

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

Closed HEARING

ODR File Number: 20343-17-18

Child's Name: M. S.

Date of Birth: [redacted]

Dates of Hearing:

05/07/2018, 05/14/18, 06/08/2018

Parent:

[redacted]

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Hearing Officer: Charles W. Jelley Esq.

Date of Decision: **08/10/2018**

Overview of the Dispute

The Parent filed an Individuals with Disabilities Education Act (IDEA) due process Complaint when the District after conducting an initial evaluation determined that the Student was not IDEA eligible. More specifically the Parent contends the Student has serious emotional disturbance and needs specially-designed instruction 34 C.F.R. §300.8(c)(4).¹ The District contends that the Student is not a person with a disability and the Student does not require specially-designed instruction. After reviewing all of the exhibits and after reviewing the transcripts I now find in favor of the Parent.

Issue:

Is the Student a person with a disability within the meaning of the IDEA, and if yes, does the Student need specially-designed instruction?

If the District failed to evaluate, locate and identify the Student for IDEA eligibility purposes, should this hearing officer award compensatory education?

Findings of Fact

General Information

1. During the 2017-2018 school year, the Student was in third-grade (N.T. 13-14). The community around the school is oftentimes referred to as a “[h]igh needs community” and the school is referred to as a “high needs” inner city school (N.T. 321, 411, 590).
2. The Student has been enrolled at the school since kindergarten to the present and has received general education programming (N.T. 177, 303).

¹ 20 U.S.C. §§1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§300.1 – 300.818. 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.

The District's Response to Intervention Efforts

- 3.** During kindergarten, first, and second grades, the Student had a handful of discipline referrals (N.T. 324).
- 4.** Prior to the 2017-2018 third grade school year, the Student did not have behavioral difficulties at school (N.T. 107, 195-97, 395).
- 5.** During the 2017-2018 school year, the assistant principal handled all student discipline referrals. The assistant principal has been trained in de-escalation and restorative justice practices and is fully aware of the District's code of conduct (N.T. 528-29).
- 6.** By the end of September 2017, the teacher initiated an informal behavior plan where the Student could earn stickers for not hitting other students, staying on task, completing assigned work, and not touching other students' possessions (N.T. 22, 25, 518-19).
- 7.** Initially the Parent thought the staff were being "petty" or claimed that the Student's behavior was "[t]ypical of a [redacted] year-old [student of Student's gender]" (S-21, 1; N.T. 25, 105, 534, 536, 552).
- 8.** As part of the teacher's informal behavior plan, for one (1) to two (2) weeks the teacher gave the Student break cards. Initially the Student bought into the informal behavior plan and things got better (N.T. 22-23).
- 9.** By October 2017 of 3rd grade, the Student's behavior concerns began to escalate in frequency, intensity and duration in the music, science, math and English and Language Arts classes (S-5, S-25, 1; N.T. 303).
- 10.** On or about October 31, 2017, the Parent came to school for a meeting and observed the Student in the classroom. Soon thereafter the informal behavior plan stopped working, when the Student declared that "[redacted] was 'allowed' to engage in the behaviors." (S-5, 18; S-21, 3; N.T. 111, 427,456, 518-19, 534-35).
- 11.** The teacher used the following instructional strategies in the classroom to decrease the Student's behavior issues and improve learning: access to daily pull out for reading intervention: small group and/or one-on-one with adults in the classroom or in small classroom setting; preferential seating;

preferential class schedule, including transferring peers to other classes; differentiated instruction; partner and small group instruction; leveled classwork including the use of leveled readers, e-books, decodable text; explicit phonics instruction; graphic organizers; highlighted text; auto-leveled reading and math apps; reteaching and enrichment; modified math assignments; access to resources such as multiplication mates, number lines, arrays and counters; class dojo; individual behavior sticker chart; time out/cool off cards; behavior tracking sheets; “fidget” manipulatives; positive texts home; positive posts and photos on school dojo page for earning points; positive dojo points for on task behaviors; time out with another adult [redacted] with a preferred teacher; school helper jobs; classroom helper jobs; school wide positive behavior incentives; opportunity to work with selected peers; ignoring negative behaviors; frequent verbal praise; and, meeting time for mediation and conflict resolution with a [redacted fellow (S-5 9).

12.To assess the Student’s comprehension the classroom teacher would read the questions and reduce the number of choices on multiple-choice tests (S-5 5). The classroom teacher commented that even with modified tests the Student earned grades such as 35% and 38% in language arts (S-5 6).

13.The Student’s behaviors had a profound impact on academic performance. For example, during a classroom observation the Student took a stack of pencils and began to [engage in a repetitive task]. When the teacher walked over to intervene, the Student yelled “See, she won’t even let me [perform tasks], she is always trying to start something with me.” (S-5 3, 6). The [special] and classroom teachers each observed the Student hit, kick, punch, slap; intentionally bump into others when lining up; move through the room and school without permission; use profanity; refuse to stay in assigned area; elope from class; steal from others; not adhere to class rules; run away from teachers; cut class; hide in bathrooms; use class materials inappropriately; disrupt class; ignore teacher directives; argue with adults; yell out irrelevant [statements] to agitate peers; throw classroom items; destroy class materials; target weaker peers for aggression; and, engage in verbal tantrums, including yelling, stomping pounding and slapping tables. The [special] and classroom teachers agree the Student has problems with the transition from one class to another (S-5 8).

14.The [special] and classroom teachers listed the following behaviors that interfered with the Student’s learning: verbally and physically aggressive

behaviors towards peers and staff; noncompliance with directions; use of sexually explicit comments towards peers and staff; use of curse words; leaving class; elopement from assigned areas; refusal to complete assignments; and, taking and destroying property (S-5 4).

- 15.**The Student's individualized behavior plan included the following elements: using a sticker chart; cool off cards; opportunity to earn stickers when demonstrating appropriate behaviors; opportunity to select prizes from Amazon; and, making [objects] with a preferred adult (S-5 9). The only setting in which the Student will predictably remain in an assigned area is a very small group setting outside of the classroom or in a one-on-one setting in the vice principal's office, another classroom or the dream room (S-5 32).
- 16.**At the time of the evaluation team meeting the Student earned the following grades: Art B, English/ Writing/Grammar E, Music B, Math E, Reading E, Science C, Spelling E (S-5 10).
- 17.**On a classroom based assessment the Student earned the following grades: Math quarter 1 assessment 56 % E; Match Ch. 2 assessment 58% E; English Language Arts mid quarter assessment 38% E; English Language Arts quarter 1 assessment 35% E (S-5 6).
- 18.**The Student's refusal to complete assignments, attend class and participate in lessons did not allow the classroom teacher to accurately assess the Student's performance levels (S-5 6).
- 19.**The Student scored below basic on the Fall DIBELS assessment and received failing grades on district wide assessments (S-5 33).
- 20.**During Parent's observation, she told the teacher that the items on display in the classroom were too "tempting" for the Student and should be put away. The Parent went so far as to move and place items in different locations around the classroom. The Student was in the classroom and more likely than not heard the exchange (N.T. 101-103, 427).
- 21.**In November 2017, the Student received two (2) behavior referrals (S-25, 2-4).

