

*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.*

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

**FINAL DECISION AND ORDER**

ODR File No. 2782-1112AS

**CLOSED HEARING**

Child's Name: J.B.<sup>1</sup>  
Date of Birth: [redacted]

Hearing Date(s):  
May 8, July 19, and September 27, 2012

Parties to the Hearing

Representative

Parent

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Record Closed: November 2, 2012

Date of Decision: November 25, 2012

Hearing Officer: Brian Jason Ford

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<sup>1</sup> Other than this cover page, the child and parent(s)' names are not used to protect their privacy - even if the parent(s) requested an open hearing. "Parent" and "Student" is used instead. Other identifying information, such as the Student's gender, is omitted to the extent possible. Citation to the notes of testimony (transcript) are to "N.T.". Citations to exhibits, as applicable, are "P-#" for Parents' exhibits, "S-#" for the school's exhibits, and "J-#" for joint exhibits.

## **Introduction**

This matter arises under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1400 et seq. (IDEA) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (Section 504). This is the second part of a bifurcated hearing.

The Student, through the Parent, alleges that the District deprived the Student of a free appropriate public education (FAPE), and demands compensatory education as a remedy. More specifically, the Parent claims that the Student was denied a FAPE through the implementation of an inappropriate individualized education program (IEP) between the start of the 2010-11 school year and December of 2010. The Parent also claims that the District denied the Student a FAPE when it inappropriately issued a diploma to the Student, precluding the Student from receiving an education at all.

## **Scope of the Hearing**

The scope of this hearing has been resolved through a number of stipulations and a preliminary decision and order (issued after the first part of this bifurcated hearing). The pre-hearing order is critical to this case, and is attached hereto as Appendix A. Two periods of time are in play: 1) The start of the 2010-11 school year through December of 2010, and 2) June 10, 2011 through February 20, 2012.

## **Issues**

1. Did the District deny the Student a FAPE from September of 2010 through December of 2010 and, if so, what remedy is owed?
2. Did the District deny the Student a FAPE from June 10, 2011 through February 20, 2012 and, if so, what remedy is owed?

## **Findings of Fact**

### **A. September 2010 to December [2010]**

1. The Student has been educated at what is now called the [Redacted Program (Program)] of Schuylkill County Intermediate Unit 29 (IU) on and off since November 1998, the Student's Kindergarten year. NT 200. [Program] encompasses emotional support programming as well as life skills support and a partial hospitalization program. NT 505. For the portion of 2010 relevant to this decision, the Student was enrolled in the emotional support program.
2. Historically, the Student has been placed into a number of residential treatment facilities by outside agencies (not by the District).

3. Immediately prior to the period of time in question, the Student was placed by an outside agency at the [redacted] residential facility located within the Montour School District.<sup>2</sup> S-13; *Preliminary Decision* at 2 (FF 2-5).
4. The Student returned from the [residential facility] to the District in August of 2010. The District convened an IEP meeting at that time. P-1, P-8. During the meeting, the Student's IEP Team reviewed the Student's most recent IEP from the [residential facility], dated March 31, 2010. S-3.
5. The Student's IEP team determined that the [Program] was the correct placement for the Student and made changes to the [residential facility] IEP so that it could be implemented at the [Program].<sup>3</sup> Specifically, several academic and behavioral goals were removed, as were several components of the Student's specially designed instruction (SDI). S-3, P-5, P-9.
6. The Student's IEP team edited the [residential facility] IEP by crossing off components of the [residential facility] IEP by hand. The resulting hand-edited IEP became the Student's operative IEP at the [Program] at the start of the 2010-11 school year. S-3; NT 35-36, 334, 352, 354, 361, 363-364, 366-367.
7. The Parent alleges that the District denied the Student a FAPE between September and December of 2010 for failure to provide appropriate behavioral supports, math programming, and transition services. Although the Student was enrolled in a wide array of courses, see S-20, I make findings of fact concerning only those courses pertinent to the Parent's allegations.
8. Regarding math, both the [residential facility] and [Program] IEPs note that the Student has significant deficits in basic math skills. The [Program] IEP, however, includes neither a math goal nor individualized SDIs to improve the Student's math skills. S-3. Instead, the Student was placed into a consumer math class that focused on independent living skills such as budgeting. See NT 223, 290, 545.
9. Regarding transition, the consumer math class itself provided instruction on math-related, adult-living skills. See, e.g. NT 545-549. The Student also participated in two [redacted] classes that focused on employability skills. NT 204-205.
10. One of the Student's two [redacted] class teachers testified. That teacher credibly explained that the students in those classes received employment and social skills training. These services were not provided pursuant to the Student's IEP. NT at 247, 252-253, 298-299, 527; S-3.

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<sup>2</sup> The Student attended the [residential facility] from March 2008 through August 2010.

<sup>3</sup> In a Pre-Hearing Order, I had stated that the Student was instructed at the [Program] under the terms of the [residential facility] IEP. With the record now fully developed, it is clear that significant changes were made to the [residential facility] IEP. Those changes are described herein.

11. The Student's [Program] IEP did not contain a measurable, objective transition goal for employment or independent living.<sup>4</sup> See S-3.
12. Regarding behaviors, some behavioral components were removed from the [residential facility] IEP in favor of the [Program]'s campus-wide behavioral management approach, known as the "restorative practices" model. See, e.g. NT 209; S-3.
13. Based on the record of this case, I find that "restorative practices" is a behavioral philosophy more than a particular behavioral intervention program. It is not an individualized positive behavioral support plan. The purpose of "restorative practices" is to restore the relationships between individuals (be it student-student or student-educator) after a conflict, and to avoid conflict by having students explore their thoughts and feelings with other students and educators. See NT 209-11, 271, 505-507, 534.
14. No data was collected regarding the use or efficacy of restorative practices with the Student. See NT 264-268, 270-272, 281-282, 299-300, 335, 530.
15. The [Program] IEP included an edited version of a behavior intervention plan (BIP) that was developed for the Student at the [residential facility]. Although the District did not believe that implementation of the BIP was an IEP goal, progress was tracked using the BIP. NT 220, S-3, S-9.
16. The Student's primary teacher at the [Program] also implemented a positive behavioral rewards program, in which the Student was rewarded with more computer time (a preferred activity) for good behavior. NT at 225-226. That rewards program was class-wide and was not a component of the [Program] IEP. No data concerning the rewards program was entered into evidence (if it was kept).
17. Similarly, the Student had a long-term, positive relationship with one of the [Program]'s social workers. Although the [Program] IEP did not include social work services, the social worker encouraged the Student to participate in small group counseling. The Student did participate in small group counseling, and received individual counseling from the social worker on an informal basis. NT 462-467.
18. Between the start of the 2010-11 school year and December of 2010, the Student exhibited inappropriate behaviors at the [Program], and sometimes Behavior Interventionists were called to help deescalate the Student. See NT 507-508. These behaviors were, however, not unusual for students with the type of behavioral profile that warrants placement at the [Program]. Consequently, none of the educators who were working with the Student felt a need to reevaluate the Student or alter the

