

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

PENNSYLVANIA

## SPECIAL EDUCATION HEARING OFFICER

### DECISION

Child's Name: N. W.  
Date of Birth: [redacted]  
ODR File No. 18615-16-17KE  
CLOSED HEARING

Parties to the Hearing:

Parents  
Parent[s]

Local Education Agency  
Avon Grove School District  
107 Schoolhouse Road  
West Grove, PA 19390

Dates of Hearing:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney  
Stephen J. Jacobson, Psy. D.  
Jacobson & John LLP  
99 Lantern Drive, Suite 202  
Doylestown, PA 18901

LEA Attorney  
Kathleen M. Metcalfe, Esquire  
Sweet Stevens Katz & Williams LLP  
331 Butler Avenue  
New Britain, PA 18901

March 23, 2017; May 8, 2017; May 15, 2017; May 25, 2017<sup>1</sup>

July 5, 2017

Cathy A. Skidmore, M.Ed., J.D.

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<sup>1</sup> By agreement, the session on May 25, 2017 was conducted by conference call for the limited purpose of admitting exhibits and specifying a due date for the parties' closing arguments.

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>2</sup> is a late-teenaged student in the Avon Grove School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>3</sup> under the category of Other Health Impairment primarily based on Autism Spectrum Disorder. Toward the beginning of the 2016-17 school year, Student's thirteenth (school) year, Student engaged in conduct that violated the District's acceptable use of technology, and the consequences significantly impacted Student's post-secondary transition programming. Student's Parents subsequently filed a Due Process Complaint against the District raising claims under the IDEA, Section 504 of the Rehabilitation Act of 1973<sup>4</sup> (Section 504), and the Americans with Disabilities Act (ADA),<sup>5</sup> as well as the federal and state regulations implementing those statutes. The issues presented related to the 2015-16 and 2016-17 school years as well as prospectively.

The case proceeded to a due process hearing with evidence presented over three sessions,<sup>6</sup> and the decision due date was extended on requests by the parties jointly, or individually without objection, for good cause shown. The Parents sought to establish that the District failed to provide Student with an appropriate program individualized to Student's needs;

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

<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> 29 U.S.C. § 794. The federal regulations implementing Section 504 are codified 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).

<sup>5</sup> 42 U.S.C. §§ 12101-12213.

<sup>6</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. It should be noted that the District exhibits were considered to be jointly offered, and this hearing officer acknowledges with appreciation that the parties and counsel strived to provide a concise hearing record in addition to agreeing to participate in the electronic exhibits pilot program. 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.

and that compensatory education, independent educational evaluations (IEEs), and declaratory relief in the form of a prospective program and placement were warranted. The District maintained that its special education program, as offered and implemented, was appropriate for Student, and that there was no basis for ordering any remedy.

For the reasons set forth below, the Parents' claims will be granted in part.

### **ISSUES**

1. Whether the District complied with its obligations to provide Student with a free, appropriate public education, including with respect to post-secondary transition, during the 2015-16 and 2016-17 school years;
2. If the District failed in its obligations to provide Student with a free, appropriate public education during the two school years in question, should the District be ordered to provide compensatory education to Student;
3. If the District failed in its obligations to provide Student with a free, appropriate public education during the two school years in question, should the District be ordered to provide reimbursement to the Parents for certain expenditures they incurred in relation to Student's educational program;
4. If the District failed in its obligations to provide Student with a free, appropriate public education with respect to post-secondary transition programming, should the District be ordered to reinstate Student to the program that was implemented during the 2015-16 school year; and
5. Should the District be ordered to provide independent psychoeducational and occupational therapy evaluations and an independent functional behavioral assessment?

### **FINDINGS OF FACT**

#### **GENERAL BACKGROUND**

1. Student is a late-teenaged student who is a resident of the District and attended District schools during the 2015-16 and 2016-17 school years. Student is eligible for special

education pursuant to the IDEA under the classification of Other Health Impairment on the basis of several diagnoses including Autism Spectrum Disorder and Anxiety Disorder. (N.T. 42-44, 556; P-1; S-53 p. 21)

2. Student has difficulty with receptive and expressive communication as well as interpersonal relationships and social skills. (N.T. 54-55, 64, 560; S-1)
3. Student has difficulty with changes to routine and environments. (N.T. 55, 618, 631-32; P-1 p. 1)
4. Student has a high interest in technology and demonstrates talents in that field. Student participated in various technology-related activities at school<sup>7</sup> beginning in the fall of 2015 that continued into the fall of 2016. Some of those were extracurricular activities. The various tasks and activities ranged from physical assistance and interpersonal communications to making decisions and responding to teacher questions about technology use. (N.T. 50, 216-31, 244-46, 280, 305-06, 459-61, 584, 586, 641; P-21 pp. 1-3, P-27; S-38 pp. 7, 12)
5. Student also experiences anxiety in connection with technology. The ability to use technology is helpful to Student's learning and is essential for writing tasks which are quite difficult due to Student's disabilities. (N.T. 62-63, 459-60, 510, 566, 620-21, 632-33, 700-01)
6. The District utilizes a secured online portal that contains information about students such as demographic data, grades, and attendance. Teachers have access to more functions and content in the portal than do parents and students who are limited to their own information. However, teachers are not able to access the portal from outside school. (N.T. 246-49, 294-95, 423)

#### RELEVANT EDUCATIONAL HISTORY

7. Student previously attended school in the District before transferring to a cyber charter school during the second half of the 2012-13 school year and the entire 2013-14 school year, then to a small private school in another state for the 2014-15 school year. In April 2015, the Parents contacted the District about Student returning. (N.T. 151, 557-58, 562-64, 643, 645-47, 654-55, 659-60; P-4; S-2, S-3, S-9)
8. In the spring of 2014, following a new diagnosis of Asperger's Disorder when Student was enrolled at the cyber charter school, the Parents engaged the services of a private therapist to provide social skills training and counseling at the recommendation of a neurologist. The private therapy continued through the dates of the hearing sessions. Student also began receiving behavioral services in the home by the fall of 2014. (N.T. 560, 635, 650-52, 704-06; P-1, P-3, P-4, P-46, P-47)

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<sup>7</sup> The specific tasks and activities are not further described in this decision in order to help protect Student's privacy.

