

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

EXPEDITED DUE PROCESS HEARING

Name of Child: RA
ODR #9580/08-09 LS

Date of Birth: xx/xx/xx

Date of Hearing: January 14, 2009

CLOSED HEARING

Parties to the Hearing:
Ms.

Freire Charter School
2027 Chestnut Street
Philadelphia, Pennsylvania 19103

Date Transcript Received:
Date Complaint Received by ODR:

Representative:
David Thalheimer, Esquire
Thalheimer and Palumbo
1831 Chestnut Street Suite 300
Philadelphia, Pennsylvania 19103

Scott Wolpert, Esquire
Timony Knox
400 Maryland Drive PO Box 7544
Ft Washington, Pennsylvania 19034

January 19, 2009
January 2, 2009

Date of Decision:

January 24, 2009

Hearing Officer:

Linda M. Valentini, Psy.D.

Background

Student is a late teen-age eligible student enrolled in the Freire Charter School (hereinafter FCS). Pursuant to a behavioral incident on December 16, 2008 FCS conducted a manifestation determination meeting which resulted in the finding that the incident was not a manifestation of Student's disability. Student's mother Ms. (hereinafter Parent) asked for this expedited hearing, alleging that the team made an incorrect decision at the manifestation determination meeting and that FCS violated Student's pendency ("stay-put") rights by continuing to exclude Student from school. The Parent seeks reinstatement for her child at FCS pursuant to a hearing officer's finding that the incident in question was a manifestation of Student's disability, and seeks compensatory education for a denial of educational benefit caused by the alleged pendency violation. FCS maintains that the manifestation determination was legally correct and should be upheld. Additionally, FCS asks that should the hearing officer find that the manifestation determination decision was not legally correct, she nevertheless find that maintaining the current

placement of Student at FCS is substantially likely to result in injury to self or to others and order Student to be placed in an alternative educational setting for 45 school days.

The Parent's complaint also alleged denial of FAPE because of an inappropriate IEP, and included a request for an independent educational evaluation (IEE) as well as additional relief in the form of compensatory education. The hearing officer notified the parties that the hearing would be bifurcated and that the expedited portion would be conducted first, with a second session to be held at a later date to address the rest of the complaint.

ODR received the hearing request on January 2, 2009. The hearing was held 8 school days later, on January 14, 2009 from 5:30 to 10:30 pm. Pursuant to Pennsylvania regulations, this expedited decision is due 10 school days after the hearing date. January 15th was Day One, and the School has scheduled closings on January 19th and January 26th, making the decision due date January 30, 2009. However this decision is being issued prior to the due date.

Issues

1. Was the outcome of the manifestation determination meeting conducted by the Freire Charter School regarding Student legally correct?
2. If the outcome of the manifestation determination was not legally correct, does Student present a significant risk of harm to self, School staff, or other students such that Student should be placed in a 45 school day alternative educational placement?

Findings of Fact

1. Student is an eligible student who is classified as having an other health impairment due to Student's diagnosis of Attention Deficit Hyperactivity Disorder, and who has a secondary classification of specific learning disability in reading

comprehension, numerical operations and written expression. (S-5)

2. On December 16, 2008 Student engaged in inappropriate behavior in school which caused FCS to conduct a manifestation determination meeting on December 23, 2008. (S-1)
3. The outcome of the manifestation determination was that the behavior Student exhibited during the December 16th incident was not a manifestation of Student's disability. (S-1)
4. The Parent disagreed with this finding. (S-1)
5. At or around 4th period on December 16, 2008 Ms. S, a teacher who did not know Student, was for the second time instructing a group of girls to clear the halls, or she would "write them up". Various witness accounts indicate that the teacher was conveying her instructions in a loud voice. Passing by, Student said, "You don't need to be so f_____ loud" and when the teacher walked up to Student, Student

stated Student's name; the teacher believed Student did this so she could "write Student up". The teacher told Student, "You need to walk with me right now to [the Dean's] office" whereupon Student told her repeatedly to "Get the f_____ out of my face" while pointing Student's finger in the teacher's face. Student's face was very close to hers, which may have been because she turned around to face Student as they were walking. (S-1; NT 48-49, 96-99, 188)

6. Ms. E, the Director of Student Services (special education services) heard yelling in the hallway, went out to investigate, told Ms. S to return to her classroom and told Student to come with her into her room. Student immediately calmed down and followed Ms. E's instruction. Student was "relaxed" in her office, and calm as Student left with the Dean and walked up the stairs to the Dean's office. (NT 49-50)

7. When the Parent was informed by telephone of the incident and told that Student was being sent home on suspension, she asked to speak with

Student. Student came back downstairs. The Parent conveyed her extreme displeasure, saying that she was “done with Student”, and Student appeared to become upset. (NT 52, 221-222)

8. About thirty (30) minutes had elapsed between the time Ms. E intervened between Student and Ms. S and when Student was on the phone with Student’s mother. (NT 52-53)

