

*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

ODR No. 13734-1213 KE

Child's Name: A.M.

Date of Birth: [redacted]

Dates of Hearing: 7/17/13

### CLOSED HEARING

Parties to the Hearing:

Parents  
Parents

School District  
Tri-Valley  
110 West Main Street  
Valley View, PA 17983

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney  
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2202 Circle Road  
Carlisle, PA 17013

School District Attorney  
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August 6, 2013

August 21, 2013

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

This case involves allegations by Parents that the District failed to take effective action to stop and prevent bullying against Student, who attended the District's high school, housing grades 7—12, for the past two years. Parents contend that a hostile atmosphere in the school resulted in a denial of FAPE under IDEA, or constituted disability-based discrimination in violation of §504 of the Rehabilitation Act of 1973. Parents also alleged that the District inappropriately disciplined Student for a serious breach of appropriate conduct in school, which Student denies occurred. Parents contend that the District should not have credited the report of the peer who disclosed the conduct because she had reason to retaliate against Student for prior reports of bullying.

Parents seek compensatory education for Student, removal of the disciplinary incident from Student's record and an order requiring the District to implement an anti-bullying program.

As explained below, Parents' claims and requests for relief based upon the District's allegedly inadequate response to specific incidents of bullying either directed toward Student, or that allegedly created a hostile school environment, are not supported by the evidence. Moreover, it would be beyond even the broad remedial authority granted to IDEA due process hearing officers to order the District to implement a general education program for all of the students in the District. Student will, however, be awarded limited compensatory education for the District's denial of FAPE during the second half of the 2012/2013 school year by failing to provide appropriate special education and related services to address Student's significant needs in the areas of social skills development and peer relationships that were clearly a major factor in the peer problems Student experienced during the second half of the past school year.

## **ISSUES**

1. Did the School District fail to appropriately address incidents of bullying and harassment, such that Student's ability to access education was adversely affected by the school environment?
2. Did the School District inappropriately discipline Student for an alleged violation of the code of student conduct that the District failed to appropriately document?
3. If the District did not violate IDEA, did the District's conduct toward Student constitute disability-based discrimination in violation of §504 of the Rehabilitation Act of 1973?
4. Should the District be required to remove the disciplinary incident from Student's record?
5. Should the District be required to implement a school-wide anti-bullying program to improve the atmosphere within the School District?
6. Is Student entitled to an award of compensatory education, and if so, in what form and in what amount?

## **FINDINGS OF FACT**

1. Student, a [teenaged] child born [redacted] is a resident of the School District and is eligible for special education services. (Stipulation, N.T. p. 15)
2. Student has been identified as IDEA eligible in accordance with federal and state standards in the autism disability category. 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 15)
3. Student has attended District schools and received special education services since kindergarten. Student completed 8<sup>th</sup> grade in the District high school during the 2012/2013 school year in regular education academic classes. (N.T. p. 38, S-32)
4. Despite ongoing organizational issues, a history of difficulty with fine motor tasks, school-related anxiety and distress arising from academic requirements, Student maintained very high grades during the two school years Student's program has been located in the high school. (94.27—7<sup>th</sup> grade and 94.5-8<sup>th</sup> grade). Student scored in the advanced or proficient levels on all subjects tested on the 8<sup>th</sup> grade PSSA assessment. (N.T. pp. 84—86; S-1 p. 2, S-31, S-32, S-33)
5. Student's difficulty with social skills, social interactions and peer relationships was first noted in the kindergarten teacher's classroom observation for a December 2004 evaluation, and was included in teacher and/or evaluator comments in each subsequent reevaluation report and IEP until the IEP developed in the middle of the 2011/2012

