

*This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.*

**Pennsylvania Special Education Hearing Officer**  
**Final Decision and Order**

**CLOSED HEARING**  
**ODR File Number: 20187-17-18**

**Child's Name:** L.B.                      **Date of Birth:** [redacted]

**Dates of Hearing:**  
4/2/2018, 5/14/2018, 5/16/2018,  
5/29/2018, and 6/6/18<sup>1</sup>

**Parent:**  
[redacted]

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**Hearing Officer:** Cathy A. Skidmore, M.Ed., J.D.    **Date of Decision:** 6/27/2018

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<sup>1</sup> Two hearing sessions were only half days, combining for a total of four hearing sessions.

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>2</sup> is a late elementary school-aged student in the School District (District). Student was previously identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>3</sup> as a child with Emotional Disturbance. [redacted]. In December 2017, the District conducted a reevaluation and determined that Student was no longer in need of specially designed instruction on the basis of Student's disability. Student's Parents disagreed with the recommendations in that reevaluation report, and filed a due process complaint against the District asserting that it has denied Student a free, appropriate public education (FAPE) under the IDEA and its implementing federal and state regulations in reaching the eligibility conclusion, as well as in its implementation Student's educational program during the 2017-18 school year.

The case proceeded to a due process hearing<sup>4</sup> at which the parties presented evidence in support of their respective positions. The Parents sought to establish that the District improperly determined Student was no longer eligible under the IDEA and Chapter 14, and further that it failed to provide Student with FAPE during the 2017-18 school year. The District maintained that its eligibility determination was correct, that Student should now be provided

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<sup>2</sup> In the interest of confidentiality and privacy, Student's name, gender, and other personal information are not used in the body of this decision. All potentially 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). [redacted.]

<sup>3</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>4</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both, and to the singular Parent to refer to Student's mother who was more actively involved in the educational program during the time period in question.

accommodations under Section 504 of the Rehabilitation Act of 1973 (Section 504)<sup>5</sup> [redacted] and that the educational program implemented was appropriate for Student in all respects.

For the reasons set forth below, the claims of the Parents must be denied.

### **ISSUES**

1. Whether Student is currently eligible for special education under the IDEA and Chapter 14;
2. Whether the District failed to implement Student's IEP in any respect over the course of the 2017-18 school year; and
3. If the District did fail to implement Student's IEP, should Student be awarded compensatory education?

### **FINDINGS OF FACT**

1. Student is a late elementary school-aged student residing in the District. (N.T. 21-22.)

#### **RELEVANT EDUCATIONAL BACKGROUND**

2. Student was evaluated at the age of three and qualified for early intervention services. (N.T. 103-04.)
3. Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), and as a result, Student is distractible and has difficulty with attention. Student also has been diagnosed with Generalized Anxiety Disorder; in addition, Student presents with oppositional tendencies and mood dysregulation. Student has been prescribed medication for the ADHD. (N.T. 32, 34-35, 105, 122-23; S-27 p. 3.)
4. Student had a history of difficulties in preschool, kindergarten, and early first grade (not in the District) including in a camp environment. Student engaged in aggressive and disruptive behaviors as well as work refusal. (N.T. 106-11, 114, 243-44.)
5. In the fall of 2014, while attending a private school, the local Intermediate Unit (IU) identified Student as eligible for special education on the basis of an Emotional Disturbance. (S-9 p. 2; S-35; S-36.)

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<sup>5</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

6. Student has treated with a private psychiatrist for a number of years in addition to outside therapy. The private therapist worked on Student's problematic behaviors, including aggression, prior to enrollment in the District. When Student first enrolled in the District, the private therapist assisted Student with the transition. (N.T. 153-54, 241-46.)
7. Student at times has exhibited behavioral difficulties at home, including anxiety and irritation, alternating with cycles of much less frequent problematic behavior observed. Symptoms have been worse at night when the medication was no longer effective. (N.T. 158-60, 167, 201.)
8. Student manifests sensory sensitivities such as to light and noise, and prefers to use certain writing instruments that have a specific texture. (N.T. 163-64, 470, 648.)
9. Student has had difficulty with the act of writing. (N.T. 186-87, 222, 564.)
10. Student understands directions better if presented both in written and oral formats. (N.T. 192.)
11. Student has responded well to positive reinforcement and can experience anxiety when not provided. (N.T. 175-76, 212, 218, 265, 270-71, 282, 662, 702, 728, 748.)
12. Student has responded well to helping others at school, such as having a leadership role. (N.T. 270-71, 283.)
13. Student has experienced some difficulty with peer relationships at times but not at others, as do most students. (N.T. 230-31, 249, 250, 266, 271-72, 376, 621, 629, 721-22, 738, 756.)