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<sup>4</sup> The IEP includes a section titled "Postsecondary Education and Training Goal." P-3 at 11. The only information in that section is that the Student "has a goal of attending a post-secondary training program." *Id.* The same section instructs the IEP Team to indicate whether there is a measurable annual goal associated with the training goal. *Id.* If there is, the team is instructed to place that goal in the goals section (Section V) of the IEP. *Id.* The team did not make a selection, and there is no such goal in the [Program] IEP.

behavioral strategies used with the Student. See, e.g. NT 211-213, 257, 267, 495, 507-508, 511.

19. The record includes somewhat conflicting testimony about the efficacy of the behavioral approaches (including restorative practices) used with the Student between the start of the 2010-11 school year and November of [2010]. Generally, for all time periods, the District's witnesses testified that these approaches were appropriate and effective – despite ongoing-but-expected behavioral problems. NT 213, 537. The Parent, however, testified that she was in frequent communication with [Program] personnel about the Student's behaviors, including elopement and aggression towards other students and teachers. See, e.g. NT at 39. The Parent's testimony regarding her communications with [Program] personnel does not contradict other testimony *per se*, but, in its totality, paints a picture of more frequent and severe behaviors that were more difficult to control.
20. As discussed in greater detail below, based on data generated by the District (technically, by the IU), I find that the Student's negative behaviors were escalating during the first and second making periods of the 2010-11 school year. See S-10.
21. The Student's first behavioral writeup of the 2010-11 school year is dated November 3, 2010. P-12. The behavioral incident involved a disruptive outburst in class. The Parent was called to pick up the Student from the [Program]. The Student also received a three-day suspension. NT 40-42, P-12.
22. Similar incidents occurred on November 10 and 11, and December 16, 2010. NT 42-48; P-13, 14, 15, 16. The Parent was called in on November 10, but the Student returned to class and received a detention. The Parent was also called in on November 11 and December 16, and removed the Student at [Program] personnel's request on both dates.

### **B. January 2011 through February 2012<sup>5</sup>**

23. Findings of fact with citation to the record regarding the Student's placement history [redacted] are contained in the Preliminary Decision, starting at Finding of Fact #12. In sum, as a result of escalating and uncontrollable behaviors, county agencies placed the Student into a residential treatment facility (RTF), located in [another] School District. This was the start of a series of residential placements, psychiatric hospitalizations, and sheltered care settings. Nearly all of the placement changes were in response to the Student's escalating and uncontrollable behaviors. All of the placements were made by third party agencies, not by the District.
24. Previously, the Student was found to have an IQ of 64. See P-29. In May of 2011, while living in shelter care, the Student was found to have an IQ of 63 and, for the

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<sup>5</sup> As noted in the "Issues" above, the Parent does raise claims for the entirety of this time period. Claims are raised for the period starting June 10, 2011 through February 20, 2012. I have included findings of fact regarding dates outside the claims period only to the extent that they are necessary to resolve this matter.

first time, was diagnosed with an intellectual disability. See Preliminary Decision at FF at 20.

25. As explained in the Preliminary Decision, the District inappropriately issued a diploma to the Student on June 10, 2011. The Parent accepted that Diploma via a NOREP on June 17, 2011, and the District considered the Student to have graduated at that time.
26. The Preliminary Decision notwithstanding, evidence and testimony concerning the Student's placement history, particularly at the time that the diploma was issued and accepted, was (and is) confusing. Both parties agree that the Student was placed by a third party agency at [redacted], a RTF outside of Schuylkill County, in June of 2011.
27. In the Preliminary Decision, I found that the [redacted] RTF placement commenced on June 10, 2011. *Preliminary Decision* at FF 24.
28. In its closing brief, the District argues that this finding is in error and urges me to reconsider. The District cites to evidence that the Student was attending a RTF located in [redacted] and then moved from that RTF to the [redacted] RTF on June 24, 2011. S-13; P-29. Upon careful consideration, I agree with the District. I find that the Student moved to the [redacted] RTF on June 24, 2011, which is after the issuance and acceptance of the diploma.<sup>6</sup>
29. The Student received educational programming after the end of the regular 2010-11 school year.
30. [Redacted] also operates a psychiatric hospital. I previously found that the Student moved from the [Redacted] RTF to the [Redacted] psychiatric hospital on July 7, 2011 and remained there until January 13, 2012. *Preliminary Decision and Order*, FF 25, 27.<sup>7</sup>
31. The Parent attended an emergency interagency meeting in June of 2011. The purpose of that meeting was to identify a placement for the Student. Based on information shared during that meeting, and subsequent conversations with the Student's clinicians at the [Redacted] psychiatric hospital, the Parent came to the opinion that the fact that the Student had graduated both prevented the Student from

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<sup>6</sup> Although it is important to make correct findings of fact concerning the Student's placement history, this correction is not outcome-determinative. Be it the [redacted] RTF or the RTF in [redacted], the Student was still placed by a third party agency in an out-of-district RTF when the District issued the diploma and when the Parent accepted it.