- school year (7<sup>th</sup> grade). (N.T. pp. 47, 80; P-1 pp. 3, 4, P-2 p. 4, P-3 pp. 5, 6, P-4 pp. 2, 3, 5, P-5 pp. 6, 8, P-6 pp. 7, 8, P-9 pp. 1, 7, P-13 pp. 3, 4, 5, P-16 pp. 5, 6, P-19 pp. 7—9)
6. A recent private neuropsychological assessment completed near the end of the current school year identified several social problems, including Student's egocentricity, problems establishing and maintaining peer relationships, difficulty initiating and maintaining reciprocal conversation, and poor "observer" function, described as seeing the world through the eyes of others, and perceptions of being bullied. (P-28 pp. 2, 4, 7)
  7. The neuropsychologist also noted "disinhibition," including over-sensitivity to external stimuli, resulting in distractibility and short attention span; thoughts with obsessive features; anxiety, motor responses/outputs with associated difficulty sitting still, pacing and toe walking (P-28 p. 1, 6)
  8. Processing problems identified by the private evaluator included poor organization; history of literal interpretation and detail orientation creating difficulties in "seeing the big picture;" poor planning, associated with impulsivity; difficulty predicting outcomes/consequences; failure to use feedback; inflexibility; rigidity; perfectionism; resistance to change; overly detailed verbal responses; deficient perceptual-motor skills; fine and gross motor incoordination. (P-28 pp. 1, 2, 6)
  9. Similar issues related to Student's social skills, thought and reaction patterns were noted in Student's evaluation reports and IEPs between kindergarten and 6<sup>th</sup> grade. (P-2 p. 2, P-4 pp. 3, 5, P-5 p. 7, P-6 p. 7, P-9 p. 7, P-13 pp. 4, 5, P-16 pp. 5, 6)
  10. In the kindergarten evaluation, the examiner noted Student's disinterest in the listener's responses during conversation. (P-2 p. 2)
  11. In the ER completed during 2<sup>nd</sup> grade, the evaluator noted Student's attempts to shift blame to others for Student's actions, as well as deficits in reciprocal communications, patterns of cognitive rigidity and hyper-sensitivity to criticism. In the mid-2<sup>nd</sup> grade IEP, teachers mentioned that Student developed a single solution to a problem and was unable to identify when a strategy was not working and develop a better solution. (P-4 pp. 3, 5, P-5 p. 7)
  12. In the 3<sup>rd</sup> grade IEP, the team noted that Student tended to become fixated on peers that bothered Student, leading to meltdowns and bad choices for dealing with situations. At that time, use of a journal was initiated to in the hope that it would help Student see the "big picture" and make better choices. (P-6 p. 7)
  13. The same issue concerning fixation on bothersome peers was repeated in the 4<sup>th</sup> grade IEP. Although it was noted that Student had mastered using appropriate strategies for dealing with unpleasant situations, a continuing need was identified for Student to develop additional strategies for dealing with anxiety in unpleasant situations and for generalizing interaction strategies to "real world" situations. (P-9 p. 7)

14. In the ER completed during 5<sup>th</sup> grade, staff who contributed observation narratives noted that Student readily pointed out flaws in peers and adults, fixated on certain individuals, lacked social skills and the ability to read social cues, had difficulty seeing viewpoints of others and needed to improve the ability to behave appropriately in situations where the outcome was not consistent with Student's desires or expectations. (P-13 pp. 4, 5)
15. The IEP developed in the middle of Student's 6<sup>th</sup> grade year identified a continuing need to work on reactions when outcomes didn't meet Student's expectations, on understanding cause-effect issues in relationships and how Student's actions impact others, as well as a continuing need to develop social skills in peer interactions. Student's needs in those areas were to be addressed through speech language and occupational therapy (OT) services. Psychological counseling services were added as a related service in a November 2010 IEP revision and included in the January 2011 IEP. (P-15 p. 2, P-16 pp. 4—6, 17, P-17 pp. 1, 2)
16. Counseling services were discontinued in January 2012 at the District's recommendation because Student no longer demonstrated a need, having met the social and emotional goals in the 2011 IEP. The January 2012 IEP also removed the speech/language and OT related services. (N.T. p. 102; P-19 pp. 9, 17 )
17. Over the years, Parents<sup>1</sup> have noted that in the home setting, Student's need for breaks between academic tasks and need for physical activity increase when Student is stressed and feels overwhelmed. Student engages in pacing, hand flapping and jumping on a trampoline. (N.T. pp. 43, 44)
18. As part of their input to the reevaluation conducted by the District in November 2012, Parents reported that Student had been, and continued to be, a victim of bullying and lacked self-advocacy skills to deal with the situation. Parents also noted that Student still lacked appropriate peer social skills, that Student was overwhelmed by academic demands and that Student's repetitive and anxiety behaviors at home had increased. (P-22, p.2)
19. Teachers who provided observations for the reevaluation noted no problems with Student's social interactions in the classroom, although two teachers noted a need for Student to be more outgoing and increase social interaction. Student's itinerant learning support teacher reported that Student had made good progress toward the goal of self-regulation by demonstrating appropriate social interactions in the classroom with no disciplinary referrals. She identified self-advocacy, described as reporting incidents of concern, as one of Student's needs. The school principal also noted that Student needed to report bullying incidents as soon as they occurred to assure that such incidents could be addressed promptly by school administrators. (P-22 pp. 3—7)

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<sup>1</sup> Both Parents signed the due process complaint and attended the due process hearing. Only Student's Mother, however, testified and composed/sent the e-mails to the District entered into evidence in this case although the signatures on the e-mails included both Parents' names. Generally, use of the plural "Parents" refers to their joint positions, claims and requests for relief in this matter. When referring to testimony and the transmission of the e-mail documents entered into evidence, the singular term "Parent" is used.