9. When the telephone conversation ended Student pointed to each of three teachers in turn and said loudly “F_ you, F__ you, F__ you” and then continuing to the right pointed and said “F__ this school, I hate this school”. (S-1, NT 53)

10. Student walked out of the office, and as Student was walking out of the office Student was saying, “Where’s that teacher? She’s f___ing lying on me. Where’s that teacher? I want to get her. I want to find her”. (NT 53)

11. Two teachers then walked behind Student as Student went back upstairs to

the Dean's office. With elbows bent Student rotated Student's arms back at the shoulder and said "Where's that f___ing teacher? I want to f___ing get her" all the way up the stairs. (NT 54-55)

12. Although Ms. E testified that Student was trying to "push back" and come back down the stairs Student did not strike anyone. Student did not reverse direction and did not come back down the stairs. (NT 55)

13. Student calmed down in the Dean's office and walked outdoors with the Dean to the public transportation stop. The Dean talked to Student about "not getting so upset at people inside the school". Student told the Dean Student did not want to stay at Freire but Student's mother wanted Student to stay there and that Student was "trying to tell her Student wants to leave". (S-2)

14. Although Ms. S was the teacher involved in the first part of the incident, and was present when Student told her to "get the f___ out of my face" she was not

present for the second part and there is no evidence in the record that she directly heard what Student said after the phone call with Student's mother in the office or on the way up the stairs. (NT 53, S-1)

15. The Director of Student Services believed that it would have been a "breach of confidentiality" to inform the faculty that Student carried an educational classification based on a mental health diagnosis related to difficulties with impulse control. Hence Ms. S knew nothing about Student or Student's disability when they encountered one another in the hallway. (NT 100-101)
16. On December 16th the school sent the Parent a letter stating that Student was being suspended for 3 days, that the violation of the Code of Student Conduct was "Threat", that Student was to return with her on December 22nd, and that Student would be able to make up exams and any work that was missed while out on suspension. (S-3)
17. On December 22, 2008 another letter went out to the Parent stating that Student

would be suspended effective December 22, 2008 for an additional 5 days “due to the nature of Student’s Code of Conduct Violation”, that Student was to return with her on January 8, 2009, and that Student would be able to make up exams and any work missed while out on suspension. (S-3)

18. On December 23, 2008 a letter was sent to the Parent indicating that “the Deans have found that Student has violated the non-violence policy of the school” and that they were recommending Student for expulsion. There is no explicit explanation on the record for the three separate disciplinary responses to the incident. (S-3)

19. FCS enrolls 489 students in grades 9 through 12. (NT 153)

20. FCS publishes a Code of Student Conduct containing the following language: Freire is a non-violent community. This policy mandates recommendation for expulsion for all acts of violence regardless of the circumstances surrounding any specific event or the disciplinary history of

any student involved. Acts of violence include, but are not limited to:

- (1) Physical violence – fights, punching, hitting, hair pulling, etc.
- (2) Verbal violence- threats, screaming, yelling, etc.
- (3) Harassment of a community member by outside family or friends.
- (4) Weapons – “including but not limited to, any knife, cutting instrument, cutting tool, nunchaku, firearm, shotgun, rifle, and any other tool, instrument or implement capable of inflicting serious bodily injury” (Act 26 of 1995- the Safe Schools Act).
- (5) Destruction of Property. (P-3)

21. The FCS Code of Student Conduct contains the following descriptions of offense levels in the area of Safety: (emphasis in the original):

Level 1 Offenses:

Not having an ID when checked 5 times will lead to level 1 consequence.

Lost ID's will cost \$5 to replace (ID's that are in poor shape will be replaced free of charge).

Level 2 Offenses:

Participating in horse play.

Speaking to any community member in a way that makes them feel unsafe or violated. (Where extreme circumstance can be shown this action lead [sic] to a level 4)

Turning lights off in the gym, hallway, or classrooms without permission.

Level 3 Offenses:

Involving other community members (or your friends) in personal matters and situations that began in school. In other words, do not bring family or friends up to fight someone for you. (Where extreme circumstance can be shown this action lead to a level 4)

Sexual harassment: Sexual harassment, including creating or maintaining a sexually hostile environment and/or seeking or demanding any sexual 'quid pro quo', is forbidden on the part of students, faculty, staff, and all adults. (Where extreme circumstance can be shown this action lead [sic] to a level 4)

Stealing or taking items that do not belong to you.

Level 4 Offenses:

Possession of a BB guns or toy guns, or any other form of a weapon on school

grounds/property (this includes indoors and out).

Possession or use of illegal substances inside or outside of school.

Violating the non-violence policy by fighting or participating in any act of violence toward any other community member at any time in any place. Verbal Aggression is VIOLENCE! Physical fighting, verbal threats, arguments, yelling, screaming or harassment will not be allowed inside or outside of school, and will be considered acts of violence.

Acting in a way that could endanger anyone in the community.

