

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 **Final Decision and Order**

Open Hearing

ODR File Number:

25657-21-22

Child's Name:

J.D.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

12/13/2021

INTRODUCTION AND PROCEDURAL HISTORY

The student, J.D. (Student),¹ is a preteenaged student who resides and attends school in the Upper Darby School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.³

In late October 2021, the Parents filed a Due Process Complaint challenging certain disciplinary action by the District, and sought an expedited hearing as provided by the IDEA and its implementing regulations.⁴ In their Complaint, the Parents sought, *inter alia*, a manifestation determination review that has since been held. For purposes of this decision, they also seek an expedited evaluation including a new Functional Behavioral Assessment (FBA) as well as compensatory education and other remedies. The hearing proceeded as scheduled, convening remotely.⁵ The Parents sought to establish that Student had been subject to

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ The Parents' other, non-expedited claims were bifurcated and will proceed pursuant to standard timelines. Nothing in this decision should be read as dispositive of or conclusive on those issues, including whether Student was denied a free, appropriate public education. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number; and Hearing Officer Exhibits (HO-) followed by the exhibit number.

⁵ District Exhibits S-1 through S-9 were admitted without objection; Parent Exhibits P-1 through P-105 were taken under advisement after the District raised an objection to those

a series of disciplinary measures that they contended amounted to a change in placement. The District disputed those contentions, and denied that any remedy was due.

Following review of the record and for all of the reasons set forth below, the claims of the Parents must be granted in part and denied in part.

ISSUES

1. Whether Student has been subject to a pattern of removals that constitute a change in placement; and
2. Whether or not a change in placement did occur, what remedy or remedies are appropriate?

FINDINGS OF FACT

1. Student is late pre-teenaged and resides within the District attending one of its middle schools. Student is eligible for special education on the basis of an Other Health Impairment. (N.T. 73-75; P-65.)
2. The District has a Middle School Code of Character that defines offenses and classifies them as Tier 1, 2, or 3. (S-6.)
3. The District does not impose formal in-school suspension at Student's middle school. The District does, however, recognize a

that were not referenced and particularly those that pre-dated the 2020-21 school year. (N.T. 344-47.) The following Parent Exhibits are hereby admitted: P-65, P-67, P-77 through P-99, P-101, P-102, P-103, P-104A, P-104B, and P-105. The District's objection to all other Parent Exhibits is hereby sustained as far beyond the scope of this expedited hearing. Citations to duplicative exhibits may not be to all.

number of behavior consequences including restorative conference, reflection, counseling, and denial of privileges, in addition to out of school suspension and expulsion. (N.T. 266; S-6.)

4. The District employs Personal Care Assistants (PCAs) and also contracts with an agency for some of those personnel. (N.T. 308, 318-19.)
5. An Individualized Education Program (IEP) was developed for Student in November 2020 after an October 2020 Reevaluation. The IEP contained annual goals addressing needs in reading and mathematics skills as well as behavior, in a program of learning support at a supplemental level. This IEP included a Positive Behavior Support Plan (PBSP) addressing off-task behavior, specifying, as one consequence for engaging in the behavior of concern, "access to 'Resource Room' for breaks" (P-67 at 4); it also provided for a full time PCA (400 minutes/school day). (P-67; P-65; S-8.)
6. Student's IEP was revised in March 2021 to provide for COVID Compensatory Services and Extended School Year Services. (S-8.)

2021-22 School Year

7. The District middle school Student attends currently permits students to access their classes through remote synchronous instruction. Not all middle school students use the synchronous learning platform, and students who are serving an out-of-school suspension do not have access to it. (N.T. 265-66, 268.)

8. During the 2021-22 school year as of the date of the hearing, Student's PCA was at times not present at school. On those days, Student went to a school building room called a center instead of attending classes for at least a portion of the school day. (N.T. 111-12, 115, 149-50, 298, 300, 302, 323.)
9. The centers are available to all students at the middle school as a resource room, with a different center for each grade level. The center at Student's grade level is staffed by a regular education teacher and a counselor. It is not a classroom and instruction does not occur in the center, but students can go there for support or to complete classwork. Students may also be sent to the center when disciplinary action is taken. (N.T. 132-33, 144-45, 153, 268; S-5 at 22.)
10. In the fall of 2021, Student was escorted to the center for different reasons, including discipline. Sometimes Student's PCA accompanied Student at the center. (N.T. 149-52.)
11. Student sometimes went to a center for a different grade level in the fall of 2021. (N.T. 253-54.)
12. Student was not provided with class-related work while at the center, but had access to a laptop. Student generally did not do any school-related work at the center. (N.T. 114, 153-54, 156, 254-55, 295.)
13. Student engaged in disruptive behavior classified as a Tier 3 offense on October 15, 2021. That incident involved use of a toy weapon and aggression toward property. Another Tier 1 offense (failure to return to class) was also documented as a conduct referral 10 days later. (S-5 at 17, 19.)