20. The IEP developed in December 2012 for the remainder of 8<sup>th</sup> grade included two goals: 1) to demonstrate self advocacy by reporting to school staff, either verbally or in writing, any issues that were creating anxiety and stress; 2) to demonstrate appropriate social interaction skills, including appropriate greetings and maintaining reciprocal conversation while remaining on topic. The specially designed instruction identified in the IEP included disability awareness instruction, role play, positive praise and encouragement to promote self-esteem. The services were to be delivered in the regular and special education classrooms. Student was placed in the regular education classroom for 99% of the school day. (P-23 pp. 18, 19, 21, 22, 29)
21. The December 2012 IEP included no speech/language or occupational therapy services to support Student's self advocacy and social interaction goals. Although Parents had been told that the counseling services removed from the IEP in January 2012 could be reinstated should the need arise, there was no discussion at the December 2012 IEP meeting with respect to whether Student would benefit from resuming school-based counseling. (N.T. pp. 102, 103, 106; P-23 p. 22)
22. At the beginning of the 2012/2013 school year, Parent informed Student's itinerant learning support teacher of bullying that Student experienced during the prior school year, beginning at the end of April 2012. Parent noted that the incidents began after another student who had been targeted moved out of the District. Parent also reported that teachers who overheard remarks made by other students intervened to stop the conduct and that at a meeting with Parents and Student, the principal had given Student a helpful suggestion for reporting such incidents, but Student was unwilling to implement it. Parent also noted that the bullying had not recurred to that point in the new school year. (N.T. pp. 80—83; S-18 pp. 3, 4)
23. Later in September, Student experienced several incidents considered by the parties to constitute bullying/harassment [involving] peers. The District reported to Parents that it would investigate. Student's complaint was substantiated, the conduct stopped and the perpetrators were disciplined. Student reported no incidents between mid-September and December 2012. (N.T. pp. 81, 87, 89—91, 131, 151, 158; S-18 pp. 7—9)
24. Student was threatened with physical violence on two occasions in December 2012. When Student reported the incidents, school officials discussed the issue with Student and notified Parents. (N.T. pp. 69—71, 94)
25. On another occasion, [a peer engaged in conduct involving Student's locker] and was disciplined after Student reported the incident. Student's locker had a hole for accessibility because of Student's difficulty operating a combination lock. The District subsequently filled the hole and provided Student with a different type of lock. (N.T. pp. 71—73)
26. After the December 2012 IEP meeting, Student was to report instances of bullying directly to the middle school vice principal. Student began reporting incidents after the

- meeting, but because Student believed that the students who participated in the reported incidents received no consequences, and that peer difficulties, including harassment directed toward Student increased after word of Student's reporting spread, Student stopped reporting to the vice principal. (N.T. pp. 48—50, 73, 74, 78, 80, 83, 94, 104, 110—112; S-26 pp. 10, 11, 15)
27. At another IEP meeting in March 2013, Parents and Student raised continuing concerns about teasing and harassment. The IEP team again concluded that reporting incidents of concern to Student was a means of developing self-advocacy skills. To facilitate Student's self-advocacy goal, the school administration was to continue investigating and monitoring Student's reports. In addition, to assist Student's reporting, a process of hand signals and notes to the teacher was added to Student's specially designed instruction. Student was to be given preferential seating near the teacher and peers who were supportive. (N.T. pp.103—105; P-26 pp. 7, 12, 13)
  28. After the March 2013 meeting, the family developed a different reporting system. Student began keeping a journal during the school day to record incidents. Parent culled the journal for instances of bullying and other inappropriate conduct Student noted and e-mailed the information to District staff. Through Student's special education case manager, the District requested that Parent report such incidents promptly to assure that the incidents could be investigated and addressed immediately. (N.T. pp. 48—50, 74, 77, 78, 103, 104, 107; S-26 pp. 10, 16—18)
  29. In addition to incidents in which Student was targeted, Student also reported instances of bullying directed toward other students that Student had observed [redacted]. (N.T. pp. 48—50, 73, 74, 78, 80, 83, 94, 158—160; S-26 pp. 10, 11)
  30. Beginning in January or February 2013, during the period Student had ceased verbally reporting incidents of bullying and harassment, a [peer engaged in conduct toward Student]. Student did not report those incidents immediately. (N.T. pp. 67, 68, 96—99, 132, 133)
  31. By mid-March, Parents reported that Student was subjected to increased incidents of verbal and physical harassment by peers who had been called to the office based on Student's reports or who were aware that Student was making frequent reports to the vice principal. The middle school principal was aware of a worsening situation between Student and a peer and spoke to the aggressor about [the] conduct. (N.T. pp.96—99; S-26 pp. 17, 18)
  32. From the end of March through the end of the school year, Parent was submitting almost daily reports to the District based on Student's journal involving peer conduct, sometimes directed toward Student or others, but also at times reporting teacher reprimands to students concerning other matters. (N.T. p. 107; S-27 pp. 5, 11—14, 17, 20—25, 28, 40, 46—49, 107; S-28 pp. 1, 8, 9, 11, 13, 15, 25, 26, 28, 29, 36, S-29 )

