

*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. 28922-23-24**

**Child's Name:**

G.P.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Parent Attorney:**

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**Hearing Officer:**

Cheryl Cutrona, J.D.

**Date of Decision:**

March 11, 2024

## **PROCEDURAL HISTORY**

The student named on the cover page<sup>1</sup> (hereafter “Student”), resides in the School District named on the cover page (hereafter “District”). The Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and Section 504 of the Rehabilitation Act (Section 504)<sup>3</sup> based on the classification of Emotional Disturbance (ED). As the result of an incident that occurred during a [redacted], the Student originally received a three-day out of school suspension (OSS). On November 15, 2024, an informal disciplinary hearing was held that resulted in the expansion of those consequences to a 5.5-day OSS and a one-year suspension from sports.

On December 13, 2023, the Parents filed an Expedited Discipline due process Complaint requesting that the one-year suspension from sports be expunged. Later, the parties agreed that this Complaint should not be classified as “Expedited” and the Complaint was diverted to the regular due process hearing timeline.

The Complaint proceeded to a two-day, closed, remote, due process hearing held on January 22, 2024 and February 12, 2024.

For the reasons set forth below, the Parents’ claims are sustained in part and denied in part.

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<sup>1</sup> 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 details appearing on the cover page of this decision, will be redacted prior to its 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).

<sup>2</sup> 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).

<sup>3</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).

## **ISSUES**

1. Did the District provide procedural due process to the Parents in regard to the informal disciplinary hearing held on November 15, 2023?
2. Was the Student improperly excluded from interscholastic sports when the Principal and the Athletic Director imposed a year-long suspension from sports based on unsportsmanlike conduct? If so, should the one-year suspension from sports be reduced to "time served" and discontinued immediately?
3. Did the imposition of a year-long suspension from sports constitute a change in placement that required a manifestation determination review (MDR)?
4. Did the District's actions exclude the Student from an extracurricular activity based on disability in violation of Section 504?
5. Did the District fail to appropriately implement the Student's IEP when it stopped providing counseling services and failed to notify the Parents?
6. Did the District fail to appropriately implement the Student's IEP when it did not provide the [redacted] coaching staff with access to the Student's IEP?
7. Did the District deny the Student a FAPE such that compensatory relief is warranted?

## **JOINT STIPULATIONS OF FACT**

1. [The] Student is a [redacted]-grade student at [the District.]
2. Student is a resident of the District who is eligible for special education and related services under the disability category of "Emotional Disturbance."

3. The District identified Student in 2019 and, since that time, Student has been offered a program of itinerant emotional support with placement at [the] neighborhood school.
4. Student's IEP dated March 10, 2021, offered a minimum of 60 minutes of counseling services per month.
5. Student's IEP dated March 7, 2022, offered a minimum of 60 minutes of counseling services per month.
6. Student continued to be eligible for special education and related services pursuant to a Reevaluation Report dated April 4, 2022.
7. On May 18, 2022, a new annual IEP was published based on information gathered during the reevaluation process.
8. Student's IEP dated May 18, 2022, offered a minimum of 60 minutes of counseling services per month.
9. Student's IEP dated April 18, 2023, offered a minimum of 30 minutes of counseling services per month.
10. After the conclusion of the 2022-2023 school year, Student matriculated to the [District] High School for the 2023-2024 school year from [redacted].
11. On November 14, 2023, the District notified Parents via telephone that Student would receive an out of school suspension for three days for getting into a fight and that Parents needed to attend a meeting.
12. On November 15, 2023, the parties attended the meeting, which was an Informal Disciplinary Hearing.
13. At the hearing, the District provided Parents with an Informal Hearing paper, which indicated that Student would be receiving 5.5 days of out of school suspension and sixty (60) days extracurricular suspension.
14. At the hearing, the Principal informed the Parents that Student would be receiving 5.5 days out of school suspension.

15. At the hearing, the Athletic Director informed Parents that Student would be suspended from sports for one year.
16. Later, the District clarified that “one year” meant one school year—until the end of the 2023-2024 school year.
17. The IEP Team recommended increasing counseling from 30 minutes per month to 60 minutes per month at a meeting held on November 28, 2023.
18. Student’s counseling services resumed with a 15-minute session on November 30, 2023.
19. The District issued a NOREP on December 7, 2023 recommending, among other things, a minimum of 60 minutes per month of counseling services.
20. Parents signed the NOREP indicating their disapproval without stating a reason and filed the current due process action.

## **FINDINGS OF FACT**

All evidence including the exhibits admitted to the record, the transcripts of the testimony and the parties’ written closing statements was considered.<sup>4</sup> The only findings of fact cited in this Decision are those needed to address the issues resolved herein. All exhibits and all aspects of each witness’s testimony are not explicitly referenced below.

