a typical public school setting.

The Parent uses *Oberti* to present a false dichotomy. When two placements are equally appropriate, or can be made appropriate through the addition of supplementary aids and services, the LEA must offer the less restrictive placement. Said differently, of all the appropriate placements, the LEA is obligated to offer the least restrictive one. In this case, the choice is not between two equally appropriate placements. The placement that the Parent seeks — placement in the Student's neighborhood school with additional supports — is not appropriate. The IU placement is appropriate. *See also, Lebron v. N. Penn Sch. Dist.*, 769 F. Supp. 2d 788 (E.D. Pa. 2011).

The Parent argues that not all possible supplementary aids and services have been tried in the Student's neighborhood school. That is true, particularly in regard to the proactive services recommended in the Neuropsychological Evaluation. Even so, examining that evaluation as a whole reveals that the Student needs more intensive services than those that can be provided in a typical public school setting. *Oberti* does not force students to fail in inappropriate placements simply because they are less restrictive before moving to an appropriate-but-more-restrictive placement.

It may be that the District stumbled into the right placement for the wrong reasons. That does not matter for an IDEA analysis. Moreover, while the IU Placement is appropriate, the Student's IEP is not. I will permit the District to change the Student's placement, but I will also require the District to reconvene the Student's IEP team, with the Independent Psychologist and personnel from the IU Program, to revise the Student's IEP to guarantee the provision of direct social skills and executive functioning instruction.

V. Deliberate Indifference

I find that the District discriminated against the Student on the basis of the Student's disability by acting with deliberate indifference from April 20 to June 15, 2018.

The cases above leave some ambiguity as to whether an *inaction* can be a deliberately indifferent action. I find that inaction can be deliberately indifferent. In *Kirsch*, the school's inaction was in question, but there was no evidence that the school deliberately chose to not tell parents of its policies. This case is different because the school's silence in *Kirsch* did not violate any affirmative duty. Here, the District violated affirmative obligations under the IDEA, Section 504, and Pennsylvania's compulsory school attendance laws. The IDEA and Section 504 required the District to provide a FAPE. Pennsylvania's Public School Code of 1949, as amended 2016, 24 P.S. § 13-1325 (2016 Act 138) requires several mandatory procedures when a child is truant for more than 10 days. The Student was truant for nearly two months, and the District did nothing.

To be clear, I reach no conclusion as to whether the threatened school shooting was a manifestation of the Student's disability. The District's disciplinary action — suspension from April 5, through April 11, 2018, and again from April 16 through April 19, 2018 — were permissible. Rather, as a child with a disability, the Student had a right to both access education to the same extent as non-disabled peers (Section 504), and a FAPE (IDEA). From April 20, 2018 through June 15, 2018, the District was aware of the Student's rights and also aware (at least constructively) of its affirmative duties. Under these circumstances, I must find that the District's complete inaction was deliberate.

I find no evidence that the District was deliberately indifferent during any other period of time.

ORDER

Now, January 4, 2019, it is hereby **ORDERED** as follows:

1. The District violated the Student's right to a FAPE from December 21, 2017, through June 15, 2018. As described in the accompanying decision, I award compensatory education to remedy the denial of FAPE as follows:

    a. I award one (1) hour of compensatory education for every hour that the Student attended school between December 21, 2017 and April 13, 2018.

    b. I award one (1) additional hour of compensatory education for every hour that school was open but the Student was suspended between December 21, 2017 and April 4, 2018.

    c. I do not award compensatory education for the period between April 5 and April 19, 2018.

    d. I award one hour of compensatory education for each hour that school was in session from April 20, through June 15, 2018.

2. The Student was denied ESY services in the summer of 2018. I award compensatory education equal to the amount of ESY that the Student qualified for in the summer of 2017 to remedy this violation.

3. The Parent may decide how the hours of compensatory education are spent within the following limitations: Compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device, purchased at or below prevailing market rates in the

District's geographical area. Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP. Compensatory education shall not be used to purchase transportation, products or services that are primarily recreational in nature, or products and services that are used by persons other than the Student except for group or family therapies.

4. The IU Placement proposed by the District is appropriate for the Student. However, in accordance with the accompanying decision, the District shall convene an IEP team meeting within fifteen (15) school days of this order to revise the Student's IEP.

5. As declaratory relief, I find that the District discriminated against the Student on the basis of the Student's disability in violation of Section 504 by acting with deliberate indifference to the Student's truancy and lack of any education from April 20 to June 15, 2018.

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

/s/ Brian Jason Ford
HEARING OFFICER