33. The District investigated all of Parent's e-mailed reports of bullying and disciplined students when it substantiated the allegations from other sources. In a number of instances, the issues Student reported either did not occur or were misinterpreted. (N.T. pp. 150, 151, 170; S-27 pp. 13, 14, 17, 27, S-28 p.10)
34. In March 2013, a peer who was called to the vice principal's office in the course of an investigation into Student's report of bullying reported that Student had used a racial slur during an argument with [the peer]. Student denied the conduct, but after investigation by both the vice principal and principal, the District determined that the report was factual, since it was corroborated by two peer witnesses, one of whom also confirmed that she had heard the accuser say mean things to Student in the past. (N.T. pp.55, 56, 146, 147, 163, 164170; S-27 pp. 8, 9)
35. As a result of the incident, the District scheduled a meeting with Parents, assigned Student to two days of in-school suspension, and informed Student and Parents that another such incident would result in additional punishment, as well as a referral to law enforcement in accordance with state law. The District did not provide Parents with a written report of the incident as Parents requested. The District did not record witness statements or compile a written report of the incident. (N.T. pp. 56, 57, 63, 145—147; S-27 p. 8)
36. Generally, if a non-disabled student engaged in conduct of that nature, a 10 day out of school suspension would be imposed, the District would file a report with the state department of education and the local police. The District elected not to follow its general policy in light of the circumstances, including Student's disability and prior reporting of bullying. (N.T. pp. 148, 149)
37. Other students who heard about the incident, particularly those who had been the subjects of Student's reports of bullying, laughed about Student's discipline. Student could not understand why school administrators did not believe Student's denial of the conduct and imposed what Student perceived to be an unjust punishment. (N.T. pp. 57, 170, 171)
38. Student remains upset about the discipline and experienced increased anxiety. Student began avoiding going out into the community where Student might encounter other students and began hiding by closing window coverings even while at home because Student believed others were watching. Student expressed concerns to Parents that others might falsely report things Student did not say. (N.T. pp. 57, 61, 62)
39. Parents initiated every other week therapeutic counseling for Student in January 2013, which is continuing. Parent did not inform the District that Student was seeing a private counselor, and did not request that the District resume services. (N.T. pp. 58, 59, 100—103)
40. Student does not want to return to the District for the 2013/2014 school year, and Parents do not intend to send Student back to the District for fear that Student will again



experience the same kinds of difficulties that prompted them to file the due process complaint.. (N.T. pp. 63, 65)

41. The District School Board has adopted an anti -bullying policy. At the high school, the policy is implemented via posting the policy in all classrooms, discussion of the policy by homeroom teachers on the first day of each school year, class meetings on the third day of the new school year for further explanation of the policy. All students in 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> grades also take a one quarter guidance class in which bullying is one of the topics addressed. (N.T. pp. 152—155; S-34)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Legal Standards**

#### FAPE/Compensatory Education

The IDEA statute provides that a school-age child with a disability is entitled to receive a free appropriate public education (FAPE) from his/her school district of residence. 20 U.S.C. §1400, *et seq.*; 34 C.F.R. §300.300; 22 Pa. Code §14. The required services must be provided in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 249. “Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley*; *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

An eligible student who has received no more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, an equitable “remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along.” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3<sup>rd</sup> Cir. 2009) (internal quotation marks and citation omitted). Compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3<sup>rd</sup> Cir. 2010), citing *Reid v. District of Columbia*, 401 F3d 516, 518 (D.C. Cir. 2005).

Compensatory education is awarded for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *Mary Courtney T. v. School District of Philadelphia* at 249; *M.C. v. Central Regional School District*, 81 F.3d at 395; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3d Cir.1995). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known. *M.C. v. Central Regional School District* at 396.

#### Due Process Hearing Burden of Proof

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the U.S. Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, a component of the burden of proof, which also includes the burden of production or going forward with the evidence. The burden of persuasion is the more important of the two burden of proof elements, since it determines which party bears the risk of failing to convince the finder of fact that the party has produced sufficient evidence to obtain a favorable decision.