- 22.**In November, due to another teacher’s illness, the Student’s day-to-day class schedule changed (S-25, 2-4).
- 23.**The change in the class schedule meant that, except for Science, the Student would have all core subjects with one classroom teacher rather than change classrooms for various subjects (N.T. 89-90).
- 24.**The staff noted that classroom transitions had taken approximately eight (8) to ten (10) minutes with three (3) to four (4) adults proctoring the move (N.T. 540).
- 25.**During transitions, the Student and the peers engaged in disruptive behaviors such as “[y]elling, running to the water fountain, to the bathroom, [and] chasing each other....” (N.T. 540).
- 26.**The schedule change remained in effect until mid-April, around the time the students took the statewide assessment (N.T. 44, 87, 9, 421, 450, 477, and 542).
- 27.**On or about January 24, 2018, the building team agreed to develop and implement a more formal Tier 2 individualized behavior plan for Student. The start date of the plan was delayed when the Parent wanted to have final approval of the behavior plan (N.T. 505, 508-09, 564-564, 571, 584, 626).
- 28.**On or about February 22, 2018, the Tier 2 behavior plan went into effect. The District staff disagree if the Tier 2 behavior plan was implemented with fidelity (S-14, S-15, S-27, S-28; N.T. 579, 630).
- 29.**In this District Tier 1 supports are generally provided to an entire school building in general education (N.T. 465, 508-09).
- 30.**Tier 2 supports are individualized for a student in general education with a projected success of capturing fifteen (15) percent of the student population (N.T. 465, 508-09).
- 31.**Tier 3 supports are generally thought of as special education supports that are believed to encompass five (5) percent of the student population (N.T. 465).

- 32.**The District provided the Student with both Tier 1 and Tier 2 supports (N.T. 508-09).
- 33.**The Student's Tier 2 behavior support plan addressed four targeted individual goals: 1) appropriate and positive language 75% of the academic day; 2) appropriate and safe control of body 75% of the academic day; 3) completion of class assignments 75% of the academic day; and, 4) stay in correct area 75% of the academic day (S-14, 27).
- 34.**During nine (9) weeks of reported Tier 2 tracking data, the Student maintained appropriate language above the 75% goal for six (6) out of nine (9) weeks (S-27, 1-2).
- 35.**During nine (9) weeks of reported data, the Student maintained appropriate and safe control of Student's body above the 75% goal for six (6) out of nine (9) weeks (S-27, 3-4).
- 36.**At the same time, the Student completed classroom assignments above the 75% goal for four (4) out of nine (9) weeks (S-7, 5-6).
- 37.**During the nine (9) weeks of tracked data, the Student stayed in the assigned area for five (5) of nine (9) weeks (S-27, 7-8).
- 38.**In the sixth week of tracked data the Student's overall rates of all targeted behavior escalated; the staff opined that the increase was connected to a short-term illness (N.T. 581).
- 39.**By the sixth day of implementation of the Tier 2 behavior support plan, the rates of compliance and on task behaviors increased at school (S-15).
- 40.**The Tier 2 behavior plan had a somewhat positive effect. However, the change was short lived. (N.T. 28, 184, 310, 582).
- 41.**In developing the Tier 2 behavior plan, the staff hypothesized that the observable antecedent reason for the Student's disruptive behaviors was linked to a deliberate choice for attention. The working hypothesis was constantly reexamined and refined throughout the course of the intervention (S-5, N.T. 430).

The School Climate

- 42.**Physical altercations at the school are common (N.T. 411-12).
- 43.**In third grade, the Student and five other students started a gang in school called [redacted]. During recess someone would yell [redacted] and then all of a sudden the group would assault a random student (N.T. 411-12).
- 44.**During the 2017-2018 school year, the school psychologist overheard other students threaten to [assault] other students (N.T. 411-12).
- 45.**The Student threatened to [assault] a student in class (N.T. 109, 119).
- 46.**Students have been overheard calling each other disparaging names, using profanity and threatening each other (N.T. 414).
- 47.**On one occasion the Student threatened to kill the teacher (NT 371, 404).
- 48.**The Program Officer heard students in the school make threats of bringing [redacted] to school (NT 415).

The Multidisciplinary Evaluation

- 49.**On or about November 15, 2017, the District issued a Request for Initial Evaluation and Request for Consent Form seeking the Parent's consent to perform a multidisciplinary evaluation (S-3; N.T. 418).
- 50.**Various teachers, including [special] and classroom teachers, provided information about the student directly into the evaluation information technology software (N.T 453, 601-03).
- 51.**On or about January 24, 2018, two (2) to two-and-a-half (2.5) months after the behaviors became more frequent, the District held its first multidisciplinary team meeting to review the evaluation report (ER) and Functional Behavioral Assessment (FBA) (S-5, S-6; N.T. 107-08, 565-66).
- 52.**The FBA data states that the Student had inappropriate social interactions with peers 5 to 8 times a day, the Student eloped from class 4 to 6 times a day and was defiant 9 to 10 times per day. On an average day, the Student had up to 24 behavioral incidents (S-6).

- 53.**The initial draft of the ER included a narrative from the classroom teacher, observation information from the school psychologist, the results of a functional behavioral assessment (FBA), the scores from the Wechsler Intelligence Scales for Children scores (WISC-V), the Wechsler Individual Achievement Test (WIAT-III) scores, the Student's BASC-3 scores, the data from a structured diagnostic interview of the Parent for indicators of Attention Deficit Hyperactivity Disorder (ADHD), and the Conners-3 scales (S-5).
- 54.**On the WISC-V the Student earned an Average full scale IQ of 100 (S-30 7, S-5, 7-8, 11-16; N.T. 424).
- 55.**Likewise, the Student's WIAT-III scores were in the solidly Average Range (S-7).
- 56.**The evaluator used the BASC-3, the Conners 3, the Connors Comprehensive Behavior Rating Scales and a Clinical Interview for Children and Adolescents Assessment to tease out how and if the Student's rate, intensity and frequency of misconduct was interfering with the Student's ability to advance from grade to grade (S-5).