1. The District is a local educational agency (LEA) within the meaning of 20 USC § 1401(15), 34 CFR § 300.28, 22 Pa. Code 14.102(a) (2)(vii) and a recipient of federal funds within the meaning of the IDEA, 20 USC § 1401 and Section 504, 29 USC § 794(b)(2)(B).

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<sup>4</sup> References to the record throughout this decision will be to the Notes of Testimony (NT), School Exhibit (S-) and/or Parent Exhibit (P-) followed by the Exhibit number and page number.

2. At the time of the due process hearing, the Student, was in the [redacted] grade at the District high school (NT, pp. 35-36). Academically, the Student was successful and participated in Advanced Placement courses (S-14, pp. 9-11; S-16).
3. In 2019, the Student was identified as having an ED in need Emotional Support Services (S-14, p. 24; P-9, p. 8). The Student's most recent Individualized Educational Program (IEP), as revised November 28, 2023, continues to provide specially designed instruction (SDI), accommodations, a Positive Behavioral Support Plan (PBSP), and Counseling (S-14).
4. The Student has difficulty managing emotions and maintaining satisfactory interpersonal relationships (P-9, pp. 7-8). The Student's maladaptive and impulsive behaviors (NT, pp. 61, 64) are related to a clinical diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD) (NT, p. 41). Behaviors addressed on the PBSP, include inappropriate comments and destructive use of items. For example, the Student defiantly and purposefully dropped a laptop on the floor (S-14, p. 42). These behaviors typically occurred during unstructured time (S-14, pp. 26-28; P-9, p. 2). Some of the accommodations listed in the IEP are frequent breaks, time outs, and an alternative lunch location (S-14, p.48). The Student's skill deficits were Social Skills, Self-Regulation, and Play Skills. "Loss of privileges" was one consequence for unwanted behavior listed in the Student's IEP/PBSP (S-10, p. 22). The IEP stated that all staff working with the Student "will receive a copy of the IEP or SDI with PBSP" (S-14, p. 49; NT, p. 263).
5. During the 2022-2023 school year, the Student participated in [sports] (NT, p. 24, 38) without accommodations (NT, p. 24, 38, 93, 256). The District did not provide copies of the Student's IEP, SDI or PBSP to the

coaching staff. In fact, it was the District's practice to *not* give Coaches access to students' IEP unless medical accommodation was needed (e.g., insulin) because as contract employees they were not provided to the District's database where IEPs are accessible to authorized personnel (NT, pp. 296-97, 309, 378-382).

6. The Student's unwanted behaviors decreased when the Student was involved in playing sports (NT, pp. 256; S-14, p. 11). The District did not implement accommodations during the time the Student was playing sports nor did the IEP team ever discuss implementing accommodations for the Student to play school-sanctioned sports (NT, p. 257).
7. The Student also participated on a [redacted] team and expected to play on the [redacted] team during the Spring 2024 season (NT, pp. 39, 446-447).
8. Throughout the Fall, the Student and a Teammate, [redacted], mutually engaged in bullying behavior and negative peer interactions. The precipitating incident that resulted in the OSS, and what brought other unsportsmanlike behavior to the administration's attention during the resultant investigation, occurred at a [redacted] game on November 10, 2023 when the Student put the Teammate in a headlock (S-20; NT, pp. 84; 314-316; 326-327). The headlock was captured on social media (P-24, p. 13). At the time of the incident at the [redacted], the Student's [redacted] (NT, pp. 75, 442-443).
9. On November 14, 2023, the Assistant School Principal telephoned the Parents and invited them to participate in a "meeting" to discuss the Student's behavior, which had resulted in the imposition of a three-day OSS (NT, p. 84). The meeting was scheduled for the next morning. A written notice of the "Informal Hearing" was given to the Student, however, the Parents did not find it in the Student's backpack until a few days after the hearing (P-18; NT, p. 90).

10. During the investigation other incidents came to light insinuating that the Student had desecrated [redacted]<sup>5</sup>. During the investigation another student (not the Teammate) said he observed the Student perform one of the alleged acts [redacted] (NT, 429-430). The Student, however, disavowed both alleged incidents claiming the Student had merely concocted the story and relayed it to other students (NT, pp. 297-98, 326, 412-13; P-19).
11. These were the eighth and ninth disciplinary incidents on the Student's record during the 2023-2024 school year. Although the "offense levels" were omitted on the Student's disciplinary history, most of the other offenses were minor, including infractions such as inappropriate behavior in the classroom, using a mobile phone during class time, asking to go to the nurse then not going there, and failing to report to class. There was one previous serious offense: academic dishonesty. It appears from the record that the most serious consequence was a "warning." There was no record of a previous OSS during the 2023-2024 school year (S-17, p. 1; P-23, p. 1).
12. The District administration considered these [sport]-related acts to be Level 3 Major Infractions of the School Code of Conduct and School Policy<sup>6</sup> (S-24). The Student's unsportsmanlike conduct also violated Pennsylvania Interscholastic Athletic Association (PIAA) rules<sup>7</sup> (NT, p. 413). Members of the PIAA must adhere to the PIAA rules or risk their membership (N.T. 292, 397). The PIAA rules include unsportsmanlike behavior, including acts intended to demean another person (NT, p. 293-296). The Athletic Director and the Principal determined which students

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<sup>5</sup> The Hearing Officer has decided not to provide a full description of the alleged behavior because it does not bear repeating herein.