The burden of proof analysis is the deciding factor in the outcome of a due process hearing, however, only in that rare situation when the evidence is in “ equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). When the evidence on one side has greater weight, it is preponderant in favor of that party, which prevails. When the evidence is equally balanced, the party with the burden of persuasion has produced insufficient persuasive evidence to meet its obligation and, therefore, cannot obtain a favorable decision. In that event, the opposing party prevails.

In this case, Parents had the burden of proof on all issues and did establish a limited denial of FAPE, albeit on a different basis than they contended leads to that conclusion. On all other issues, Parents did not produce sufficient evidence to establish their claims.

#### Parents’ Claims

The focus of Parents’ claims in this matter was the District’s allegedly inadequate and ineffective response to Student’s and Parents’ reports of what they contend were numerous instances of peer on peer bullying that created a poisonous atmosphere at the District high school and resulted in a denial of FAPE to Student. In fact, both parties focused the testimony at the hearing and their arguments with respect to Parents’ claims of an IDEA violation and discrimination exclusively on the District administration’s response to Student’s and Parents’ bullying complaints in terms of investigating and addressing Student’s reports of bullying incidents

There is no doubt that both courts and administrative agencies recognize that bullying of students with disabilities can interfere with the ability of eligible students to make meaningful educational progress, thereby denying their right to a free, appropriate public education (FAPE)

in the least restrictive environment. *See, Shore Regional High School Board of Education v. P.S*, 381 F.3d 194 (3<sup>rd</sup> Cir. 2004); *T.K. v. New York City Dept. of Education*, 56 IDELR 228 (E.D.N.Y. 2011); *In Re: Southmoreland School District*, 111 LRP 50995 (SEA Pa (Skidmore) 6/18/11); *Dear Colleague Letter*, 55 IDELR 174 (OCR Oct. 26, 2010); *Dear Colleague Letter*, 111 LRP 45106 (OCR July 25, 2000). Notably, the Office of Special Education and Rehabilitative Services (OSERS) issued its most recent *Dear Colleague Letter* on this subject on August 20, 2013, reiterating the serious and debilitating effects of bullying, the responsibility of educational agencies to prevent and stop its occurrence. OSERS also enclosed a document entitled *Effective Evidence-based Practices for Preventing and Addressing Bullying*, describing proven strategies that educational agencies should consider employing to combat bullying and harassment in schools.

In this case, however, the focus of both parties on the bullying issue caused them to ignore the District's broader obligation to identify and address all of Student's disability-related needs. In this case, the District failed to understand that the bullying issues Parents identified arose from Student's social deficits that the District apparently believed had been effectively remediated in the school setting by the time Student was in 7<sup>th</sup> grade. The District's IDEA violation in this case is based upon its failure to recognize that Student's needs in the areas of social skill development and peer relationships needs resurged in 8<sup>th</sup> grade and needed to be addressed again.

#### District School Administration Response to Bullying Reports

There is sufficient persuasive evidence presented by the District in both testimony and documents admitted into evidence to conclude that the District investigated and addressed

Student's and Parents' reports of bullying and harassment by peers on an incident by incident basis, responding in accordance with policies and procedures that it generally applies in those circumstances. *See*, FF 22, 23, 24, 25, 28, 31, 32, 33. Indeed, the school principal and Student's special education teacher encouraged both Student and Parent to report incidents immediately, and there was no suggestion from the school principal, the only District witness who testified at the hearing, that he considered the reports excessive or unwarranted, although many could not be substantiated upon investigation. (FF 27, 28, 29)

Parents and Student, however, were clearly dissatisfied with the results of their reports in terms of their perception that the perpetrators were not disciplined severely enough. Understandably, Parents and Student were also concerned about the increased difficulties in Student's peer relationships that was the unintended, and apparently unanticipated, result of Student's and Parent's vigilance in reporting instances of what they perceived inappropriate conduct by other students. (FF 26, 27, 30, 31) The District's response to Parent's and Student's reports was in accordance with its written anti-bullying policy (S-34) and in keeping with Parents' expectations that students who engaged in the conduct reported by Student and Parent would be investigated and disciplined. Parents cannot control how the District conducts its investigations or the type of discipline it imposes. It is the District's responsibility and prerogative to respond to incidents of bullying in the manner which it determines to be effective and appropriate at the time, in light of the circumstances and all information available. Although Parents clearly believed that the District did not effectively address what they perceive to be out of control, pervasive harassment and bullying, the evidence in this case does not support that conclusion.