<sup>7</sup> The record does not explain why the Student moved from the [Redacted] RTF to the [Redacted] psychiatric hospital. The Parent argues, however, that the Student remained hospitalized, without educational services, for over six months because other RTFs (that include educational components) do not accept students post-graduation. The Parent's testimony on this point was entirely credible, as was the testimony of the Student's advocate. Much of that testimony, however, was hearsay. I have noted previously, however, that hearsay is admissible in IDEA administrative proceedings but cannot be used to form the basis of my decision. See *Preliminary Decision and Order* at FF 26. I have parsed the record carefully so that I rely only on non-hearsay testimony in making findings of fact concerning the impact of the Student's diploma on the Student's ability to secure a FAPE.

receiving educational services at [Redacted] and blocked admission to other RTFs with educational components. See NT 82, 124, 339-341.

32. By October of 2011, the Parent was working with [Redacted] clinicians in an effort to convince the District to rescind the Student's diploma. NT 372-374. That effort was joined by an educational advocate by November of 2011. P-30. The District initially refused this request. P-31.
33. The Student transferred from the [Redacted] psychiatric hospital to [another] RTF in the [Redacted] School District, on January 13, 2012. NT 126, S-2. Again, this was a third party agency placement. Although the Student received therapeutic services from [this RTF], the Student did not receive educational services at first. *Preliminary Decision and Order*, FF 27.
34. [The District] rescinded the Student's diploma on February 20, 2012. The Student began to receive educational services from [Redacted RTF] on March 19, 2012. *Id.* at FF 28.
35. The Student remains at [Redacted RTF] through the present, receiving educational services at the District's expense.

## **Discussion**

### **A. Legal Principles**

#### **The Burden of Proof**

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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 party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

#### **Free Appropriate Public Education (FAPE)**

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458

U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

### **B. September 2010 through December 2010**

The Parent argues that the Student was denied a FAPE from September 2010 through December 2010. During this period, the Parent argues that 1) the Student's math programming was inappropriate, 2) the District failed to provide appropriate transition services, and 3) the District failed to provide appropriate behavioral interventions.

I note the practical challenges that the District faced when developing a program for the Student. The Student returned from the [residential facility], an out-of-district RTF, for the start of the 2010-11 school year. At that time, both parties and the IU all agreed that the District was not able to provide an appropriate program or placement for the Student on its own. Pennsylvania Intermediate Units were developed, in part, to address this very situation. When a school district cannot program for a student on its own, the intermediate unit is one of the first places that the school district looks to for assistance. When this happens, it is often the case that school districts defer to the expertise of intermediate unit personnel for both the development and implementation of an IEP. It appears that this was the scenario in this case. Although the District sent representatives to IEP meetings (and technically was the LEA convening those meetings), the IU took on the role of program development and implementation. By operation of law, however, the District was responsible for any violation of the IDEA, even though the IU was educating the Student.

The Student's IEP, S-3, is inappropriate both as a function of the way in which it was developed, and because of its actual content. By all accounts, the Student made meaningful progress, both behaviorally and educationally, at the [residential facility]. The Student made so much progress that the Student was ready to return to the [Program], a comparatively less restrictive environment. Upon the Student's return, the District became the Student's LEA and was obligated to provide services comparable to those described in the [residential facility] IEP until the District either adopted the [residential facility] IEP or developed a new IEP. See 34 C.F.R. § 300.323(e).

No evidence was presented to suggest that the Student required new evaluations at the time of the transfer. As such, the District could have simply adopted the [residential



facility] IEP.<sup>8</sup> Instead, the District made significant, substantive changes to the [residential facility] IEP, creating a new IEP in the process. This new IEP removed goals. The behavior support plan developed at the [residential facility] was both reduced and removed from the goals section of the IEP. These deletions were made without any new assessment of the Student's needs. No evidence was presented to show that the IEP Team considered progress data from the [residential facility] when removing goals. Rather, scrutiny of the IEP in light of the testimony reveals that the District removed items from the [residential facility] IEP until it matched the program offered at the [Program]. As such, the [Program] IEP was not individualized for the Student, but was crafted to match the programming available to the District.

Specifically regarding math, the present levels section of the IEP reflects that the Student had only recently mastered basic addition and was starting to develop other basic math skills like subtraction. Despite this, the IEP included no math goals or SDIs. S-3. It is not clear that the [residential facility] IEP included math goals, and the Student did not have a diagnosed math disability at the time. However, when the District received the [residential facility] IEP, it was placed on notice that a 17-year-old student in 12th grade did not have a grasp of basic math. The District then developed a new IEP for the Student without assessing whether the Student required SDIs to provide appropriate math instruction. In doing so, the District violated its obligation to assess all areas of the Student's suspected disability. See, e.g. 20 U.S.C. § 1414(b)(3)(B).

This is not to say that the Student's placement in consumer math was inappropriate *per se*. My finding that the District's issuance of a diploma was inappropriate notwithstanding, both parties expected that the 2010-11 school year would be the Student's final year at the District. As such, placement in a math class geared towards independent living is not surprising. However, it is difficult to understand how the Student could have made progress in the consumer math curriculum (budgeting, balancing a checkbook, etc.) without first mastering the basic subtraction skills that, according to the IEP, the Student was missing. Although some testimony suggests that the consumer math concepts were presented to the Student at the Student's instructional level, the record preponderantly shows that the Student did not receive individualized math SDI.<sup>9</sup> The District knew that the Student lacked the basic math required to benefit from the consumer math curriculum, but did not put programming in place to fill in the Student's math gaps. For these reasons, I conclude that the District's failure to provide appropriate math instruction constitutes a substantive denial of FAPE.

Regarding transition, the Parents are correct that the IEP does not include a measurable, objective transition goal. P-3. At the time the IEP was drafted, the lack of a

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<sup>8</sup> It would have been permissible to adopt the [residential facility] IEP and still edit the document to reflect the fact that the Student was no longer attending the [residential facility] but had returned to the [Program].