There are no second chances for violation of the non-violence policy. Any act of violence is immediate grounds for expulsion. NO EXCEPTIONS. (P3)

22. The DSM-IV¹ offers a description of Associated Features and Disorders of Attention Deficit Hyperactivity Disorder as follows: may include low frustration tolerance, temper outbursts, bossiness, stubbornness, excessive and frequent insistence that requests be met, mood

¹ Diagnostic and Statistical Manual of the American Psychiatric Association Fourth Edition (DSM-IV).

lability, demoralization, dysphoria, rejection by peers, and poor self-esteem. Academic achievement is often markedly impaired and devalued, typically leading to conflict with the family and with school authorities.

Inadequate self-application to tasks that require sustained effort is often interpreted by others as indicating laziness, a poor sense of responsibility and oppositional behavior. (P-4)

23. The following are the diagnostic criteria² for Attention Deficit Hyperactivity Disorder:

Either (1) or (2):

Six or more of the following symptoms in either category have persisted for at least 6 months to a degree that is maladaptive and inconsistent with developmental level, were present before age 7 years, cause some impairment is present in two or more settings (e.g. school or home), cause clinically significant impairment in social or academic functioning, do not occur exclusively during the course of [a listing of other disorders]:

² Criteria descriptions are abbreviated slightly.

(1) Inattention

- a. often fails to give close attention to details or makes careless mistakes
- b. often has difficulty sustaining attention in tasks
- c. often does not seem to listen when spoken to directly
- d. often does not follow through with instructions and fails to finish schoolwork
- e. often has difficulty organizing tasks or activities
- f. often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort
- g. often loses things necessary for tasks
- h. is often easily distracted by extraneous stimuli
- i. is often forgetful in daily activities.

(2) Hyperactivity

- a. often fidgets with hands or feet or squirms in seat
- b. often leaves seat in classroom or other situations
- c. often runs about or climbs excessively in inappropriate situations (adolescents

- or adults may be limited to subjective feelings of restlessness)
- d. often has difficulty playing or engaging in leisure activities quietly
- e. is often on the go or acts as if driven by a motor
- f. often talks excessively

Impulsivity

- a. often blurts out answers before questions have been completed
- b. often has difficulty awaiting turn
- c. often interrupts or intrudes on others (P-4)

24. Prior to the December 16, 2008 incident, Student's Disciplinary Record contained approximately 187 separate disciplinary entries³ starting on September 18, 2006. Of these notations, approximately 88 are "late" to class or to school or "tardy"; approximately 10 were "no ID"; approximately 9 were for "cutting" class or detention or for "walking out" of class; approximately 5 were for "missing

³ Entries related to parent conferences, imposing consequences for a group of already cited offenses, etc. were not counted.

(mandatory) tutoring; approximately 4 were for “sleeping”; approximately 4 were for “Internet” or “electronics” (phone) offenses.
(S-12)

25. Prior to the December 16, 2008 incident, Student’s Disciplinary Record contained approximately⁴ 14 notations for “disrespect”; approximately 9 notations for “defiance”, one of which was for “severe defiance”; approximately 6 for “disruptive” behavior.
(S-12)

26. Prior to the December 16, 2008 incident, Student’s Disciplinary Record contained 6 Suspensions: 9-19-06: not paying attention to instructions and when redirected began to argue with teacher), 12-1-06: trying to cut one substitute’s class and enter another substitute’s class, too many write-ups this quarter and had skipped two detentions; 2-27-07: cut detention and cut advisory; 5-17-07: disruptive, caught writing on school property, defiant when asked to leave class, never reported to Dean’s office; 4-15-08: accumulated too many write-ups, cursed a woman on the street yesterday; 5-21-08:

⁴ Some single entries were coded with two descriptors, e.g. “disruptive/disrespectful”.

caught by principal in Dunkin' Donuts, said Student was finishing Student's breakfast and was already late so it didn't matter. (S-12)

27. Prior to the December 16, 2008 incident, Student's Disciplinary Record contained 2 notations marked "Detention". These include 12-12-06: book check; 12-18-06: no show for advisory. (S-12)

28. Prior to the December 16, 2008 incident, Student's Disciplinary Record contained 16 notations marked "Discipline". These include 10-27-06: cheated on a test; 11-16-06: made a comment that was of very poor taste out loud about a student who was not present; 11-30-06: chewing gum; 12-8-06: speaking during a quiz; 1-5-07: unprepared for class; 1-19-07: disruptive behavior; 1-24-07: refused to complete a teacher intervention; 3-26-07: "impish" all morning, talkative, baiting, read a passage about Asians in a Chinese accent; 3-28-07: no show for class detention, talked in class; 3-30-07: told to be quiet in two periods, second time told teacher she was picking on Student, told to be quiet or leave so

Student left; 4-25-07: walked out of after school detention and said Student would take whatever punishment Student received; 5-7-07: hid teacher's guide for most of the class period; 5-15-07: had head down and was warned, said teacher should go ahead and write Student up as Student was told this would happen, left when asked if Student would rather leave after first saying 'no' but came back in for Student's coat; 5-16-07: wrote F-Block on classroom window, when told to leave said to just write Student up, and kept saying curse words under Student's breath; 5-21-07: talking and out of seat; 6-12-07: caught with cheat sheet during exam. (S-12)