The BASC-3

- 57.**The BASC-3 “[i]s a measure of behaviors associated with externalized behavior problems, attention and learning difficulties, and internalized disorders.” When raters complete the BASC-3, they are asked to complete the questions based upon behaviors that have occurred within the month prior (S-5, 25, N.T. 440-41).
- 58.**Scores at the Clinically Significant range suggest a high level of maladjustment, while scores in the At-Risk range identify potential problems that require close monitoring. (S-5). The BASC-3 rating scales completed by the science teacher revealed 10 Clinically Significant endorsements, 5 At Risk endorsements, and 3 Average endorsements. The other teacher gave the Student 4 Clinically Significant endorsements, 1 At Risk endorsement and 12 Average endorsements (S-5).
- 59.**One teacher rated the Student as average for Depression and the other teacher rated the Student with a T-score of 60 in Depression, which is the

lowest score possible in the at-risk range. The teachers' scores for Depression were not clinically significant (S-5).

- 60.**The music teacher and the science teacher each rated the Student as having significant concerns with aggression and conduct (S-5, 22-25).
- 61.**The science teacher rated the Student's behavior at the Clinically Significant range for Externalizing Problems, Hyperactivity, Aggression, Conduct Problems, Atypicality, Social Skills and Adaptability. The science teacher also rated the Student's conduct as At Risk on the Depression, School Problems, Attention Problems, Leadership, and Study Skills (S-5, 22-25).
- 62.**The music teacher, on the other hand, rated the Student's behavior as Clinically Significant on Aggression, Conduct Problems and Adaptability scales, and the music teacher rated the Student as At Risk on the Hyperactivity and Behavior Symptoms scales (S-5 22-25).
- 63.**The music and the science teachers reported that the Student demonstrates Clinically Significant and At-Risk social-emotional behaviors related to Externalizing Problems, which reflects elevated levels of hyperactivity, conduct problems and aggression. The BASC-3 scores also indicate the Student's adaptability score is Clinically Significant (S-5 22-25).
- 64.**The BASC-3 scores completed by the music teacher and the science teacher included an "F Index" score in the Extreme range (S-5, 24; N.T. 434-35). Extreme scores indicate a negative view of the Student's behaviors. The ER notes that less than 1% of children in the general population receive ratings with an F-Index in this range. The music and science teachers' "Extreme" ratings reflect the fact that the teachers were experiencing a great deal of frustration with the Student's behavior, coupled with difficulties in managing the Student in the classroom (S-5 24). On the Conners-3 the classroom teacher reported that the Student demonstrated both Clinically–Significant and At-Risk social-emotional behaviors in the composite areas of Externalizing Behaviors, such as hyperactivity, conduct problems and aggression. The music teacher and the science teachers' T-scores also indicate that Bullying, Anger Control and Negativity all fell within the Clinically Significant classification. The behavior symptoms index across both raters indicates that the Student has the tendency to be disruptive, intrusive, and/or threatening towards other students and will react negatively when faced with changes in everyday life. (S-5 22-25).

- 65.**Initially, the Parent did not complete the BASC-3 until sometime before the March 2018 meeting. The Parent’s BASC-3 scores all fell within the “Average” range with only the Adaptability scale in the “At-risk” range. The Parent scored the Student as Average on 17 out of 18 BASC-3 scales. The only scale the mother rated the Student as At Risk was on the Social Skills scale. (S-5 26-7. N.T. 495-96, 499-500).
- 66.**The Parent’s T-scores ratings on the Anger Control, Bullying, Development Social Disorder, Emotional Self-Control, Executive Functioning, Negative Emotionality and Resiliency content scales fell with the Average range. As part of the BASC-3 ratings the Mother indicated the Student can regulate affect and self-control well (S-5). Later in April 2018, as part of the Parent’s IEE the Mother and the classroom teacher completed the BASC-2. By April 2018, the Mother’s and the classroom teacher’s BASC-3 scores rated the Student as “Clinically” to “Potentially Clinically Significant” on Inhibitory Control and Behavior Regulation (P-2 14-18).

The Conners-3

- 67.**The Conners-3 was completed by the teacher and reviewed prior to the January 24, 2018, multidisciplinary team meeting (S-5, 20; N.T. 436).
- 68.**The Conners-3, asks raters to complete a series of questions based upon behaviors that have occurred within the month prior (N.T. 440-41).
- 69.**The Conners-3 scale looks at behaviors associated with ADHD. The Student’s scores fell within the Average Range on the DSM-5 criteria for ADHD Predominately-Hyperactive –Impulsive Presentations and ADHD Predominately Inattentive Presentation(S-5 26).
- 70.**The Student’s scores also met the DSM-5 criteria for a Conduct Disorder and Oppositional Defiant Disorder (ODD) (S-5, 20, 26; N.T. 436-37).
- 71.**On the Conner’s Comprehensive Behavior rating scale, the Parent and the classroom teacher reported that the Student had Very Elevated levels of hyperactivity, defiant/aggressive behaviors, violence potential, and social problems. The classroom teacher endorsed symptoms consistent with DSM-5 diagnostic criteria for Major Depressive Disorder and Social Anxiety,

while the Mother's endorsed statements correspond to criteria for Conduct Disorder and Oppositional Defiant Disorder (S-5).

72. To address the non-IDEA conditions, the District referred the Mother to a community based mental health provider (S-5 29).

Structured Interview with Parent

73. A structured diagnostic interview for Parent was completed on January 2, 2018 (S-5).

74. According to the Parent's observation over the past 6 months the Student's behavioral symptoms possibly met the requirements for ADHD combined type. The Parent reported that the Student often fails to give close attention to details or makes careless mistakes in schoolwork; has difficulty sustaining attention in tasks or play activities; does not seem to listen when spoken to directly; is easily distracted by extraneous stimuli; is forgetful in daily activities; loses things necessary for tasks/activities; fidgets with hands or feet and/or squirms when seated; runs about or climbs excessively in situations in which it is inappropriate to do so; has difficulty playing or engaging in leisure activities quietly; talks excessively; leaves seat in classroom or in other situations in which remaining seated is expected; and, interrupts others or intrudes on others (S-5 20).

75. At the January 24, 2018 meeting, the Parent elaborated on her responses. Per Parent report her interview report was based upon what the teachers were telling her and were not her settled opinions (S-5 20).

The Private Evaluator's April 2018 Evaluation

76. The Parent's private evaluator used the Behavior Rating Inventory of Executive Functioning, Second Edition (BRIEF-2) to assess eight (8) aspects of executive functioning. The BRIEF can provide insight into the Student's understanding of self-control and problem-solving. The teacher scored the Student at the Clinically Significant range on the Inhibit, Shift and Emotional Regulation scales. The Inhibitory scale "[g]enerally measures the student's ability to control behaviors... The definition is... interchangeable with... impulsivity." (N.T. 432).