The problems relating to the effects of the high school administration's response to Student's and Parent's reports of bullying and harassment arose from the truth that no school district policy, program or procedure can fundamentally alter human nature, and especially, the reaction of adolescents to investigations of incidents that either had not occurred at all, or had not occurred as Student perceived them. Although Parents appear to assume that all negative reactions toward Student by peers were disability-based harassment, there was no direct evidence that Student was targeted by peers specifically because of Student's disability. The more reasonable inference is that peers reacted more negatively toward Student during the past school year, and particularly during the second half of the school year, based on Student's reporting of issues of concern to District administrators. There is no evidence to support the conclusion that a denial of FAPE in this case arose from an ineffective District response to harassing/bullying conduct of the students in general, since the high school administrators investigated and disciplined students for violations of the code of student conduct that could be substantiated. That was a necessary response, and was sufficient to address the incidents of bullying/harassment as they occurred.

#### IEP Team Response to Bullying Reports

The inadequacy of the District's response to the escalating problems in Student's peer relationships during the second half of the 2012/2013 school year is not based on the school principal's and/or vice principal's handling of reports of bullying and harassment. Rather, the deficiency on the part of the District lies in the minimal involvement of the IEP team and special education staff in what the evidence suggests was hyper-vigilance and sensitivity to the conduct of peers that Student considered harassment or bullying, even when Student was not involved in the conduct, and at times was not even present. (FF 29, 32) The increase in Student's reports

during the second half of the school year, with an apparently even greater increase in March 2013, when Parent became involved in the reporting, obviously raised no red flags for the IEP team, but should have.

Prior to the IEP developed in the middle of the 2011/2012 school year (7<sup>th</sup> grade), teachers had consistently noted Student's needs in the areas of social skills development and peer relationships. (FF 5) Moreover, the comments in evaluation reports and IEPs through the years, beginning in kindergarten were strikingly similar to the description of Student's issues that supported a statement in a recent private evaluation that "significant problems persist and undermine overall adolescent adjustment and adaptation." (P-28 p. 2)(FF 9, 10, 11, 12, 13, 14, 15) In the last reevaluation report and Student's last two IEPs, however, there was little mention of continuing social interaction/peer relationship issues. (P-19, P-23) Although it is certainly the goal of special education services to meet an eligible student's disability-related needs in order to minimize or eliminate educational problems, it is difficult to believe that the social issues had completely abated, in light of the long history of persistent problems and the issues that were identified at the end of 8<sup>th</sup> grade, when Student was evaluated privately.

The evidence establishes that although teachers did not report difficulties with classroom peer relationships in 7<sup>th</sup> and 8<sup>th</sup> grades, Parents continued to identify social skills and peer relationships as areas of need in their input for the reevaluation conducted in November 2012. (FF 18) Parents also identified a need for self advocacy, since Student had relied on them to report incidents of bullying and harassment that occurred at the end of the 2011/2012 school year and in September 2012. (FF 18, 22, 23)

Student had been also been threatened before the December 2012 IEP meeting, and reported those incidents. Both Student and Parents were concerned about those incidents, and

what they considered an increase in harassing behaviors, although there had been no incidents reported by Student to either Parents or the District between mid-September and December. (FF 23, 24) Based upon the discussion at the meeting, the IEP team concluded that Student needed a self-advocacy goal and a pragmatic language goal, which were incorporated into the IEP, but the SDI related to those goals were vague: “role play,” positive praise and encouragement, disability awareness.<sup>2</sup> The speech/language, OT and counseling related services that the District had previously provided to address Student’s social issues were not reinstated. (FF 20) It appears that based upon discussions at the IEP meeting, the primary, if not the sole, focus on implementing the self-advocacy IEP goal was encouraging Student to report instances of bullying and harassment.

After a short time, Student accurately perceived that regardless of the school administration’s response to reports of bullying, an increase in reporting the conduct of other students increased rather than reduced Student’s peer conflicts, and a generally adverse effect on Student’s peer relationships. Unfortunately, both Student and Parents attributed the negative consequences to the District’s failure to effectively address the incidents. It appears that no one, including the high school principal and Student’s itinerant support teacher, considered whether self advocacy of that nature actually met Student’s disability-related needs.

After the IEP team meeting in March 2013, Student was again encouraged to resume reporting incidents that bothered Student. (FF 27) At that point, Parent became involved in e-mailing school administrators reports of behaviors that Student collected in a journal each day. (FF 28) No one on the IEP team apparently questioned how that procedure furthered Student’s self-advocacy goal, since the reports were coming directly from Parent, not Student. Moreover,

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<sup>2</sup> It was unclear from the record whether, or how frequently, or in what manner, any such services were provided, since no one from Student’s IEP team, other than Parent and the school principal testified at the due process hearing.



although the District was clearly aware that Student's reports often involved conduct that Student perceived to be harassing toward peers, and did not directly involve Student, no one from Student's IEP team suggested that the self-advocacy goal was creating more difficulties and had strayed far from meeting Student's needs. At that point, Student and Parent were advocating for other students.

