

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the 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**

Closed Hearing

ODR No. 30008-24-25

Child's Name:

J.S.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

August 5, 2024

INFORMATION AND PROCEDURAL HISTORY

The Student (Student)¹ is [redacted] years old and enrolled in the District. The Student is eligible for special education services under the categories of emotional Disturbance, Other Health Impairment, and Speech or Language Impairment.² The Student is entitled to procedural protections under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), the Americans with Disabilities Act (ADA), and the regulations implementing those statutes.³

The Parent filed this complaint and requested an expedited due process hearing to resolve the allegations that the District failed to offer an appropriate extended school year (ESY) program and that District punished this disabled Student after a manifestation determination in violation of applicable law. The complaint also contained non-expedited FAPE claims. The parties agreed to bifurcate the proceedings with the resolution of the denial of FAPE claims to occur through standard IDEA resolution timelines.

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including the details on the cover page, will be redacted prior to the decision's posting on the website of the Office for Dispute Resolution in compliance with 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).

³ 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14). Section 504 is found at 29 U.S.C. § 794. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11. The Americans with Disabilities Act is found at 42 U.S.C. §§ 12101-12213.

As relief, the Parent seeks an Order rescinding the restrictions that prevent the Student from accessing school property and compensatory education for inadequate ESY programming. In response, the District maintained that it has fulfilled its legal obligations to the Student and that the relief requested by the Parent should be denied.

For the following reasons, the claims of the Parent are partially granted.

ISSUES4

- 1) Does the District's exclusion of the Student from school property constitute "discipline" or "punishment" under the IDEA or the Pennsylvania School Code?
- 2) If the District's exclusion of the Student from school property constitutes "discipline" or "punishment" under the IDEA or the Pennsylvania School Code, were the District's actions appropriate?
- 3) Did the District offer an appropriate ESY program for the 2023-2024 school year?

⁴ (N.T. 9-10)

FINDINGS OF FACTS

1. The Student is currently [redacted] years old, enrolled in the District and eligible for special education as a child with emotional Disturbance, Other Health Impairment, and Speech or Language Impairment. (P-1)
2. Before [redacted] two years ago, the Student experienced abuse and neglect. From kindergarten through the 2022-2023 school year, the Student attended school outside the District. (N.T. 22)

2023-2024 School Year

3. At the beginning of the 2023-2024 school year, the Student enrolled in the District. (P-1)
4. The Student received an out-of-school suspension from August 25 and August 29 to September 5, 2023. (P-1)
5. From September 4, 2023, until November 13, 2023, the Student was placed at [redacted], a therapeutic placement. (P-5, p. 2; N.T. 66-68)
6. On October 2, 2023, [redacted] conducted a psychiatric evaluation that determined Student had diagnoses of autism spectrum disorder, ADHD, disruptive mood dysregulation disorder, impulse control and conduct disorder, PTSD, intellectual developmental disorder (ID), mild and unspecified trauma-stressor related disorder. On October 23, 2023, a District record review/reevaluation concluded that the Student

was a child with OHI and Speech-Language Impairment. (P-1, p. 3; N.T. 24)

7. The [redacted] RR determined the Student had a FSIQ of 65 in the first percentile. (P-1, p. 12; N.T. 94)
8. On October 25, 2023, [redacted] reevaluated the Student. The Student was identified with emotional disturbance, OHI, and speech-language impairment. (P-1)
9. A residential treatment facility (RTF) was recommended for the Student after discharge from [redacted]. The Parent disagreed with this placement option. (N.T. 68-69)
10. On November 14, 2023, the Student was placed at [redacted]. At [redacted], the Student had eighteen aggressive behaviors that warranted restraints. (P-1, p. 5-6)
11. An FBA conducted by [redacted] identified behaviors of concern, including self-injurious behaviors, aggression toward others (staff/peers), punching/kicking, spitting, biting, property destruction, elopement, verbal opposition, incendiary comments, and intimidation. (P-1, p.15)
12. On February 20, 2024, [redacted] terminated the Student's placement. (P-1, p. 5-6)
13. From February 21, 2024, to March 12, 2024, the Student was placed in the District in an emotional support placement. (P-1)

14. From March 13, 2024, to March 25, 2024, the Student received 1:1 full-time emotional support through an intermediate unit (IU) placement. On March 15 and March 18, the Student was restrained, resulting in staff injuries; the Student was placed outside the school setting for the remainder of the week. (P-5, p. 2)