- 77.**The teacher's April BRIEF ratings differ from her Conners-3 scores reported in the ER. Previously, the teacher did *not* score the Student as Clinically Significant in Impulsivity (S-5; P-2; N.T. 432).
- 78.**The Parent rated the Student's Self-Monitoring and Behavior Regulation Scale scores at the Clinically Significant levels (P-2 15). The Parent endorsed statements and anecdotal observations are consistent with DSM-5 scales for Major Depressive Episode and Social Anxiety Disorder (S-5 28).
- 79.**The BRIEF-2 was performed at a time when the Student was showing improved behaviors at school. However, the teacher's BRIEF scores are inconsistent with the reports that at the time the BRIEF was administered the Student was doing better in school (N.T. 440).
- 80.**In April the Parent and the teacher once again completed the BASC-3. The teacher endorsed areas related to Hyperactivity, Aggression, Conduct Problems, and Adaptability. The teacher also endorsed At-Risk statements associated with Depression, Somatization, Attention Problems, Learning Problems, Atypicality, Withdrawal, Social Skills, Study Skills and Functional Communications (P-2).
- 81.**The Parent endorsed Clinically Significant statements related to Somatization and Attention Problems. The Parent also endorsed At-Risk Statements associated with Aggression, Conduct Problems, Adaptability, Social Skills, Functional Skills and Activities of Daily Living (P-2 17).
- 82.**The District's School Psychologist performed the Behavior Observation of Students in School (BOSS) that compared the Student to the other classroom peers. The Student was on task 100% of the time as compared to selected control peers who were on task 80% of the time (S-5, 10). In April 2018, on the Conners-3, the Parent rated the Student at the Very Elevated range for Inattention, Hyperactivity, Defiance/Aggression, and ADHD Hyperactive-Impulsive. The Parent also rated the Student at the Elevated range for behaviors associated with ADHD Inattentive type (P-2).
- 83.**The classroom teacher rated the Student at the Very Elevated range for Defiance/Aggression. The classroom teacher answered two additional questions at the end of the Conners; when asked what concerns she had for the Student she responded as follows "[redacted]'s behavior has improved in

the past month as reflected on this assessment but it is still impacting [redacted]'s academic success.” (P-2).

- 84.**The also Student completed the Conners-3 self-report. (P-2). The Student self-endorsed Very Elevated ratings for Hyperactivity/Impulsivity, Learning Problems, Defiance/Aggression, Family Relationships, ADHD Inattentive, ADHD Hyperactive Impulse, Conduct Disorder and Oppositional Defiant Disorder (P-2 19).
- 85.**The Parent and the Student endorsed either Elevated or Very elevated ratings for ADHD (P-2 19).
- 86.**The private evaluator concluded that the Student met the DSM-5 diagnostic criteria for a diagnosis of ADHD, Combined Presentation, Oppositional Defiant Disorder and Conduct Disorder (P-2 21-21).
- 87.**The Private evaluator did not reach a conclusion about the Student's IDEA eligibility as a person with an Emotional Disturbance (P-2).
- 88.**After the initial draft of the ER was completed, but prior to the March 1, 2018, multidisciplinary team meeting, the School Psychologist requested that the Parent and Teacher complete the Conners Comprehensive (S-5, 27-29).

The Contrast Between the Conners-3 and the Conners Comprehensive Scores

- 89.**As a result of the January 2018 team meeting the Parties agreed that the District would conduct additional assessments. The evaluator asked several members of the team to complete the Conners Comprehensive which is a more detailed checklist than the Conners-3 (S-5, 27-29). The District evaluator finds that when the scores on the Conners are divergent, the Conners Comprehensive is one way to better understand a student's behaviors (N.T. 437).
- 90.**According to both raters, the Student demonstrated Very Elevated levels of hyperactivity, defiant/aggressive behaviors, and violence potential and social problems. The teacher's endorsed statements correspond to DSM-5 diagnoses of Conduct Disorder and Oppositional Defiant Disorder (S-5 26-27).

91. The Parent's T-Scores indicate symptoms consistent with Major Depressive Episode and Social Anxiety Disorder (S-5 26-27).
92. The Parent's scores on the Conners Comprehensive contrasted with her BASC-3 scores trend towards a finding that the Student likely met the DSM-5 criteria as a person with a Major Depressive Episode and Social Anxiety Disorder (Social Phobia) (S-5, 27-28; N.T. 498-500).
93. The Program Officer performed the Behavioral Observation of Students in Schools (BOSS) that compared the Student to the classroom peers on two separate dates. The BOSS data indicated that the Student's rates of on-task and off-task times were clearly similar to those of classroom peers, and at times exceeded the on-task time of peers (S-29; N.T. 591-99).

General Legal Principles

Burden of Proof

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that 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 rests with the Parent who requested this hearing. In IDEA disputes the hearing officer applies a preponderance of proof standard.

Credibility Determinations

Hearing officers, as fact-finders, are 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); *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 now finds the District's and the Parent's witnesses were credible, and their testimony was essentially consistent with respect to the actions taken or not taken by the District in evaluating the Student for IDEA eligibility. I will, however, give more weight to the testimony of certain District witnesses, specifically the classroom teacher, the music teacher, the assistant principal, and

the principal, as each witness provided a clear, cogent and convincing explanation of how he/she worked with the Student and/or participated in the development of the ER. I will give less persuasive weight to the testimony of the staff members who did not implement the Tier 1 or Tier 2 interventions or interact with the Student on a day-to-day basis. While several of the District witnesses disagreed with the classroom teacher's input into the evaluation report, I find their testimony about the classroom teacher unpersuasive. I also find the Parent's evaluator's testimony credible and persuasive. For the following reasons, I now find in favor of the Parent.

Applicable Legal Principles

Classification of Emotional Disturbance

In order to qualify as a "student with a disability" under the IDEA, a student must meet the definition of one or more of the categories of disabilities. 34 C.F.R. 300.8 (a)(1). Pursuant to the IDEA Part B regulations, 34 C.F.R. 300.8(c)(4)(i) "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.

The definition of emotional disturbance (ED) includes schizophrenia but does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under 34 C.F.R. 300.8(c)(4)(i). A student needs to exhibit only one of the five criteria under the definition of an emotional disturbance to potentially qualify for special education and related services under the ED classification, but the student must exhibit the criteria to "a marked degree" over "a long period of time." 34 C.F.R. 300.8(c)(4)(i). While 34 C.F.R. 300.8(c)(4)(i) states that a student with an emotional disturbance must manifest at least one of the identified characteristics described in subsections (A) through (E)

"to a marked degree" for "a long period of time," neither the IDEA statute nor its regulations define how long a qualifying "long period of time" must be.

In *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989) OSEP stated that a generally acceptable definition of "a long period of time" can range from two to nine months, assuming preliminary interventions have been implemented and proven ineffective during that period. *See also R.B. v. Napa Valley Unified Sch. Dist.*, 48 IDELR 60 (9th Cir. 2007) (Because a child made significant improvements in her classroom behavior once she adjusted to her placement, her inability to maintain peer relationships did not persist for a long period of time.). As for the "to a marked degree" criteria, OSEP has taken the position that it generally refers to the frequency, duration, or intensity of a student's emotionally disturbed behavior in comparison to the behavior of his peers and can be indicative of either degree of acuity or pervasiveness. *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989).