When the District's investigations into the incidents Student reported either directly, or through Parents, resulted in the conclusion that some of the incidents were unfounded or at least misinterpreted, the escalating reports should have raised a red flag concerning Student's apparently increasing perceptions of and obsession with the level of bullying and harassment that was occurring. The IEP team should certainly have reconsidered Student's need for additional services in the form of counseling and social skills training to interrupt the cycle of Student's increasing focus on reporting incidents that Student perceived to be a problem, even when the incidents did not directly involve Student.

In short, the District's response to the increased reports of harassing and bullying conduct failed to consider whether Student's reporting activities arose from the same disability symptoms that had been noted consistently between kindergarten and 7<sup>th</sup> grade. Difficult peer relationships and inadequate social skills are core deficits associated with Student's eligibility category, yet the District's singular focus on addressing Student's reports of bullying allowed those skills and relationships to deteriorate in the latter part of the 2012/2013 school year to the point that Student now does not want to return to school. (FF 40)

#### Denial of FAPE

The conclusion that the District failed to adequately address Student's social and peer relationship needs during the second half of the last school year leads to the conclusion that

Student was denied a FAPE for half of the 2012/2013 school year. Although the District focused on Student's academic success as the only indication of meaningful progress, the IDEA focus is broader. A school district's obligation to provide FAPE to an eligible student also includes assuring that behavioral, social, and emotional needs arising from a disability are addressed. *Breanne C. v. Southern York County School District*, 732F.Supp.2d 474, 483 (M.D. Pa. 2010).

On the other hand, however, the difficulties in social and peer relationships that developed during the past school year did not result in a complete lack of meaningful progress. As the District pointed out, the record establishes that Student performed very well academically in both of the past two school years, and despite reports of feeling overwhelmed and of increased anxiety during 8<sup>th</sup> grade, Student actually ended the year with a higher average than in 7<sup>th</sup> grade. (FF 4)

Increased problems in the areas of social skills and peer relationships that the record in this case establishes is attributable to the insufficiency and inadequacy of the District's response to Student's intense focus on bullying that apparently exceeded the level of actual occurrences, leading to more actual problems with peers which, in turn, increased Student's anxiety. The District appropriately met Student's academic needs, but failed to appropriately address Student's disability-related needs in the areas of peer relationships and social skills. Student will, therefore, be awarded compensatory education in the form of counseling services and/or social skills training from January 2013 when the December 2012 IEP was implemented through the end of the 2012/2013 school year.

Parents requested compensatory education for the two year period prior to the filing of the due process complaint (April to June 2011 and the 2011/2012 school year). There was,

however, no evidence that Student was experiencing significant difficulties or anxiety related to either social skills, peer relationships arising from bullying or otherwise during that period. Parents reported no bullying/harassment issues until the end of the 2011/202 school year, and at the time, Parents expressed satisfaction with the District's response to reports of bullying. (FF 22)

The same is true for the beginning of the 2012/2013 school year. There were a few incidents of bullying directed toward Student between September and December 2012 that the District acknowledged and addressed appropriately, as discussed above. (FF 23, 24, 25) Parents may believe that the District's response to the incidents in which Student was targeted during the first half of the past school year were perceived by Student to be inadequate and triggered an increase in anxiety, leading to more frequent reports of bullying that Student either observed or was told about. Even if accurate, however, that conclusion is possible only in hindsight. There is nothing in the record suggesting that the District had any reason to anticipate such an effect, and in any event, the District responded appropriately to the incidents.

#### March 2013 Disciplinary Incident

Parents' basis for requesting that the discipline imposed as a result of the March 2013 incident involving Student's use of a racial slur remains unclear after careful consideration of the record. The evidence establishes that the District investigated the incident and concluded that it had occurred. (FF 34) There is no reason to disbelieve the school principal's account of the investigation or the reason the school administrators credited the testimony of a witness to the event. (FF 34) Although Parents wanted a written report of the incident and investigation that the District did not provide, Parents did not cite to any law or regulation that requiring the District to accede to that request. (FF 35)

A conclusion that the District acted inappropriately or contrary to law must be based on evidence that the District's actions constituted a violation, not on Parents' and Student's conviction that the District was wrong. Since there was no such evidence in the record, reversing the District's conclusion that the incident occurred and required a disciplinary response could only be based on speculation. A decision and order based on speculation would be contrary to proper hearing procedures and applicable state law, which provides that due process hearing decisions must be based on only on substantial evidence presented at the hearing. 22 Pa. Code §14.162(f).