<sup>9</sup> Testimony reveals that the Student's teachers believed that the Student was appropriately placed in consumer math. This opinion, even if considered to be an expert opinion, was not supported by objective data. Rather, the evidence (primarily the District's own IEP) suggests that the Student had significant math gaps, that the District was aware of these gaps, and that the Student was not provided an objective, measurable math goal or specially designed instruction to remediate the Student's math deficiencies.

transition goal constitutes a procedural violation of the IDEA. See 34 C.F.R. § 300.43(a); 34 C.F.R. § 300.320(b); see *also* 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). As with math, however, an examination of the services that the Student actually received is required to determine whether this procedural failure resulted in a substantive denial of FAPE. See 20 U.S.C. § 1415(f)(3)(e).

The Parent's contention that the transition services that the Student received were inappropriate is not supported by preponderant evidence. To the contrary, testimony from the Student's teachers and the evidence (S-20 in particular) demonstrate that the [Program] personnel took an interest in the Student's desire to live independently and go on to a postsecondary training program. Significant portions of the Student's day were dedicated to the direct instruction of pre-employment skills, and all of the Student's programming was coordinated around that effort. No evidence suggests that these services were inappropriate for the Student, even if they were not drafted into the Student's IEP. Consequently, I conclude that the District committed a procedural violation of the IDEA by failing to include an objective, measurable transition goal in the Student's IEP, but that procedural violation did not give rise to a substantive violation of the IDEA.

Regarding behavioral interventions, the same analysis applies. The District knew of the Student's behavioral problems when the Student returned from the [residential facility] at the start of the 2010-11 school year. The IEP Team placed the Student at the [Program], in part, because of the Student's behavioral problems. Despite this, the IEP includes no behavioral goals. S-3. In fact, the [residential facility]'s BIP was removed from the goals section of the IEP (but was still contained in the IEP itself, with modifications). See P-3 at 23. The BIP, as drafted by the [residential facility], called for daily behavioral data collection. This requirement was stricken from the BIP in the [Program] IEP. *Id.* Despite this, data was collected and reported using the BIP. Unfortunately, this data suggest that the Student's behaviors were deteriorating. See S-10 at 2.

Behavioral data was collected over three quarters of the 2010-11 school year. *Id.* As far as I can tell, the data reported in the third quarter represents a period after December of 2010 during which the Student was living in a RTF outside of the District but was attending the [Program] during the school day. Just comparing the first two quarters, the Student's acts of physical aggression increased from one incident during the first quarter to an average of two incidents per month in the second quarter. *Id.* The Student engaged in "verbally or physically instigative behaviors" at least once per day during the first and second quarters. *Id.* The Student's "out of room self-time-away" (presumably relating to elopement from the classroom or removal from the classroom for deescalation) doubled from an average of five times per month in the first quarter to ten times per month in the second quarter. *Id.*

Although this data, as reported, may not be ideally precise, it is the best evidence of the Student's behaviors in school during the period of time in question. Despite this data, all of the [Program] personnel who testified were of the opinion that the Student's

behaviors were properly managed through use of restorative practices. I respectfully disagree. There is preponderant evidence that [Program] personnel appropriately responded to the Student's behavioral incidents as they occurred. In fact, the [Program] personnel should be commended for their ability to deescalate the Student after incidents. However, there is a significant difference between appropriately responding to behavioral incidents and implementing a goal-driven BIP to decrease the frequency and intensity of such incidents.

The Student came from the [residential facility] with a summary of a functional behavioral analysis (S-3 at 22), a BIP that required daily progress monitoring, and an IEP that made the BIP into a goal. The District then removed daily progress monitoring from the BIP and removed the behavioral goal. This was not suggested by the FBA, and the record does not reflect any other source of information upon which the decision to remove these components could be based. Even if these decisions were justified, the data suggested that, minimally, an evaluation was necessary to determine why the Student's behaviors were escalating. Daily progress monitoring would have made this data available to the Parent before the end of the second quarter.

For the foregoing reasons, I find that the Student was substantively denied a FAPE as a result of inappropriate behavioral interventions. The [Program] IEP did not set a goal of reducing the Student's negative behaviors and the evidence shows that those behaviors increased. Although the [Program] personnel were able to appropriately address the Student's behaviors incident by incident, no systematic, objective plan was in place to reduce or eliminate the Student's behaviors.<sup>10</sup>

### **C. June 10, 2011 through February 20, 2012**

The Parent argues that it was impossible to secure an educational placement for the Student after the District issued a diploma *because* no educational placement would accept a student who had graduated and could not secure funding for educational services through a school district. The District agrees that the "absence of an accepting residential treatment facility posed a difficulty in effecting [the Student's] discharge from [the Redacted] hospital," and that "the relevant adults sought, but could not find, a residential treatment facility that would accept [the Student], until January 2012, when [the Student] was accepted at ... [Redacted] Services." *District's Closing* at 7, 8.

The District argues, however, that the diploma did not preclude an educational placement for the Student. More specifically, the District points to a lack of evidence in the record supporting the Parent's contention that the diploma was the barrier to the Student's education. The District also points to a lack of evidence suggesting that the

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<sup>10</sup> The District was obligated to draft an IEP that was reasonably calculated to address the Student's behaviors, which clearly affected the Student's learning. A reasonably calculated plan may not have ultimately been successful, and the IEP should not be judged in hindsight. However, at the time that it was offered, the IEP was not reasonably calculated to address the Student's behaviors. Key components of the [residential facility] BIP were eliminated, and the purpose of that change was to conform the IEP to services offered at the [Program] (not in response to information about the Student).

Parent (or anybody working with the Parent or on the Parent's behalf) sought educational programming from the school district in which [Redacted] is located and/or funding for such programming from the District.

The District also argues that the Student's behaviors were so severe that RTFs either discharged or rejected the Student even prior to the issuance of the diploma. There is some evidence to support this argument. See P-29. The same evidence, however, also suggests that the District was unwilling to fund programming beyond the date that the Student would have graduated if the Student was not disabled. See P-29 at 3 ("[Redacted] maybe [sic] able to accept [the Student] past [the Student's] 18th birthday if [the Program] IEP stated that [the Student] could receive education until the age of 21"). The District also argues that the diploma was not an absolute bar to an RTF placement, as the Student was able to secure placement at the [Redacted] RTF after the diploma was issued.