<sup>6</sup> The District's school board policies on bullying and hazing are available publicly online. <https://go.boarddocs.com/pa/cmdvsd/Board.nsf/goto?open&id=BJ9GBN430905#>

<sup>7</sup> In addition to the testimony of the high school Principal and the Athletic Director about the PIAA requirements, the PIAA Bylaws, Constitution, and Rules and Regulations are publicly available online. <https://www.piaa.org/resources/handbook/default.aspx>.

were eligible to participate on the high school sports teams (N.T. 291, 375, 436). Participation in extracurricular sports activities was considered a “privilege” not a “right” (NT, p. 296, 304-305).

13. As a result of the egregious nature of the behavior that was discovered during the investigation, after the original penalty was imposed, the Athletic Director and the high school Principal increased the severity of the consequences (NT, pp. 88-92; 297-299; 412-413).
14. The informal hearing resulted in the Student’s OSS being increased from three to 5.5 days and the 60-day “extracurricular” suspension listed on the informal hearing report (P-19, p. 6) was extended to one year. The Athletic Director *orally* told the Parents about the sports suspension. No written notice was, nor has been, given to the Parents or the Student about the increased sports suspension (NT, p. 441). The duration of the sports suspension was later clarified as lasting until the end of the 2023-2024 school year (NT, p. 441). No Manifestation Determination Review was held.
15. The Parents were surprised that the “meeting” turned out to be an “informal discipline hearing.” Had they known, the Parents would have prepared differently. The Parents were prevented from showing the Student’s mobile phone to the District as evidence of bullying (NT, pp. 438-442; P-28).
16. The Parents requested an IEP meeting to be held following the Student’s OSS. At the November 28, 2023 IEP meeting, the Parents discovered that the Student was not receiving Counseling Services as required by the IEP. The School had not notified the Parents of that.

### **Parents’ Claim**

The Parents claim that the structure, consistency, exercise, stress release, and the opportunity to connect socially with peers contributes to the

Student's ability to succeed socially and academically and are an integral part of the Student's coping mechanism. Therefore, the District's imposition of a year-long sports suspension constitutes a change in placement. The Parents also assert that, as such, an MDR was required.

The Parents argue that the District failed to provide due process as prescribed in the District's Policy Manual Section 200, Code 233 because they were not given sufficient notice of the informal hearing, nor were they given the opportunity to offer evidence or witnesses, and the high school Principal rejected their offer to present social media posts and communications they found on the Student's phone to demonstrate the Teammate's bullying of the Student.

Furthermore, the Parents allege that the District failed to implement the IEP appropriately because the [redacted] Coaches were not given the Student's IEP, and the Student's counseling services had been unilaterally discontinued due to the District's needs without notifying the Parents.

Based on the above, the Parents request a reevaluation that includes a Functional Behavioral Assessment (FBA), compensatory education for a denial of FAPE, and an order that the time the Student has been suspended from participating in sports is sufficient and that the Student be permitted to participate in sports immediately so that the Student can play on the high school's [redacted] team this season.

### **District's Claim**

The District claims that it followed all of the legal requirements of IDEA. The District asserts that the Parents were provided with proper notice of the informal hearing and that a MDR was not required because the OSS was only 5.5 days and the athletic suspension did not constitute a change of placement because the Student's program and placement, including time spent in regular education, were not changed.

Furthermore, the District purports that the athletic suspension is not regulated by IDEA, but rather the PIAA, which regulates interscholastic athletics. The District maintains that the PIAA, has delegated the authority to impose athletic suspensions to the School District administration and those suspensions cannot be appealed to a state court or a special education hearing officer.

The District argues that participating in sports is a privilege, not a right. Therefore, the athletic suspension for the remainder of the 2023-2024 school year is fair and is intended to communicate to the Student that targeting another person will result in a loss of privileges. The District argues that the Student's PBSP contemplates consequences that demonstrate that certain behaviors will not be tolerated and will result in the removal of privileges.

