

*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**  
**Final Decision and Order**

**CLOSED HEARING**  
**ODR File Number: 22149-18-19**

**Child's Name:** K. M.

**Date of Birth:** [redacted]

**Parent:**  
[redacted]

*Counsel for Parent*  
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**Local Education Agency:**  
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**Hearing Officer:** Cathy A. Skidmore, M.Ed., J.D.

**Date of Decision:** 06/05/2019

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, (hereafter Student),<sup>1</sup> is a late-teenaged student in the East Allegheny School District (District) who is a protected handicapped student pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504) and Pennsylvania Chapter 15.<sup>2</sup> As such, Student is entitled to certain procedural protections afforded to children with disabilities who are subject to discipline in excess of ten school days. Following imposition of an out of school suspension of Student that exceeded ten school days, the District elected to proceed pursuant to the disciplinary provisions set forth in the Individuals with Disabilities Education Act (IDEA),<sup>3</sup> but found that the behavior in question was not a manifestation of Student's disability. Student's Parent filed a Due Process Complaint against the District in late April 2019, asserting, among other things, that it failed to comply with the IDEA when it imposed disciplinary measures on Student during the 2018-19 school year.<sup>4</sup> The case proceeded to an efficient single-session, expedited due process hearing for the reception of evidence on the discipline issues presented.<sup>5</sup>

For the reasons set forth below, the Parent has established a violation of the IDEA and Section 504 on the narrow expedited issue presented in this portion of the bifurcated proceeding. An award of compensatory education shall be made to remedy the deprivation.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page of and elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>3</sup> 20 U.S.C. §§ 1400-1482.

<sup>4</sup> The case was bifurcated so that the issues that were not considered to be expedited under 34 C.F.R. §§ 300.530 – 300.536 could proceed under the ordinary timelines. A new file number was assigned to those issues for separate disposition.

<sup>5</sup> Citations to the record in this decision shall be to the Notes of Testimony (N.T.); Parent Exhibits (P-) followed by the exhibit number; School District Exhibits (S-) followed by the exhibit number; and Hearing Officer Exhibits (HO-) followed by the exhibit number.

## **ISSUES**

1. Whether the District violated its obligations to Student as a protected handicapped student in imposing discipline and concluding that the behavior in question was not a manifestation of Student's disability;
2. If the District did violate its obligations to Student, should the manifestation determination be reversed; and
3. If the District did violate its obligations to Student, should Student be awarded compensatory education?

## **FINDINGS OF FACT**

1. Student is a late-teenaged student who is a resident of the District and is a protected handicapped student under Section 504 and Chapter 15. (S-1.)
2. Student demonstrates difficulty with resolving conflicts, problem solving, and social skills. (N.T. 32, 72, 92.)
3. Student has been receiving wraparound services for the past six years. Student has had a mobile therapist who visits weekly to address social skills and help with conflict resolution. (N.T. 28-29, 32-33, 40.)
4. Student was evaluated by a psychologist in November 2016 to determine continued need for behavioral health services. A report of that evaluation included the Child and Adolescent Needs and Strengths Inventory, which reflected significant concern for manifestations of Attention Deficit Hyperactivity Disorder (ADHD) and occasional oppositional behaviors. Diagnoses were ADHD and Unspecified Disruptive, Impulse-Control, and Conduct Disorder. (P-1.)
5. Student has been treating with a psychotherapist since 2017, with the frequency depending on the extent of Student's difficulties at home or school. The psychotherapist referred Student for a neuropsychological evaluation. (N.T. 62-63, 71, 84-85.)
6. Student was evaluated by a neuropsychologist in May 2017 as suggested by the psychotherapist. The report of that evaluation details Student's history of behavioral dysregulation, difficulty with problem solving, and impulsivity including at school. A past diagnosis of Oppositional Defiant Disorder was also noted. Among other things, the neuropsychologist discussed in her report Student's impulsive behaviors associated with ADHD and other diagnoses which were identified as: ADHD, Obsessive-Compulsive Disorder, and Oppositional Defiant Disorder. (N.T. 93-94; P-2.)
7. The psychotherapist has observed Student to exhibit impulsivity and a lack of problem

solving skills. Student also had difficulty following directions. The psychotherapist has worked with Student on social skills, problem solving skills, and managing frustration and impulsivity. (N.T. 66, 71-72, 78-79.)

