

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

Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: B.K.

Date of Birth: [redacted]

Dates of Hearing:

June 26, 2012

July 19, 2012

August 17, 2012

September 26, 2012

October 4, 2012

### **CLOSED HEARING**

ODR Case # 2939-1112KE

Parties to the Hearing:

Parents

Tyrone Area School District  
701 Clay Avenue  
Tyrone, PA 16686

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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October 29, 2012

November 20, 2012

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

[The student] (hereinafter “student”)<sup>1</sup> is [a pre-teenaged] student who resides in the Tyrone Area School District (“District”). The parties dispute whether the student should have been identified by the District as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”) and Pennsylvania special education regulations (“Chapter 14”),<sup>2</sup> as well as whether the District had analogous obligations to the student under the Rehabilitation Act of 1973 (specifically under Section 504 of that statute, hence the follow-on reference to “Section 504”) and Pennsylvania education regulations which implement Section 504 (“Chapter 15”).<sup>3</sup> Particularly, the dispute centers on whether the District should have identified the student as a student with a serious emotional disturbance given problematic in-school behaviors in the 2010-2011 and 2011-2012 school years.<sup>4</sup> More pointedly, the parents contend that various acts and omissions by the District amount to discriminatory and/or retaliatory acts and omissions

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<sup>1</sup> The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

<sup>2</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.164.

<sup>3</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for services to “protected handicapped students”.

<sup>4</sup> At the end of the hearing, a District witness confirmed that, subsequent to the initiation of these proceedings, the District had identified the student as a student with a serious emotional disturbance. (NT at 848-849). This does not blunt the parents’ claim that the identification of the student should have occurred earlier in the student’s education at the District.

by the District toward the student and parents. As a result of these claims, parents seek compensatory education as a remedy.

The District counters that, based on the information it had in the 2010-2011 and 2011-2012 school years, the student did not qualify as a student with a disability under the terms of the IDEIA. To the extent that the student qualified as a student with a disability under Section 504/Chapter 15, the District argues that those needs were met with an appropriate Section 504 plan. For those reasons, the District claims that no compensatory education is owed. The District also vigorously denies that it engaged in discriminatory and/or retaliatory acts and omissions against the student and parents.

For the reasons set forth below, I find in favor of parents on the issues of denial-of-FAPE and discrimination but in favor of the District on the issue of retaliation.

### **ISSUES**

Should the student have been identified as a student with a disability under the IDEIA in the 2010-2011 and/or 2011-2012 school years?

If so,  
did the District deny FAPE to the student as a result?

If not,  
did the District provide FAPE to the student under its Section 504 obligations?

Did the District engage in discriminatory and/or retaliatory acts and/or omissions?

## **FINDINGS OF FACT**

1. The student attended District schools since kindergarten. In the 2010-2011 school year, the student attended the District elementary school for 4<sup>th</sup> grade. In the 2011-2012 school year, the student attended the District middle school for 5<sup>th</sup> grade. (School District Exhibit ["S"]-10).
2. Since early childhood, the student engaged in [specific behavior]. This behavior was noted both at home and at school. As time went on, the behavior stopped at home but continued in school. (Notes of Testimony ["NT"]<sup>5</sup> at 87-89).
3. The family consulted with the student's pediatrician who advised that the behavior was not out of the ordinary. Annually, at parent-teacher conferences, teachers noted concerns with the behavior although the principal at the student's schools was unaware of the behavior.<sup>6</sup> (NT at 87-89, 391-393).
4. On November 16, 2010, the student's mother attended a meeting with two of the student's teachers<sup>7</sup> and the building principal regarding the student's [specific] behavior in addition to aggressive behavior in the school environment. (Parents' Exhibit ["P"]-4).
5. At the November 16<sup>th</sup> meeting, the group discussed the [specific] behavior and the student's mother shared [information] from the American Academy of Pediatrics. (P-1, P-4).
6. The group discussed a nexus between the [specific] behavior and student stress in the school environment. (P-4).

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<sup>5</sup> The Notes of Testimony run over consecutive pages 1-854 for the sessions on June 26<sup>th</sup>, July 19<sup>th</sup>, September 26<sup>th</sup> and October 4<sup>th</sup> sessions. The session on August 17<sup>th</sup> was handled by a separate court reporting agency and the Notes of Testimony for that session are numbered as pages 1-89. As a result, where reference is made to the testimony of August 17<sup>th</sup>, it will be noted as "NT-August 17<sup>th</sup>". All other references to Notes of Testimony as "NT" refer to the appropriate page number for the June, July, September, and/or October sessions.