I look to the record to resolve this issue. The record reveals that it was reasonable for the Parent to conclude in June of 2011 that the Student's diploma was preventing the Student's receipt of an education (let alone a FAPE). Whether or not the Parent actually sought educational services from the school district in which [Redacted] is located, the Parent communicated her belief about the diploma to the District. It is telling that educational services did not resume for the Student until the District rescinded the diploma and agreed to provide funding per Pennsylvania law.<sup>11</sup> All of this compels me to agree with the Parent: the Student received no educational services at all from June 10, 2011 to February 20, 2012 because the District issued a diploma to the Student.

At the same time, no preponderant or compelling evidence was presented concerning the Student's entitlement to extended school year (ESY) services. Therefore, I find that there was no substantive denial of FAPE from the last day of the regular 2010-11 school year until the start of the 2011-12 school year. Even so, for reasons stated above, the Student was denied a FAPE from the Start of the 2011-12 school year until February 20, 2012.

I note as *dicta* that although I ultimately agree with the Parent, the District's arguments are also sound in a literal way. However, even if I had found that the diploma did not prevent the Student from securing an educational placement (or, even if I had found that the diploma was not the *only* thing that prevented the Student from securing an educational placement), the result would be the same. In the Preliminary Decision and Order, I concluded that the diploma and the Student's graduation were improper. By improperly "graduating" the Student, the District disclaimed all obligations to fund the Student's educational programming.<sup>12</sup> At all times, the District was obligated to make

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<sup>11</sup> Although the Student transferred to [Redacted] before the diploma was rescinded, educational services did not begin until the diploma was rescinded.

<sup>12</sup> In a literal sense, the record does not reveal what the District would have done had the Parent obtained an RTF placement after the District issued the diploma and then sought funding from the District prior to or at the start of the 2011-12 school year. The record strongly suggest that the District would have denied the request. This is evidenced both by the District's staunch refusal to rescind the diploma, knowing that

the Student's appropriate public education free. By prematurely terminating its funding obligation by inappropriately issuing a diploma, the District made it impossible for the Student to obtain a **free** appropriate public education.

#### D. Remedies

Hearing Officer Skidmore has provided the best distillation of current compensatory education jurisprudence in Pennsylvania:

It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); see also *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.)) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

*M.J. v. West Chester Area Sch. District*, ODR No. 01634-1011AS (Skidmore, 2011). In this case, no evidence or testimony was presented concerning what amount of compensatory education would put the Student in the position that the Student would have been in but for the denial of FAPE. By default, therefore, I apply the *M.C.* standard.

For reasons stated above, the Student was denied a FAPE between September of 2010 and December of 2010 as a result of the District's failure to provide appropriate math instruction. Testimony suggests that the consumer math class met daily for 45 minutes. NT 293, 562. Therefore, I award 45 minutes of compensatory education for each day that the Student attended school between September 1, 2010 and December 31, 2010.

For reasons stated above, the Student was denied a FAPE between September of 2010 and December of 2010 as a result of the District's failure to provide appropriate

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the Parent was attempting to locate an RTF placement that the District would otherwise be obligated to fund, and by the fact that the District resumed funding very shortly after the diploma was rescinded.

behavioral interventions. Even using the *M.C.* standard, it is difficult to calculate the amount of compensatory education that is owed to remedy this denial. With no better evidence to rely on, I note that the Student was enrolled in a social skills class during the period of time in question, and extrapolate to find that social skills instruction is part and parcel to appropriate behavioral intervention. This loose correlation is somewhat unsatisfactory but, again, no better evidence was presented (and no other calculation was suggested by either party). Therefore, I award an additional 45 minutes of compensatory education for each day that the Student attended school between September 1, 2010 and December 31, 2010.

For reasons stated above, I find that the Student was denied a FAPE between the start of the 2011-12 school year through until February 20, 2012 as a result of the issuance of the District's diploma on June 10, 2011. During this period, the Student received no education at all. Therefore, I award the Student one hour of compensatory education for each hour that the District was in session from the start of the 2011-12 school year through February 19, 2012.

### ORDER

And now, November 25, 2012, it is hereby ordered as follows:

1. For reasons set forth in the Decision above, the Student was denied a free appropriate public education from September of 2010 through December of 2010 and again from the start of the 2011-12 school year through February 19, 2012.
2. The Student is awarded 90 minutes of compensatory education for each day that the Student attended school between September 1, 2010 and December 31, 2010.
3. The Student is awarded one hour of compensatory education for each hour that the District was in session from the start of the 2011-12 school year through February 19, 2012.
4. The Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student's current or future IEPs. The Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP to assure meaningful educational progress.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER

## APPENDIX A: PRELIMINARY DECISION AND ORDER

**NOTE: The original Preliminary decision and order contained footnotes starting at #1. In this appendix, the footnote numbering flows from the final decision and order, above**

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

[Redacted], Parent o/b/o J.B., Student	ODR No. 2782-1112AS
v.	
[Redacted] School District	

### PRELIMINARY DECISION AND ORDER

#### Introduction

The Parent, on behalf of the Student, initiated these proceedings against [Redacted School District]<sup>13</sup>, alleging violations of the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1400 *et seq.* (IDEA) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (Section 504).

This matter has been bifurcated. An issue concerning the scope of this hearing was presented during a hearing session on May 8, 2012, and this Preliminary Decision and Order only addresses that issue only. Although this Preliminary Decision and Order resolves that issue, it should not be considered a final decision for purposes of administrative exhaustion.

The scope of this hearing (that is, the period for which [the District] could be potentially liable for an IDEA violation and for which the Parent seeks a remedy) was largely resolved through agreements between the parties, pre-hearing motions, and pre-hearing correspondence. Despite their efforts, the parties were unable to resolve the question of whether [the District] could be potentially liable for an IDEA violation between June 10, when the Student graduated from high school, and February 20, when the District voided the Student's diploma.