The District points out that the Complaint does not request, nor have the Parents historically requested, that the IEP Team consider whether to add accommodations during sports as part of the IEP. The Student has always successfully accessed, participated in, and been successful at interscholastic sports without accommodation, proving that the Student's in-school disruptive behaviors – which *are* a manifestation of the Student's disability – do not constitute an access barrier for sports participation. The Student does not need accommodations to be afforded an equal opportunity to participate as evidenced by the Student's successful participation in [redacted] grade, in-district sports as well as participating in a community-based travel team (NT, 93, 156).

The District did not fail to provide the Student a FAPE. The missed counseling services were *de minimis*, and they were made up. As soon as the District recognized the error, it rectified the error within a reasonable time period. There was no denial of FAPE so compensatory education is not appropriate here.

Based on the above, the District requests that the Parent's claim be denied.

## **LEGAL PRINCIPLES**

### **Burden of Proof**

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. 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).

The burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called " equipoise." When the evidence is in "equipoise," the party seeking relief and challenging the program and placement must prove their case by a preponderance of the evidence in order to prevail. See *Schaffer* above; see also *Ridley S.D. v. M.R.*, 680 F.3d 260 (3d Cir. 2012); *L.E. v. Ramsey Board of Education*, 435 F.3d 384 (3d Cir. 2006).

On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See *Schaffer*, above.

### **Credibility Determinations**

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of the witnesses' testimony. See *22 Pa. Code §14.162* (requiring findings of fact); 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*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings).

This Hearing Officer found the Parent and each of the District witnesses to be candid, credible and convincing, testifying to the best of their ability and recollection concerning the facts necessary to resolve the issues presented at the due process hearing.

### **IDEA Discipline Principles**

When discipline is imposed, the IDEA provides important protections to students found to be eligible for special education services. A local education agency (LEA), including a school district, is permitted to remove a child with a disability from his or her current educational setting for violating 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).

An LEA is also permitted to impose additional disciplinary removals for separate incidents of misconduct for fewer than ten consecutive school days, provided that such removals do not constitute a "change of placement." 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b). A "change of placement" based on disciplinary consequences is met if a removal for more than ten consecutive school days is imposed on an eligible student. 34 C.F.R. § 300.536(a).

“Any unique circumstances” 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).

### **Student Rights to an Informal Disciplinary Hearing**

According to 22 Pa. Code § 12.6, a student who is being suspended for three days or more has these due process rights in regard to an informal hearing:

- (ii) A student may not be suspended until the student has been informed of the reasons for the suspension and given an opportunity to respond. Prior notice of the intended suspension need not be given when it is clear that the health, safety or welfare of the school community is threatened.
- (iii) The parents or guardians and the superintendent of the district shall be notified immediately in writing when the student is suspended.
- (iv) When the suspension exceeds three school days, the student and parent shall be given the opportunity for an informal hearing consistent with the requirements in § 12.8(c) (relating to hearings).

The Pennsylvania Code due process requirements for informal disciplinary hearings are as follows:

- (c) Informal hearings. The purpose of the informal hearing is to enable the student to meet with the appropriate school official to explain the circumstances surrounding the event for which the student is being suspended or to show why the student should not be suspended. (1) The informal hearing is held to bring forth all relevant information regarding the event for which the

student may be suspended and for students, their parents or guardians and school officials to discuss ways by which future offenses might be avoided. (2) The following due process requirements shall be observed in regard to the informal hearing: (i) Notification of the reasons for the suspension shall be given in writing to the parents or guardians and to the student. (ii) Sufficient notice of the time and place of the informal hearing shall be given. (iii) A student has the right to question any witnesses present at the hearing. (iv) A student has the right to speak and produce witnesses on his own behalf. (v) The school entity shall offer to hold the informal hearing within the first 5 days of the suspension.<sup>8</sup>

### **Manifestation Determination Review**

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 MDR 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)(E)(i); see also 34 C.F.R. § 300.530(e). See *J.H. v. Rose Tree Media School District*, 2018 U.S. Dist. LEXIS 157803 (E.D. Pa. 2018) (upholding manifestation determination that conduct was not related to the student’s disability when the team considered all available relevant information, including the student’s disability-related manifestations, and agreeing there was no causal relationship); *Fitzgerald v. Fairfax County School Board*, 556 F.Supp.2d 543 (E.D. Va. 2008) (same).

Within ten school days of any decision to change the placement of a child with a disability or suspected disability because of a violation of a code

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<sup>8</sup> 22 Pa. Code § 12.8 (c)

of student conduct, the MDR team – including the LEA, the parent and relevant members of the child's IEP team (as determined by the parent and the LEA) – must review all relevant information in the student's file, including the student's IEP, the student's disability, any teacher observations, and any relevant information provided by the parents.

If 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 the child with a disability remains 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). More specifically, the child shall continue to be provided educational services enabling him or her to participate in the general education curriculum, and to make progress toward meeting the IEP goals; and, where appropriate, have an FBA conducted and implementation of behavior interventions. 20 U.S.C. § 1415(k)(1)(D); 34 C.F.R. § 300.530(d). The student's IEP team determines the services to be provided during the period of removal as well as the setting. 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.530(d)(5).