8. Student entered the District at the start of the 2018-19 school year. Student began to experience conflict with peers sometime after the school year started. (N.T. 91, 96-97.)
9. A Section 504 Plan was created for Student on October 26, 2018, based on the 2016 psychological evaluation. The impairments listed were ADHD and the Unspecified Disruptive, Impulse-Control, and Conduct Disorder. Pursuant to the Section 504 Plan, Student was to be provided with test and assignment accommodations (extended time, chunking of assignments, and use of a support room for test-taking); preferential seating in the front of the classroom; tutoring; and parental monitoring of academic performance. (S-1.)
10. Student at times experiences conflict with peers at school that can result in outbursts by Student. At those times, Student has the opportunity to go to a quiet room to calm self with the support of a District staff member. (N.T. 52-53, 55.)
11. Student and a peer were involved in a physical altercation in late March 2019. Student was suspended from school because of that incident. (N.T. 119, 146.)
12. On April 8, 2019, Student and the peer from the March 2019 altercation engaged in a verbal confrontation at school. Upon notification of the new encounter between the two, the District Superintendent of Schools had them escorted by security to his conference room for a meeting. (N.T. 129-31; S-3 at 4.)
13. After the meeting began, Student expressed that Student did not want to remain at the meeting, became upset and repeatedly refused to sit down, and spoke loudly to the peer using curse words. Ultimately Student made physical movements that toppled a table onto the peer causing injury to the peer. (N.T. 131-33, 140; P-6; S-2.)
14. Student was suspended from school for a three-day period on April 9, 2019 to be followed by an informal hearing. (P-5; S-6.)
15. An informal hearing convened on April 11, 2019, which the Parent attended. Following that hearing, the District notified the Parent and Student that Student would be placed in an alternative education setting beginning May 6, 2019. (N.T. 102, 136; P-13; S-9.)
16. The Parent made a request for a special education evaluation following the April 8, 2019 incident, and gave written consent on April 24, 2019. (N.T. 105; P-7; P-9; S-8.)
17. A manifestation determination review meeting convened on April 29, 2019, attended by the Parent. A few days prior to that meeting, the Parent provided the District with the 2017 neuropsychological evaluation report. (N.T. 106-08, 150; P-12; S-4; S-5.)
18. The District members of the manifestation determination review team considered Student's ADHD presentation but concluded on or about April 30, 2019 that the behavior

on April 8, 2019 was not a manifestation of ADHD, and conveyed that decision to the Parent. The District members of the team noted that Student had exhibited only minimal behavioral difficulties at school prior to April 8, 2019. (N.T. 110-11, 151-52, 158; S-5.)

19. Student has worked with the mobile therapist to process the April 8, 2019 disciplinary incident. (N.T. 40.)
20. Student has worked with the psychotherapist on a regular basis to process the April 8, 2019 disciplinary incident. (N.T. 79-80.)
21. The Parent did not agree with the manifestation determination. (N.T. 113-14.)
22. After the manifestation determination meeting, Student was provided with work packets to complete at home before enrolling in the District's cyber school program. Student experienced difficulty with the cyber school program, requiring continual redirection by the Parent. Student did not attend the District's proposed alternative education program. (N.T. 115-16, 117.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. It is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this administrative hearing. Nevertheless, the application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipose." The outcome is much more frequently determined by a preponderance of the evidence.

A special education hearing officer, as the fact-finder, is charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute*

*Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

This hearing officer found each of the witnesses to be generally credible, testifying to the best of his or her recollection with respect to the circumstances relevant to decide the narrow issue presented; the testimony was essentially quite consistent as a whole.

In reviewing the record, the testimony of every witness, and the content of each admitted exhibit, were thoroughly considered in issuing this decision.

#### DISCIPLINARY COMPLAINT AND RELATED FILINGS: PROCEDURAL HISTORY

The Parent's Due Process Complaint, filed on April 29, 2019, challenged the District's failure to complete the manifestation determination review as of that date, with Student by that time excluded from school for fourteen days. She also sought an immediate return to school, a remedy that was reiterated in a Motion seeking a return to the previous placement. The District filed a Motion to Dismiss the Complaint because it was filed prior to the actual manifestation determination; the District also opposed the Parent's Motion to return Student to the regular education setting. Pursuant to the IDEA and its applicable regulations, the Parents had the right to challenge any District decision regarding a change in placement for disciplinary reasons in an expedited due process hearing. 20 U.S.C. § 1415(k)(3); 34 C.F.R. §§ 300.532(a) and (c). Accordingly, the District's Motion to Dismiss was denied; the Parent's Motion was also denied pursuant to the provisions for placement during disciplinary proceedings. 20 U.S.C. § 1415(k)(4)(A); 34 C.F.R. § 300.33; HO-1.