15. On March 24, 2024, the District issued its RR regarding the Student. The RR concluded that the Student was eligible for special education based on OHI (ADHD) and considered exceptionality on the basis of emotional disturbance. The RR ruled out eligibility under the exceptionality of ID because Student's social-emotional behavioral presentation was "in crisis" and likely affected presentation. The RR noted that identification was not appropriate at that time. (P-1, p. 22; N.T. 89, 96)

16. From March 25, 2024, to April 30, 2024, the Student received instruction in the home (P-1, P-5, p. 2)

17. From April 30, 2024, to May 17, 2024, the Student received full-time emotional support with a 1:1 teacher, modified day in an alternative District setting. (P-5, p. 2; N.T. 27-28)

18. On May 3, 2024, the Student's IEP team met to develop programming. ESY offered in the IEP included up to 24 hours/8 sessions of modified math and reading instruction and speech-language services twice per ESY session. Continuous monitoring of

academic goals, behavioral intervention and implementation of coping skills are necessary to maintain and advance both behavioral and academic skills. (P-3, p. 25; N.T. 139)

19. On May 17, 2024, the Student engaged in escalated behavior at school that included pulling the hair of staff, yelling, throwing objects, pulling paint off the wall, and elopement. The physical and verbal behaviors were characterized as "in crisis." [redacted]. (P-4; N.T. 25)

20. That same day, a pre-scheduled interagency meeting occurred to discuss placements for the Student because of known aggressive and violent behaviors. (N.T. 26)

21. On May 20, 2024, the District conducted a manifestation determination (MD) following the Student's May 17 behavioral episodes. The worksheet indicated the reason for a change in educational placement was due to extreme aggression and repeated assaults on staff. (P-4)

22. The MD concluded that the behavior was caused by the Student's disability or had a direct and substantial relation to the Student's disability and not the direct result of the LEA's failure to implement the IEP. The team agreed to revise the Student's May 3, 2024, IEP, PBSP, and safety plan. The team agreed that the Student would receive instruction via virtual learning for the remainder of the 2023-2024 school year. (P-4)

23. Although referrals to therapeutic placements have occurred, with the exception of a residential treatment facility (RTF), all placements have denied admission to the Student because of behaviors. The Parent is opposed to the Student's placement in an RTF. (N.T. 27)
24. On May 20, 2024, in a meeting with the Parent, the District issued a NOREP that proposed to change the Student's placement to full-time emotional support, one-to-one instruction, up to three hours a day, in the virtual setting of the home. The District offered to conduct a functional behavioral assessment (FBA). (P-5; N.T. 40, 41, 152, 154)
25. The Parent, a special education teacher, agreed to the imposition of virtual education as outlined in the NOREP because no other options were presented, and ostensibly to avoid a long-term suspension and potential disruption of the provision of instruction for the remainder of the school year. (P-5; N.T. 40, 41, 152, 154)
26. Through a letter dated May 21, 2024, the District suspended the Student from May 20 to May 24. The letter indicated that the Student was forbidden to attend any sporting or extracurricular activities while suspended. (P-8; N.T. 109-110)
27. Through a letter dated May 21, 2024, the District Superintendent sent a "Notice of Trespass" letter to the Parent that due to the Student's dangerous behaviors:
- we will not be allowing [] to be present on campus for the foreseeable future. This would include all school related and non-school-related events. If J[] behavior changes and improves the

situation will be re-evaluated. Please understand that violations of this directive would cause the district to pursue charges of trespassing on [] and the adult who is accompanying []. (P-6; N.T 113-114, 118)

2024 ESY Programming

28. The Student receives ESY programming through synchronous and asynchronous virtual instruction on Monday, Wednesday and Thursday. The ESY schedule is: 8:30 -9:00 asynchronous work through teams, 9:00-9:30 meeting with the teacher, 9:30-10:15, independent work, 10:15-10:30-break, 10:30-11:00 teacher provided live instruction. (N.T. 70-71)
29. The Student typically tolerates one live session daily, although the IEP offered more programming. (N.T. 71)
30. The Parent requested a rescheduling of the July 5 speech session. The second speech session is unscheduled. (N.T. 71)
31. On July 11, 2024, the Parent filed a due process complaint. (P-9)

DISCUSSION and CONCLUSIONS OF LAW

General Legal Principles

Burden of Proof

The burden of proof consists of two elements: the burden of production and persuasion. In special education due process hearings, the

burden of persuasion lies with the party seeking relief.⁵ The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise.⁶ In this case, the Parent is the party seeking relief and bears the burden of persuasion.

Witness Credibility

Special education hearing officers, in the role of fact-finders, are also 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).