#### Issue

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<sup>13</sup> This matter involves multiple LEAs. Usually, the name of the respondent district is redacted. In [the original] decision, the name of the respondent district is not redacted for the sake of clarity and readability. I note that school district's names are not typically redacted in IDEA court decisions.

Can [the District] be potentially liable for any IDEA violation occurring between June 10, 2011 and February 20, 2012?

### Stipulations

During the hearing session, the parties reached the following stipulation:

We stipulate that [the Student] was living in [the District] from August 12, 2010 until December 12th, 2010. We also stipulate that [the Student], as a result of hospitalizations and placements by county agency, did not live in [the District] from December 12th [2010] to the present.

NT 13.

### Findings of Fact

Although the narrow issue presented at this phase of the hearing is predominantly a matter of law, the chronology of the Student's placements and the circumstances of the Student's graduation are important.<sup>14</sup>

5. Chronologically, the 2010-11 school year was the Student's 12th grade year. Both parties expected that the Student would graduate at the end of the 2010-11 school year.
6. Prior to August 2010, the Student attended [a residential facility], an out-of-district residential treatment facility (RTF).
7. The Student returned to [the District] from the [residential facility] on August 12, 2010. *Stipulation.*
8. For the 2010-11 school year, [the District] placed the Student at the [Redacted Program (Program)], a school operated by Intermediate Unit 29. [Program] is not a RTF. P-10.
9. The Student was instructed at [Program] under the terms of the last IEP developed at the [residential facility]. NT 37; S-13.2; P-7.
10. In conformance with its ordinary practice, [Program] sent paperwork concerning graduation to the parents of all seniors, including the Parent in this case, in September or October of the 2010-11 school year. NT 143-144.
11. Transmission of the graduation paperwork was based on the grade level reflected in the Student's IEP (12th grade in this case) and the number of years that the Student had participated in [Program]'s program. NT at 155. The paperwork was not generated in response to the Student's educational performance or progress towards IEP goals. *Id.*
12. Using [Program]'s paperwork, the Parent confirmed that she approved the Student's graduation, publication of the Student's graduation in the local newspaper, and approved the Student's participation in [the District]'s graduation ceremony. S-5.

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<sup>14</sup> Going forward, the parties are urged to stipulate facts that are not disputed - such as the chronology of the Student's placements.



13. Based on the Parent's approval of the graduation paperwork, and verbal comments from the Parent and Student in support of graduation, [Program] informed [the District] that the Student should graduate at the end of the 2010-11 school year. NT 143-144, 177-178.
14. Although the graduation paperwork was not generated in response to the Student's progress, [Program]'s principal during the 2010-11 school year also believed that the Student should graduate because the instruction provided at [Program] was driven by the Student's IEP. NT at 153.
15. [Program] does not view parental approval of the graduation paperwork as a guarantee that the Student will graduate. NT at 144. However, the record of this case indicates only one circumstance under which a student would not graduate after a parent approves the graduation paperwork. Specifically, if a parent completed the graduation paperwork a second time, indicating that they were not in agreement with graduation, [Program] would transmit that information to whatever school district or districts were involved with the student. See NT 178-179.
16. By January of 2011, as a result of unmanageable behaviors, the Student was placed by a third party into an RTF called the [Redacted], located in [Redacted] School District. S-13, NT 57.
17. While living at [Redacted], the Student continued to attend [Program].
18. On March 3, 2011, a Schuylkill County Children's Interagency Team met. Documents from that meeting indicate that [Redacted] was the Student's "host" district and that [the District] was the Student's "home" district.<sup>15</sup> P-19.
19. On March 14, 2011, [Redacted] issued a new IEP for the Student. P-20.
20. On April 21, 2011, the Student was removed from [Redacted] and placed by a third party into [Redacted], another RTF within [Redacted].<sup>16</sup>
21. On May 2 or 3, 2011, the Student was discharged from [Redacted] upon psychiatric admission to [Redacted] Hospital. P-24, P-29.
22. Although the record is not entirely clear, it appears that the Student stopped attending classes at [Program] around the time of the psychiatric hospitalization.
23. On May 10, 2011, the Student was placed by a third party into shelter care in [Redacted] County. P-29. The Student did not attend classes at [Program] while living in shelter care.
24. While in shelter care, the Student was evaluated. An evaluation report of May 16, 2011 concluded that the Student had a full-scale IQ of 63, triggering an identification of Intellectual Disability.<sup>17</sup>
25. On June 3, 2011 the Student returned to [Redacted], but only for a short time. It is not clear whether the Student attended classes at [Program] during this time.
26. On June 10, 2011, the District issued a Notice of Recommended Educational Placement recommending that the Student should graduate (Graduation NOREP). NT at 78-80, P-28.

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<sup>15</sup> The terms "host" and "home" districts are explained and discussed in this decision, below.

<sup>16</sup> Strictly speaking, the reason for the transfer from [Redacted] to [Redacted] is not relevant to this part of the hearing but, by all indications, the Student was transferred because [Redacted] could not longer address the Student's escalating and dangerous behaviors. See P-24, P-29.

<sup>17</sup> Previous evaluations found the Student's FSIQ at 64, just out of the ID range.

27. The Parent signed the Graduation NOREP on June 17, 2011. The Diploma, however, was dated June 10, 2011.
28. On June 10, 2011, contemporaneous with the issuance of the diploma, the Student was placed by a third party into [Redacted], an RTF outside of Schuylkill County. S-13.2. See also NT 108, 113. The Student did not attend [Program] while at [Redacted].
29. [Redacted] operates both an RTF and a psychiatric hospital. On July 7, 2011, the Student was transferred by a third party from [Redacted] RTF to [Redacted] hospital and remained there through January of 2012 as the Parent and various agencies attempted to secure a residential program for the Student. NT 120-124.
30. A significant amount of testimony illustrates that it was exceedingly difficult to secure a RTF for the Student after the diploma was issued because 1) some funds available to IDEA-eligible students are no longer accessible after a student graduates and 2) many RTFs that include an academic component are not available to student who have graduated. NT at 120-138. A substantial portion of that testimony was hearsay, which was admissible but cannot be used to form the basis of my decision.
31. On January 13, 2012, the Student transferred from [Redacted] hospital to [Redacted], an RTF in the [Redacted] School District. NT 126, S-2. Although the Student received therapeutic services from [Redacted], the Student did not receive educational services at first.
32. [The District] rescinded<sup>18</sup> the Student's diploma on February 20, 2012. The Student began to receive educational services from [Redacted] on March 19, 2012. NT at 126, P-42.
33. The Student remains at [Redacted] through the present.