29. Following are the notations from the Discipline Record for entries coded as being disrespectful: 11-14-07: sat in back of class and had head down, repeatedly asked to raise Student's head which Student did saying Student didn't want to, told Student could take Student's (correct) seat or leave the class and chose to leave, in the hall walked away when teacher tried to talk to Student about situation; 1-4-08: does not stay in assigned seat and speaks to teacher

in disrespectful manner when she tells Student to move, do Student's work or complete an assignment; 1-7-08: used profane language, calling a faculty member a 'fat b__'; 1-24-08: late to class and started talking, when corrected told teacher 'Ms. S1, people be telling me that you always snapping on me and it's not fair. All these other people be talking and you always pick on me. It's not fair". Told Student was out of line and to just be quiet Student "started to use vulgarities such as sh__, f__, and others. Student spoke at me using these words...continued over and over again. In my five years here, no student has ever talked to me like this"; 2-6-08: disruptive, warned three times, continued to excessively talk, asked to use the bathroom and told if Student completed Student's work Student could use the bathroom, asked three more times and then left the classroom without permission to use the bathroom, when came back continued to talk excessively and disrupt the class; 2-11-08: disruptive, after four warnings asked to leave class then argued with teacher; 3-5-08: disrespectful while taking a test, told twice Student would be written up and said

Student did not care; 4-3-08: disrespectful to teacher and when told Student would be written up said Student didn't care and "you can write me up ten times"; 4-10-08: talking during peer's presentation; 4-25-08: disrespectful remark to teacher; 5-19-08: called out during class to say how much Student hated chemistry and used derogatory words to describe the class; 5-29-08: disrespected classroom environment, did not listen to warnings; 10-27-08: came to class with cup of coffee and when told to throw it out said no one was going to make Student throw out Student's coffee not even the Dean and said just to write Student up; 11-10-08: did not agree with the lesson being taught and said, 'If you were us you'd be sick of this sh__ too'. (S-12)

30. One instance was specifically coded "Inappropriate Language": 2-13-08: after refusing to take a quiz was told Student's mother would be called and replied, 'Why do you always have to call my mom, you don't need to call that f__ing lady'. (S-12)

31. One instance was specifically coded “Severe Defiance/Profanity”. The 5-8-08 notation read: “Student cursed in the middle of class, and then proceeded to tell me that Student did not care and that I was acting like a girl (teacher was a male). Therefore I sent Student to the Dean’s office.” (S-12)
32. One instance was specifically coded “Code of Conduct Violation”. The 3-31-08 notation involved Student’s “blurting out ‘Why the f__ is she in my class?’ when seeing Ms. E enter the classroom. (S-12)
33. The Disciplinary Record supports, and the principal testified after having reviewed the records, that Student has never engaged in any assaultive behavior in the time that Student has been attending the School. (NT 189-192, 207; S-12)
34. Student’s current IEP, dated July 7, 2008 specifies under Related Services that Student was to receive one 50-minute therapy session per week at FCS for the 2008-2009 school year. (S-8)

35. Ms. E, the Director of Student Services at FCS testified that the therapy specified in the IEP did not happen as Student “was not interested” in receiving Student’s therapy. The witness was not aware of the day and time on which the therapy was scheduled. The witness neither kept nor produced records documenting sessions offered versus sessions held, and the reason(s) sessions were not held. The witness did not know how the designated therapist followed up with Student to encourage compliance. The witness did not follow up with Student herself. The witness did not follow up with the Parent. (NT 145-146)
36. Student’s IEP called for, under Supports for School Personnel, “modifications of curriculum and de-escalation training”, 1 30-minute session per week. (S-8)

Legal Basis

Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief.

Schafer v. Weast, 126 S. Ct. 528, 537 (2005).

The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of

Education, 435 F.3d. 384; 2006 U.S. App.

LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case.

Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

As the Parent asked for this hearing, the Parent bears the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this case, the evidence was not in equipoise.

The Burden of Proof has two parts – the burden of production and the burden of persuasion.

The burden of production refers to which party presents its case first, and generally the same

party bears both the burden of production and the burden of persuasion. In this matter, although the burden of persuasion was assigned to the Parent, the hearing officer offered, and the parties chose, the option of having the District present its witnesses first.

Charter Schools

The IDEA requires states to provide a "free appropriate public education" to all students who qualify for special education services.⁵ Pennsylvania implements IDEA by way of 22 Pa. Code Chapter 14. However, Pennsylvania charter schools are designed to be "independent public schools." Act 22 of 1997 provides charter schools with autonomy from school districts and freedom from certain regulations. Specifically, charter schools are exempt from complying with Pennsylvania's special education regulations and standards.⁶ The Charter School Law was passed June 12, 1997. As of June 12, 1997 charter schools have had special education duties, as Act 22 of 1997 requires charter schools to comply with federal laws and regulations governing children with disabilities.