IDEA Specific Evaluation Criteria and Standards

In order to meet their child find obligations, school districts must conduct a comprehensive evaluation of a student in all areas of suspected disability, identify those students with a disability, and, if the Student is eligible the District must then develop a comprehensive individualized education program (IEP) tailored to the Student's unique needs, and have the IEP in place before the start of each school year 20 U.S.C. §1412(a)(1)(A); 20 U.S.C. §1414(d). The district's comprehensive evaluation is used as a basis to develop, define and determine the scope and breadth of the services that meet the child needs.

The IDEA sets forth three broad criteria that the local educational agency must meet when evaluating a child's eligibility for services under the IDEA. First evaluators, must "use a variety of assessment tools and strategies" to determine "whether the child is a child with a disability." Second, the district "[may] not use any single measure or assessment as the sole criterion" for determining either whether the child is a child with a disability or the educational needs of the child. 20 U.S.C. §1414(b)(2)(B). And third, the district must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 20 U.C.S. §1414(b)(2)(C).

The IDEA regulations impose additional criteria that school officials must use when evaluating a child to determine if the child has a disability. A child's initial

evaluation or reevaluation consists of two steps. First, the child's evaluators must "review existing evaluation data on the child," including any evaluations and information provided by the child's parents, current assessments and classroom based observations, and observations by teachers and other service providers. 34 C.F.R. §300.305(a)(1). Second, based on their review of that existing data, including input from the child's parents, the evaluation team must "identify what additional data, if any, are needed" to assess whether the child has a qualifying disability and, if so, "administer such assessments and other evaluation measures as may be needed." 34 C.F.R. §300.305(a)(2)(c).

Under the first step of the analysis, the district is required to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent." 34 C.F.R. §300.304(b). All the assessment methods, protocols and materials used must be "valid and reliable" and "administered by trained and knowledgeable personnel." 34 C.F.R. §300.304(c)(1). In combination, these well-established criteria have the effect of ensuring the evaluation either confirms or rules out the student's potential disabilities, identifies the student's individual circumstances and examines whether the child is in need of specially instruction.

IDEA Assessment and Eligibility Standards

Upon completion of the administration of assessments and other evaluation measures:

- (1) A group of qualified professionals and the parent of the child determine whether the child is a child with a disability, as defined in 34 C.F.R. §300.8 in accordance with 34 C.F.R. §300.306 (b) and the educational needs of the child; and
- (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent. 34 C.F.R. §300.306 (a)

A child must not be determined to be a child with a disability:

- (1) If the determinant factor for that determination is:
 - (i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in Section 1208(3) of the Elementary and Secondary Education Act);
 - (ii) Lack of appropriate instruction in math; or
 - (iii) Limited English proficiency; and

- (2) If the child does not otherwise meet the eligibility criteria under 34 C.F.R. §300.8 (a).

Each public agency, in interpreting evaluation data for the purpose of determining if a student is a person with a disability under 34 C.F.R. §300.8 must:

- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- (ii) Ensure that information obtained from all of these sources is documented and carefully considered. 34 CFR §300.306 (c)(1).

The failure of an individual education or evaluation team to consider relevant information about the student's needs or individual circumstances in making an eligibility determination may, at times, result in a denial of FAPE. *Lauren G. v. West Chester Area Sch. Dist.*, 60 IDELR 4 (E.D. Pa. 2012).

Compensatory Education

In *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) the court endorsed a “complete” make whole remedy favoring relief for the entire period of the violation *G.L.* 802 F.3d at 626. Compensatory education “accrue[s] from the point, that the school district knows or should know of the injury to the child, and the child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.”²

G.L.'s adoption of the “make whole” remedy, however, left unanswered several threshold questions. First, *G.L.* did not address the question of how the “make whole” remedy would equitably factor in violations or claims, that are otherwise barred by 20 U.S.C. §1415(f)(3)(C). Second, *G.L.* did not comment on at what stage of the hearing process the factual proofs are offered to substantiate the type of services or the amount of compensatory education relief that should be awarded. Third, *G.L.* did not describe what a hearing officer should do when the parent establishes liability for FAPE violation(s), yet does not offer any proof to quantify the magnitude of the “make whole” or “hour for hour” relief. Fourth, how if at all,

² *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

does the “reasonably rectification” apply when the proofs follow a *Reid* “make whole” analysis.

One option is to adopt the *M.C.* “cookie cutter” approach. The second option is to employ the *Reid* “qualitative” approach. The third option is to make an equitable determination about the time and services necessary to provide appropriate relief.³ Each option, however, assumes the record is properly developed to support a finding grants appropriate equitable relief.

This decision implicates multiple questions of first impression. First, how should the hearing officer calculate the magnitude of the appropriate relief when the Parents make out a child find claim, yet no evidence is offered about the “hour for “hour” approach or the “make whole” relief. Second, how should the hearing officer calculate the reasonable rectification period when no evidence is proffered. Third, how if at all, does the reasonable rectification period factor in calculating a “make whole” relief.

Compensatory education is appropriate relief that is intended to compensate a disabled student, who has been denied FAPE.⁴ Compensatory education should place the child in the position they would have been in but for the IDEA violation.⁵

As an *equitable* remedy, compensatory education is intended to provide more than “some benefit” or for that matter “meaningful educational benefit and significant learning.”⁶ The factors included in crafting the stockpile of compensatory education relief hinges on student specific facts and circumstances, including but not limited to, projecting how much progress the student might have shown if he or she had received the required special education services, the student’s age, ability, past achievement, stage of learning, unmet needs, projected progress on the IEP goals, and the student’s current present levels. Therefore, the “make whole” or

³ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

⁴ *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

⁵ *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) IEPs are forward looking and intended to “conform[] to . . . [a] standard that looks to the child's present abilities”, whereas compensatory education is meant to “make up for prior deficiencies”. *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP “carries no guarantee of undoing damage done by prior violations, IEPs do not do compensatory education's job.”

⁶ *Boose v. District of Columbia*, 786 F.3d 1054, 1058 (D.C. Cir. 2015).

“hour for hour” calculation requires some factual evidence about the type, frequency, intensity and amount of services needed to place the student in the same position he or she would have occupied but for the LEA’s violations of the IDEA.⁷ Also after *GL* and *MC*, the parents must establish when the District either “knew or should have known” the child was not receiving FAPE.⁸ Assuming a finding of a denial of FAPE, the District, on the other hand, following *M.C.* must produce evidence on what they suggest is the length of the reasonable rectification period to put the child back on the correct path. *Id.* Therefore, whether the parents follow *Reid* or *MC*, the “make whole” or “hour for hour” approach must be supported by the factual record as a whole. *Id.* With these principles in mind, I will now turn to the instant dispute.