<sup>6</sup> The principal who testified was the principal of the elementary building (grades K-4) through the student's 4<sup>th</sup> grade year. In the student's 5<sup>th</sup> grade year, when the student began to attend the District middle school, the principal became principal of grades 5-6 at the middle school. In effect, relevant to these proceedings, the principal was the administrator of the District buildings where the student attended. (NT at 391-393).

<sup>7</sup> In 4<sup>th</sup> grade, the student was part of a large group of approximately 50 students who were co-taught by two teachers. (NT at 235-239).

7. The group discussed counseling for the student, and the student's mother indicated that the family would engage a private counselor. The student's mother denied the District permission to speak directly with the pediatrician. (P-4).
8. The group did not discuss, nor did the District seek, permission to evaluate the student. (P-4).
9. On November 17, 2010, a school-based child study team considered issues related to the student. The child study team included the building principal, a school counselor, a mental health counselor providing contracted services to the District through an outside agency, and a school nurse. One of the student's teachers who had attended the November 16<sup>th</sup> meeting the day before also attended the meeting. (NT at 326-329, 369, 395-397).
10. The student's teacher left the child study team meeting after 30-40 minutes. The child study team continued to deliberate. The child study team suspected that the student might be the victim [of abuse]. (NT at 327-328).
11. As a result of the child study team meeting, the District did not seek permission to evaluate the student.
12. On November 18, 2010, as mandated reporters when suspecting child abuse under Pennsylvania's Child Protective Services Law<sup>8</sup>, the guidance counselor and school nurse jointly reported to the Blair County Office of Children, Youth and Families ("CYF") [the suspicion of] abuse. (P-2).
13. In December 7, 2010, the student began treatment with a private clinical psychologist. The psychologist diagnosed the student with anxiety disorder. (NT at 61-62).
14. CYF investigated the complaint and did not find any evidence of [the suspected] abuse. (NT-August 17<sup>th</sup> at 13-16, 59-86).
15. On December 20, 2010, parents requested a meeting to discuss events as they had developed since the November 16<sup>th</sup> meeting which the student's mother had attended. Particularly, the parents wanted to discuss the concerns that had led the District to file a report with CYF. The December 20<sup>th</sup> meeting included both

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<sup>8</sup> 23 Pa C.S.A. Chapter 63.

- parents, one of the student's teachers (the same teacher who had attended the November 17<sup>th</sup> child study team meeting), the principal, a school counselor (the same school counselor who had attended the November 17<sup>th</sup> child study team meeting and who acted as a co-source for the CYF complaint), a District school psychologist, the District superintendent, the CYF investigator, and a CYF supervisor. (P-4; NT-August 17<sup>th</sup> at 16).
16. As a result of the December 20<sup>th</sup> meeting, the District did not seek permission to evaluate the student.
  17. Over the course of September 2010 through March 2011, the student continued to engage in the [specific] behavior, to be aggressive toward other students, and to exhibit task/work avoidance in class. (P-9).
  18. Over the course of September 2010 through March 2011, the District's response to the student's [specific] behavior was to tap the student on the shoulder to re-direct the student or to allow the student to leave class to engage in the [specific] behavior. (P-10).
  19. Over the period September through December 2010, the student had seven documented disciplinary incidents (three for academic non-compliance, two for horseplay, one for obscene gesture and one for harassment). Over the same period, the student's teachers reported three serious or repeated instances of incomplete academic work and aggression toward other students [descriptions redacted]. (P-8, P-9).
  20. In February 2011, the student's psychologist spoke with the student's school counselor regarding the student's treatment and diagnosis. At this time, the District constructed a "behavior plan" to allow the student to be excused from class to engage in [specific] behavior when "(the student) [redacted] was feeling nervous". (P-10; NT at 69-70, 73-74).
  21. In March 2011, the parents and the District met to discuss educational programming for the student. The District explained the difference between IDEIA/Chapter 14 programming and Section 504/Chapter 15 programming. The District left the decision to parents, who requested a Section 504 plan for the student. The District did not seek permission to evaluate under IDEIA. (NT at 245-255, 823-824).
  22. At approximately the same time, the student was transferred from the caseload of the two co-teachers who had been working