9. The frequency of Student's sessions with the private therapist varied over the time period in question, ranging from approximately weekly to approximately monthly. (P-46)
10. The cyber charter school evaluated Student in late spring/early summer in 2014 and issued an Evaluation Report (ER) in July of that year. In addition to Parent input and some teacher information, the ER summarized results of cognitive, achievement, and behavioral assessments. Results revealed average cognitive ability (FSIQ 108) and average to very superior achievement; strengths and weaknesses in adaptive skills; and a number of characteristics consistent with the Autism Spectrum Disorder diagnosis. Behavior rating scales completed by the Parents also yielded clinically significant concerns in a number of areas including anxiety, depression, withdrawal, adaptability, social skills, emotional self-control, executive functioning, and resiliency, and other at-risk concerns. (S-1)
11. Speech/language assessment reflected many areas of strength and no speech/language impairment. Among other things, an occupational therapy evaluation was recommended to assess sensory integration. The ER concluded with special education eligibility in the categories of Other Health Impairment and Autism. (S-1)
12. Educational programming recommendations in the ER were for social skills training, behavior support, post-secondary transition exploration, and anger management. Teachers recommended work completion and requesting help/communication be the focus of Student's program, and noted Student's lack of interaction with peers. (S-1)
13. The charter school evaluation in July 2014 was Student's last evaluation. (N.T. 51-52, 564)
14. An Individualized Education Program (IEP) created by the charter school team in the fall of 2014 reflected needs in the areas of work completion, self-advocacy and requesting help, social skills and development, regulating emotions, post-secondary transition, and initiating and accepting responsibility for assigned tasks; Student's anxiety and difficulty with new or changed routines and schedules were also noted as impacting Student's performance at school. (P-2)
15. The fall 2014 IEP included goals addressing time management and assignment completion, managing and regulating emotions, and self-advocacy. Post-secondary transition programming incorporated those goals in addition to career exploration. Program modifications/items of specially designed instruction (SDI) included guidance counseling as needed, assignment accommodations, and prompts and review of directions and expectations. Occupational therapy was included as a related service. (P-2)
16. Student's District-led IEP team met in May 2015 to review the prior IEP from the charter school to prepare for Student's return, and agreed that Student continued to have the needs specified in the cyber charter school IEP. Student attended the meeting. Updated present levels in the IEP for the transition to the District high school included Student having access to his/her own technology devices, which the team discussed and agreed to

at the meeting. (N.T. 60, 68, 151-52, 154-55, 565, 567-68; P-2 pp. 8-12, P-5, P-6 p. 1; S-4, S-5 pp. 5-9, S-7)

17. The May 2015 IEP revised the self-advocacy and assignment completion goals to be consistent with the high school environment, with baselines to be determined at the end of the first marking period. A number of new SDI were added: notification of changes to schedule, additional accommodations for certain classes based on Student's sensitivity, social skills instruction, ability to communicate with the guidance counselor or a Parent as needed when anxious, early/late arrival to or dismissal from classes, preferential seating, and self-advocating for assignment accommodations. Student's ability to use his/her own technology devices and programs/applications was part of the SDI, as was the ability to assist with certain technology during assemblies. Adaptive physical education was an additional related service. Student was determined to be not eligible for extended school year (ESY) services. Itinerant Autistic Support was specified for the program. (S-5)
18. The Parents approved the Notice of Recommended Educational Placement (NOREP) for itinerant Autistic Support. (S-6)

#### 2015-16 SCHOOL YEAR - FALL

19. Student's schedule included one period per day for Autistic Support and access to the learning center where Student might work on any needs in the IEP. Student also had one period per day for social skills instruction with the remainder of the day in regular education classes. (N.T. 156, 158)
20. Student's social skills class provided instruction in numerous areas such as communication, peer relationships, coping skills, transition, and self-advocacy. (N.T. 103-05)
21. Student preferred to assist with certain technology aspects of assemblies rather than sitting in the audience due to Student's sensory needs. Student was generally permitted to do so during the 2015-16 school year. (N.T. 91, 94-95, 218-19)
22. Student preferred to use Student's personal technology devices at school using the District's wireless network, and exhibited anxiety when not able to do so. Student was much more comfortable with personal devices using one operating system that was different from that used by the District's equipment. (N.T. 91-94, 97-98, 459-60, 492-93, 499, 566, 700-01; P-6)
23. At the start of the 2015-16 school year, Student went to school on the first day. However, Student did not believe Student was provided with full access to the District's wireless network and found the process to log in to be cumbersome. Student did not attend school for several days as a result until better wireless network access was made available to Student. (N.T. 100-01, 160-62, 459-60, 481-82, 510, 568; P-8, P-9, P-10, P-12; S-10 p. 9)