⁵ 20 U.S.C. §1412.

⁶ 22 Pa. Code Chapters 14 and 342. (See, the Charter School Law, Act 22 of 1997, 24 P.S. §17-1732-A; see also, 22 Pa. Code §711.2(c)).

On June 8, 2001, the Charter School Services and Programs for Children with Disabilities Law,⁷ was adopted and became effective on June 9, 2001 to specify how the Commonwealth of Pennsylvania would meet its obligations to ensure that charter schools comply with the IDEA and its implementing regulations.⁸ Accordingly, although from June 12, 1997, to June 8, 2001, Pennsylvania charter schools were governed in the area of special education under the Federal Laws, effective June 9, 2001, 22 Pa. Code §711.1 et seq., also governs special education in Pennsylvania Charter Schools.

On June 27, 2008, effective July 1, 2008 22 Pa. Code §711.61 was amended. The code reads as follows in relevant part:

Suspension and expulsion

(b) Charter schools and cyber charter schools shall comply with Chapter 12 (relating to students) and 34 CFR 300.530—300.537, regarding discipline procedures.

(d) When a child with a disability has been expelled from a charter school or cyber charter school, the charter school or cyber

⁷ 22 Pa. Code §711.1 et seq

⁸ 34 CFR Part 300, and Section 504 and its implementing regulations in 34 CFR Part 104

charter school shall provide the child with a disability with the education required under § 12.6(e) until the charter school or cyber charter school is notified in writing that the child is enrolled in another public agency, private school, approved private school or private agency.

(e) Notwithstanding the requirements incorporated by reference in 34 CFR 300.530(b) and 300.536 (relating to authority of school personnel; and change of placement because of disciplinary removals), a disciplinary exclusion of a student with a disability for more than 15 cumulative school days in a school year will be considered a pattern so as to be deemed a change in educational placement.

22 Pa. Code § 711.61(b)(d)(e)⁹

Special Education

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA

⁹ Authority: The provisions of this § 711.61 amended under sections 1732-A(c)(2) and 1749-A(b)(8) of the Charter School Law (24 P. S. 17-1732-A(c)(2) and 17-1749-A(b)(8)). Source: The provisions of this §711.61 amended June 27, 2008, effective July 1, 2008, 38 Pa.B. 3593. Immediately preceding text appears at serial page (279627).

2004” or “IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* This federal special education statute recognizes that a child’s disability may lessen or remove her responsibility for a behavioral infraction, and thus mitigate the disciplinary consequence of the action. If an LEA wishes to discipline an eligible student in such a way that changes the student’s current educational placement, it must first determine whether or not the action in question was a manifestation of the student’s disability.

The IDEIA and its implementing regulations set forth detailed provisions for disciplinary matters. Because this is the first experience involving a due process hearing of this type for both the charter school and the parent, the complete provisions are presented as follows:

Discipline Procedures

34 CFR §300.530 Authority of school personnel.

(a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in

placement, consistent with the requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) General. (1) School personnel under this section may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under §300.536).

(2) After a child with a disability has been removed from Student's or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) Additional authority. For disciplinary changes in placement that would exceed

10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) Services. (1) Except as provided in paragraphs (d)(3) and (d)(4) of this section, a child with a disability who is removed from the child's current placement pursuant to paragraphs (b), (c), or (g) of this section must--

(i) Continue to receive educational services, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications,

that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1) of this section may be provided in an interim alternative educational setting.

(3) A public agency need not provide services during periods of removal under paragraph (b) of this section to a child with a disability who has been removed from Student's or her current placement for 10 school days or less in that school year, if services are not provided to a child without disabilities who has been similarly removed.

(4) After a child with a disability has been removed from Student's or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under §300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed under paragraph (d)(1) of this section, if any, and the location in which services, if any, will be provided.

(5) If the removal is for more than 10 consecutive school days or is a change of

placement under §300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section and the location in which services will be provided.

(e) Manifestation determination. (1)

Except for removals that will be for not more than 10 consecutive school days and will not constitute a change of placement under §300.536, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--

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

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the

LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must--

(1) Either--

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of

the modification of the behavioral intervention plan.

(g) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child--

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

(h) Notification. Not later than the date on which the decision to take disciplinary action is made, the LEA must notify the parents of that decision, and provide the

parents the procedural safeguards notice described in §300.504.

(i) Definitions. For purposes of this section, the following definitions apply:

(1) Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) Serious bodily injury has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(4) Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

(Authority: 20 U.S.C. 1415(k)(1) and (7))

§300.531 Determination of setting.

The interim alternative educational setting referred to in §300.530(c) and (g) is determined by the IEP Team.

(Authority: 20 U.S.C. 1415(k)(2))

§300.532 Appeal.

(a) General. The parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and 300.531, or the manifestation determination under §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may request a hearing.

(b) Authority of hearing officer. (1) A hearing officer under §300.511 hears, and makes a determination regarding, an appeal requested under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may--

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

(3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes the child would be dangerous if returned to the original placement.

(c) Expedited hearing. (1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§300.510 through 300.514, except as provided in paragraph (c)(2) through (5) of this section.

(2) The SEA or LEA must arrange for an expedited hearing, which must occur within 20 school days of the date the hearing is requested and must result in a determination within 10 school days after the hearing.

(3) Except as provided in §300.510(a)(3)—

(i) A resolution session meeting must occur within seven days of the date the hearing is requested, and

(ii) The hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of receipt of the hearing request.

(4) For an expedited hearing, a State may provide that the time periods identified in §300.512(a)(3) and (b) are not less than two business days.

(5) A State may establish different procedural rules for expedited hearings under this section than it has established for due process hearings under §§300.511 through 300.513.

(6) The decisions on expedited due process hearings are appealable consistent with §300.514.

(Authority: 20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A))

§300.533 Placement during appeals.

When an appeal under §300.532 has been requested by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the

expiration of the time period provided for in §300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

(Authority: 20 U.S.C. 1415(k)(4)(A))

Functional Behavioral Analysis (FBA) and Behavior Improvement Plan (BIP):

The Parent indicated the belief that Student's IEP was deficient because it did not contain evidence of a formal FBA or a BIP. By way of dicta, the IDEA only expressly requires an FBA and a BIP upon removal of an eligible child for 10 school days in a school year,¹⁰ [which did not arise in this case as Student had not been suspended this school year prior to the December 16, 2008 incident]. Otherwise, there is no such obligation under the IDEA except to the extent implicit in the requirement that the IEP team "consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address ... behavior [that impedes the child's learning or that of others]."¹¹ Second, as noted in PA Sp. Ed.

¹⁰ 34 C.F.R. § 300.520(b)-(c). Moreover, the 2004 IDEA Amendments do not add any requirements applicable to this case. 20 U.S.C.A. §§ 1415(k)(1)(D) and 1415(k)(1)(F).

¹¹ *Id.* § 300.346(a)(2)(i).

Opinion No. 1724 (April 2006) “the courts have been averse to importing best practice in the absence of legal standards for FBAs and BIPs”.¹²

Compensatory Education

Compensatory education is an appropriate remedy where a school district has failed to provide a student with FAPE. M.C. v Central Regional School District, 81 F.3d 389 (3rd Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 488 U.S. 923 (1991). For many years the period of compensatory education has been calculated to be equal to the period of deprivation, less a reasonable rectification period. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999) Since 2006, hearing officers can also focus on what it will take to bring the student to the point Student should have been if not for the deprivation of FAPE. B.C. v. Penn Manor, 906 A.2d 642 (Pa. Cmwlth. 2006) In the instant matter this hearing officer finds it impossible to determine where Student would be educationally but for the denial of FAPE and furthermore is unable to devise a reasonable plan for bringing

¹² See, e.g., Alex R. v. Forestville Valley Cmty. Sch. Dist., 375 F.3d 603 (7th Cir. 2004); Robert B. v. West Chester Sch. Dist., 44 IDELR ¶ 123 (E.D. Pa. 2005).

Student up to where Student should be. Therefore an hour-for-hour compensatory education package will be awarded.

The regulatory school day for a high school student is a minimum of 5.5 hours per day. 22 PA Code §11.3; In Re A.J. and Methacton School District, Special Education Opinion No. 1766 (2006)

Spec. Educ. Appeal No. 1763 (September 2006) provides a comprehensive explanation of the parameters of compensatory education awards and is reproduced here for the benefit of the parties:

The Panels have provided guidance for determining how, when and where compensatory education that is due a student must be provided. In B.R., Spec. Educ. Opinion No. 1102 (2001), the Panel held: “Certain guidance may be inferred from applicable case law, however, as well as in common sense principles. First and foremost, compensatory education is a remedy which does not seek to give a student that to which Student is already entitled. As an eligible student is entitled to

FAPE, it follows that compensatory education may not simply further current and future educational goals which are (or should be) included in Student's present IEP. Instead, compensatory education serves to make up for a prior deprivation of service. In addition, it is the parent who has properly sought and obtained an award of compensatory education from a school district which had deprived a student of FAPE. Just as a parent may choose the site of a private school placement, which will be upheld where a school district has denied FAPE so long as the placement is 'reasonable', then logically a parental selection of compensatory education services should be honored so long as the selection is appropriate and reasonable under the circumstances."

Thus, we hold that Student's parents may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers the goals of Student's present or future IEPs. Such hours must be in addition to Student's then current IEP and may not be used to supplant

such services. These services may occur after school hours, on weekends and during the summer months, when convenient for Student and Student's parents.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's present or future IEPs. The costs to the District of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services and the actual costs for salaries, tuition and transportation for contracted services. This principle sets the maximum cost of all of the hours or days of the compensatory education awarded. The parents may balance expensive and inexpensive instruction or services so long as the total cost and hours do not exceed the maximum amount. The parents also may use fewer hours of expensive services so long as the maximum amount is not exceeded. Finally, the parents may not be

required to make co-payments or use personal insurance to pay for these services.

Additionally, we reiterate the rule underscored in previous decisions that the time for utilizing the compensatory education awarded may extend beyond age 21. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); R.S., Spec. Educ. Opinion No. 1755 (2006).

Expedited Hearings

Pennsylvania Special Education Regulations at PA Chapter 14 §14.162(q)(4) provide:

If an expedited hearing is conducted under 34 CFR 300.532 (relating to appeals), the hearing officer decision shall be mailed within 30 school days of the public agency's receipt of the request for the hearing without exceptions or extensions.

Discussion and Conclusions of Law

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹³ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. In this case however, credibility of the witnesses did not present as a salient factor. There was little disagreement about the facts of what happened on December 16, 2008, and the School witnesses gave testimony that was largely corroborated in the documents. The Parent's testimony was given little weight

¹³ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

because it largely was not credible (she professed having difficulty remembering seeing or receiving documents she had signed, for example) but the matters about which she testified were not essential to the instant matter. The case essentially came down to whether or not the judgment of the manifestation determination team was legally correct.

It is undisputed by the parties that Student is eligible for special education services under federal and state special education laws, and that Student is a protected handicapped student under federal law¹⁴. The parties do not dispute Student's classification as Other Health Impaired due to having a diagnosis of Attention Deficit Hyperactivity Disorder.¹⁵ Students eligible for special education are entitled to certain protections in the area of discipline, such that in the absence of certain specific exceptions they cannot be disciplined in the same way that nonexceptional students are disciplined. Federal and state statutes and regulations require that an inquiry be done as

¹⁴ See Section 504 of the Rehabilitation Act of 1973.

¹⁵ Parent also attempted to establish Oppositional Defiant Disorder as a qualifying diagnosis under Other Health Impaired. Whether or not this diagnosis qualifies is a matter of debate that need not be decided here.

to whether or not a student's inappropriate action was "caused by, or had a direct and substantial relationship to, the child's disability". The same statutes and regulations also require an inquiry as to whether "the conduct in question was the direct result of the LEA's failure to implement the IEP". If either criterion is met, the student is exempt from disciplinary measures imposed on nonexceptional students. However, even if a student does not meet either criterion, such that the conduct in question is not a result of Student's disability and/or a failure to implement the IEP, the law allows hearing officers to order a student to be removed from Student's placement to an alternative educational setting for 45 school days if there is evidence that the student's remaining in Student's placement is substantially likely to result in injury to himself or to others.

Direct and Substantial Relationship of the Incident to the Disability:

Student impulsively involved self in a situation that had no relation to Student, and when the teacher called Student on it and followed Student down the hall insisting Student come with her to the office Student displayed poor

frustration tolerance and had a temper outburst. As soon as Student was redirected by another teacher Student calmed down and remained calm for about a half-hour. The telephone call with Student's mother, who told Student she was "done with Student" occasioned another short-lived temper outburst. During both outbursts Student used inappropriate language, very similar to language Student had used before in other incidents (although during the incident the language was deemed to be threatening) but Student refrained from physical aggression and quickly calmed down with the help of the staff's verbal prompts and physical presence. Impulsivity is one of the index criteria for ADHD. Low frustration tolerance, temper outbursts, stubbornness, and mood lability are ADHD's associated characteristics, and individuals with this diagnosis typically have conflicts with school authorities. The conduct in question was clearly a manifestation of Student's disability in that it was caused by, and had a direct and substantial relationship to, Student's disability.

IEP Implementation

Therapy: Student's two-and-a-half-year history with the School was replete with disciplinary

offenses, many of which were related to impulsivity, low frustration tolerance and temper outbursts including use of inappropriate language. In drafting the July 2008 IEP, the IEP team decided that in order to benefit from Student's educational program Student required the Related Service of weekly 50-minute therapy sessions. These sessions were to be provided by Mr. P, FCS's therapist. The therapy would support the second behavioral goal in the IEP – to “demonstrate cooperative behavior towards adults and peers at all times”, specifically addressing the objective of “not curs[ing] or us[ing] derogatory statements or actions towards adults and peers”.

FCS knew that Student had a history of being in conflict with School staff and that Student was not generally an eager and willing student. It should have been clear to FCS staff that persuading Student to attend therapy would require persistent effort on the part of the therapist, at least until some rapport could be established. FCS was able to provide no reason for not implementing this crucial portion of Student's IEP other than that Student was “not interested” and that it was a “constant fight” to have Student comply with supports put

into place. FCS was not able to provide evidence that any effort was made to have Student attend therapy and offered no details to support a conclusion that getting Student to therapy was part of the “constant fight”. The discipline log carries multiple notations regarding Student’s failure to attend detention, but there is not a companion record of Student’s failing to attend scheduled therapy sessions. The Director of Special Services did not work with Student to persuade Student to attend therapy and did not enlist the assistance of the mother in this regard. Given Student’s behavioral history and Student’s disability, Student’s conduct during the incident in question was the direct result of the School’s failure to implement the therapy which was a very important related service in the IEP.