- with the student to the caseload of another 4<sup>th</sup> grade teacher. (NT at 245-255, 823-824).
23. On March 8, 2011, the District implemented a Section 504 plan. The plan formalized the practice of re-directing the student away from [specific] behavior and/or allowing the student to leave class to engage in [that specific] behavior. (P-6; S-2).
  24. Following the transfer of the student to a new teacher, the student did not exhibit the [specific] behavior in class. From March 2011 through June 2011, the student did not seem to exhibit problematic behaviors, and parents felt the school year ended successfully with the new teacher. (NT at 650-655).
  25. The District did not request permission to evaluate the student at any time in the 2010-2011 school year.
  26. The student moved to the District middle school for the 2011-2012 school year, the student's 5<sup>th</sup> grade year.
  27. Over the course of the 2011-2012 school year, the relationship between the student's parents (and particularly the student's father) and the District was acrimonious. (S-5; see *generally* NT at 137-227).
  28. On September 8, 2011, the student received a revised Section 504 plan. The plan addressed the student's [specific] behavior in the same way as in 4<sup>th</sup> grade—re-direction when the student engaged in the behavior in class and/or excusing the student from class to engage in the behavior. (P-5; S-3).
  29. In November 2011, in a conversation with the middle school counselor, the student indicated [an incident with a peer]. The counselor contacted CYF to report [suspicion of] abuse. Because the alleged perpetrator was a peer under 14 years of age living outside the household who was not a babysitter, CYF did not have jurisdiction and referred the complaint to local law enforcement. The police concluded the investigation without filing charges. (NT at 156-158, 759-769; NT-August 17<sup>th</sup> at 20-22).
  30. On November 7, 2011, the District proposed a revision to the Section 504 plan to add daily initialing of the student's agenda. This Section 504 plan was never approved by parents. (S-4).

31. In November and December 2011, the District offered to help the family obtain private therapeutic support for the student given the student's behavior. (S-5).
32. In January 2012, parents verbally requested permission to evaluate the student for eligibility under IDEIA. Initially, there were miscommunications between the parents and District regarding parental permission to evaluate, but eventually parents provided permission to evaluate and the District undertook [and] engaged in the evaluation process. (S-5; NT at 825-827).
33. In February 2012, a report was made by a teacher that the student was engaging in [another problematic behavior]. The teacher reported that she did not see this as related to the student's anxiety. (NT at 599, 827).
34. On February 29, 2012, the student was discovered with a note that read [redacted]. The parties dispute [certain] words [in the note]. (P-13; S-5; NT at 565-569, 680-684; NT-August 17<sup>th</sup> at 25-26).
35. The student makes [a certain letter in a certain manner]. (P-13; S-11; NT 501-556).
36. The [certain] letter in the note is different. [Redacted.] (P-12; S-11; NT at 501-556).
37. After diligently reviewing the note, numerous examples of the student's writing including the [certain] letter over 53 pages in the student's agenda book, and the expert testimony of a handwriting expert proffered by parents, the evidence is preponderant that the student wrote [redacted] and that some unknown person—the student, a fellow student, a District employee, or some other person—[made a change to the note]. (P-12; S-11; NT at 501-556).
38. Following the discovery of the note, the District contacted CYF a third time to report [suspicion of] abuse [redacted].<sup>9</sup> [Redacted.] CYF found no indications of [the suspected] abuse. (NT-August 17<sup>th</sup> at 22-35).
39. Following the CYF investigation, at the request of the District, individuals from the District met with officials from CYF outside the knowledge of parents. CYF reiterated its findings that

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<sup>9</sup> [Footnote redacted.]



there was no indication of [the suspected] abuse. (NT-August 17<sup>th</sup> at 26-35, 48-49).

40. On March 20, 2012, the District issued its evaluation report ("ER"). It viewed the referral in terms of whether the student qualified for special education and related services as a result of diagnosed anxiety disorder. (S-9).
41. The ER notes that, in March 2011, records provided by parents to the District indicated that the student had been diagnosed with an anxiety disorder. (S-9).
42. On the Behavior Assessment System for Children-2<sup>nd</sup> edition, the student was rated as clinically significant by parents for anxiety, depression, somatization, and the internalizing problems composite. The student was rated by one teacher as at-risk for aggression, atypicality, social skills. The student was rated by a second teacher as at-risk for adaptability and the behavior symptoms index; the same teacher rated the student as clinically significant for aggression, conduct problems, and the externalizing problems composite. (S-9).
43. Teachers reported problem with attention, inappropriate attention-seeking behavior, verbal and physical aggression towards peers, non-compliance. The student continued to exhibit [the specific] behavior in school. (S-9).
44. Even though [the other problematic behavior] had been reported to the evaluator by a teacher, this information was not included in the report. (S-9; NT at 599, 827).
45. The student was found by the District not to have a disability. (S-9).
46. Over the period October 2011-May 2012, the District contacted the parents 31 times about behavior issues, 15 times about [the specific] behavior, 15 times about academic concerns, and 6 times about other issues. Over the period December 2011-March 2012, the District requested nine meetings with parents. (S-6).
47. Over the period October 2011-May 2012, anecdotal incidents reported home to the parents by email included (chronologically): consistent [specific] behavior, missed assignments, [aggression] (multiple incidents), non-compliance, being in an unauthorized area, [and other behaviors]. (S-5).

48. The parents requested and the District provided an independent educational evaluation (“IEE”). The IEE was issued on May 29, 2012. The independent evaluator concluded that the student qualified as eligible under the terms of the IDEIA as a student with a serious emotional disturbance. (Joint Exhibit 1; NT at 33-58).
49. The student ended the 2011-2012 school year at the District and did not return for the 2012-2013 school year. (NT at 847-848).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Failure of Child Find Obligation under IDEIA/Chapter 14

Pursuant to the requirements of IDEIA and Chapter 14, Pennsylvania school districts have an obligation “to establish a system of screening...to”, *inter alia*, “identify students who may need special education services and programs.”<sup>10</sup> School districts are explicitly granted the authority to seek permission from parents to evaluate a student who the school district feels might qualify as a student with a disability.<sup>11</sup> This duty is known as a school district’s child-find obligation.

In this case, the District failed in its child-find obligation. The District knew that the student engaged in [specific] behavior. In 4<sup>th</sup> grade, teacher concerns rose to a level that, early on, the matter was addressed with the student’s parents. Indeed, as a result of that interaction, the behavior was discussed the next day by the school’s child

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<sup>10</sup> 22 PA Code §14.122(3); *see also* 34 C.F.R. §300.111.

<sup>11</sup> 34 C.F.R. §§300.300(a), 300.301(b).

study team and concerns rose to a level where, as mandated reporters of suspected child abuse, a referral to CYF was made. As of November 18, 2010, then, the District was on notice that (a) teachers had significant concerns about the [specific] behavior, (b) the concerns rose to the level that parents were engaged in a meeting with the student's teachers and the building principal, and (c) the concerns warranted mandated reporting for [suspicion of child] abuse.

Furthermore, an evaluation process should have led to the appropriate result: the student qualified under IDEIA as a student with a serious emotional disturbance as the result of anxiety exhibited in the school environment.

Accordingly, as set forth more fully below, the District failed in its child find obligations and, in doing so, denied the student an opportunity to receive a FAPE under IDEIA/Chapter 14.

#### Compensatory Education

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEIA.<sup>12</sup> The right to compensatory education accrues from a point where a school district knows or should

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<sup>12</sup> 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).

have known that a student was being denied FAPE.<sup>13</sup> The U.S Court of Appeals for the Third Circuit has held that a student who is denied a FAPE “is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.”<sup>14</sup>

In this case, the District knew or should have known as of November 18, 2010 that the student should have undergone an evaluation for eligibility under IDEIA. Giving the District time to seek and receive permission to evaluate the student (reasonably, 14 calendar days to account for an intervening Thanksgiving holiday), 60 calendar days to complete its evaluation<sup>15</sup>, and an additional 30 calendar days to craft an individualized education plan for the student<sup>16</sup>, it is the considered opinion of this hearing officer that the student was denied a FAPE beginning on March 1, 2011.

The record fully supports the notion that the District’s failure to respond to continual [specific] behavior over the 4<sup>th</sup> and 5<sup>th</sup> grade years, as well as a failure to address the student’s aggressive, non-compliant behaviors in school (especially as those behaviors escalated in the 5<sup>th</sup> grade), support an award of compensatory education. Equitably, the student will be awarded 2 hours of compensatory education for each

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<sup>13</sup> Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996).

<sup>14</sup> M.C. at 397.

<sup>15</sup> 34 C.F.R. §300.301(c)(1)(i); 22 PA Code §14.123(b).

<sup>16</sup> 34 C.F.R. §300.323(c)(1).

school day the student attended from March 1, 2011 through the end of the 2010-2011 school year and for each school day the student attended for the 2011-2012 school year.

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as they 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 the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education, either hourly or as the result of a lump sum settlement, must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

An award of compensatory education will be fashioned accordingly.

## Denial of FAPE under Section 504/Chapter 15

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with a FAPE.<sup>17</sup> While the provisions of IDEIA and Chapter 14, and subsequent case law, regarding the provision of FAPE is more voluminous, the standards are analogous.<sup>18</sup>

Accordingly, the fact-finding and legal analysis outlined above in the *Failure of Child Find Obligation under IDEIA/Chapter 14* subsection are adopted here in support of the conclusion that the District denied the student a FAPE by failing in its obligation to identify the student as a protected handicapped student.<sup>19</sup> More specifically, the District's response through the student's Section 504 plan is entirely inappropriate. Where re-direction away from the [specific] behavior was effective, it failed to address the ongoing nature of the student's anxiety with special education and/or related services. The other option to address the behavior was the wholly inappropriate response to excuse the student from class to engage in the behavior.

Accordingly, the student was denied FAPE under the terms of the Section 504 and Chapter 15. The compensatory education award outlined above addresses this deprivation.

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<sup>17</sup> 34 C.F.R. §104.33; 22 PA Code §15.1.

<sup>18</sup> And while the obligations of IDEIA/Chapter 14 to identify and evaluate students with disabilities are much more intricate, Section 504/Chapter 15 impose similar obligations on school districts in Pennsylvania. 34 C.F.R. §104.35; 22 PA Code §15.5.

<sup>19</sup> 22 PA Code §15.2. Chapter 15 nomenclature speaks of "protected handicapped students"; Chapter 14, at 22 PA Code §14.101, uses the term "student with a disability".

### Discrimination/Retaliation under Section 504

*Discrimination.* To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) he is disabled or has a handicap as defined by Section 504; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of his disability.<sup>20</sup>

In the instant case, the first, second and fifth prong of this analysis is undisputed. While not a matter of evidence, the receipt federal funds by the District is a near certainty. The crux of a finding that the District discriminated against the student is whether the student was the subject of discrimination as the result of the disability. Here, the entirety of the record supports a conclusion that the District, through its acts and omissions, discriminated against the student.

Accordingly, there will be an explicit finding that the District engaged with deliberate indifference in discriminatory acts against the student.

*Retaliation.* Where a family engages in the process for educating students with disabilities under Section 504, it should do so secure in

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<sup>20</sup> Ridgewood; W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

the knowledge that engaging in those processes will not be held against them by the school district and that they will not be penalized for engaging in those processes. To establish that a school district has retaliated against a family for engaging the processes outlined in Section 504, a three-part test has been elucidated, namely: (1) did the parents engage in protected activities, (2) was the school district's retaliatory action sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) was there a causal connection between the protected activity and the retaliation. Lauren W. v. DeFlaminis, 480 F.3d 259 (3d Cir. 2007).

Here, the retaliation claim is based on the three reports made by the District to CYF in November 2010, November 2011, and March 2012. While parents have a definitive view of why those reports were made, the record does not support a finding that the District acted in a retaliatory way in making those reports. All three reports were made after deliberations by the District, explicitly in light of duties imposed as mandated reporters of suspected child abuse under Pennsylvania's Child Protective Services Law. The record supports a finding that all three reports were made in good faith [redacted].

Accordingly, the District did not retaliate against the parents in lodging reports with CYF in November 2010, November 2011, and March 2012.



## **CONCLUSION**

The District denied a FAPE to the student under its obligations to provide FAPE both under the IDIEA/Chapter 14 and Section 504/Chapter 15. Compensatory education is owed as a result of those deprivations. The District discriminated against the student in violation of Section 504 but did not retaliate against the family.

## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student is awarded compensatory education in an amount equal to 2 hours of compensatory education for each school day the student attended from March 1, 2011 through the end of the 2010-2011 school year and for each school day the student attended for the 2011-2012 school year.

It is an explicit finding that the District engaged in discrimination against the student as a result of the student's disability.

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

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

November 20, 2012