Moreover, the discipline imposed for the incident did not amount to a change of placement, triggering IDEA disciplinary protections, such as a manifestation determination review. (FF 35) 34 C.F.R. §300.530(c), (e). The District's response to the incident was less stringent than it would have been with respect to a non-disabled student, and took into account the history between Student and the accuser. (FF 36) The District treated Student more favorably, therefore, not less favorably than a similarly situated non-disabled student.

It is unfortunate that Student so adversely reacted to the finding that the offense had occurred, but the reaction does not establish a violation. Although Student's objectively disproportionate reaction to which Parent testified was not addressed by the District, there was no evidence that the District was aware of it prior to the due process hearing. In any event, the incident and aftermath occurred during a time for which Student will receive compensatory education for failing to appropriately address Student's social/peer relationship needs in general.

#### Remedy

Base upon the denial of FAPE described above, Student will be awarded compensatory education in the form of services the District should have provided between January and June

2013. Since neither party provided explicit evidence concerning the type and amount of an appropriate award, it will be based upon evidence in the record of services Student received in the past that appeared to be effective in addressing Student's social skill and peer relationship needs. The amount is based on the level of services that the District reasonably should have provided in order to address a resurgence in Student's needs that the District should have identified at the December 2012 IEP meeting.

Prior to January 2012, Student received 30 minutes/month of psychological counseling services, 60 minutes/month of direct OT services and an unspecified amount of consultative speech/language services. (P-16 p. 17) Given the concerns raised by Parents and Student about bullying, Student's self advocacy needs identified at the December 2012 IEP meeting, as well as the continuing need for social skills development Parents identified in their input for the November 2012 evaluation, the District should have provided explicit instruction in effective self-advocacy, as well as counseling services to help Student discern the difference between actual bullying and lesser peer conflicts, as well as to deal with the effects the perceived bullying. *See Dear Colleague Letter*, 55 IDELR 174 (OCR 2010). The District should also have resumed OT services for social skills development and provided direct speech/language services for to develop more effective social language skills. It would have been reasonable and appropriate to increase counseling services to 60 minutes/month, reinstate the 60 minutes/month of OT services and provide 60 minutes/month of direct speech/language services. There were 5 full months left in the school year beginning with January 2013, and sufficient time in the final month to assure that Student received the full amount of the services.

Student, therefore, will be awarded 18 hours of compensatory education, to be used for counseling and/or social skills/pragmatic language instruction.

The District will not be required to implement an anti-bullying program for two reasons. First, as discussed above, the record does not support a conclusion that the difficulties Student experienced during the second half of the 2012/2013 school year were attributable to the atmosphere at the high school in general. More important, notwithstanding broad remedial authority, requiring a District to implement a general education program to be delivered to all students is beyond the jurisdiction of a special education hearing officer. Moreover, in this case, since it appears that Student may not return to the District, such a program would not provide direct benefit to the only eligible Student currently within my jurisdiction.

That is not to say, however, that the District should not consider whether broader programs for preventing bullying and raising disability awareness would not be beneficial, and the District should consider such programs. The District will be directed to undertake such consideration in the event Student does attend school in the District at any time in the future.

Finally, although it is certainly implicit in this decision, the District will be required to consider Student's need for services such as those on which the compensatory education award is based if Student returns to the District high school.

## **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parents' claims are **DENIED** with respect to: 1) Parents' allegations that the District high school administration's response to Student's complaints of bullying and harassment constituted violations of IDEA or §504; 2) the discipline imposed on Student for an incident that occurred in March 2013.

It is **FURTHER ORDERED** that because the District denied Student a FAPE from January 2013 through the end of the 2012/2013 school year by failing to appropriately address Student's impaired social interactions and peer relationships arising from Student's disability, the School District shall provide Student with eighteen (18) hours of compensatory education to be used for psychological counseling/social skills training by provider(s) selected by Parents.

It is **FURTHER ORDERED** that at such time, if any, that Parents notify the District that Student will return to school in the District, for the 2013/2014 school year or subsequently, Student's IEP team shall meet and fully consider appropriate goals, special education and related services designed to address Student's needs for developing social skills and appropriate peer relationships based upon Student's needs at that time.

It is **FURTHER ORDERED** that at such time, if any, that Parents notify the District that Student will return to school in the District, for the 2013/2014 school year or subsequently, the District shall consider whether its general anti-bullying policies and procedures are adequate, and whether it might be helpful to implement additional or different anti-bullying procedures and/or a disability awareness program for the general student population.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER

August 21, 2013