#### APPLICABLE DISCIPLINARY PRINCIPLES

The regulations implementing Section 504 provide procedural safeguards to students who qualify. 34 C.F.R. § 104.36. "Compliance with the procedural safeguards of [the IDEA] is one means of meeting this requirement." *Id.* In addition, the LEA of a protected handicapped

student for whom a change in placement is contemplated is required to conduct an evaluation of the student before making such change. 34 C.F.R. § 104.35(a). The Office for Civil Rights considers that any suspension or other exclusion from school in excess of ten days “constitutes a significant change of placement that would trigger the district’s duty to reevaluate [the] student.” *Green (OH) Local School District*, 116 LRP 31198 at 6 (OCR 2016).

In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 104.34 [relating to least restrictive environment and alternative settings].

34 C.F.R. § 104.35(c).

As noted, the District here elected to proceed pursuant to the IDEA disciplinary provisions in conducting a manifestation determination review. Those provisions permit a local educational agency (LEA) to remove a child with a disability from his or her current educational setting for violation of the code of student conduct for a period of no more than ten consecutive school days within the same school year, provided that the same discipline would be imposed on non-disabled students. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b). A “change of placement” based on disciplinary removals is defined in the IDEA as (1) removal for more than ten consecutive school days; or (2) a series of removals during the same school year that constitutes a “pattern”. 34 C.F.R. § 300.536(a). The relevant Pennsylvania regulations explicitly provide that disciplinary exclusion of a child with a disability that exceeds fifteen days in the same school year is deemed a pattern and, thus, a change in placement. 22 Pa. Code § 14.143(a). “Any unique circumstances” of a particular case may be considered by the LEA when

determining whether a change in placement is appropriate for a child with a disability who violates a student code of conduct. 20 U.S.C. § 1414(k)(1)(A); 34 C.F.R. § 300.530(a).

Once a decision is made to change the placement of a child with a disability for violating the code of student conduct, the LEA must conduct a manifestation determination review to determine whether the conduct “was caused by, or had a direct and substantial relationship to, the child’s disability; or ... was the direct result of” the LEA’s failure to implement the child’s IEP. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f). The manifestation determination must be made within ten school days of any decision to change the eligible child’s placement, and must be made by “the LEA, the parent, and relevant members of the child’s [] team (as determined by the parent and the LEA.” 34 C.F.R. § 300.530(e); *see also* 20 U.S.C. § 1415(k)(1)(E). If the team determines that the behavior was a manifestation of the child’s disability, the team must return the child to the placement from which the child was removed unless the parent and LEA agree otherwise; and, either conduct an FBA and implement a behavior intervention plan, or review and modify an existing behavior plan. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f). If, however, the team determines that the behavior was not a manifestation of the child’s disability, the LEA may take disciplinary action that would be applied to children without disabilities, except that a child with a disability is entitled to special education services. 20 U.S.C. §§ 1415(k)(1)(C) and (k)(1)(D); 34 C.F.R. §§ 300.530(c) and (d).

#### GENERAL SECTION 504 PRINCIPLES

Section 504 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include



learning. 34 C.F.R. § 104.3(j)(2)(ii). The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005).

The law requires the states to provide a “free appropriate public education” (FAPE) to its students who qualify for special education services. 20 U.S.C. § 1412. LEAs meet the obligation of providing FAPE to students with disabilities through development and implementation of a program which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Fairly recently, the U.S. Supreme Court concluded that FAPE requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352.

#### APPLICATION TO THE DISCIPLINE IMPOSED

It merits mention at the outset that the decision of the Superintendent to meet with Student and the peer was not, in and of itself, necessarily problematic in this hearing officer’s view. The Parent expressed concern if not disagreement with that decision at the hearing. However, the District was responding to a current situation between students, as one expects schools to do on a continual basis, and its professionals must be afforded reasonable latitude to do so as the administrator or professional concludes is prudent.

Nevertheless, the failure to evaluate Student before imposing a change in placement and even prior to conducting a manifestation review was improper. 34 C.F.R. § 104.35; *see also Green (OH), supra*, at 7. Furthermore, even setting aside that the Parent was apparently not part of the step of actually making the final manifestation determination decision, it is unclear why

the District focused solely on the ADHD to the exclusion of Student's other disabilities. As set forth above, the team was required to carefully consider a variety of sources of information before making any change in placement. In conducting the manifestation determination review, the team was also required to deliberate over whether the behavior arose from or was substantially related to Student's disability. The record convincingly establishes that the District members of the team completely overlooked the references in available information to Student's disabilities that were not ADHD. Although it is true that the Parent had only provided the neuropsychological report shortly before the manifestation determination review meeting, the District's own Section 504 Plan documentation explicitly referenced the diagnosis of Unspecified Disruptive, Impulse-Control, and Conduct Disorder. The District's failure to adequately consider all circumstances including all of Student's disabilities was a fatal flaw; and, consideration of all of the available information leads to the inescapable conclusion that the behavior in question was a manifestation of Student's disabilities.