24. Student's IEP team met and revised that document in early September 2015 where Student's difficulty with accessing technology was discussed. One possibility mentioned was whether Student could use a District-owned device that utilized the same operating system that Student preferred. The present levels were updated. Student's English and Physical Education classes were changed to better meet Student's needs, and an additional period of academic support was added. SDI was also revised to include use of a discreet note to let a teacher know Student was experiencing anxiety and the addition of a provision for adapted assessments. Autistic and Learning Support increased to a supplemental level. (N.T. 100-02, 509-10; P-7; S-10)
25. The Parents approved the September 2015 NOREP for supplemental Autistic/Learning Support. (S-11)
26. Monthly guidance counseling sessions were added to the IEP later in September with the approval of the Parents. (P-13; S-13)
27. A Positive Behavior Support Plan (PBSP) was developed in late October 2015 to address Student's needs in regulating and managing emotions, particularly anxiety, and returning to non-preferred or difficult tasks. The District did not conduct an FBA in developing the PBSP but had data on Student's escape and avoidance behaviors. (N.T. 111, 172-73; S-16, S-18)
28. The Parents approved the addition of the PBSP to Student's IEP. (S-18 p. 1, S-19)
29. The District used a tally sheet to monitor Student's emotional responses when exhibiting feelings of anxiety or frustration. Monitoring of that goal required a teacher to recognize that Student was exhibiting anxiety or frustration or learn later from Student or one of the Parents. Teachers frequently reported seeing no problems with Student's emotional responses, although Student did communicate with the special education teacher at times to express anxiety, but at other times did not. (N.T. 71-77, 180, 203; S-16, S-29, S-40 pp. 4, 6-9, 13, 15-17, 19-21, 23-24, 27-28, S-46)
30. The District used a different tally sheet to monitor self-advocacy skills by noting when Student did exhibit behaviors such as asking a teacher for help or clarification. Student's regular education teachers communicated with the autistic support teacher to report on self-advocacy in their classes. However, Student exhibited self-advocacy skills that were not included on the tally sheets and communicated regularly with teachers about concerns over assignments. No data was taken on when Student did not use self-advocacy skills. (N.T. 80-90, 309; P-19S-40 pp. 2-3, 11-12, 18, 25, S-46)
31. A third tally sheet was used to monitor Student's assignment completion. (S-40 p. 1)
32. An occupational therapist began working with Student on managing and regulating emotions. There was some confusion at the beginning of the 2015-16 school year with respect to Student's occupational therapy needs, although the Parents indicated sensory integration was the primary need in that area. One occupational therapist suggested an evaluation for that related service, but one was not completed. (N.T. 206-08, 573; P-11 pp. 1-2, 6-8, P-13 p. 2; S-13 p. 5, S-14, S-21, S-24 p. 14)

33. In late November, Student and the Parents reported that Student was struggling with English and a mathematics class. (P-16; S-22 p. 3, S-23)
34. An IEP meeting convened on December 1, 2015. The team discussed Student's struggles with the English and mathematics classes, and agreed to additional accommodations to assist Student with the English class. Student enrolled in a virtual mathematics class to replace the then-current course. This IEP also added two occupational therapy goals addressing problem solving in unexpected situations and understanding body language; however, the amount of direct services would decrease before reduction to monthly consultation at the end of the second marking period. There were no meaningful baselines added to the other goals despite progress monitoring at the end of the first marking period. This IEP proposed continued Autistic/Learning Support at the supplemental level. (N.T. 174-75; S-24, S-26, S-27)
35. The Parents approved the revisions to Student's IEP in December 2015. (S-25, S-27)

#### 2015-16 SCHOOL YEAR - SPRING

36. In mid-December 2015, Student applied to be a teacher's assistant for the second semester of that school year with an instructor who taught technology-related classes and had significant experience in the field. Student was accepted as a teaching assistant and became even more involved with such activities in the District than had previously been the case. (N.T. 176-77, 181-82, 217, 225-31, 282-84, 301-03; S-28)
37. The application for teaching assistant included a list of guidelines, one of which states that the teaching assistant "will not be allowed to access" the District's student portal. Student and one of the Parents signed the application form. (S-28 pp. 2-3)
38. In the spring of 2016, the IEP team decided to provide Student with a mentoring opportunity for the thirteenth year with the teacher who had experience with and used technology in the District and for whom Student was a teaching assistant. Student would be mentored by the teacher and also engage in job shadowing (a single or partial day for gaining experience with a professional in the community) and possible internships (long term with more responsibility than job shadowing, paid or unpaid). Student was in agreement with that plan and the IEP was revised to reflect those decisions in March. Student reportedly had mastered the occupational therapy goals, but meaningful baselines remained absent from the IEP. (N.T. 112-16, 181-82, 185-87, 231-36, 332-37, 339-40, 368-70, 379, 584-85, 681; P-18; S-32)
39. As part of the discussion for the thirteenth year, the District suggested the possibility that Student could be employed by the District. The Parents rejected that option because they believed Student was not mature enough emotionally for employment. (N.T. 589-90)
40. The Parents approved the NOREP accompanying the March 2016 revised IEP for continued supplemental Autistic/Learning Support. (S-33)

41. At the annual May 2016 IEP meeting, the team continued to discuss the mentoring opportunity for the thirteenth year for half of the school day with a period of Autistic/Learning Support. Student's present levels of academic achievement and functional performance reflected positive input from Student's teachers, including the technology instructor, and described possible activities for the following school year. (N.T. 336-37, 586-; S-38)
42. Student's post-secondary transition interests were surveyed and described in the May 2016 IEP, focusing on Student's technology interests. Identified needs were the same as in prior IEPs (work completion, self-advocacy and requesting help, social skills and development, regulating emotions, post-secondary transition, and initiating and accepting responsibility for assigned tasks). The self-advocacy and assignment completion goals continued, and the transition program further specified research of training opportunities in areas of interest; developing study skills; improving time management skills; and creating/updating a transition portfolio. Minor changes to the SDI for the 2016-17 school year reduced the time spent in the learning center to one period per day and elimination of the social skills class. The program remained supplemental autistic/learning support. (P-21; S-38)
43. The team discontinued the PBSP after the May 2016 meeting because Student had mastered the goal. (N.T. 113-14, 126, 187-88; S-38 p. 7)
44. Student mastered the assignment completion goal during the 2015-16 school year. (N.T. 178; S-40 p. 1)
45. The Parents approved the NOREP accompanying the May 2016 IEP. (S-39)
46. Student earned final grades in the B+ to A+ range in all classes for the 2015-16 school year. (S-43)
47. Student attended graduation at the end of the 2015-16 school year with a few accommodations provided, but did not receive a diploma. (N.T. 190, 580-81; P-23 p. 2; S-44)

#### 2016-17 SCHOOL YEAR - FALL

48. Student began the 2016-17 school year mentoring with the assigned technology instructor. In that role, essentially continuing to function as a teaching assistant and more, Student had more authority than did most students and accepted responsibility for many technology tasks in the District. (N.T. 120-22, 243-47, 287-88, 292-93; P-27; S-48, S-49, S-52)
49. Student had some confusion over Student's status at school during the thirteenth year, since Student did not fit squarely within the role of either a student or a staff member at the District. Student spoke with the private therapist about that confusion during counseling sessions. (N.T. 309-11; P-47)

50. Student attended some staff meetings that students generally do not attend where new technology was proposed and considered. (N.T. 256-58, 274-75)
51. Because Student worked closely with the mentoring teacher, Student was exposed to, or provided with that teacher's password for accessing, the District student portal and other computer programs and related purposes. Student did not have permission to log on to the portal as the teacher and was aware of that absence of permission. (N.T. 246-53, 296, 312-13, 470; P-25, P-28 p. 10)
52. Student had one period scheduled for autistic support and work in the learning center several times each six-day cycle. (N.T. 114, 121-22)
53. Student no longer had academic or social skills classes at the start of the thirteenth year. (N.T. 116-18)
54. Student frequently spent many more hours at school with the technology teacher than the half day specified in the IEP. (N.T. 244)
55. Student planned to take courses at a local community college during the thirteenth year, but dropped the classes. Student did complete a summer course there. (N.T. 119-21, 185-86, 588, 682-84)

#### OCTOBER 2016 INCIDENT AND THROUGH END OF 2016

56. In October 2016, Student used a Virtual Private Network from home to access the District's online portal system that was restricted to teachers, a task that required sophisticated technology skills to accomplish. In doing so, Student gained access to the District's database to obtain information [redacted]. (N.T. 253, 296-98; P-28 pp. 9-10, P-32 p. 2; S-51 pp. 53-56)
57. [Redacted] (N.T. 288, 407-08, 439-40, 463, 484-85; P-28; P-32 pp 1-2; S-50, S-51)
58. Student was not questioned about how the access to the online portal was accomplished. (N.T. 470)
59. Student was suspended from school as a result [redacted], and the District notified the Parents. Student was out of school for approximately ten school days. (P-28 pp. 1-3; S-50 pp. 1-2, S-56, S-58)
60. Student was determined to have violated the District's policy on acceptable use of technology. The Parents were also notified of that determination. (N.T. 406-08, 468; P-29; S-50 p. 2)
61. A major consequence of Student's violation of the District's acceptable use of technology policy was revocation of Student's access to the District's technology including the wireless network. Student was not precluded from using Student's own devices including using one as a hotspot to access the internet; Student could also use a District

- device with oversight and supervision or monitoring of usage. (N.T. 130, 408-12, 444-45, 473-74, 479, 515, 519-22, 534-39; P-31; S-55)
62. Student's hotspot is part of a parentally-paid data plan. (N.T. 520-21, 630)
  63. Student was offered a District-provided word processing program that was not compatible with Student's preferred operating system. (N.T. 130)
  64. The District held a manifestation determination meeting on November 3, 2016. The team concluded that the behavior was a manifestation of Student's disability based in part on Student's social skill deficits and difficulties with interpersonal relationships as well as perseveration tendencies. (N.T. 123-24, 196-99, 389-98, 423-24, 467-68, 607-10; P-32; S-53 pp. 4-8)
  65. The Parents agreed that the behavior was a manifestation of Student's disability, but not with the proposed action of providing transitional employment skills through community based instruction. (N.T. 690-93; S-53 pp. 8-9)
  66. After the manifestation determination meeting, the District became aware that Student had accessed the District's online portal. That particular conduct was not considered in connection with any manifestation determination but was determined to be further violation of the District's acceptable use of technology policy. The District ultimately found violations for: user logging on as another individual without permission; [redacted]. (N.T. 470-71, 485-87, 606; P-32 p. 2, S-50 p. 4)
  67. An IEP meeting was held following the manifestation determination. The team discussed options for providing vocation-oriented programming to include development of necessary "soft" employment skills, but the Parents did not wish to pursue possibilities outside of the District. The team concluded that Student should continue to be provided with autistic support and the mentoring opportunity with a focus on post-secondary transition skills. (N.T. 126, 128-39, 198-99, 408-09, 412-18, 429-32, 450-52, 692, 695-96, 699-700; S-53)
  68. The District employs a Board Certified Behavior Analyst (BCBA) who participated in the November meeting and later in developing a news PBSP. That BCBA also provided private services to Student. (N.T. 442-43, 666, 678-79)
  69. Student's IEP was slightly revised in November 2016, briefly noting the November 10, 2016 meeting and adding sentences on Student's progress toward the goals (self-advocacy and assignment completion) during the first marking period. In all other respects, the IEP was the same as that finalized in the May 2016 IEP. (P-35; S-53 pp. 12-36)
  70. The Parents did not approve the NOREP accompanying the November 2016 IEP. They sought but later withdrew a request for mediation. (P-30; S-54)

71. Student did not fill out a job-shadowing application until November 2016. Student had expressed difficulty in completing that form and had requested a digital version in early September 2016. (N.T. 338-44, 372; P-24 pp. 1-4)
72. At a meeting in December 2016, Student, the Parents, and a number of District staff members met to discuss future planning to include job shadowing opportunities and Student's creation of a digital portfolio. The same teacher with technology expertise would continue to mentor Student with respect to the digital portfolio. (N.T. 199-200, 489-90; S-55 pp. 9-11)
73. Student did not attend school for a period of time, approximately two months, after the December 2016 meeting. (N.T. 200, 202, 490-91, 617-19, 698-700, 709-11; S-56 p. 1, S-58, S-66)

#### 2016-17 SCHOOL YEAR - SPRING

74. Student exhibited signs of depression and isolated Student's self from others prior to returning to school in February 2017. (N.T. 620-21, 623-24, 626-28)
75. After Student returned to school, Student's schedule provided for only a few classes that were limited to 55 minutes on some days and up to 2.5 hours on others. Three periods each six day cycle were for a repeat of the social skills class Student had successfully completed. Student maintained regular attendance after returning in February. (N.T. 202-03, P-45 p. 1; S-66 pp. 2, 4)
76. [Redacted]. (N.T. 258-59)
77. [Redacted]. (N.T. 129-32, 135-36, 261, 266-67, 298, 410-11)
78. Student usually met with the technology teacher in other classrooms after the fall 2016 incident. By the spring of 2017, Student was meeting with the mentoring teacher one time each six-day cycle for thirty minutes. (N.T. 129-30, 277)
79. After the incident, the mentoring teacher closely monitored and supervised Student. Because that appeared to the teacher to be unproductive use of the teacher's time, Student was expected to perform technology related activities outside of that teacher's classroom. The focus moved toward Student building a digital portfolio and exploring career opportunities. (N.T. 261-62, 264-65, 271, 276-77)
80. Student spent more time with the autistic support teacher and returned to the social skills class. (N.T. 133-35, 494-95, 625)
81. Student no longer attended staff meetings. (N.T. 257-58)
82. With one exception, Student was no longer permitted to participate in the various technology-related production activities at school. (N.T. 129-32, 135-36, 199, 202, 261-68, 271, 276-77, 298, 410-11, 476; P-31; S-55 pp. 1, 4)

83. In order to permit Student to participate in technology-related activities at school, Student would require a highly trained one-on-one aide who was sophisticated in the technology that Student would use. (N.T. 269-72, 528-29)
84. Student was permitted to participate in one technology-related extracurricular activity at school with a one-on-one aide. That activity did not involve access to the internet. There was a brief delay in securing the aide for that activity due to the aide's illness. (N.T. 264, 306, 495, 523, 539-40, 542; P-45 pp. 2, 7)
85. District personnel typically assist students in exploring job shadowing and internship opportunities. They assisted Student and made initial contacts in the spring of 2017, but expected that Student would follow up with contacts that responded, with support if needed, or initiate other potential contacts. (N.T. 277-79, 335-36, 364-65, 380-83)
86. For job shadowing and internship opportunities, once Student completed the job-shadowing application form, District professionals contacted several area businesses but met with limited success, in part because there were few relevant businesses in the geographic area. Student did job shadow a District employee on one occasion on an outside job. (N.T. 237-40, 242, 337-38, 346-47, 352, 372-76)
87. An IEP meeting convened in January 2017. Student did not attend. The team members present discussed possibilities for job shadowing and internships and the impact of Student's lack of access to District technology. The transition goals remained from the prior IEP and newly added were a job shadowing/internship opportunity and direct social skills instruction. In the main section of the IEP, the assignment completion goal was removed as having been mastered; the self-advocacy goal continued and was supplemented by a second self-advocacy goal relating to identification of successful use of those skills. Two behavior goals were added. The SDI section added a second learning center period each day and a return to the social skills class; removed the provision for assisting with technology during assemblies; and included several new provisions for a modified schedule to gradually return to school, make referrals to outside agencies including to a local Intermediate Unit job coach, and a one-on-one aide during extracurricular activities. A PBSP was attached to the IEP targeting [redacted] and refusal to attend school. The proposed program was for supplemental autistic support. (N.T. 200-02; P-43; S-59)
88. The new PBSP was developed without an FBA. The District members of the IEP team believed they had sufficient information about Student's behavior and the incident in question was an isolated behavior. The team also considered that Student's placement was not to change. The PBSP goals related to initiating and maintaining peer relationships, and identification of anxiety causes and successful coping strategies. (N.T. 126-27, 401-04, 442-43; S-59 pp. 31-32)
89. The Parents did not approve the January 2017 NOREP and requested a due process hearing. (S-60)

90. By the spring of 2017, District staff were expanding their search of job shadowing and internship opportunities for Student. (N.T. 299-300, 339-41, 353-56, 361, 377-80, 449-51; S-61, S-68)
91. Student participated in a second job shadowing opportunity for a half day arranged by the District in early February 2017. Student did not continue with that opportunity because it was not an area of interest. (N.T. 356-57, 366, 375-76, 633-34)
92. During the 2016-17 school year, Student performed technology-based services for the counseling practice where Student has been receiving therapy. Student earned credit from the District for a job-shadowing experience for those services, but Student was not interested in pursuing that opportunity as an internship. Student also periodically performed technology-related work for a [redacted] company. (N.T. 304-06, 348-49, 358-61, 634-35, 638-39. 685-88; P-24 pp. 5, 7-8; S-56, S-61 pp. 18, 38-40)
93. The frequency of Student's sessions with the private therapist did not materially change after the incident compared to the relevant period of time when Student attended school in the District during the 2015-16 and 2016-17 school years before the incident. (P-46)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### GENERAL LEGAL PRINCIPLES

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 in this case must rest with the Parents who filed the Complaint and requested the hearing. Nevertheless, application of this legal principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position, which is the case here.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of each 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 to be generally credible, testifying to the best of his or her recollection from his or her own perspective. The testimony of the technology teacher in particular was accorded substantial weight in light of his significant interactions with Student and very clear knowledge and experience in his field of expertise, particularly regarding the specifics of the incident involving Student's access of the online portal<sup>8</sup> and the near impossibility of securing a one-on-one aide who would have the expertise to truly monitor Student at school; but the testimony of all witnesses was relatively consistent as a whole, and will be discussed further as necessary. It merits mention that the Parents in this case are clearly loving and devoted advocates for Student; and the District professionals involved with Student's education were not only dedicated but openly regarded Student highly. In reviewing the record, the testimony of every witness and the content of each exhibit were thoroughly considered in issuing this decision.

#### IDEA PRINCIPLES

The IDEA and state and federal regulations obligate local education 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*

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<sup>8</sup> There were objections to specific testimony by the Parent that were taken under advisement (N.T. 577-79, 602-03) and contradicted this teacher's description of the complexities involved in Student's access to the portal from home. While those objections are hereby overruled because they serve to explain certain aspects of the Parents' position on the issues, the weight given to that testimony was minimal as it was clear hearsay with limited indicia of reliability under the circumstances; and, one must also consider that what Student may consider to be easily accomplished must be viewed in the context of Student's own clear technological sophistication and expertise.

*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 permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free 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 Individualized Education Program (IEP), which 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 considered anew the application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA[.] \* \* \* A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the

child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. \* \* \* As we observed in *Rowley*, the IDEA "requires participating States to educate a wide spectrum of handicapped children," and "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."

*Endrew F.*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017) (citing *Rowley* at 206-09). 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. This is especially critical where the child is not "fully integrated into the regular classroom." *Id.* The Court thus concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit.<sup>9</sup>

As *Rowley*, *Endrew*, and the IDEA make clear, the IEP must be responsive to the child's identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, the IEP need not "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Furthermore, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

#### GENERAL SECTION 504 AND ADA PRINCIPLES

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a

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<sup>9</sup> At least two federal District Courts in Pennsylvania have recently opined that the *Endrew* decision did not change Third Circuit jurisprudence regarding the standards for judging whether a special education program is appropriate. *E.D. v. Colonial School District*, No. 09-4837, 2017 U.S. Dist. LEXIS 50173, at \*36 (E.D. Pa. Mar. 31, 2017); *Brandywine Heights Area School District v. B.M.*, 2017 U.S. Dist. LEXIS 47550, at \*29 n. 25 (E.D. Pa. Mar. 28, 2017).

handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). In Pennsylvania, Parents may request an administrative hearing under Section 504 and Chapter 15 to challenge an LEA’s identification, evaluation, or programming for a protected handicapped student. 22 Pa. Code § 15.8.

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

#### STUDENT’S EDUCATIONAL PROGRAM

Parents who believe that a local education agency (LEA) has failed to comply with its obligations under the IDEA may file a Due Process Complaint wherein they may “present a complaint [] with respect to any matter relating to the identification, evaluation, or educational

placement of the child, or the provision of a free appropriate public education to [a] child.” 20 U.S.C. § 1415(b)(6)(A). An administrative hearing will be held on the issues presented. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.511, 300.512, 300.515; 22 Pa. Code § 14.162. In this matter, the Parents’ filed such a Complaint and challenged the District’s program over the 2015-16 and 2016-17 school years.

#### 2015-16 SCHOOL YEAR

Prior to Student’s return to the District in the fall of 2015, the District convened an IEP meeting to have a plan in place well in advance of the start of school. Armed with an ER that contained only limited teacher input, and recognizing that Student would be making a significant change from a cyber-school program, it is puzzling that the District did not consider whether any further evaluation should be undertaken. The IEP itself mirrored the previous cyber-school IEP to a significant extent, but also incorporated a substantial number of appropriate program modifications and SDI based on Student’s understood needs. On its face, and prior to Student’s enrollment in the District, this hearing officer cannot conclude that the May 2015 IEP was not reasonably calculated to yield meaningful educational benefit to Student under all attendant circumstances.

Early in that school year, IEP team promptly addressed a number of concerns that arose once Student began school: Student’s access to the wireless network, difficulties with certain classes, need for counseling, and a PBSP to address additional needs. The Parents inquired about occupational therapy, and noted that the need was for sensory integration; however, a suggested evaluation was not conducted and it is therefore impossible to ascertain whether the services provided and goals for that related service were appropriate for Student, or whether discontinuation of occupational therapy was warranted in the spring of 2016. The discussion

*infra* will address the consequences of these irregularities with the occupational therapy services.

Further revisions in December 2015 again addressed difficulties that Student was having in two classes and need for additional SDI. However, no meaningful baselines were added to the IEP goals, and the chosen methods of monitoring Student's progress on the goals relating to anxiety/emotional responses and self-advocacy were not based on objective measurement, and lacked information on occasions that Student did not express anxiety or self-advocate, thereby proving to be less than accurate. Without any means to understand whether Student was making progress on these goals, this hearing officer concludes that Student was denied FAPE in these areas, and compensatory education shall be awarded for that deprivation.

The Parents also challenge the self-advocacy and emotional response goals as vague and not responsive to Student's needs as identified in the cyber charter school ER; they also claim many of those needs were not otherwise addressed. (Parent Closing at 12-15, 17-18) However, while the District's IEP documents could have been more detailed, the special education teacher provided persuasive testimony about the "umbrella" of social skills that included self-advocacy, interpersonal communications, and emotional responses including coping skills.<sup>10</sup> (N.T. 68-69, 79-80, 103-05) Thus, despite the flaws noted above with respect to monitoring of those two goals, Student's program as implemented directly addressed Student's identified needs through means reasonably calculated to provide Student with meaningful benefit, and did not amount to a denial of FAPE during the 2015-16 school year.

By the spring of that school year, Student was acting as a teaching assistant with an expanded role in one particular classroom and a focus on technology activities throughout the

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<sup>10</sup> For these same reasons, this hearing officer finds no denial of FAPE in Student's taking the social skills class again after the fall 2016 incident despite the Parents' contention that the repetition was not beneficial for Student. (Parents' Closing at 21)

school day. Still, despite the above-mentioned flaws in the implementation of Student's program and the breadth of the technology activities in which Student was engaged outside of the curriculum, Student excelled in all classes with very high marks and, notably, mastered the assignment completion and PBSP goals. The IEP team was also already considering a creative approach to Student's thirteenth year that would be specific to Student and permit acquisition of post-secondary transition skills and experiences. That spring semester was clearly a successful period for Student other than the continued deprivation relating to the self-advocacy and anxiety/emotional response goals for which compensatory education shall be awarded.

#### 2016-17 SCHOOL YEAR

The start of the thirteenth year held much promise for Student. Although Student reportedly harbored some confusion given the new and different status at school, Student accepted responsibility for and productively handled a number of tasks that ordinarily would have been assigned to a District professional. With the exception of the continued flaws regarding the self-advocacy and anxiety/emotional response goals and Student's concerns expressed to a counselor about uncertainty over Student's role, the start of that school year appeared to be an effective and a positive experience for Student from which Student gained significant benefit. There thus can be no question that the incident in October 2016 had a devastating impact on Student's educational program.

Before examining the program itself, it merits mention that both parties devote significant portions of their closing arguments on the question of whether the District unilaterally and improperly changed Student's placement after the manifestation determination, after the Parents disagreed with the proposed action and initiated mediation. (Parents' Closing at 5-7; District's Closing at 19, 21-23) The IDEA expressly provides that

during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child[.]

20 U.S.C. § 1415(j). *See also* 34 C.F.R. § 300.518(a). This language is “unequivocal” and is “an absolute rule in favor of the status quo.” *Drinker v. Colonial School District*, 78 F.3d 859, 864 (3d Cir. 1996)(citations omitted). “The stay-put provision’s protective purpose means that ‘it is often invoked by a child’s parents in order to maintain a placement where the parents disagree with a change proposed by the school district.’” *M.R. v. Ridley School District*, 744 F.3d 112, 124 (3d Cir. 2014) (quoting *Susquenita School District v. Raelee S.*, 96 F.3d 78, 83 (3d Cir. 1996)).

As courts have recognized, often “[t]he relevant inquiry ... becomes the identification of the ‘then current educational placement.’” *Drinker, supra*, at 865 (citation omitted); *see also Susquenita, supra*. The Third Circuit has explained that “the dispositive factor in deciding a child’s ‘current educational placement’ should be the Individualized Education Program ... actually functioning when ‘stay put’ is invoked.” *Drinker, supra*, at 867 (citations omitted). In other words, the critical question is what is “the operative placement actually functioning at the time the dispute first arises.” *Id.* (quoting *Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 625-26 (6th Cir. 1990)) (emphasis added). As both parties observe, however, the term “placement” is not defined in the IDEA. Here, while Student’s programming and services did undergo dramatic change after the manifestation determination, the adjustments were not without reason and, in this hearing officer’s estimation, were not technically in violation of the existing IEP so as to constitute a procedural violation. In any event, whether or not one might consider that the District changed Student’s placement is not a critical determination to make, since it is the implementation of Student’s educational program following the fall 2016 events that must be

considered and evaluated in light of the circumstances.

The District certainly faced a serious challenge in responding to Student's violation of its technology policy, particularly in light of the high level of Student's sophistication.<sup>11</sup> This hearing officer cannot fault the District in declining to permit Student to continue to access its wireless network without some form of monitoring or supervision, or in restricting Student's activities at school that involved technology [redacted]. It is unclear whether the District again offered to permit Student to use a District-owned device of the operating system that Student preferred after October 2016, but it did not outright deny Student the ability to access technology and Student's own devices at school. Rather, the District reasonably insisted on safeguards to protect all of its students, including Student.

Still, the post-secondary transition opportunities for Student essentially came to a screeching halt in November 2016. Student's meetings with the mentoring teacher decreased dramatically in both form and duration, Student's ability to engage in preferred technology activities that provided significant opportunities for skills such as making decisions and engaging in job-like interpersonal relationships was markedly reduced, and the search for job-shadowing and internship opportunities in the geographic area was hampered by Student's difficulty in completing a required form and then lukewarm responses to Student's and District inquiries of various organizations and companies into potential opportunities. The expectation that Student would initiate or follow up on possible contacts without providing specific supports to assist Student in doing so also raises concerns given Student's deficits in language and interpersonal skills.

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<sup>11</sup> Although the Parents suggest that the District's initial response [redacted] was an overreaction (Parents' Closing at 8-9), the subsequent discovery that Student had accessed the District's online portal provided ample justification for its restrictions on Student's use of technology that were well explained at the hearing.

On the other hand, the very reasonable suggestion by the District that Student pursue vocation-oriented programming outside of the District was rejected by the Parents who remained steadfast in their position that Student should be returned to the same situation as at the start of the 2016-17 school year. Student did participate in several job-shadowing opportunities and received credit for at least one with the counseling practice; and, the internships were clearly mere possibilities rather than specific directives. Moreover, given the lack of success in finding potential job-shadowing and internship options, it is noteworthy that Student had not previously participated in vocational experiences and activities, particularly since the Parents recognized that Student was not yet ready for employment in the fall of 2016; therefore, it is also puzzling why they did not agree to consider exploration of additional career paths that may not have aligned exactly with Student's interests but would have permitted the acquisition of "soft skills" as well as a learning experience in accepting and adapting to something other than the most desired employment.

On balance, this hearing officer concludes that the significant changes to Student's post-secondary transition programming after October 2016 and through the end of the 2016-17 school year, wherein Student was not afforded the same level of special education programming toward those transition goals even beyond the mentoring opportunity, amounted to a denial of FAPE for which an equitable amount of additional compensatory education shall be awarded.

With respect to the requested prospective relief, at the hearing, the Parent conceded that they no longer sought to have Student reinstated to the role in which Student began the thirteenth year. (N.T. 695) The District also sought a directive (District's Closing at 34) that Student be provided a community-based out-of-District placement for the 2017-18 school year. In light of the need for further evaluations before any decisions may be made on future programming,

discussed *infra*, neither of these requests will be granted.

Finally on the issues of FAPE, having reached the above conclusions under the IDEA, there is no need to separately discuss the Parent's coextensive Section 504 and ADA claims, beyond noting that the same determinations are reached with respect to denial of FAPE and consequent disability-related discrimination under those two statutes.

#### COMPENSATORY EDUCATION

As one remedy, the Parents seek compensatory education, which is an appropriate form of relief where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C., supra*. Such an award may compensate the child for the period of time of deprivation of educational services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has recently endorsed a different approach, sometimes described as a "make whole" remedy, where the award of compensatory education is designed "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

This hearing officer observes that the record does not include evidence on an appropriate equitable remedy that would place Student in the position where Student would be absent the FAPE denials described above. Thus, the hour-for-hour method provides a basis for the appropriate approach, although the number of hours is difficult to quantify in light of the

complexities of this case.

For the 2015-16 school year, where Student clearly excelled academically and enjoyed significant successful opportunities with technology experiences, Student shall be awarded one hour of compensatory education for each day that Student attended to remedy the FAPE deprivation regarding self-advocacy and emotional regulation beginning with the first day of the second marking period, by which time baselines for those goals should have been established and reviewed, for the reasons set forth above.

For the 2016-17 school year, the same one hour of compensatory education shall continue for each day that Student attended through December 2016 since the self-advocacy and emotional regulation programming remained essentially the same. In addition, for the changes in and reduction of the mentoring opportunity and the decrease in special education services in the schedule that began in February 2017, Student shall be awarded two hours for each school day that Student attended from February 2017 through the end of the 2016-17 school year. As an additional equitable remedy for the overall delay in and reduction of post-secondary transition services beyond the mentoring opportunity, and lacking evidence from which a precise calculation may be made for experiences such as job-shadowing and possible internships, Student shall be awarded twenty five hours of compensatory education.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product, or device that furthers Student's post-secondary transition or social/emotional/behavioral needs and skills. The compensatory education shall be in addition to, and shall not be used to supplant, educational

and related services that should appropriately be provided by the District. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents, and may be used at any time from the present until Student turns age twenty-two (22). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents.

#### REIMBURSEMENT

The Parents also seek reimbursement for Student's data plan that was used and for which they paid, as well as the private counseling that has been provided. While the counseling and data plan costs were incurred within the period of deprivation as discussed above, the test for reimbursement for a parentally-provided program or service includes three separate inquiries: first, a finding must be made that the program offered by the public school did not provide FAPE; second, it must be determined that the private placement is proper; and third, equitable considerations may operate to reduce or deny reimbursement. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T., supra*, 575 F.3d at 242. Here, the record does not establish by a preponderance of the evidence that any of the counseling expenses were a result of aspects of the District's educational programming for Student. While the therapy was very likely helpful for Student and did appear to supplement the previous cyber-school program, it is not evident that the District was made aware of the extent of Student's confusion over Student's role at school during the thirteenth year, or that it was provided with an opportunity to address those difficulties. With respect to the data plan, the District did not outright deny Student access to technology, but merely granted Student permission to use a personal hotspot. The record does not establish that either of these expenditures resulted to any meaningful degree from the

District's special education programming decisions for Student and, accordingly, reimbursement for the claimed expenses incurred by the Parents must be denied.

#### INDEPENDENT EDUCATIONAL EVALUATIONS

The last issue is whether the District should be ordered to provide independent psychoeducational and occupational therapy evaluations and an FBA. When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Following a parental request for an IEE, the LEA must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). Here, the Parents did not make any such request of the District, which has not yet conducted an evaluation. In this circumstance, the Parents have not been presented with a District evaluation with which they could disagree.

This hearing officer has no reason to doubt that the District is capable of conducting a sufficiently comprehensive evaluation of Student, which at this point in time is statutorily mandated. 20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2). Nevertheless, it is also not insignificant that the District did not pursue a suggested occupational therapy evaluation in the fall of 2015, and has never conducted an initial evaluation, or even an FBA despite the determination that Student's behavior was a manifestation of the child's disability, requiring the IEP team to either conduct an FBA and implement a behavior intervention plan, or review and modify an existing behavior plan. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f).

The law is clear that hearing officers have the authority to order an IEE at public expense as part of a due process hearing. 34 C.F.R. § 300.502(d). In an exercise of the hearing officer's

broad discretion to fashion an appropriate remedy under the IDEA,<sup>12</sup> and recognizing that the objective viewpoint of neutral, qualified professionals would no doubt greatly assist the parties with programming decisions for the fall of 2017 and beyond, the District will be ordered to provide an independent psychoeducational evaluation (IEE) of Student, which shall be comprehensive and include recommendations for Student’s future post-secondary transition planning, for consideration of the IEP team upon its completion. *See Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 698 (11<sup>th</sup> Cir. 2012) (explaining that the remedy of a publicly funded IEE services to “guarantee meaningful participation [of the Parents] throughout the development of the IEP” and placement decision going forward) (quoting *Schaffer, supra*, 546 U.S. at 60-61 (noting that an IEE can afford parents “a realistic opportunity to access the necessary evidence” and information relating to an appropriate program and placement for their child)). The District shall also provide an independent occupational therapy evaluation. However, with respect to an FBA, such should ideally be conducted in the environment where behaviors are occurring, and future placement at this point in time is yet to be determined. Should an FBA appear to be necessary in the fall of 2017 or a later date, there is nothing in the record to suggest that the BCBA employed by the District who knows Student is not qualified to conduct that assessment.

## **ORDER**

AND NOW, this 5<sup>th</sup> day of July, 2017, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District failed in part its FAPE obligations to Student under the IDEA.

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<sup>12</sup> *See, e.g., Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009).

2. The District shall provide Student with compensatory education as follows:
  - a. One hour of compensatory education for each day that the District was in session from the start of the second marking period to the end of the 2015-16 school year,
  - b. One hour of compensatory education for each day that Student attended school from the start of the 2016-17 school year through Student's last day in December 2016;
  - c. Two hours of compensatory education for each day that Student attended school from February 2017 through the end of the 2016-17 school year; and
  - d. Twenty five hours of compensatory education for the overall reduction in post-secondary transition services after October 2016.
3. The compensatory education award is subject to all of the following conditions and limitations:
  - a. Student's Parents may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student's post-secondary transition or social/emotional/behavioral needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District.
  - b. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents, and may be used at any time from the present until Student turns age twenty-two (22).
  - c. The compensatory services shall be provided by appropriately qualified professionals selected by the Parent.
4. The District shall provide an independent psychoeducational evaluation and an independent occupational therapy evaluation.
  - a. Unless otherwise agreed, within five calendar days of the date of this Order, the District shall provide to the Parents a list of not less than three local professionals who are qualified to conduct an independent psychoeducational evaluation. The Parents shall make an election from that list within five calendar days of receipt of the list, and notify the District in writing.
  - b. Unless otherwise agreed, within five calendar days of the date of this Order, the District shall provide to the Parents a list of not less than three local professionals who are qualified to conduct an occupational therapy evaluation. The Parents shall make an election from that list within five calendar days of receipt of the list, and notify the District in writing.

- c. If the Parents do not notify the District, in writing, of their selections under ¶¶ (a) and (b), the District shall promptly make the selection(s) from the same lists.
  - d. The selected evaluators shall be given access to Student's education records, and shall determine the scope of the evaluations.
  - e. The selected evaluators shall conduct the evaluations as soon as possible and disseminate final written reports of the evaluations within forty five calendar days of the date of this Order.
  - f. The independent evaluations shall be at public expense.
  - g. Any additional evaluations recommended by the private evaluators shall be at public expense.
  - h. A meeting of Student's IEP team shall promptly convene upon completion of the IEE reports to review the results of those evaluations to guide programming decisions for the 2017-18 school year
5. Nothing in this decision and order should be read to prevent the parties from mutually agreeing to alter any of the terms of this decision and Order.
  6. The claims presented under ADA and Section 504 are DISMISSED as having been fully addressed under the IDEA.

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  
ODR File No. 18615-1617KE