## **Legal Principles**

### **I. Graduation**

In Pennsylvania, school districts are local educational agencies (LEAs), as defined by the IDEA at 20 U.S.C. § 1401. The IDEA requires LEAs to provide a free appropriate public education (FAPE) to qualifying students with disabilities. Qualifying students are entitled to a FAPE until they graduate or until the end of the school year in which they turn 21 years old. 34 C.F.R. § 300.102(a)(3)(I).

The term "graduation" is not defined in the IDEA. See 20 U.S.C. § 1401. The IDEA's implementing regulations suggest that graduation occurs when a Student is issued a diploma that is "fully aligned with the State's academic standards." 34 CFR § 300.102(a)(3)(iv). The issuance of such a diploma is a change in placement for IDEA purposes, which must be based on an evaluation and triggers a number of procedural safeguards. See 34 C.F.R. § 300.102(a)(3)(iii). In Pennsylvania, however, it is difficult to say exactly what the State's academic standards are.

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<sup>18</sup> There is a semantic argument as to whether [the District] voided or rescinded the diploma. Regardless, as of February 20, 2012, [the District] considers the Student to be not-graduated.

In compliance with the No Child Left Behind Act of 2001 (Pub. L. No. 107-110, 115 Stat. 1425), Pennsylvania has adopted state standards for the administration of a state-wide assessment known as the Pennsylvania System of School Assessment or PSSA. The PSSA standards are not, and should not be confused with, graduation requirements.

Under the Pennsylvania Code, a “student’s graduation from high school signifies both the student’s fulfillment of the high school graduation requirements set forth in Chapter 4 (relating to academic standards and assessment) and the end of the student’s membership in a school district for the purpose of State subsidy reimbursement.” 22 Pa. Code § 11.27(1).<sup>19</sup> Funding provisions notwithstanding, each Pennsylvania school district has considerable discretion to set its own graduation criteria.<sup>20</sup> The record in this case does not establish what [the District]’s graduation criteria was at the end of the 2010-11 school year.

IDEA-eligible students may also graduate upon the completion of their IEP goals. 22 Pa Code § 4.24(e). Under the Pennsylvania Code, the “school district of residence” (e.g. the home district) issues a diploma when an IDEA-eligible student graduates on IEP goals. *Id.* This section must be read cautiously; and must be interpreted consistently with federal laws that provide FAPE though age 21 or until graduation with the issuance of a diploma aligned with the State’s academic standards – even if those standards are hard to define.

## **II. Out-Of-District Placements by Third Parties**

An LEA may place a student in a school located outside of the LEA’s boundaries. When that happens through the ordinary IEP process, the LEA remains responsible for the provision of FAPE to the Student. For example, when [the District] placed the Student at [Program], [the District] continued to be responsible for the provision of FAPE to the Student while the Student lived at home.

Pennsylvania statutes address LEAs responsibilities when a student is placed out-of-district by a third party (e.g. a mental health agency or juvenile court). Specifically,

any school district in which there is located any orphan asylum, home for the friendless, children's home, or other institution for the care or training of orphans or other children, shall permit any children who are inmates of such homes, but not legal residents in such district, to attend the public schools in said district, either with or without charge for tuition, textbooks, or school supplies, as the directors of the district in which such institution is located may determine.

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<sup>19</sup> IDEA-eligible students may participate in graduation ceremonies without actually “graduating,” so that they may receive services through age 21, and so that school districts can continue to receive subsidies for such services, without denying IDEA-eligible students the chance to participate with their peers. See 22 Pa Code § 11.27(4).

<sup>20</sup> Although not directly applicable to this case, individual school districts may lose some autonomy in this regard. See 22 Pa Code § 4.24.

24 P.S. § 13-1306(a). The district in which the institution is located is commonly referred to as the “host district.” The Statute goes on to describe the host district’s obligation to IDEA-eligible students:

whenever a student described in this section is a suspected or identified eligible student as defined in 22 Pa. Code Chs. 14 (relating to special education services and programs) and 342 (relating to special education services and programs), the school district in which the institution is located is responsible for:

- (1) providing the student with an appropriate program of special education and training consistent with this act and 22 Pa. Code Chs. 14 and 342; and
- (2) maintaining contact with the school district of residence of the student for the purpose of keeping the school district of residence informed of its plans for educating the student and seeking the advice of that district with respect to the student.

24 P.S. § 13-1306(c). Under the foregoing provision, the host district is responsible for the provision of FAPE to IDEA-eligible students placed within its borders. However, in such cases, the host district may then bill the “school district ... [that is] the legal residence of the child” for the cost of the services provided. See 24 P.S. § 13-1308. The District of legal residence is referred to as the “home district.”

Said simply, when a third party places an IDEA-eligible student outside of [his or her] home district, the host district becomes responsible for the provision of an appropriate public education, but the home district remains responsible for payment.<sup>21</sup>

### **Discussion**

[The District] should not have issued a diploma to the Student. The above-cited regulations illustrate two circumstances under which school districts may graduate an IDEA-eligible student through the issuance of a diploma, terminating the student’s right to a FAPE: 1) the student has satisfied the same graduation criteria applicable to all students in the school district or 2) the student has achieved all IEP goals.<sup>22</sup> In this case, [the District] did not determine that the Student met its graduation criteria and did not determine that the Student achieved all IEP goals. Rather, [the District] relied upon both a lack of information from the Student’s host district and intermediate unit, and the Parent’s desire for the Student to graduate. [The District] did participate in some interagency IEP meetings, but testimony indicates that the information shared during those meetings was not the basis for the decision to issue the diploma.