The Parent, Coordinator of Special Education, Director of Special Education, the Principal and District Superintendent testified at this due process hearing. This hearing officer found each of the witnesses who testified to be credible as to the facts. In the few instances that there were contradictions, those are attributed to lapses in memory or recall, or to differing perspectives, rather than an intention to mislead; in any event, credibility was not determinative on any issue. The weight accorded the evidence, however, was not equally placed.

ESY Principles

The FAPE requirement extends to the provision of ESY services as necessary for the child. 34 C.F.R. § 300.106(a)(1). Pennsylvania sets forth a

⁵ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

⁶ See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed. Appx. 920, 922 (3rd Cir. 2010).

number of criteria that IEP teams must consider to ascertain whether a student is eligible for ESY; in essence, a determination must be made on whether ESY services are "required as part of a Student's program." 22 Pa. Code § 14.132(a). Eligibility is established if the factors in Section 14.132(a)(2) "make it unlikely that the student will maintain skills and behaviors relevant to IEP goals and objectives." Pennsylvania Department of Education, Basic Education Circular, Extended School Year Eligibility (April 15, 2013). If the student is eligible, the team must also determine the services to be provided. 22 Pa. Code § 14.132(a)(1).

In determining whether a proposed ESY program is appropriate, the general principles applicable to special education must be applied since ESY services must be provided by the child's IEP. 34 C.F.R. § 106(b). In addition, "a public agency may not ... [u]nilaterally limit the type, amount, or duration of [ESY] services." 34 C.F.R. § 106(a)(3).

Although not binding, the Bureau of Special Education and the Pennsylvania Training and Technical Assistance Network explain the ESY determination process this way:

The IEP team will determine which services and how much of these services will be provided during the extended school year. The team may decide that the student will continue all the services received during the regular school year, or it may decide that the student will only receive a portion of services or one specific service. This decision is based on the needs of each student.

A fundamental premise for ESY services has been described as serving as a vehicle for preserving skills that the child has gained over the school year, rather than as a means for maximizing growth. *L.G. v. Wissahickon School District*, 2011 U.S. Dist. LEXIS 476 *16 n.3, 2011 WL 13572 (E.D.

Pa. 2011). As noted, FAPE does not require maximizing programs or services, and ESY services are no exception to that general principle.

IDEA DISCIPLINARY PRINCIPLES

The IDEA provides a number of protections when a local educational agency (LEA) seeks to impose discipline on a student with a disability. Specifically, when an eligible student is facing a change in placement for disciplinary reasons, a meeting must convene to determine whether or not the conduct in question was a manifestation of the student's disability:

(E) Manifestation determination

(i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP. 20 U.S.C. § 1415(k)(1)(E)(i) (*italics added*); see also 34 C.F.R. § 300.530(e).

If it is determined that the conduct in question had either the causal relationship with the disability or was a result of the failure to implement the child's IEP, the conduct "shall be determined to be a manifestation of the

child's disability." 20 U.S.C. § 1415(k)(1)(E)(ii); see also 34 C.F.R. § 300.530(e)(2). The IEP team must either conduct a functional behavioral assessment, unless the [district] had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan (BIP) for the child; or If a BIP already has been developed, review the BIP and modify it, as necessary, to address the behavior. The Student must return the child to the placement from which the child was removed unless the parent and the [district] agree to a change of placement as part of the modification of the BIP. An exception to these procedures is 34 CFR 300.530 (g). The exception indicates school personnel may remove a student to an interim alternative educational setting for up to 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability if the child:

1. Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of a state or local educational agency;
2. Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under

Under the IDEA, a Parent may request an expedited hearing to dispute a disciplinary exclusion that constitutes a change of education placement. A change of educational placement has occurred if an exclusion is longer than 10 consecutive school days, or if the student is excluded for more than 15 school days in one school year, or when school days 11-15 constitute a pattern of exclusion. Any removal from school of a student who is identified

as having an intellectual disability is considered a change of educational placement, except if a disciplinary event involved weapons, drugs, or bodily injury.

Parent's Claims

The Parents filed a due process complaint and requested an expedited hearing on the grounds that the Student's ESY programming was inappropriate, an improper placement change occurred following a manifestation determination, and the District constructively expelled the Student from school grounds. Based on this hearing record, the Parents have sustained their burden of proof concerning some of the claims.