#### ENROLLMENT IN DISTRICT JANUARY 2015

14. Student first enrolled in the District halfway through the 2014-15 school year (first grade). (N.T. 126.)
15. The Parents have been and are very involved with Student's educational program and communicate frequently with District professionals. (P-4; P-8; P-9; S-56; S-57; S-59; S-60; S-61; S-62.)
16. An Individualized Education Program (IEP) developed in January 2015 was based on Student's need to manage anxiety at school. This IEP provided annual goals for reducing and managing anxiety and communicating concerns regarding noise levels. There were a number of program modifications/items of specially designed instruction (including a "calm down" corner, check-ins and check-outs, a therapeutic toolkit, breaks, a visual schedule, de-escalation techniques, constant positive reinforcement, and preferential seating). Student's program was for itinerant emotional support. The Parents approved the Notice of Recommended Placement (NOREP) accompanying this IEP. (S-6; S-7.)
17. A Reevaluation Report (RR) consisting of a record review in March 2015 considered and accepted the results of the previous IU evaluation identifying Student as eligible for

special education on the basis of an Emotional Disturbance. The RR recommended a Functional Behavioral Assessment (FBA) in addition to supports for anxiety and expressing feelings appropriately. (S-9.)

18. The District conducted the FBA in March 2015, identifying the problem behaviors of Student's use of hands to cover ears and exhibiting anxiety with loud noises, and a failure to follow directions. (S-2; S-8.)
19. [redacted.]
20. A new IEP was developed in March 2015. Present levels of functional performance indicated that Student's identified behaviors were exhibited only infrequently and Student was successfully managing anxiety. The annual goals continued to address reducing and managing anxiety and communicating concerns regarding noise levels. The program modifications/items of specially designed instruction from the previous IEP were maintained as supplemented by antecedent strategies, replacement behaviors, and consequences through a plan of behavioral support. Student's program was for itinerant emotional support. (S-11.)
21. Following an April 2015 IEP meeting (and as updated and further revised twice over the course of the calendar year), Student's IEP was revised to update the present level information [redacted]. Practice with keyboarding, handwriting, and drawing were new items of specially designed instruction. The Parents approved the April 2015 NOREP. (S-14; S-15.)

#### 2015-16 AND 2016-17 SCHOOL YEARS

22. A new IEP was developed in April 2016 (and updated and further revised twice over the course of the year). The annual goals continued to address reducing and managing anxiety [redacted]. The program modifications/items of specially designed instruction from the previous IEP, including behavioral support, were maintained; added were notice of changes in advance, use of signals for a break, and self-advocacy. Student's program remained itinerant emotional support [redacted]. (S-19.)
23. The April 2016 IEP was revised in March 2017 and again in August, September, and early October 2017. The final version of that IEP contained annual goals to address reducing and managing anxiety and emotions (using self-calming techniques to manage emotions during unstructured settings or when distressed by noise; and demonstrating appropriate coping skills using a variety of available tools, including self-reflection, to decrease anxiety over school and peer interactions) [redacted]. The method of measuring progress on the goals for managing anxiety and emotions specified "observation self report on feelings chart" [sic] for the former and "teacher observation student self reflections" [sic] for the latter (S-31 pp. 30-32) with no use of conjunctions or punctuation in the quoted language. (S-31.)
24. Program modifications/items of specially designed instruction were for behavioral support (check-ins with an adult, therapeutic toolkit, short breaks as needed, advance notice of changes to schedule including substitute teachers, a feeling chart or journal,

signals or cards to indicate a need for a break, weekly opportunities for leadership roles, positive reinforcement (four times more frequent than non-positive reinforcement) and a number of antecedent strategies and techniques Student had been taught and used); an available calm down area; clear and consistent directions; a quiet space for lunch; preferential seating; access to iPad applications for assignments; tools for drawing shapes; copies of notes; available headphones; and turning in homework to teacher mailboxes. There were additional accommodations for days that there was a substitute teacher and when Student had specific preferences for lunch and/or recess. (S-31.)

25. Student's program remained itinerant emotional [redacted] in that final IEP. (S-31.)
26. In second and third grades, Student used a calming area at times and at other times used the items listed in the IEP at the desk. Student also took breaks as needed. (N.T. 266-68, 281, 657-59, 667-68, 677-79, 726-27.)
27. Student required redirection at times during second and third grades when Student engaged in work refusal. (N.T. 268-69, 278, 669, 674, 677.)

#### 2017-18 SCHOOL YEAR: FOURTH GRADE

28. During the 2017-18 school year, all classrooms at Student's elementary school had a calming or cool-down area that was accessible to all students as needed. (N.T. 266, 348, 726, 757.)
29. The parties met and engaged in numerous communications before start of the 2017-18 school year to plan the schedule and clarify expectations. Those communications continued through the end of the school year, with the District promptly responding to each of the Parents' concerns (such as Student being "irritable" (P-4 p. 99) and struggling with homework), with a greater number in the fall of 2017 as Student and everyone else became accustomed to new schedules and routines. (P-4 pp. 25-121; P-8 pp. 2-19, 25-27, 32-36, 40-47; P-12 pp. 17-26; P-13 pp. 11-12; P-16; P-18; P-22; S-56; S-57; S-59; S-62.)
30. Student was in homeroom again for the last period of the day for a Response to Intervention period during the 2017-18 school year. The homeroom teacher escorted the students to their lockers for dismissal. (N.T. 335-36, 339, 341-42, 760.)
31. Except for an approximately one week period early in the 2017-18 school year, Student did not exhibit anxiety at school over missing the school bus at the end of the school day. (N.T. 338, 342, 545-46, 758-61.)
32. Student attended two of the three English/Language Arts periods on days spent at the elementary school during the 2017-18 school year; for that third period, Student had related arts class (specials). (N.T. 371-72.)
33. Student tended to become upset at times when another student would hold the teacher's hand during the 2017-18 school year, but no more so than other students in the class. (N.T. 345-46, 393, 582.)

34. Student occasionally exhibited anxiety at school during the 2017-18 school year. (N.T. 356; P-8 pp.24-25, 28; S-56 pp. 14-15.)
35. Student occasionally engaged in behaviors that required redirection or other attention of a teacher, but generally did not manifest behaviors atypical of peers, during fourth grade. (N.T. 372-73, 375-78, 473-77, 479-80, 489-90, 503-06, 512-13, 551-52, 579-80, 606-07, 613-16, 625, 629.)
36. Students in the fourth grade class, including Student, had the opportunity to write about events that upset them at school, and then discuss them later with a teacher. (N.T. 347-48.)
37. Student used the calming area at times, and occasionally wrote in the journal or took a break, during the 2017-18 school year. Student's use of these tools was typical for fourth graders, and Student did not need to use all of the items of specially designed instruction in the IEP. (N.T. 348-49, 374-75, 390, 392, 549-50, 555-57, 559-60, 614, 618-19.)
38. Student occasionally went into the third grade reading teacher's room during fourth grade for a break. That teacher allowed all former students to do so, and many children did. Student did not do so more frequently than peers. (N.T. 698-99, 701, 729.)
39. Student rarely if ever used the therapeutic toolkit during fourth grade. (N.T. 394-95.)
40. As leadership opportunities, which were provided to Student daily during the 2017-18 school year, Student acted as a line leader, made presentations, and took responsibility for tasks such as distributing classroom technology and creating schedules, among other things. (N.T. 373-74, 393, 616-17.)
41. Student regularly had an iPad with Student in class as well as a keyboard during the 2017-18 school year. Student did not always need or use the keyboard. (N.T. 349-60, 368, 392, 649.)
42. Student's difficulties with homework were typical of students in fourth grade. Homework only accounted for ten percent of a student's grade. (N.T. 351, 377, 472.)
43. Student's fourth grade teachers regularly checked in with Student. (N.T. 387-90, 604.)
44. Student's fourth grade teachers provided frequent positive reinforcement to Student. (N.T. 390-91, 582-83.)
45. For one English/Language Arts assignment to compose a biography during the 2017-18 school year, Student composed an autobiography. The directions for that biography assignment were presented in writing to each student, and were also posted in the classroom with visual examples. Student earned credit for that assignment because Student's final product accomplished the purpose of the assignment, but the teacher let Student know that Student's completed composition was different than what was assigned. (N.T. 357-58, 360-61, 380-82, 572.)

46. Student's progress on the anxiety goals during the 2017-18 school year was monitored through teacher observations throughout the school day and occasionally Student's use of a feelings chart during calming breaks. Student did not frequently use the feelings chart. As of the second quarter, data from all teachers was collected on any behaviors Student was exhibiting. (N.T. 558-59, 575, 591-92, 611; P-8.)
47. The Parents disagreed with the method used to monitor Student's progress on the anxiety goals during the 2017-18 school year. (P-17.)
48. Student typically turned in homework directly to the teacher during the 2017-18 school year because Student's schedule did not include homeroom most days. (N.T. 396-97, 619.)
49. In January 2018, Student began to struggle with homework because Student was angry with teachers. (N.T. 185-87.)
50. Progress on Student's IEP goals for reducing and managing anxiety and emotions during the 2017-18 school year reflected consistent use of appropriate techniques throughout the school day to the point of mastery of the goals by April 2018. (P-11.)
51. Student has never eloped from a District elementary school. (N.T. 151, 235, 376, 506, 587, 601, 673, 723-24.)

#### DISTRICT REEVALUATION 2017

52. The District conducted a reevaluation of Student in the fall of 2017 at the Parents' request. (N.T. 400-01; S-25.)
53. The Parents provided input into the Reevaluation Report (RR), including concerns with Student exhibiting anxiety over missing the school bus at the end of the day and internalizing anxiety. The District school psychologist also interviewed one of the Parents. (N.T. 405, 409, 413; S-27 pp. 4-5, 11-12.)
54. The RR included progress toward Student's IEP goals. As of November 2017, Student had reached mastery of the goals for managing anxiety and using appropriate coping skills. (S-27 pp. 6-8.)
55. Teacher recommendations in the RR were for organization and assignment check-ins, reminders to turn in assignments, and use of templates and graph paper for drawing shapes. (S-27 pp. 9-10.)
56. Student's grades while in the District were reported in the RR, with Student having all As except for one B in reading at the time. (S-27 p. 6.)
57. Informal speech/language assessment for the RR (a screening at parental request, a conversational sample, and a classroom observation) reflected no need for such services, although it was noted that Student tended to speak quickly resulting in mild distortions of some sounds due to rate. (S-27 pp. 8-9.)



58. As part of the RR process, the District school psychologist observed Student in the classroom during a variety of forms of classwork and instruction, and in unstructured settings including hallways, the cafeteria, and a school concert in the auditorium. (N.T. 435-37, 459; S-27 pp. 13-14.)
59. During one of the testing sessions for the RR, the District school psychologist interrupted the assessments to continue at a later date because Student was concerned about missing a class. (N.T. 414-15.)
60. Although Student was at times non-compliant with testing, and the District school psychologist described those behaviors in the RR, Student did not overall engage in off-task behavior during assessments that were atypical of children of Student's age. Student's noncompliance was attributed by the District school psychologist to Student's concerns over missing classes. (N.T. 415-18, 429; S-27.)
61. Student's cognitive ability was assessed for the RR (Wechsler Intelligence Scale for Children – Fifth Edition, WISC-V). [redacted.] (S-27 pp. 15-17.)
62. Assessment of Student's academic achievement (Wechsler Individual Achievement Test – Third Edition and written expression subtests of the Woodcock-Johnson Test of Achievement, Fourth Edition) for the RR revealed above (or high) average to very superior range scores in all areas but one: Student's performance on writing samples was in the average range, but the District school psychologist noted Student's failure to comply with the instructions for that assessment and that the score was likely a low estimate of Student's abilities. (S-27 pp. 15, 17-18.)
63. On the Beery-Buktenica Developmental Test of Visual-Motor Integration – Sixth Edition, also administered for the RR, Student attained an average standard score. (S-27 pp. 19-20.)
64. Social/emotional/behavioral functioning was assessed for the RR through a variety of measures. The Parents specifically requested that narrow band measures of Student's anxiety and depression be administered. (N.T. 422, 425; S-27.)
  - a. For the Behavior Assessment System for Children – Third Edition, the Parents and four of Student's teachers completed rating scales. Overall ratings by teachers were in the average range (with no more than one of the teachers reflecting at-risk concerns for hyperactivity, adaptability, social skills, leadership, study skills, and on the Adaptive Skills Composite; and no more than one teacher reflecting clinically significant concerns with withdrawal and social skills). By contrast, the Parent ratings reflected concerns in the at-risk range for attention problems and activities of daily living, and on the Externalizing Problems and Behavioral Symptoms Composites; and in the clinically significant range for hyperactivity, anxiety, depression, adaptability, and on the Internalizing Problems Composite. (S-27 pp. 20-23.)
  - b. Assessment of certain of Student's executive functioning skills (portions of the Delis-Kaplan Executive Function System and the Behavior Rating Inventory of

Executive Functioning – Second Edition (BRIEF 2)) yielded scores above or at the expected level in most areas in the school environment. The Parent’s BRIEF 2 ratings indicated at-risk to potentially clinically significant concerns on the Inhibit, Initiate, Working Memory, Plan/Organize, and Task Monitor scales as well as the Behavior Regulation Index; and clinically significant concerns on the Emotional Control and Organization scales and on the Emotional Regulation and Cognitive Regulation Indices. The Global Executive Composite for the teacher was 50 (average range with no concerns) whereas that of the Parents’ was 74 (clinically significant concerns). (S-27 pp. 18-19, 23-25.)

- c. On the Children’s Depression Inventory - Second Edition, Student’s self-report reflected elevated to very elevated scores indicating struggles especially with self-esteem and interpersonal relationships. The Parent’s rating was in the high average range on the emotional problems scale, whereas the two teachers’ ratings were all in the average range with no concerns. (S-27 pp. 25-26.)
  - d. To assess Student’s anxiety, the Revised Children’s Manifest Anxiety Scale – Second Edition was administered through a self-report. Student’s scores were all in the average range on this measure. (S-27 pp. 26-27.)
  - e. The Conners Comprehensive Behavior Rating Scales were completed by a teacher and the Parent. The teacher’s ratings on this scale were all in the average range with the exception of Perfectionistic and Compulsive Behaviors (high average range) and the Emotional Distress Total (high average range). By contrast, the Parent’s ratings were very elevated on a number of the scales (Upsetting Thoughts/Physical Symptoms, Hyperactivities/Impulsivity, and Physical Symptoms) and on the Emotional Distress Total scale. The Parent’s ratings supported Student’s ADHD and Generalized Anxiety Disorder diagnoses. (S-27 pp. 27-28.)
  - f. The District school psychologist considered the variability among some of the teacher’s rating scales because it was important to try to understand the reasons that Student’s behaviors were viewed differently across educational settings. (N.T. 426-27.)
65. The RR concluded that Student was a child with a disability (Anxiety and ADHD) but did not require specially designed instruction. A number of recommendations for accommodations through a Section 504 Service Agreement were made, including consistent expectations, check-ins and check-outs, notice of transitions and schedule changes, positive reinforcement, an organizational system for materials and homework, verbal and visual prompts and cues, availability of fidget items and sensory materials, monitoring of peer relationships and social development, assistive technology consultation, chunking and pacing of tasks, visual support for directions, and continuation of Student’s self-reporting of concerns and anxiety. A number of other suggestions were also included to support social/emotional and executive functioning. (S-27 pp. 28-31.)

66. Although Student exhibited needs with respect to anxiety and ADHD in the reevaluation, the District school psychologist concluded that those needs would easily be met through accommodations since Student's educational functioning was not adversely affected. (N.T. 425, 451-52.)
67. The District issued a NOREP in January 2018 proposing to exit Student from itinerant emotional support. (S-28.)

#### INDEPENDENT EDUCATIONAL EVALUATION

68. The Parents obtained an Independent Educational Evaluation (IEE) for which a report was issued sometime in the spring of 2018.<sup>6</sup> The results of assessments administered for the IEE were consistent with previous evaluations. (N.T. 27, 29, 33; P-2; S-50.)
69. The private evaluator obtained teacher input for the IEE, requesting information on Student's presentation on a typical good day and a typical bad day. One teacher specified that Student had fewer than five bad days over the course of the school year through the date of the input. Negative behaviors mentioned included lack of engagement, doodling, fidgeting, and irritability, as well as assertiveness toward adults and peers. (N.T. 46; S-50.)
70. The Parents provided extensive input into the IEE, also describing a typical good day and a typical bad day. (N.T. 46; S-50 pp. 11-13.)
71. Student was tested on a single date in February 28, 2018 for the IEE. The private evaluator described Student as talkative, distractible, oppositional, lacking focus, disruptive, and impulsive. (S-50 pp. 13-14, 22.)
72. The private psychologist conducted cognitive assessment (Woodcock-Johnson Tests of Cognitive Ability – Fourth Edition) for the IEE. [redacted.] (S-50 pp. 2, 14-16.)
73. Academic achievement (Woodcock-Johnson Tests of Achievement – Fourth Edition) for the IEE revealed overall scores at or near expected levels compared to cognitive ability, with all but one writing subtest exceeding the average range for Student's age and grade level. (S-50 pp. 3, 16-21.)
74. Assessment of Student's language skills (Comprehensive Receptive and Expressive Vocabulary Test – Third Edition) for the IEE reflected well developed skills with all scores above the average range. (S-50 pp. 3, 16.)
75. On Autism Spectrum Rating Scales completed by the Parents and three teachers for the IEE, scores were slightly elevated in a few areas, with the Parents reporting some difficulty with self-regulation, adult social socialization, and attention; and the teachers