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<sup>21</sup> There are some exceptions to this rule, none of which are applicable here. See 24 P.S. § 13-1307; 24 P.S. § 13-1306(d).

<sup>22</sup> Under some circumstances, school districts issue a certificate of attendance or similar document to IDEA-eligible students either when participating in graduation ceremonies or when aging out of programming. Nothing in this decision is intended to preclude school district from issuing such certificates.

[The District] received a list of graduating students from [Program] during the 2010-11 school year. The Student's name was on that list because the Parent approved [Program]'s graduation paperwork. The graduation paperwork was generated based on the grade level listed on the Student's IEP. By all indications, [the District] relied upon [Program]'s list to determine that the Student should receive a diploma. During the 2010-11 school year, [the District] received no subsequent information saying that the Student should not graduate. [Program] would only generate and transmit such information if the Parent had re-completed the graduation paperwork and changed her responses.

Given the foregoing, the information that [the District] relied upon to issue the diploma did not suggest that the Student had completed the goals of his IEP or had satisfied [the District]'s graduation requirements.<sup>23</sup> [The District]'s reliance on this insufficient information would be inappropriate under ordinary circumstances. [The District]'s error in this case is compounded by the Student's increasingly restrictive residential placements and identification as a student with an intellectual disability during the 2010-11 school year. Both circumstances tend to indicate that the Student's behaviors were uncontrolled or escalating, and that the Student may have educational needs that were not known or addressed before the intellectual disability diagnosis.

[The District]'s reliance upon the Parent and Student's acceptance of, if not enthusiasm for, the Student's graduation is similarly misplaced. Parental approval of an inappropriate IEP via a NOREP does not alter an IDEA-eligible student's right to FAPE. In such circumstances, students may seek redress for a denial of FAPE even though the parents approved the inappropriate IEP. The circumstances of this case are analogous. The offered educational placement was the termination of both the Student's enrollment in any school district and the Student's entitlement to special education. That offer was inappropriate because [the District] had made no affirmative determination that the Student had met IEP goals or graduation criteria. The Parent's approval of the Graduation NOREP, therefore, did not terminate the Student's right to FAPE.

It is speculative to postulate what services the Student would have received if the diploma was not issued.<sup>24</sup> There is preponderant evidence, however, that the Student would have remained placed by third parties in residential programs located outside of [the District] regardless of the diploma. The Student would have been eligible for special education, but special education would have been provided by the school district in

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<sup>23</sup> Nothing in the record suggests that [the District] relied upon anything else. Further, [Program]'s principal's testimony regarding his belief that graduation was appropriate is not compelling. Testimony that an IEP was implemented does not indicate that IEP goals were met. It is also not clear whether the principal shared his beliefs with [the District] at any time during the 2010-11 school year.

<sup>24</sup> The diploma should not have altered the Student's legal status. Unfortunately, testimony in this case tends to indicate that third parties accepted [the] diploma and, consequently, educational programs (and sources of funding for those educational programs) may have been closed off to the Student between the issuance of the diploma and its eventual rescission or voiding. As noted above, portions of that testimony are hearsay. The factual issue of whether the Student was denied services as a result of the diploma should be resolved in the second part of this hearing.

which the residential placements were located per § 13-1306. [The District] argues that to whatever extent the Student was denied a FAPE during the period of the diploma, other LEAs must be responsible for that violation.

§ 13-1306 does not compel host districts to scrutinize the legitimacy of a student's diploma. In this case, [the District]'s issuance of the diploma may have triggered both the discontinuation of special education and precluded educational placement options. It is not equitable for [the District] to take actions that hinder the efforts of other agencies to provide FAPE, and then use other agencies' obligation to provide FAPE as its defense. Moreover, § 13-1306 does not terminate all of [the District]'s obligations to the Student under the IDEA. IDEA-eligible students are entitled to a *free* appropriate public education. § 13-1306 obligates the host district to provide an appropriate public education but also obligates the home district to make that "APE" free. [The District] cannot circumvent that obligation through the inappropriate issuance of a diploma. As a result, [the District] did have IDEA obligations to the Student during the period in which the diploma was operative, and [the District] can be potentially liable for violating the Student's rights under the IDEA.

The issue of potential liability – which is the narrow issue presented during this part of the hearing – does not speak to what remedy [the District] could potentially owe the Student during the period in which the diploma was in place. In the overall context of this hearing, I believe it is important for the parties to know my assessment of this closely-related issue.

I am unaware of any precedent under which a school district interfered with another school district's efforts to provide FAPE (intentionally or otherwise) and, as a result, owed compensatory education to a student. Similarly, I am unaware of any precedent precluding such a remedy.<sup>25</sup> At the same time, it is increasingly clear that hearing officers have the authority to fashion equitable relief on a case-by-case basis that furthers the purposes of the IDEA. See *e.g. Ferren C. v. School Dist. of Philadelphia*, 612 F.3d 712, 720 (3d Cir., 2010); see also *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass*, 471 U.S. 359 (1996), 105 S.Ct. 1996.

If the Parents are able to prove by preponderant evidence that the Student was denied a FAPE between June 10, 2011 and February 20, 2012 as a result of [the District]'s issuance of the diploma, compensatory education is an appropriate equitable remedy. Evidence that the issuance of the diploma terminated funding sources and precluded placement options is relevant to that inquiry, but such evidence must be more than hearsay. Money damages (i.e. forcing [the District] to literally pay for the services that another school district should have provided, assuming those services can be established) are generally not available under the IDEA and beyond my authority to award. Therefore, if the Parent cannot prove a causal connection between the issuance of the diploma and a denial of FAPE, remedies must be limited to declaratory relief regarding the inappropriate issuance of the diploma and Graduation NOREP.

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<sup>25</sup> I invite the parties to educate me if there is a case that speaks to this rather unique issue.

## ORDER

And now, July 3, 2012, it is hereby ordered as follows:

1. [The District] is potentially liable for IDEA violations occurring between June 10, 2011 and February 20, 2012.
2. The scope of this hearing includes the period of time between June 10, 2011 and February 20, 2012.

/s/ Brian Jason Ford  
HEARING OFFICER