Discussion and Analysis

Upon filing the due process Complaint, the Parent as the moving party accepted the burden of proof to establish the District’s evaluation was inappropriate, inadequate and incomplete. More specifically the Parent contends the District failed to properly interpret and apply the IDEA eligibility criteria enabling the Student to be identified as a student with an emotional disturbance. In support of the Parent’s contention, the Parent asserts the District did not give proper weight to the frequency, duration, or intensity of the Student’s impulsivity, inattentiveness and ongoing misconduct in violation of the District’s code of conduct. The District, on the other hand, contends its evaluation was a comprehensive assessment of the Student in all areas of suspected disability. The District further contends that the Student’s misbehavior, while persistent, is not indicative of at least one of the five (5), identified characteristics of a child with emotional disturbance as described in subsections 34 C.F.R. §300.8(c)(4)(i)(A) through (E).

The District insists the Student’s misconduct is motivated by the Student’s dislike of the teacher. Finally, they argue even if the Student’s misbehavior fits within one

⁷ *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid, supra*. (the parent, as the moving party, has the burden of “propos[ing] a well-articulated plan that reflects the student’s current education abilities and needs and is supported by the record.”); *Phillips ex rel. T.P. v. District of Columbia*, 736F.Supp.2d 240, 248 (D.D.C.2010) (citing *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F.Supp.2d 169, 172 (D.D.C.2008) (Facciola, Mag. J.); *Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012) (the burden of proof is on the parents to produce sufficient evidence demonstrating the type and quantum of compensatory education that makes the child whole).

⁸ . *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg’l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

(1) of the five (5) characteristics of a child with an emotional disturbance, the misbehavior does not adversely affect the Student's education, and the Student's behaviors have not existed "to a marked degree" or for "a long period of time."

To support her position, the Parent relies upon the results of the private evaluator's observation, report and the District's own teachers and administrators. I now find that when the private evaluation data is combined with the District's evaluation data, the District's action in denying eligibility was a violation of the IDEA. The Student is a person with a disability and the Student needs specially-designed instruction.

The District Misapplied the IDEA Eligibility Criteria

By early November, the Parties reached an agreement to evaluate the Student. The District's evaluator used a variety of assessment techniques, including norm referenced standardized testing, direct observation, multiple checklists, rating scales and actively sought teacher and Parent input; however, the final evaluation report was incomplete and inappropriate.

To determine the Student's overall ability, the evaluator administered the nationally recognized WISC-V. The Student earned an average IQ of 100. The evaluator noted that the testing was administered under normal conditions, the Student willingly went with the evaluator and the Student demonstrated attentive and compliant behavior during the testing. To assess the Student's overall achievement, the District's evaluator administered the WIAT-III. The Student's scores ranged from a high standard score (SS) of 105 in Math Problem solving to an Average Reading Composite SS of 87.

The Student's overall Written Expression SS of 85, is in the low Average range. Overall, the Student displayed strengths in the ability to solve word problems in math and oral reading. The ability and achievement testing rule out an intellectual impairment or a learning disability. The Parent's evaluator accepted the District's ability and achievement testing; therefore the Parent conceded the fact that the ability and achievement testing was appropriate. This concession satisfies the first of the five (5) eligibility prongs at 34 C.F.R. §300.8(c)(4)(i) indicating that the Student does not have an intellectual disability or a learning disability.

When the evaluation team members reviewed the multiple behavioral ratings and checklists, the District members of the team concluded that the data did not support a finding of IDEA eligibility. As expected the Parent disagreed with the team's

interpretation of the social, emotional and behavioral ratings, endorsements and data. The Parent requested and the District agreed on another round of behavioral ratings and checklists.

The teachers', the Parent's and the Student's self-endorsements from the November 2017, March 2018 and April 2018 ratings coupled with the two classroom observations and the Tier 2 data clearly support a finding that the Student's persistent behaviors qualifies as an IDEA disability as described at 34 C.F.R. 300.8 (c)(4)(i). First, I find the time from September 2017 through the end of the school year satisfies OSEP's persuasive guidance "for a long period of time." Simply stated, the fact that the Student's behaviors persisted for nine (9) plus months, therefore the Parent has satisfied the "marked degree" eligibility prong.

In *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989) OSEP took the position that a determination of "to a marked degree" generally refers to the frequency, duration, or intensity of a student's emotionally disturbed behavior in comparison to the behavior of his/her peers and can be indicative of either degree of acuity or pervasiveness. *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989). While the OSEP letter is not black letter law, it is one of the few statements about how these criteria should be applied; therefore, giving it due weight, I now find viewing the record as a whole, the Student's behaviors existed to "a marked degree." Although the District argued that other students regularly made similar disruptive statements and threats, the record is preponderant that this Student's rates of behavior exceeded intensity, duration and frequency for a regular education student. Several witnesses testified that the Student would spend a significant amount of time in the principal's office or walking around the school.

Multiple District witnesses testified that the school resource [police] officer would either find the Student walking around the school or be called in to address the Student's misbehaviors when all else failed. This level of assistance, despite the Program Officer's, the psychologist's, or the building principal's testimony, is preponderant evidence that the Student's behaviors existed to "a marked degree."

As for a "long period of time" prong, the Student's behaviors began in September and continued until the end of the school year (9 months). Simply stated the Student's persistent misbehaviors, threats, inattentiveness and interpersonal difficulties throughout the school year are preponderant proof of a serious emotional disturbance. Therefore, based on the frequency, duration, and intensity of the Student's inattentiveness and interpersonal difficulties I now find the

Student's behavior existed for a "long period of time." Accordingly, I now find the Student is a person with an emotional disturbance.

The evidence is preponderant that the Student was not able to build or maintain satisfactory interpersonal relationships with peers and teachers. It is axiomatic that statements such as [redacted] are unacceptable, inappropriate and create a hostile environment that adversely affects the Student's education. The Student's exaggerated behaviors, such as elopement, inattentiveness and aggression, in response to the music, science and classroom teachers' everyday directions is proof positive that the Student's education is currently adversely affected. The fact that the school resource officer [police] would find the Student walking around the school when the Student was supposed to be in the principal's office is further evidence that the regular interventions as a whole were not successful. Granted, for short periods of time, the interventions reduced the frequency of the behaviors; however, the interventions did not shape or change the intensity or duration of the behaviors.

The music and the science teachers both corroborate the classroom teacher's observation, as does the building principal and assistant principal that the Student's behaviors impeded learning. The FBA data states that the inappropriate social interactions with peers occurred up to eight (8) times a day, the Student eloped from class up to six (6) times a day and was defiant up to ten (10) times per day. Therefore, the teaching staff could expect the Student to have twenty-four (24) behavioral incidents a day. Extrapolating the number for the entire school year suggests that the Student might well have engaged in up to 4,320 behavioral incidents covering a span of nine (9) months (24 incidents a day times 180 days). The frequency, severity and intensity of the Student's behavioral incidents contradict the District's contention that this Student's passing grades rule out an IDEA disability.