Supports for School Personnel: The July 2008 IEP calls for Supports for School Personnel (regular education teachers and special education teachers) in the form of de-escalation training, signifying that the IEP team believed at times Student needed to be de-escalated. It is not clear whether or not Ms. S received de-escalation training, or whether just a select team of teachers were to receive this training.

Although Student's behavior is not to be excused or dismissed, it is likely that a teacher who was aware of Student's disability, or who had been trained in de-escalation techniques, would have handled the initial hallway incident differently and the situation would not have occurred. Although the Director of Student Services made a major issue of confidentiality's being the reason why Ms. S was not made aware of Student's disability, this concern for confidentiality is misplaced. Relevant portions of a student's IEP must be shared with all personnel with whom a student has contact so that the IEP can be implemented appropriately; in fact, as appropriate, relevant information from some students' IEPs are shared with cafeteria workers, maintenance personnel and others coming into contact with the student. Because she carried out the duties of a hall monitor, or took it on herself to monitor the hallway, there was a very good chance that at some point Ms. S would encounter Student. Given the number of Student's disciplinary notations, and given the small student body, all teachers monitoring the hallways and otherwise interacting even occasionally with Student should have been made aware of Student's having an other health impairment affecting

Student's ability to control Student's impulses even if there was only "a slight possibility" that Student would be walking down a particular hallway. Had Ms. S known Student, or at least have been made aware of Student's disability and its manifestations, the incident may never had gotten beyond the first half of the first part, that is she would have thanked Student for giving Student's name and walked on to complete her write up.

45-Day Alternative Educational Setting

The School requested of the hearing officer that even if the outcome of the manifestation determination had been proven to be legally incorrect, she order Student to be placed in a 45-day alternate educational setting through a finding that Student posed a substantial risk of injury to self or others. Although it has been found that the incident in question was a manifestation of Student's disability and that the outcome of the manifestation determination was not legally correct, the following is offered for the parties' consideration.

Even without hearing officer intervention an LEA may unilaterally remove a student who has inflicted "serious bodily injury" upon another in

the school setting even if the action was a manifestation of the student's disability. The use of two modifiers – “serious” and “bodily” describes the parameters. “Serious” injury alone is not enough (suggesting that mental or emotional injury does not qualify as an “injury” under the statute), and “bodily” injury alone is not enough (suggesting that the fact that there is non-severe bodily injury does not qualify as an “injury” under the statute). Hearing officers appear to have a lower standard of review, given that the modifiers “serious” and “bodily” are removed from the language, leaving only “injury”. This hearing officer can find no support for anything other than a conservative interpretation of the phrase “substantially likely to result in injury to the child or to others”, and concludes that the risked injury would have at least to be a bodily injury, and that the risk would need to be considerably, essentially, and significantly more likely than not.

It is clear that in an urban setting FCS has given the elimination of the risk of school-related violence a very high priority, and is here commended. However, based on Student's two-and-a-half year physical-violence-free record at FCS, as well as on the actual

physical-violence-free incident in question at the hearing there is simply no support for the finding that Student's returning to FCS is substantially likely to result in injury to self or to others.

The witnesses for the School conveyed the overwhelming impression of being individuals who adhered to strong ethical principles and who cherished values supportive of a peaceful school and social society. This hearing officer has every hope that, disappointed and apprehensive though they may be given this decision, they will take proactive steps toward reintegrating Student into the School. It is suggested that the Head of School and the Parent arrange for and attend a meeting between the student and Ms. S so that the two can face one another and have a reconciliation before Student's first day back at school. In this situation it seems incumbent upon the Head of School and the Parent to make expectations for a reconciliation very clear. It may not be particularly helpful for the parties to have the attorneys present, but support at the meeting might be appropriately sought from Student's individual therapist and from the School's consulting psychologist.

This hearing officer finds that the eight days of suspension imposed upon Student was an appropriate response to Student's conduct. The first day Student would have been back in the School following these days was January 8th. Therefore, as the School maintained Student's suspension beyond an appropriate response for an incident that was a manifestation of Student's disability, Student is due 60.5 hours of compensatory education [11 days (January 8, 9, 12-16, 20-23) at 5.5 hours per day] in accord with the guidelines presented above.

ORDER

It is hereby ORDERED that:

1. The outcome of the manifestation determination meeting conducted by the Freire Charter School regarding Student was not legally correct. The conduct in question had a direct and substantial relationship to Student's disability, and the conduct in question was the direct result of the School's failure to implement the IEP.
2. Student's actions were a manifestation of Student's disability.

3. Student does not present a significant risk of harm to self, School staff, or other students such that Student should be placed in a 45 school day alternative educational placement.
4. Student is to be immediately returned to Freire Charter School.
5. Freire Charter School must provide Student with 60.5 hours of compensatory education in accordance with the guidelines provided above.

January 24, 2009
Valentini, Psy.D.
Date
Psy.D.

Linda M.
Linda M. Valentini,
Hearing Officer