The resolution of this matter is limited to the expedited hearing record developed to resolve very narrow issues. The first question is whether the ESY programming for the 2023-2024 school year was appropriate. The Parents contend that the up to twenty-four (24) hours of virtual instruction over eight sessions lacked specificity, social-emotional and behavioral needs were unmet, and the duration of the speech-language sessions is uncertain. The Parent testified that the Student is offered 2.25 hours of synchronous and asynchronous ESY programming three days a week between 8:30-11:00. Many days, the Student could not tolerate portions of the live sessions. Although the Parent contends that the up to "twenty-four hours" is unclear, based on the hearing record, this flexibility was warranted given the Student's behavioral concerns, the ability to attend and now the demonstrated inability to consistently complete the full 2.25 hours of instruction in place. I will clarify the ESY programming offer and order the District to provide a total of twenty-four (24) hours of math and reading ESY. The offered speech ESY programming was adequate. Although two

sessions were scheduled, the Student was unavailable for the first one. I conclude that the District's failure to offer responsive ESY programming to address the Student's well-documented behavioral and social-emotional needs was a FAPE denial. Accordingly, a compensatory education remedy is appropriate.

The gravamen of this complaint is a District issued "notice of trespass" letter sent to the Parent advising that the Student could not be present on school property. The overarching contention is that this action punished the Student for disability status. Specifically, the Parent contends that the District's post MD determination resulted in a unilateral change of placement for the Student that exceeded ten days. The District contends the Student's placement was not unilaterally changed and occurred with the Parent's participation. I agree with both parties.

The Parent's testimony was credible that agreement to the NOREP occurred without other options and because of concern that a more severe consequence would result for the Student. Understandably, educational placement options for this behaviorally complex child are minimal. However, the Parent had an option not to agree to the proposed change of placement and exercise due process protections. On this expedited hearing record, except the for ESY issues, I defer a determination regarding the substantive appropriateness of the virtual home-based placement until the related FAPE denial claims are adjudicated. The District complied with the procedural post MD requirements of the IDEA. It offered to conduct an FBA, held a meeting and presented the Parent with a NOREP that proposed a change to the Student's education placement, to which the Parent consented, 34 CFR 300.530 (f). This was not a unilateral change. Notably, at no point did the District propose a removal of the Student on the grounds of the infliction of serious bodily injury, 34 CFR 300.530 (g).

Although the Parent, after the MD, through a NOREP, consented to change the Student's placement, there was no agreement to a complete exclusion from school property.⁷ Although notification of the exclusion occurred after the MD process, it was inextricably related to the Student's behavior that occurred in the school setting, days before. This is not to suggest that the District impose a more severe penalty on the Student. However, if the Student will receive education in the home through a virtual setting, as agreed through the NOREP, an indefinite exclusion from school property is inappropriate without invoking the proper disciplinary procedure. A similar result ensues if the Student is returned to the pendent placement. Understandably, the District has safety concerns for the Student and staff; however, the IDEA offers disciplinary procedures specific to an LEA, which were not accessed.

When a District fails to provide FAPE, it is well-settled that compensatory education is an available remedy for the student. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Ridgewood Bd. of Educa. v. N.E.*, 172 F.3d 238, 250 n.11 (3d Cir. 1999); *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996). The purpose of compensatory education is to provide an in-kind remedy for the period of time (minus any period of time required for a district's proper actions in regard to the student). *In Re: the Educational Assignment of J.K. Special Education Appeal No. 1481*. Once awarded, the computation of compensatory education is from the time a "district knew or should have known of [the] programmatic deficiency." See *Id.* citing *M.C. v. Central Regional School District and Millersburg Area School District v. Lynda T.*, 707 A.2d 572 (Pa Cmwlth, 1998). Because the District has failed to provide FAPE for ESY programming through social,

⁷ During testimony the Parent contended that virtual instruction was the only option presented. (P-4; N.T. 40-41)

emotional and behavioral skills programming for the summer of the 2023-2024 school year, the Student is entitled to twelve (12) hours of compensatory education. This amount will meet the Student's needs, and it was determined after consideration of testimony that the Student had great difficulty attending and completing the academic virtual programming.

ORDER

AND NOW, this 5th day of August 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. The Student shall receive a total of (twenty-four) 24 hours of ESY programming to address modified math and reading instruction. This is a clarification, and these ESY hours are deducted from those already provided.

2. The District's exclusion of the Student from school property during the change in placement, as outlined in the May 20, 2024, NOREP, is inconsistent with the disciplinary protections of the IDEA.

3. To address the established FAPE denial, the Student is awarded a total of twelve (12) hours of compensatory education to address social, emotional, or behavioral programming.

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

/s/ Joy Waters Fleming, Esquire

Joy Waters Fleming

HEARING OFFICER
ODR File No. 30008-24-25

August 5, 2024