14. Student was suspended for one school day on October 20, 2021 for minor physical contact with a peer. (S-1 at 1; S-4 at 6-7; S-5 at 18.)
15. Student was suspended for one school day on October 28, 2021 for various Tier 1 and 2 offenses, including making an inappropriate [redacted] remark to a teacher.⁶ (S-1 at 2; S-2 at 1; S-4 at 8; S-5 at 20-21.)
16. A new IEP was developed in late October 2021. At that time, one teacher reported that Student was “very disruptive” when the regular PCA was not present (S-9 at 13); another reported that Student continually required redirection. (S-13.)
17. The October 2021 IEP addressed needs related to reading and mathematics skills as well as behavior. This IEP included an updated PBSP (still addressing off-task behavior) with a revised consequence of “access to brain breaks or tasks first inside then outside of the classroom if necessary” (P-82 at 4); and maintained full time PCA support (400 minutes/school day). Student’s program remained learning support at a supplemental level. (P-82; S-9.)
18. Student was suspended for eleven school days beginning on November 1, 2021, pending further review that could include expulsion, for using shoulder to push a teacher (simple assault on

⁶ There are handwritten witness statements describing a number of these offenses, some of which are undated and some of which occurred in October 2021, with a few involving incidents of physical aggression between Student and peers. Some of these handwritten statements are simply indecipherable. (S-3 at 1-11.)

staff). The suspension was later modified. (P-87; S-1 at 3; S-2 at 2; S-3 at 8; S-4 at 8-9; S-5 at 24.)

19. A manifestation determination review meeting convened on November 3, 2021. The team determined that Student's conduct was caused by or had a direct and substantial relationship to Student's disability, and also that the conduct was the direct result of the District's failure to implement Student's IEP. Student's out of school suspension was decreased to four school days. (N.T. 174-75, 276-77; P-87.)
20. At the manifestation determination meeting, the absence of PCA support was discussed, and the team decided that a substitute should be provided when the PCA was not present; and Student would have access to synchronous learning. After that, at times, the teacher from the center accompanied Student to and remained with Student in classes when Student's PCA was absent. A learning support teacher also checked in briefly with Student when the PCA was absent and at times served as a PCA. A District paraprofessional may also have served as Student's PCA for a brief period of time. (N.T. 154-55, 257, 295, 303-04, 319, 322-23, 329-30.)
21. Student returned to school on November 8, 2021, but Student was in the center all day because the PCA was not present. (N.T. 298; S-7 at 2.)
22. On November 12, 2021, the District sought permission to conduct a reevaluation of Student. The form provided included the standard language on timelines for completing an evaluation (60 calendar days from receipt of consent excluding summers). The

Parents did not consent to the reevaluation because they believed it should be completed much more quickly than the proposed sixty calendar days. (N.T. 172-73, 183, 324-25; P-98 at 4-8.)

23. Student was suspended for two school days beginning on November 16, 2021 for pushing Student's PCA (simple assault on staff). (S-1 at 4; S-3 at 13; S-4 at 10-11; S-5 at 25.)
24. Student was suspended for one school day beginning on November 29, 2021 for a physical altercation with a peer on November 24, 2021. Student was not in assigned classes for most of the day on November 24, 2021 because of the incident to provide opportunity for de-escalation. (S-4 at 15; S-5 at 27.)
25. As of the date of the due process hearing, Student's Parents were called to the school to pick up Student three times during the fall of the 2021-22 school year. On at least one of those occasions, the call was made at the end of the school day; and Student was generally present for the last class period when not suspended. (N.T. 169, 179, 284; S-4.)
26. There are no complete records on when Student had a PCA and when Student did not. For example, on at least one occasion, Student's PCA left Student unattended for thirty minutes without notifying District staff; and, Student engaged then in behavior that resulted in discipline while the PCA was not present with Student. (N.T. 318-19, 322, 325-27.)
27. The Behavior Assessment System for Children - Third Edition (BASC-3) is an instrument used to identify emotional and

behavioral disorders for children through rating scales that assess a number of areas. (N.T 247; P-99 at 3.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who filed for this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, in the role of fact-finders, are also responsible for making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts as they recalled them. The testimony overall was rather consistent; and, where there were contradictions, those are attributed to lapse in memory, or to differing perspectives, rather than any intention to mislead. The weight accorded the evidence, however, was not equally placed. Witnesses with first hand, personal knowledge of the relevant facts was given more probative value over those without, and is discussed further below as necessary.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.⁷

IDEA Disciplinary Principles

For purposes of this decision, the Parents' Due Process Complaint challenges the District's imposition of discipline over the course of the 2021-22 school year to date that they contend amount to a change of placement. Pursuant to the IDEA and its applicable regulations, the Parents had the right to challenge any District decision regarding a change in placement for disciplinary reasons in an expedited due process hearing.⁸ 20 U.S.C. § 1415(k)(3); 34 C.F.R. §§ 300.532(a) and (c).

A local education agency (LEA), including a school district, is permitted to remove a child with a disability from his or her current educational setting for violation of the code of student conduct for a period of no more than ten consecutive school days within the same school year, provided that the same discipline would be imposed on non-disabled students. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b). An LEA is also permitted to impose additional disciplinary removals for separate incidents of misconduct for fewer than ten consecutive school days, provided that such removals do not constitute a "change of placement." 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b). A "change of placement" based on disciplinary removals is

⁷ The parties submitted written closing statements following the conclusion of the hearing, despite the expedited timeline. The Parents' closing statement exceeded the limitations placed on both parties' closing statements (N.T. 348-49). Nonetheless, both parties' closing statements were thoroughly reviewed, with the exception of the Parents' Exhibit A that appears to reference events occurring after the due process hearing, and the District's objection thereto has been marked as HO-3. This decision must be based on the evidence of record so the objection to that Exhibit A is sustained.

⁸ HO-1 referenced at the hearing (N.T. 132-33) is hereby admitted. The December 3, 2021 order has been marked as HO-2. HO-2 and HO-3 are also hereby admitted.

defined as (1) removal for more than ten consecutive school days; or (2) a series of removals during the same school year that constitutes a “pattern”. 34 C.F.R. § 300.536(a).

The LEA must determine, on a case by case basis, whether a series of disciplinary removals constitutes a pattern and, therefore, a change of placement. 34 C.F.R. § 300.536(b). A pattern may arise if three factors exist: (1) the series of removals totals more than ten school days in the school year; (2) the child’s behavior is “substantially similar” to previous incidents that led to removals; and (3) additional factors such as the length of each removal, total amount of time of removal, and proximity in time support a conclusion that there is a pattern. 34 C.F.R. § 300.536(a)(2). The relevant Pennsylvania regulations explicitly provide that disciplinary exclusion of a child with a disability that exceeds fifteen days in the same school year is deemed a pattern and, thus, a change in placement. 22 Pa. Code § 14.143(a). “Any unique circumstances” of a particular case may be considered by the LEA when determining whether a change in placement is appropriate for a child with a disability who violates a student code of conduct. 20 U.S.C. § 1414(k)(1)(A); 34 C.F.R. § 300.530(a).

Once a decision is made to change the placement of a child with a disability for violating the code of student conduct, the LEA must conduct a manifestation determination review to determine whether the conduct “was caused by, or had a direct and substantial relationship to, the child’s disability; or ... was the direct result of” the LEA’s failure to implement the child’s IEP. 20 U.S.C. § 1415(k)(E)(i); *see also* 34 C.F.R. § 300.530(e). The manifestation determination must be made within ten school days of any decision to change the eligible child’s placement, and must be made by “the LEA, the parent, and relevant members of the child’s IEP team (as determined by the parent and the LEA).” 34 C.F.R. § 300.530(e); *see also* 20 U.S.C. § 1415(k)(1)(E). If the team determines that the behavior was a

manifestation of the child's disability, the IEP team must return the child to the placement from which the child was removed unless the parent and LEA agree otherwise; and the team must also either conduct an FBA and implement a behavior intervention plan, or review and modify an existing behavior plan. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f). If the team determines that the behavior was not a manifestation of the child's disability, the LEA may take disciplinary action that would be applied to children without disabilities, except that the child with a disability is entitled to special education services. 20 U.S.C. §§ 1415(k)(1)(C) and (k)(1)(D); 34 C.F.R. §§ 300.101(a), 300.530(c) and (d).

When a Parent seeks an expedited hearing to challenge disciplinary action taken by an LEA, the hearing officer has authority to order a change of placement through one of two explicit remedies: return the child to the placement from which he or she has been removed; or direct a change of placement in circumstances not present here. 20 U.S.C. § 1415(k)(3)(B); 34 C.F.R. § 300.532(b). The law does not, however, preclude other relief within the hearing officer's jurisdiction. The IDEA in general confers the hearing officer with broad discretion in fashioning an appropriate equitable remedy. *See, e.g., Stapleton v. Penns Valley Area School District*, 2017 U.S. Dist. LEXIS 204143, *14 (M.D. Pa. 2017).

Application to the Discipline Imposed

Although Student was technically subject to thirteen days of out of school suspension as of November 1, 2021, the record establishes a total of nine non-consecutive days of out of school suspension as of the date of the hearing, consistent with the District's contention. That number does not amount to a change in placement within the meaning of the federal and state disciplinary provisions unless the series of removals presents a "pattern." As this hearing officer has previously explained, however, the Office of Special Education Programs has a longstanding position that LEAs

should consider whether a student's educational program needs to be revisited *even before* the child has accumulated ten days of disciplinary removal, particularly if there is a recurring denial of access to instruction.

Some SEAs and LEAs may have erroneously interpreted the IDEA to provide school personnel with the broad authority to implement short-term removals without restriction and without regard to whether the child's IEP is properly addressing his or her behavioral needs... and that "there are a number of legal memos and technical assistance documents which have erroneously characterized the 10-day period as 'free days.'"

Dear Colleague Letter, 68 IDELR 76 (OSEP 2016).⁹ This guidance is, in this hearing officer's view, instructive and persuasive. Moreover, the Parents posit that the District's use of the center, while not called "in-school-suspension," serves the same purpose as that form of discipline. There is no definition of in-school suspension in the applicable District Code of Conduct or the IDEA. However, the state regulations pertaining to public schools include provisions relating to student discipline such as in-school suspension. More specifically, 22 Pa. Code § 12.7 is entitled "Exclusion from classes—in-school suspension." Though that provision does not define in-school suspension, the title itself is helpful in light of the general principles of statutory construction:

[The] starting point is the language of the statute. If the meaning of the text is clear, "there is no need to . . . consult the purpose" [when the statute's language is plain and certain]. Where a statute's text is ambiguous, relevant legislative history, along with consideration of the statutory objectives, can be useful in illuminating its meaning.

⁹ *J.L. v. Shaler Area School District*, 22120-1819AS (Skidmore, May 29, 2019).

United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161, 169 (3d Cir. 2005)(citations omitted). Furthermore, “[i]t is a fundamental rule of statutory construction that a statute's provisions should be read to be consistent with one another.” *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181, 191 (3d Cir. 2005). “Under Section 1924 of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1924, the headings prefixed to titles, sections and other divisions of a statute may be used to aid in construing the statute.” *Harrisburg Area Community College. v. Pennsylvania State Employees Retirement System*, 821 A.2d 1255, 1259 (Pa. Commw. Ct. 2003). It follows, then, that Student’s exclusion from regularly assigned classes when directed to the center may qualify as an in-school suspension regardless of how it is characterized. Under Section 12.7,¹⁰ Student was entitled to the provision of educational services while in the center. This conclusion is consistent with guidance from the U.S. Department of Education, as the Parents observe, regarding the question of whether an in-school suspension may be considered a removal:

It has been the Department’s long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in § 300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.... Portions of a school day that a child had been suspended may be considered as a removal in regard to

¹⁰ “Courts have applied the canon [of statutory construction] with equal force to regulations.” *Espinoza v. Atlas Railroad Construction, LLC*, 657 F. App'x 101, 109 n.11 (3d Cir. 2016)(citation omitted).

determining whether there is a pattern of removals as defined in § 300.536.

71 Fed. Reg. No. 156, 47615 (2006). *See also Big Beaver Falls Area School District v. Jackson*, 624 A.2d 806 (Pa. Commw. 1993)(concluding in school suspension was a *de facto* exclusion under specific circumstances). Thus, as applied here, the fact that Student has been out of school for fewer than ten school days pursuant to formal discipline is not necessarily determinative if Student has been effectively removed. As noted, any “unique circumstances” are relevant to decisions regarding disciplinary changes in placement. 34 C.F.R. § 300.530(a). And, at least until the date of the manifestation determination review, Student was not able to access the regular education curriculum in the center, nor was Student’s IEP implemented in that environment.

The Parents had the burden of persuasion on the issue of whether Student has been excluded for purposes of the discipline imposed including whether a pattern of removals exists. An analysis of the applicable factors for a pattern requires an initial determination of whether there is a series of removals that cumulatively total more than ten school days.

The difficulty in this case, however, is that the record is far from clear when Student was sent to the center and for what reasons.¹¹ Cited bases for this action included discipline, de-escalation, and the absence of Student’s PCA. The Parents do make the novel argument that when Student was sent to the center because the PCA was absent, the action was prompted because without the PCA, the District anticipated that Student would engage in problematic behaviors. While this contention may very well be at least part of the District’s rationale, the IDEA and its implementing

¹¹ One cannot fault the parties for not overcoming impossible evidentiary hurdles such as unavailable witnesses particularly given the expedited timelines.

regulations provide the disciplinary protections for a student with a disability when he or she violates a code of student conduct. This language could not be more explicit, and does not suggest that other removals from the classroom for alternate reasons invoke those same protections. Indeed, Congress expressly considered the import of the violation of code language prior to the enactment of the current IDEA, and declined to remove it. S. Rep. 108-185 at 44. The U.S. Department of Education similarly rejected a request from stakeholders to clarify the meaning of the term “violates a code of student conduct” to, for example, preclude removals for “any minor infraction.” 71 Fed. Reg. No. 156, 46714 (2006).

Even assuming, *arguendo*, that there is a series of removals exceeding ten days, this hearing officer cannot conclude that the behaviors in question as of the date of the hearing are “substantially similar” to previous conduct leading to removal within the meaning of the applicable law. When the current IDEA regulations were promulgated, the Department of Education noted that its “longstanding position” on this question is, “whether the behaviors, taken cumulatively, are substantially similar” in nature; and, that such a determination is necessarily subjective but must be made on a case by case basis. 71 Fed. Reg. No. 156, 46729-30 (2006). The behaviors involved in the several particular incidents ranged from physical aggression toward others, to making inappropriate remarks to a teacher, to failing to return to class. While a few of the behaviors were consistent, when all are viewed cumulatively, they simply are not substantially similar.¹²

The opinion of the Parents’ private psychologist/BCBA that Student exhibits behavioral patterns (N.T. 208-10) was based primarily on results from the BASC rating scales, an instrument that is used not to compare or contrast behaviors but, rather, to identify social and behavioral disorders.

¹² It does, however, appear that a pattern of physical aggression is emerging and must be promptly addressed, as discussed *infra*.

As such, her testimony was not persuasively supportive of finding a pattern of behaviors within the context of the disciplinary protections in the IDEA.

Furthermore, and again assuming that Student was removed from school for a period of more than ten days, the law requires that District conduct a manifestation determination review. The District did so, and the team concluded that Student's behaviors had a direct relationship to Student's disability and, furthermore, directly resulted from a failure to implement the IEP. Following that determination, the District was required to return Student to the placement from which Student was removed, in the absence of a contrary agreement, with the provision of Student's special education services; and either conduct an FBA and implement a behavior intervention plan, or review and modify an existing behavior plan. The attached order will ensure that the District complies with those provisions to the extent there remains any question that it has failed to do so.

Additional Remedies

The Parents seek an expedited evaluation of Student, citing to 34 C.F.R. § 300.534(d)(2). Reports of evaluations and reevaluations generally must be provided by the LEA within sixty calendar days (excluding summers) of consent that must be sought promptly. 22 Pa. Code §§ 14.123(b), 14.124(b). Section 300.534 is entitled, "Protections for children not determined to be eligible for special education and related services." The subheading for Section 300.534(d) relates to an LEA having no basis of knowledge that the student has a disability. Student was clearly identified as eligible prior to the start of the 2021-22 school year, and the District was obviously aware of that status. Construing the plain meaning of the provisions of 34 C.F.R. § 300.534, including headings, defeats the request for an expedited evaluation in this case. Nevertheless, the District would be

well advised to complete its reevaluation of Student as soon as possible,¹³ particularly since Student's difficult behaviors have changed significantly and increased over the fall of 2021. In the interim, Student must remain in the placement identified in the most recent IEP; and the IEP team must act promptly to revise Student's PBSP to provide additional support for the newly exhibited concerning behaviors that does not simply provide for Student automatically going to the center for an entire class period or longer.¹⁴ The team should consider the cogent suggestions of the private psychologist/BCBA for additional strategies and interventions such as the availability of small group instruction and the addition of instruction in coping skills as soon as possible for implementation while the FBA and reevaluation occurs.¹⁵

The Parents also seek a declaration that the District is required to employ Student's PCA rather than contract with an agency for those personnel, citing to 22 Pa. Code § 101 (defining school personnel including paraprofessionals). Whether or not Student's PCA is a District employee or not, however, the District is obligated to provide Student with FAPE, which could clearly be impacted by the ability of staff to implement Student's special education program.

The Parents also seek an Independent Educational Evaluation (IEE) and reimbursement for the evaluation conducted by their private psychologist/BCBA. Parents may request an IEE at public expense when they disagree with an LEA's educational evaluation. 20 U.S.C. § 1415(b)(1);

¹³ One of the Parents testified at the hearing, under oath, that they agreed with a reevaluation of Student. (N.T. 173.)

¹⁴ "Access to" a break or resource room, within the ordinary meaning of the term "access," dictates that Student would have the permission or ability to take a break or use a resource room, not that Student would be required to utilize any particular strategy.

¹⁵ This hearing officer also respectfully suggests that the District consider assigning a different professional to handle any future disciplinary referrals for Student rather than the LEA who attended the manifestation determination review meeting. Doing so would likely help the parties cooperatively collaborate as the IDEA demands.

34 C.F.R. § 300.502(b). Here, however, the District did not decline or refuse to conduct a reevaluation; rather, within a reasonable time after the manifestation determination review, it provided the Parents with a request to consent to such reevaluation. There is also nothing in this record to suggest that the District is unable to unwilling to proceed with its reevaluation. While the Parents had reasons to reject the terms of the permission to reevaluate form, they may not obtain an IEE on that basis.¹⁶ However, the District will be ordered to conduct a psychiatric evaluation as well, because this hearing officer shares the concerns of the Parents and their private psychologist/BCBA (N.T. 172, 174, 277) that formal assessment in that area is necessary in order to obtain a thorough understanding of Student's profile, strengths, and needs.

Lastly, the Parents seek other directives with respect to training of District staff in addition to compensatory education and related remedies. These issues may more properly be developed and addressed in the bifurcated companion case that is scheduled to begin next month on the Parents' more global, non-disciplinary claims, rather than in this expedited proceeding.

ORDER

AND NOW, this 13th day of December, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Student's placement shall remain that identified in the most recent IEP, with implementation of all of its provisions as revised pursuant to ¶ 6 herein, unless the parties otherwise agree.

¹⁶ Whether they may be entitled to reimbursement for their privately obtained evaluation is a matter better deferred for the bifurcated companion case.

2. Within five school days of the date of this Order, the District shall provide to the Parents a new Permission to Reevaluate form that includes assessments in all of the areas identified in its November 12, 2021 form (P-98) as well as a psychiatric evaluation.
3. Within five school days of receipt of the new Permission to Reevaluate form, the Parents shall return the form with their decision on consenting to the reevaluation.
4. If the Parents consent to the revised Permission to Reevaluate form, the consent shall be deemed to have been provided on November 29, 2021, the date of the expedited hearing.
5. If the Parents do not consent to the revised Permission to Reevaluate form, the District need not evaluate Student with the exception of conducting an FBA. In that circumstance, this order shall serve as the District's permission to conduct an FBA.
6. Within five school days of the date of this decision, the District shall convene a meeting of Student's IEP team to include the Parents to identify all behaviors of concern in the school environment and discuss the parameters and process of the FBA. The FBA shall be conducted by a BCBA. The team shall also review and revise Student's PBSP as necessary to address the new behaviors for immediate implementation.
7. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 25657-21-22