It is an uncontested fact that the teacher modified the Student's tests.⁹ It was not until March-April 2018 that the District either knew or should have known that the Student was IDEA eligible. When all of the teachers' input, the multiple behavioral rating scales and the outside evaluation are combined the evidence is preponderant that the Student is a person with a disability. The evidence is also preponderant that the Student was not responding to a host of 39 or more regular education strategies and multiple behavioral interventions.¹⁰

⁹ S-5 6

¹⁰ S-5 18

I do not find the District's contentions that the teacher did not implement the interventions with fidelity persuasive. Assuming *arguendo*, the teacher's style conflicted with the Student's expectations, no one ever explained why the principal, the Program Officer or the psychologist did not immediately intervene, retrain the teacher or move the Student to another class. No one cogently explained why a Student who creates safety hazards and persistently disrupts and provokes adults and peers to elicit one-on-one attention in the music and science class is not disabled. Therefore, I do not find the District's demeanor and teaching style testimony particularly persuasive. The finding of an IDEA disability does not end the analysis; the Parents must still show a need for specially-designed instruction.

The Student Needs Specially-Designed Instruction

The teacher began informal interventions in September 2017, followed by Tier 1 then Tier 2 interventions; therefore, it is an uncontested fact that the District's interventions lasted throughout the school year. A student needs special education and related services when the student requires those services in order to receive an educational benefit from the educational program. Academic progress alone is not the sole determinative factor in determining the need for specially-designed instruction.

In order to make an eligibility determination, Districts should draw upon information from a variety of sources. 34 C.F.R. 300.306 (c) (1). Unique needs are broadly construed to include academic, social, health, emotional, physical, and vocational needs. See, *J. D. v. Wissahickon Sch. Dist.*, 56 IDELR 294 (E.D. Pa. 2011); *Lauren G. v. West Chester Area Sch. Dist.*, 60 IDELR 4 (E.D. Pa. 2012) (district should have considered the services a student is already receiving in determining whether the student requires special education).

Evaluations under the IDEA serve two purposes, identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and helping IEP teams identify the special education and related services the student requires. 71 Fed. Reg. 46,548 (2006). In *A.W. v. Middletown Area Sch. Dist.*, 115 LRP 4105 (M.D. Pa. 01/28/15) the court found that a student's evaluation was inappropriate because it lacked information from which the district could develop a positive behavior plan, crafted with IEP goals and related services.

After participating in a full year of Tier 1 and Tier 2 interventions, it is clear that the regular education interventions and strategies, for whatever reason, were not

sufficiently personalized to enable the Student to self-regulate and progress in the regular education curriculum. Granted, while the Student is not failing academically, the Student is, however, failing socially. The Student spends an inordinate amount of time out of the class and otherwise inattentive. The evidence is preponderant that the Student needs specially-designed instruction and the psychological services to address a variety of behaviors that interfere with learning.

The testimony is preponderant that while the behaviors declined slightly, the decline was short lived. The evidence is also preponderant that the District did not consider that although the student attended a regular education class and had the benefit of 39 plus regular education strategies, including modified classroom English and Language Arts tests, when those strategies were coupled with the interventions the package of supports/services did not manage or modify the Student's behavior. In fact, one might even say that the sheer number of interventions coupled with the 39 plus classroom instructional strategies were, in fact, specially-designed instruction.

In *L.J. v. Pittsburg Unified School District*, 116 LRP 37786 (9th Cir. 09/01/16), the court ruled that student who met one or more classifications under the IDEA, like here, was eligible in terms of the need for special education when, at the time of the evaluation, he was receiving services in general education that amounted to specially-designed instruction like a 1:1 aide, individually determined mental health services, BIP and various classroom accommodations. The Student's overall regular education program here closely resembles the student in *L.J.* Like *L.J.* the Student here has received a host of regular education strategies in conjunction with a host of behavioral strategies. Likewise in *Letter to Chambers*, 59 IDELR 170 (OSEP 2012), OSEP explained that just because the specialized instruction that a student with a disability requires is already part of the general curriculum in a particular district doesn't mean the student doesn't need an IEP. I now find when the BASC-3, the Conners-3, the Clinical Interview, the Conners Comprehensive Behavior Rating Scale and the Parent's private evaluation, are viewed together they support a finding that the frequency, duration, and intensity of the Student's misconduct, impulsivity and inattentiveness is adversely affecting the Student's ability to maintain satisfactory build and maintain interpersonal relationships with peers and teachers. This finding is supported by the teachers', the Parent's and the building level administrators' decision early on that the Student would be given a "preferential class schedule (including moving [other] students with whom [redacted] had conflict to a different homeroom.") This preferential class schedule strategy is a tacit acknowledgment that the Student's behaviors existed to a

“marked degree.” The fact that other children were placed in different classes is indicative of how the Student’s disability is substantially affecting interpersonal relationships and further corroborates the severity of the Student’s peer relationship issues.

After an evaluation is completed, a district must develop an IEP within 10 school days that provides a student with a disability individualized specially-designed instruction that meets a Student’s unique needs/circumstances, regardless of whether the same instruction is provided to other children with or without disabilities in the child's classroom, grade, or building. *See District of Columbia Pub. Schuss.* 115 LRP 16952 (SEA DC 01/18/15) (grade schooler's behaviors hindered his ability to learn leading the hearing officer to conclude the school erred by finding the student ineligible as OHI); 22 Pa Code 14.131(a)(6).

The IDEA defines "special education" as specially-designed instruction, at no cost to the parents, intended to meet the unique needs of a child with a disability. 34 C.F.R. 300.39. “Specially-designed instruction” means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction - - 1) to address the child's unique needs resulting from the disability; and 2) ensuring the child's access to the general curriculum so that the child can meet the educational standards that apply to all children within the jurisdiction of the public agency. 34 C.F.R. §300.39 (b) (3).

Absent modifications, adaptations to the content, methodology, or delivery of the regular education interventions/instruction this Student will not be provided FAPE.¹¹ Accordingly, I now find in favor of the Parent.

Appropriate Relief is Compensatory Education

The Parent did not offer any testimony or exhibits on the scope of the requested relief. Likewise, the District did not offer any testimony on the *M.C.* reasonable rectification period. Consistent with *G.L.*, *Reid*, and *M.C.* to cure the gap in the record, I will dismiss the Parent’s request for compensatory education, without prejudice. Rather, than award too much or too little appropriate relief, pursuant to

¹¹ *Cumberland Valley School District v. Lynn T.*, 725 A.2d 215 (Pa. Cmwlth. 1999) (evaluation report findings were sketchy and thin and program failed to address a means of handling the student’s emotional and behavioral disorders); *Stroudsburg Area School District v. Jared M.*, 712 A.2d 807 (Pa. Cmwlth. 1998) (emotional needs were not addressed and student’s behavior continued to worsen).