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<sup>6</sup> The IEE reflects a testing date of February 28, 2018 (P-2; S-50). Given its length, the IEE was likely issued some time after February 28, 2018.

reporting some difficulty with peer socialization. The results were not indicative of Autism. (S-50 pp. 2, 24, 51-86.<sup>7</sup>)

76. Social/emotional/behavioral functioning was assessed as part of the IEE using a variety of instruments. (S-50.)
- a. On the Adaptive Behavior Assessment System – Third Edition, the Parents’ ratings reflected low or below average scores in the areas of home/school living, self-care, and self-direction, as well as on the General Adaptive Composite and Practical Composite. One or two of Student’s teachers reported below average social skills and on the Social Composite. (S-50 pp. 4, 22-24.)
  - b. On the Piers-Harris Children’s Self Concept Scale – Second Edition, Student’s scales reflected all average to high average range scores, suggesting that Student did not have concerns with self-esteem or self-concept. Based on Student’s demeanor and presentation during the assessments, the private evaluator had concerns with the validity of those results. (S-50 pp. 4, 21-22.)
  - a. Assessment of Student’s attention and executive functioning (Conner’s Third Edition, Conner’s 3) for the IEE revealed parental concerns in the very elevated range with respect to inattention, hyperactivity/impulsivity, executive functioning, defiance/aggression, as well as the DSM-5<sup>8</sup> scales for ADHD and Oppositional Defiant Disorder; the Parent’s overall rating was in the very elevated range.<sup>9</sup> One or two of the teachers who completed these rating scales reported very elevated concerns with hyperactivity/impulsivity, executive functioning, peer relations, and ADHD, and elevated concerns with inattention and ADHD. The teachers’ overall ratings were in the average to very elevated range; however, both teacher ratings indicated that Student’s academic and social functioning in areas assessed by the Conner’s 3 was only occasionally impacted if at all. Neither teacher’s results suggested concerns with anxiety or depression. (S-50 pp. 4, 24, 97, 99, 136, 138.)
77. The private evaluator concluded that Student met the criteria for IDEA eligibility under the Emotional Disturbance and Other Health Impaired categories. (S-50 pp. 25-26.)
78. The private evaluator made a number of recommendations for Student’s educational programming: keyboarding and assistive technology training; social skills interventions; cuing and redirection for and reinforcement of attention and focus; accommodations to the environment for attention and focus; chunking and sandwiching of tasks for attention and focus; and instruction in note-taking. The evaluator also recommended a Functional Behavioral Assessment (FBA). (S-50 pp. 27-29)

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<sup>7</sup> The summary of one of the teacher’s results on p. 24 of the IEE (P-2; S-50) are inconsistent with the actual scores reported on pp. 2 and 51-86 (*id.*).

<sup>8</sup> The DSM-5 is the Fifth Edition of the Diagnostic and Statistical Manual of Mental Health Disorders. The references to the Fourth Edition of the DSM in the IEE are erroneous (N.T. 87-88).

<sup>9</sup> The Parent’s ratings on the Conner’s 3 were flagged as suggesting a negative response style (N.T. 67-68; S-50 p. 109).

79. The private evaluator did not observe Student at school or anywhere outside of the testing environment. All of the recommendations in the IEE were based solely on the reports of the Parents regarding the home environment and observation of Student during the assessments administered for the IEE. (N.T. 30-31, 43-44, 73.)

[Section redacted.]

## **DISCUSSION AND CONCLUSIONS OF LAW**

### GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion in this administrative proceeding 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 requested 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. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of 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 generally credible, and the testimony overall relating to factual matters was essentially consistent. The testimony of the District witnesses regarding events and Student’s presentation at school was credited over other

accounts because of the personal and first-hand knowledge of the teachers and administrators, their individual professional experience, and the corroboration of their testimony through the record as a whole.

Both of the psychologists who testified provided testimony that was credible. However, the testimony of the District school psychologist was accorded more weight than that of the private evaluator, whose opinion was focused on parental reports of Student's presentation at home and Student's behavior during the IEE testing rather than on Student's presentation in the school setting.<sup>10</sup>

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' closing statements. However, a not insignificant portion of the record was devoted to concerns outside of the time period in question, and citation to the majority of that evidence was not deemed to be necessary in order to decide the issues.

#### GENERAL IDEA AND SECTION 504 PRINCIPLES

The IDEA and the implementing state and federal regulations obligate local educational agencies (LEAs) to provide a "free appropriate public education" (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free

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<sup>10</sup> At least one of the errors in the IEE bring its final conclusions into question (*see* note 8, *supra*, and accompanying finding).

appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP that is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Recently, the U.S. Supreme Court reaffirmed the “reasonably calculated” standard in *Andrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). The Court explained that, “an educational program must be appropriately ambitious in light of [the child’s] circumstances... [and] every child should have the chance to meet challenging objectives.” 137 S. Ct. at 1000, 197 L.Ed.2d at 351.

In the context of education, Section 504 and its implementing regulations similarly “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, an “appropriate education” means “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy” all of the requirements of each of the related subsections of that chapter: §§ 104.34, 104.35, and 104.36. *See* 34 C.F.R. § 104.33(b). Thus, under both statutes, the FAPE analysis is essentially the same.

[Section redacted.]

## IDEA ELIGIBILITY

The first issue is whether the District complied with its obligations under the IDEA in its conclusion that Student is no longer eligible for special education. The IDEA and its implementing state and federal regulations require LEAs to locate, identify, and evaluate children with disabilities who are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. A “child with a disability” is defined by the statute to mean a child who has been evaluated and identified with one or more of a number of specific disability classifications, and “by reason thereof” needs to be provided with special education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8(a). The IDEA classifications or categories for purposes of this definition are “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a).

Here, there is no question that Student has Anxiety and other mental health diagnoses. It is also true that, as has been long recognized, education is much more than academics; an appropriate education encompasses “all relevant domains under the IDEA, including behavioral, social, and emotional.” *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010)(citation omitted). Merely having an identified disability, however, does not automatically mean that a child is eligible for special education, since that is merely one prong of the two-part test. The other step to IDEA eligibility is a determination that the child needs special education because of that disability. And, “special education” refers to specially



designed instruction which is devised to meet the child's individual learning needs. 34 C.F.R. §

300.39(a). More specifically,

*Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

The Parents claim that Student remains eligible under the Emotional Disturbance classification. The IDEA implementing regulations define these terms in as follows.

*Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i).

It also prudent to address the other basis of eligibility found by the private psychologist,

Other Health Impairment, which is defined by those same regulations as follows:

*Other health impairment* means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that -

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.8(c)(9).

Again, there is no question that Student has a disability. It is much less clear that Student meets the definition for Emotional Disturbance based upon Student's presentation at school. For purposes of this decision, however, it will be assumed based on reports of the Parents on Student's Anxiety symptoms at home that Student would be eligible for special education *if* Student required specially designed instruction by reason of either the Anxiety or ADHD manifestations. The record as a whole conclusively establishes that Student no longer requires adaptations to the "content, methodology, or delivery of instruction" in order for Student to successfully access the curriculum.

First, and most compellingly, Student's teachers uniformly expressed that Student's behavior, including anxiety-related manifestations, were not dissimilar from those of Student's typical peers. Student could be and was easily redirected and typically followed cues when attention lagged. And, at times that Student did experience anxiety, Student took advantage of a number of the strategies and tools available to help Student manage that anxiety. Countering that testimony, the Parents emphasized, both during testimony and in their Closing Statement, several specific instances where Student did experience anxiety, frustration, irritability, and/or annoyance, particularly at the beginning of the school year. Nevertheless, upon consideration of Student's overall behavior at school, Student's fourth grade teachers provided persuasive and logical testimony that the few incidents to which the Parents pointed amounted to nothing more than "minor" situations or events (N.T. 559) based on their experience, typical of children of Student's age; and, that Student, like other students, needed time to adjust to the new school year. The results of input from the several teachers including rating scales provided for the District's RR further reflected careful consideration of the reasons for variability and the bases

for the ultimate conclusion of the District professionals involved in the reevaluation, most of whom interacted with and observed Student on a daily basis in the educational environment. The evidence convincingly supports the District's eligibility determination in the fall of 2017.

In addition, the private psychologist who conducted the IEE made recommendations that could just as easily be provided in a Section 504 Service Agreement [redacted] rather than appearing as items of specially designed instruction in an IEP: assistive technology, interventions for focus and attention, [redacted.] (N.T. 36-39, 69-71). Moreover, the additional suggestion for an FBA for development of a new behavior plan was based on the private psychologist's description of Student as "really disruptive" based on parental reports rather than on the teacher input that failed to suggest such extreme behavior at school (N.T. 39-40, 49). Similarly, the private therapist's belief that Student continued to need emotional support was premised on the possibility that Student would experience difficulty transitioning to middle school, especially with peers, and begin to engage in problematic behaviors again (N.T. 255-56, 259). None of this evidence established preponderantly that Student's educational performance is currently adversely impacted by a disability such that Student remains eligible for special education.

The Parents are clearly very devoted and involved advocates who want what is best for Student, who clearly presents very differently in the home compared to in the educational setting. Student's inconsistent presentations across the home and school environments are at the very heart of the parties' disagreement, but serve to explain their very divergent perspectives on Student's eligibility including educational needs. The Parents' concerns for the present and future and their apparent wish for proactive and preventative interventions are wholly understandable. Nevertheless, the law does not demand that LEAs provide services beyond

those that are appropriate such as those that “loving parents” might desire. *Andrew F., supra; Ridley School District. v. M.R.*, 680 F.3d 260, (3d Cir. 2012); *see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Finally on this issue, the record establishes that the District plans to provide Student with a Section 504 Service Agreement that will specify the accommodations Student does need. There is more than enough time to accomplish that prior to the start of the 2018-19 school year based on the wealth of information available about Student’s strengths and needs. And, there is no reason to suspect that the District and the Parents will fail to monitor Student, and communicate concerns promptly, about whether the Service Agreement is appropriately meeting Student’s educational needs.

#### PROGRAM IMPLEMENTATION

The next issue is whether Student’s IEP was properly implemented over the course of the 2017-18 school year. The Parents first contend that the District did not ensure that Student had available many of the items of specially designed instruction set forth in the IEP in order to effectively manage anxiety. For example, they expressed concerns that Student was afraid to and therefore did not use the calming areas in classrooms (*e.g.*, N.T. 204-05), and that Student was unable to access all of the tools in the specially designed instruction that should have been provided to help Student manage anxiety (Parents’ Closing at 1-5). However, the evidence compels a conclusion that Student was successful with the tools and strategies that Student did use to manage anxiety, and did not need all of those items. At best, this contention alleges a procedural violation that did not deprive Student of FAPE or inhibit the Parents’ ability to

participate meaningfully in Student's programming decisions.<sup>11</sup> 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Moreover, there is nothing in the record to suggest that teachers ignored signs of anxiety in Student or input from the Parents on how those manifestations appear; nor that they withheld other specially designed instruction including positive reinforcement and leadership roles in all educational settings.

In a related contention, the Parents challenge the District's method of monitoring Student's progress on the IEP goals relating to managing anxiety. They believe that the District should be measuring Student's ability to describe Student's feelings, rather than what teachers observe. The language of the relevant goals does indicate that progress will be measured by teacher observation and by Student self-reflection. The IEP does not, however, require both; and one of Student's teachers provided persuasive testimony that Student's self-reflection was not necessarily always practical, or more accurate in comparison to the observations throughout the school day by the teachers who knew Student (N.T. 610-13). This hearing officer cannot conclude that the District failed to properly implement Student's IEP by permitting Student to choose the tools and strategies to be used, not all of which required self-reflection.

[Section redacted.]

This hearing officer has considered each of these contentions in the context of the entire record, but does not conclude that the District failed to implement Student's IEP in any respect. Having found no denial of FAPE, no remedy is due.

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<sup>11</sup> The same may be said about the District's approach to assigning grades to homework, which is a matter properly left to the discretion of the educational professionals and, in any event, does not rise to the level of a denial of FAPE on this record.

## **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did not err in reaching its determination on Student's continued eligibility for special education in the fall of 2017, and further did not fail in providing appropriate educational programming to Student for the time period in question.

## **ORDER**

AND NOW, this 27<sup>th</sup> day of June, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not commit any error in reaching its conclusion with respect to Student's continued special education eligibility in the fall of 2017.
2. The District did not deny Student FAPE in any respect during the 2017-18 school year.
3. The District is not ordered to take any action.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER  
20187-1718AS