The manifestation determination review in *J.H. v. Rose Tree Media School District*, 2018 U.S. Dist. LEXIS 157803 (E.D. Pa. 2018), on which the District relies, is clearly distinguishable. There, the team did consider the student's "disability-related manifestations such as impulsiveness and low frustration tolerance," triggers, and other factors. *Id.* at \*9. In this case, the District members of the team considered only the disability-related manifestations that Student had previously exhibited at school without regard to whether Student's identified disability was in fact manifested through impulsive and oppositional behaviors in any setting. Little if any attention was paid to Student's unique circumstances. Moreover, if an LEA could only consider behaviors in which someone on staff had observed the student engage, a student who was generally successful in managing behaviors (a common and important aim of

educational programming) would not be afforded the same protections as would another student with a similar disability who was not so successful. The purposes of manifestation determination reviews would clearly not be served if the focus were construed so narrowly. Simply put, on this record, Student was denied the protections that the IDEA and Section 504 demand in this case, and was thereby denied FAPE due to the exclusion.

## REMEDIES

### DISCIPLINARY REMEDY

Pursuant to the IDEA disciplinary provisions, a hearing officer may return a student to the placement from which he or she was removed if it is determined that the behavior in question was a manifestation of the child's disability. 20 U.S.C. 1414 (k)(3)(B); 34 C.F.R. § 300.532(b). Because the 2018-19 school year has ended, Student will be returned at the start of the 2019-20 school year to the regular education setting that Student attended before April 9, 2019 if Student remains enrolled in the District.

### COMPENSATORY EDUCATION

As another remedy, the Parents seek compensatory education, which is an appropriate form of relief where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3d Cir. 1996). Such an award may compensate the child for the period of time of deprivation of educational services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has recently endorsed a different approach, sometimes described as a "make whole" remedy, where the award of compensatory education is designed "to restore the child to the educational path he or she would have traveled" absent the denial of

FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE).

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Compensatory education may also be an appropriate remedy where a District violated the disciplinary protections for students with disabilities. *See, e.g., Bristol Township School District v. Z.B.*, 2016 U.S. Dist. LEXIS 4626, 2016 WL 161600 (E.D. Pa. 2016).

This hearing officer finds that the record does not include evidence on an appropriate equitable remedy that would place Student in the position where Student would be absent the FAPE denial resulting from the removal from the previous placement. Thus, the hour-for-hour method must provide the basis for the appropriate approach, although the number of hours is a challenge to quantify in light of the fact that Student was provided a cyber school program. As a matter of equity, Student shall be awarded three hours per day (approximately half of the regular school day),<sup>6</sup> beginning with the eleventh day of Student's removal from school, for each day that school was in session through the end of the 2018-19 school year to compensate for Student's difficulty accessing that program and lack of opportunities to interact with peers.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product, or device that furthers Student's academic or social/emotional needs and skills. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should

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<sup>6</sup> *See* 22 Pa. Code § 11.1, 11.3.

appropriately be provided by the District. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent, and may be used at any time from the present until Student turns age twenty one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent and may be limited to the average market rate for private providers of those services in the county where the District is located.

### **ORDER**

AND NOW, this 5<sup>th</sup> day of June, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District violated the discipline protections afforded to Student in reaching its manifestation determination.
2. The decision of the manifestation determination made on or about April 30, 2019, is **REVERSED**. The behavior in question was a manifestation of Student's disabilities.
3. Student shall be returned to the previous placement that Student attended prior to April 9, 2019 beginning with the first day of the 2019-20 school year.
4. Student was denied FAPE due to the exclusion, and is awarded three hours of compensatory education for each day that school was in session beginning with the eleventh day of Student's removal from school through the end of the 2018-19 school year.
5. The hours of compensatory education are subject to the above conditions and limitations.
6. Nothing in this decision should be read to prevent the parties from mutually agreeing to alter the terms of this Order, including consideration of revisions to Student's programming and placement following completion of the pending evaluation.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and Order are **DENIED** and **DISMISSED**.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER  
ODR File No. 22149-1819AS