### **FAPE under Section 504**

A recipient of federal funds that operates a public elementary or secondary education program "shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 34 C.F.R. § 104.37(a)(1). Section 504 and Chapter 15 require that districts "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 CFR 104.33(a); 22 PA Code §15.1. The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section

504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. See generally *P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009).

## **FAPE under IDEA**

The IDEA requires the provision of a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412.

To be eligible for special education services under the IDEA, the student must (1) meet the requirements of one or more of the disability categories identified in the regulation and (2) require specially designed instruction to benefit from that instruction.

FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

## **The Individualized Education Plan (IEP)**

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v.*

*Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's IEP Team, which includes teachers, school officials, the local education agency (LEA) representative and the child's parents.

An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29).

A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D)

## **Reevaluation**

The IEP is based on evaluations and reevaluations. The IDEA requirements are substantively the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

The IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child[.]" 20 U.S.C. §1414(a)(1).

Reevaluations are required every three years unless waived by both LEA and parent(s). Reevaluations may also be requested by Parents or teachers for a specific purpose. 20 U.S.C. § 1414 (a)(2).

The IDEA and its implementing regulations set out procedural requirements designed to ensure that all of the child's individual educational needs are examined: (1) the District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information; (2) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and (3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 20 U.S.C. § 1414(b)(2); see also 34 C.F.R. §§ 300.303(a), 304(b).

The evaluation must assess the child "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]" 34 C.F.R. § 304(c)(4); see also 20 U.S.C. § 1414(b)(3)(B).

And, the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services' needs, whether or not commonly linked to the disability category in which the child has been classified," and utilize "[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]" 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3).

## **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 IDEA. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Big Beaver Falls Area School District v. Jackson*, 615 A.2d 910 (Pa. Commw. Ct. 1992). Compensatory education may be an appropriate form of relief where an LEA knew, or should have known, that a child's special education program is not appropriate or that they are receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996).

Traditionally, Pennsylvania courts have recognized two distinct methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the "hour-for-hour" method, embraced by *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996), a student would receive one hour of compensatory education for each hour that FAPE was denied. The Third Circuit has also endorsed an alternate approach, sometimes described as a "make-whole" remedy, where the award of compensatory education is crafted "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). In *Reid*, the court concludes 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. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or *Reid* method. The more nuanced *Reid* method 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 preference for the *Reid* method, that analysis poses significant practical problems when, in administrative due process hearings, evidence is not 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.

## **DISCUSSION**

### **Procedural Due Process for Informal Disciplinary Hearings**

The School District Policy Manual mirrors the Pennsylvania Code’s procedural due process requirements for Informal Disciplinary Hearings. The guidelines in Section 233 are clear:

#### **Purpose of Informal Hearing**

The purpose of the informal hearing is to permit the student to explain the circumstances surrounding the event leading to the

suspension, to show why the student should not be suspended, and to discuss ways to avoid future offenses. [6]

Due Process Requirements for Informal Hearing

1. The student and parent/guardian shall be given written notice of the reasons for the suspension. [6]
2. The student and parent/guardian shall receive sufficient notice of the time and place of the informal hearing.
3. The student may question any witnesses present at the informal hearing.
4. The student may speak and produce witnesses who may speak at the informal hearing.
5. The District shall offer to hold the informal hearing within five (5) days of the suspension.<sup>9</sup>

The Parents' claim that they were not given sufficient notice must fail. The District provided the Student and the Parents with written notice of the informal hearing. The Student was given the written notice; it is not the District's fault that the Student failed to give it to the Parents.<sup>10</sup>

The afternoon before the Informal Disciplinary Hearing, the Assistant Principal contacted the Parents by telephone, to ensure that they were aware of the meeting which was scheduled for 9:30 a.m. the next day. Unfortunately, the message conveyed led the Parents to believe that this was merely a "meeting." It was not clear to the Parents that the meeting would be an informal disciplinary hearing. It is clearly understandable that the Parents were upset about not realizing the informal hearing had more serious gravamen requiring different preparation. Despite that being the

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<sup>9</sup> <https://go.boarddocs.com/pa/cmdvdsd/Board.nsf/goto?open&id=BJ9GBN430905#>

<sup>10</sup> To avoid future problems, the District might want to revisit the practice of giving important information to students without also sending it to the Parents electronically, and requesting a response to confirm that that notice has been received.

case, the Hearing Officer finds that the Parents were *technically* provided with sufficient notice.

However, the fact that the Student and the Parents were not given the opportunity to present evidence and question witnesses at the informal disciplinary hearing *is* a procedural violation. The testimony convincingly proves that the Parents were not given an opportunity to provide the social media evidence they wanted the District to consider. The District did not show the Parents the video footage from the [redacted] they took in consideration in making their disciplinary decision. The video allegedly shows the Student and the Teammate interacting with each other and the head-lock. And, the Athletic Director verbally informed the Parents that the suspension from interscholastic sports had been increased to one year, without giving them an opportunity to respond. The administration's refusal to permit the Parents to fully participate in the informal disciplinary hearing caused serious trust issues between the Parents and the School District. The manner in which the Athletic Director communicated that the sports suspension was being increased to one year appeared abrupt and arbitrary, shocked the Parents and left them confused, without an opportunity to respond at the informal hearing, and with no written confirmation of the change.

In conclusion, the Parents proved by a preponderance of the evidence that the District denied their procedural due process rights by not permitting them to present evidence and question witnesses at the informal hearing.

### **Student Conduct Prohibited by the PIAA Bylaws**

While the year-long sports sanction was discussed during the informal hearing, it does not fall under the purview of IDEA for two reasons: (1) it is clearly excluded from the definition of extracurricular activities in the District's Student Handbook; and (2) penalties for unsportsmanlike conduct

are under regulated by the PIAA, which delegates the imposition of sanctions to the School Principal.

“Interscholastic athletics” is excluded from the definition of “extracurricular activities” in the 2023-2024 District Student Handbook. Policy 122 defines sports “extracurricular activities” as, “An athletic contest or competition, *other than interscholastic athletics*, that is sponsored by or associated with the school, including cheerleading, club-sponsored sports activities and sports activities sponsored by school-affiliated organizations”<sup>11</sup> (emphasis added).

The evidence presented at the hearing demonstrates only the Student’s participation in interscholastic athletics is contemplated by the year-long sanction, [redacted], both of which are governed by the PIAA. It does not relate to the [redacted] team or physical education classes at school.

The PIAA Constitution and Bylaws support the District’s argument that sports sanctions are governed by PIAA, which authorizes school principals to impose discipline for sportsmanship and unsportsmanlike conduct. While the Athletic Director is the one who told the Parents what the penalty would be, he testified that the decision was discussed with the high school Principal.

The PIAA 2023-2024 Bylaws<sup>12</sup> apply to “all PIAA member schools and those students seeking to participate in interscholastic competition at those PIAA member schools.” The PIAA 2023-2024 Bylaws vest enforcement of the Bylaws with the School Principal (p. 10). All athletes must comply with the Athletic Courtesy guidelines which include, “E. No action is to be taken nor course of conduct pursued which would seem unsportsmanlike or dishonorable if known to one’s opponent or the public.” (p. 10)

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<sup>11</sup> See J-2, p. 54.

<sup>12</sup> The link to page 10 of the PIAA Bylaws is:  
<https://www.piaa.org/assets/web/documents/Handbook%20-%20Section%20I%20-%20Constitution%20and%20By-laws.pdf>

The PIAA Bylaws section on "Sportsmanship and Unsportsmanlike Conduct" explains, "Sportsmanship is a core principle in interscholastic athletics. Actions which are unethical or intended to demean, embarrass, intimidate or injure opposing contestants, teams, spectators and officials are considered unsportsmanlike and will not be tolerated since they are contrary to the purposes of PIAA and convey lessons incompatible with the reason why high school sports exist." (p. 10)

The Hearing Officer's authority is limited to IDEA, Section 504, and their implementing State rules and regulations. The Hearing Officer has no authority to disturb a sanction for unsportsmanlike conduct imposed by the school administration authorized by the PIAA to do so.

## **Change in Placement and Need for a Manifestation**

### **Determination Review**

The 5.5-day OSS did not constitute a "change of placement" because it was not for more than ten consecutive school days, nor was there a pattern of short-time removals. 34 C.F.R. § 300.536(a). For those reasons, there was no requirement to hold a MDR.

The Parents assert that the year-long suspension from sports, however, does constitute a change in placement. The Hearing Officer concurs with the District that the sanction is not a change in placement because the Student's IEP and time spent in regular education were not changed by it. And, as mentioned above, interscholastic sports are not included in the District's definition of "extracurricular activities." The IDEA does not provide, nor is there any binding precedent that provides, disciplinary protections for interscholastic athletics regulated by the PIAA. And, there was no evidence presented that the Parents ever requested accommodations during extracurricular activities or that the IEP Team ever discussed including accommodations during participation in sports-related extra-curricular activities so there was no denial of FAPE.

## **Discrimination under Section 504**

Until this incident occurred, the District had provided the Student a FAPE with access to sports with regular peers. The Student's IEP does not identify accommodations that are specifically necessary for the Student to access sports. And, until this incident, the Student had participated in sports successfully. The IEP Team can certainly consider accommodations in the future in light of what happened; however, the Hearing Officer concurs with the District that this issue was not pled in the Complaint and, therefore, cannot be ordered here.

By implementing the one-year sanction, the question is whether the District is *now* excluding the Student from accessing sports based on disability in violation of Section 504.

In other jurisdictions, it has been found that students may be removed from extracurricular activities, as a consequence for misconduct without discriminating on the basis of disability when there is a legitimate, nondiscriminatory reason for doing so.<sup>13</sup> Herein, the sanction is directly related to the infraction that occurred in the [redacted] locker room, will be unpleasant for the Student as a reminder that this type of behavior will not be tolerated, and serves as a legitimate repercussion for the unsportsmanlike behavior that demeaned the Teammate. And, as mentioned above, is regulated by the PIAA.

Furthermore, the District has noted that the Student will be welcome to resume participating in school-based sports during the next school year when the suspension has run its course. Therefore, the Hearing Officer finds no violation of Section 504.

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<sup>13</sup> See *Cody v. Kenton Cnty. Pub. Sch.*, 2023 U.S. Dist. LEXIS 22909 (E.D. Ky. Feb. 10, 2023); *In re: Board of Education of the St. Joseph Public Schools*, 101 LRP 74 (Michigan Ed. Agency May 3, 2001); and *In re: Sayreville Bd. of Ed.*, 103 LRP 33930 (N.J. SEA June 12, 2003)

## **Implementation of the IEP**

The Parents contend that the District failed to implement the Student's IEP for two reasons: (1) the District did not provide the coaches access to the Student's IEP as required in the IEP; and (2) the amount of counseling time predicated in the IEP was reduced without notifying the Parents.

### **Coaches' Access to the IEP**

The District failed to implement the IEP by not providing the coaching staff with access to the Student's IEP. Not all the coaching staff are school employees, so they are not provided with access to the High School's confidential database that includes the IEPs. For that reason, the administration does not regularly provide the coaching staff with access to IEPs, despite the fact that the coaching staff works with students who have IEPs. Apparently, as is the case here, even when a student's IEP requires that the staff be provided with it, that might not happen unless the student has a unique physical medical need. However, the District failed to prove that the coaching staff is informed about exceptional students who have been identified as having social and emotional needs, even when their IEP requires that it be shared with the staff who work with the student. Even if access to the school database is not traditionally provided to non-school employees, the administration needs to develop a plan for alerting the coaching staff about the special needs of the students they coach short of giving them access to the confidential database.<sup>14</sup>

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<sup>14</sup> Perhaps an "IEP at a Glance" or an "IEP Summary" could be created so proper notice can be given. One cannot help but wonder if the coaches in this case had been aware of the Student's (and any others on the team) social and emotional needs, they might have developed a plan of action to more closely supervise the students in the locker room or invented other strategies to prevent bullying and other inappropriate behaviors while the students are under their supervision.

Based on the above, the Hearing Officer finds that the District failed to implement the IEP by not providing the coaching staff with some IEP information about the Student's special needs.

#### Counseling Hours

The missed counseling sessions during the Fall of 2023 were *de minimis* and did not constitute a denial of FAPE. The Student was not denied a meaningful educational benefit. The 2022-2023 IEP required 60 minutes of counseling per month, or about 15 minutes per session. The counselor, who is a contract employee, testified that the Student was resistant to counseling, gave excuses for not going, or skipped it entirely. At some point when a scheduling issue arose for the counseling service, the Student's sessions were discontinued to reduce a counselor's workload. The District alleges that it was unaware of the adjustment until the IEP meeting so the Parents were not made aware of the shift in services.

The missing counseling sessions did not negatively impact the Student's educational success, although not participating in counseling might be a contributing factor to the Student's participation in mutual bullying, but there was no evidence to prove that. Furthermore, as soon as the District became aware of the missed counseling sessions, a plan was developed to make up the lost hours and they missing time had been made up at the time of the due process hearing.

### **Compensatory Education or Other Relief**

#### Procedural Violations

Compensatory education is one form of relief. A parent/student is only entitled to compensatory education or other relief if there has been a denial of FAPE or other violation of IDEA.

For a procedural violation to be actionable under IDEA, the Parent must show that it resulted in a loss of educational opportunity for the

student, seriously deprived the parents of meaningful participation, or caused a deprivation of educational benefit. *Ridley School District v. MR and JR ex rel. ER, supra*; IDEA 615(f)(3)(E); 34 C.F.R. § 300.513(a).

Relief under IDEA is equitable in nature; should be flexible and designed to remedy the harm caused by the violation; and tailored to the specific facts and circumstances of a particular case, considering the nature and severity of the violation and the nature and severity of the student's disability. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005).

A special education due process hearing officer has broad equitable powers to award appropriate remedies when a district violates IDEA.<sup>15</sup>

The Decision Notes included in 22 Pa. Code § 12.6 regarding sanctions for "Procedural Violations" states, "Where defendant school district summarily suspended plaintiffs for a period in excess of 3 days and failed to follow notice and hearing procedures, those portions of the suspension served before proper notice and hearing were expunged from plaintiffs' records." *Mullane v. Wyalusing Area School District*, 30 D. & C.4th 179 (1997).

The relief ordered for the procedural violations at the informal due process hearing will be that the District will reduce the 5.5-day OSS back to the original three-day OSS and be reflected as such on the Student's Disciplinary Record. And, because the Student has already served the 5.5-day OSS, the Hearing Officer awards the Student 2.5 days of compensatory

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<sup>15</sup> *The School Committee Town of Burlington v. Department of Educ.*, 471 U.S. 358, 369, 105 S. Ct. 1996, 556 IDELR 389 (1985); *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 52 IDELR 151, n. 11 (U.S. 2009); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005); *See, Garcia v. Board of Education of Albuquerque Public Schools*, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008); *In re Student with a Disability*, 108 LRP 25824 (SEA WV 2008); *Dist. of Columbia Public Schs.*, 111 LRP 76506 (SEA DC 2011); *In re Student with a Disability*, 111 LRP 40544 (SEA WV 2011).

education. In this case, using the hour-for-hour approach, the total amount will be calculated by using the number of hours the Student spends in the regular education classroom. According to the IEP, that is 6.77 hours per day (S-24, p. 54) multiplied by 2.5 for a total of 16.925 hours.

#### Coaches Access to the IEP

The District inappropriately implemented the Student's IEP when they did not provide the coaches with access to the Student's IEP. The District is ordered to provide the Student's IEP to the coaching staff as required by the Student's IEP when the Student returns to sports following the suspension.

#### Counseling Hours

In this matter, the missing counseling sessions did not result in substantive harm to the Student and the lost time has been made up so compensatory education is not warranted.

#### Reevaluation to include an FBA

In their Complaint, the Parents requested that the Hearing Officer order a reevaluation of the Student that includes a Functional Behavior Assessment (FBA). There was no evidence that the Parents had requested and been denied one prior to filing the Complaint. IDEA provides for triennial reevaluations or at a parent's request, as long as they are not more often than once per year or unless the parties agree otherwise. The Student's last Reevaluation Report is dated April 4, 2022 and the next scheduled reevaluation will be due April 4, 2025. Because the Parents did not provide evidence of the need for a reevaluation outside of the three-year schedule (e.g., based on a student's changing needs), the Hearing Officer will not order one here. If the Parents do want an FBA and reevaluation in light of the Student's conduct that led to the sports sanction (which appears to be

unlike any previous behavior), they may request one<sup>16</sup> and the District will have an opportunity to respond with a Notice of Recommended Educational Placement (NOREP) or a Permission to Reevaluate (PTRE).

## **CONCLUSION OF LAW**

1. The District violated the Parents' procedural due process rights in regard to the informal disciplinary hearing held on November 15, 2023. The District is ordered to reduce the OSS back to three days, adjust the Student's disciplinary record accordingly, and award 2.5 days of compensatory education.
2. The Principal and the Athletic Director were authorized by PIAA to impose sanctions for unsportsmanlike conduct. As such, the Hearing Officer does not have the authority to reduce or rescind it.
3. The imposition of an OSS for less than 10 days with no pattern of OSS and the year-long suspension from interscholastic sports does not constitute a change in placement that requires a manifestation determination review.
4. The District actions that resulted in the Student's year-long exclusion from interscholastic sports were not based on disability, and therefore, did not violate Section 504.
5. During the Fall of 2023, the District improperly implemented the Student's IEP when the Student's counseling hours were changed from what was delineated in the IEP; however it was a *de minimis* lapse, it did not negatively impact the Student, the District was unaware of it until the IEP meeting held in November 2023, and as soon as they became aware of it, they developed a plan to make up the lost time in counseling. No relief is due in light of the fact that the missing hours have been recouped.

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<sup>16</sup> See 20 U.S.C. § 1414

6. The District erred when it failed to provide the coaching staff with access to the Student's IEP in contradiction of the IEP. The District is ordered to provide the coaching staff with the Student's IEP in place at the time the Student returns to sports activities after the suspension is completed.
7. All other relief requested by this Complaint is hereby denied.

## **ORDER**

AND NOW, this 11th day of March 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parents' claim is SUSTAINED in part and DENIED in part. It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DISMISSED. The Hearing Officer's jurisdiction is relinquished.

*Cheryl Cutrona*

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**Cheryl Cutrona, J.D.**  
**Special Education Hearing Officer**

**Date of Decision**

March 11, 2024

**ODR 28922-23-24**