34 C.F.R. §300.508(d), I am directing the District to fund an independent compensatory education evaluation to determine the magnitude and range of the compensatory education relief.¹²

In this particular instance, I find that the District either knew or should have known the Student was IDEA eligible by mid-March 2018. The independent evaluator using either the “hour for hour” or “make whole” approach should calculate the educational loss the Student suffered and the magnitude of the compensatory education services, the Student should receive to make up for the educational loss in not receiving FAPE from mid-March 2018, to the end of the school year.¹³

I also, find consistent with the applicable regulations regarding when an IEP should be offered to an eligible student, the reasonable rectification period, in this particular instance, is the same 10-day window the District would have had to offer a Notice of Recommended Educational Placement (NOREP) and an IEP 22 Pa Code §14.131(a)(6).

Therefore, assuming the independent evaluator uses an “hour for hour” approach the evaluator should deduct 10 days of services from the compensatory education calculation. The value of the equitable deduction should not exceed the amount of time the Student would attend one full hour of compensatory education as either calculated by the independent evaluator or as agreed to by the Parties.

Acknowledging that the court in *G.L.* cited *M.C.* with approval when endorsing *Reid*, I now find the application of an equitable reduction of time from the “make whole” remedy would not otherwise put the Student in the same position as they would have been but for the denial of FAPE. Therefore, recognizing that this is an issue of first impression, absent further clarification I am directing the evaluator not to deduct or calculate any time from the calculation of the “make whole” compensatory education plan.

¹² See, *Jackson-Johnson v. D.C.*, 2015 U .S. Dist. LEXIS 53909 *28 (D.D.C. Mar. 30, 2015) (hearing officer can order evaluation to develop the record to make a fact-specific inquiry essential to determine what, if any, compensatory education would be appropriate); *Phillips v. District of Columbia*, 736 F. Supp. 2d 240, 55 IDELR 101 (D.D.C. 2010) (action remanded to hearing officer with instructions to determine what, if any compensatory education would be appropriate to ameliorate the denial of FAPE); *Henry v. District of Columbia*, 750 F. Supp. 2d 94 (D.D.C. 2010)(same); 34 C.F.R. §300.508(d).

¹³ Absent any evidence suggesting quantum of the educational loss or evidence of what the proposed level and intensity of services are needed to provide a prospective FAPE, this hearing officer could not make an equitable award of compensatory education. Therefore, assuming the Parties can jointly agree on the magnitude of compensatory education, the Parties are free to forgo the independent compensatory education evaluation.

To the extent practicable, using the above, the evaluator should set out the essential elements of a well-articulated compensatory education plan that takes into account the Student's social, emotional and behavioral present levels of educational performance, abilities, individual circumstances and unique needs. At a minimum, the compensatory education "make whole" or "hour-for-hour" plan should include the type of service(s), frequency, intensity, range and magnitude of compensatory education service(s) needed to place the Student in the same position the Student would have received but for the denial of FAPE. The evaluator should review the then existing data about the Student's present education levels, past evaluations, and then current FBA data when crafting the essential elements of a well-articulated compensatory education plan.

Conclusion

In this instance, after reviewing the existing data and after giving due weight to the testimony of all of the witnesses I now find the District failed to identify the Student as a person with a disability in need of specially-designed instruction. An appropriate Order follows.

Order

And now, this 10th of August 2018, it is hereby **ORDERED** as follows:

1. I now find the District violated its child find obligation for this particular Student.
2. To remedy the mid-March 2018 denial of FAPE the District is Ordered to convene an IEP meeting within 10 calendar days to develop an interim IEP, which should include specially-designed instruction and an interim individual positive behavioral support plan.
3. Within 30 calendar days of the start of the school year, the District is further Ordered to conduct and complete a functional behavior assessment of any behaviors that impede the Student's learning in the new classroom.
4. Thereafter, within 10 calendar days, consistent with the remaining requirements at 22 Pa. Code Chapter 14, *et. seq.*, once the functional behavior assessment is completed, the IEP team should meet to review the results of the functional behavior assessment. The District should then, as part of that same meeting, prepare and offer an annual IEP that addresses the Student's disability, unique

needs, individual circumstances, including any behaviors that impede learning. The District is free to use its personnel to conduct the functional behavioral assessment and prepare the IEP.

5. Ten (10) calendar days after receiving the District's offer of FAPE, if the Parties cannot reach an agreement on the magnitude of compensatory education, the Parent should thereafter within 5-calendar days secure the services of an independent educational evaluator to calculate the magnitude of the compensatory education. Within 24 hours of selecting the evaluator, the Parent should notify the District of the name of the independent evaluator. The District is directed to make whatever arrangements necessary to ensure the evaluator has access to the Student's records and if necessary assist the evaluator in scheduling a time(s) to observe the Student in school.
6. To remedy the denial of FAPE, to the extent practicable, the evaluator selected by the Parent should conduct whatever assessment(s) he/she deems necessary to craft the essential elements of a well-articulated compensatory education plan.
7. The independent compensatory education evaluation/assessment should be completed within 25 calendar days of the evaluator's first observation. Once the well-articulated plan is completed, the evaluator should provide the plan to both Parties at the same time.
8. Ten (10) calendar days, after receipt of the plan, if the Parties continue to disagree about the magnitude of the independent compensatory education plan, the appropriate Party should file a request for a hearing. Otherwise, if the appropriate Party does not file a request for a hearing, within the 10 calendar days, in this Paragraph 8, consistent with this Order the District should immediately fund the services outlined in the well-articulated compensatory education plan.
9. The well-articulated compensatory education plan should include the type, intensity, magnitude and quantity of compensatory education services needed to place the Student in the same position the Student would have achieved but for the denial of FAPE.
10. The Parent has the sole authority to select any and all evaluator(s) to craft the compensatory education plan. The District is Ordered to pay the full market rate costs for the independent compensatory education evaluation, either in the Student's county of residence or surrounding counties, in Pennsylvania. The full market rate costs include but are not limited to the evaluator's ordinary and

reasonable expenses like time expended in conducting a classroom observation(s), travel costs, report writing expenses and attendance at one meeting to review the plan.

11. The District is Ordered to pay the full market rate costs for the Student to participate in the suggested compensatory education services, either in the Student's county of residence or surrounding counties, in Pennsylvania.
12. Subject to the above appropriate relief herein, the Parent's claim for compensatory education is dismissed without prejudice.
13. All other claims for appropriate relief or any other affirmative defenses are dismissed with prejudice.

Date: August 10, 2018

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer