

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: 19230-16-17

Child's Name: J. C. **Date of Birth:** [redacted]

Dates of Hearing:
10/5/2017, 11/14/2017, and 1/8/2018

Parents:
[redacted]

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Hearing Officer: Cathy A. Skidmore, Esquire **Date of Decision:** 2/15/2018

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a mid-teenaged student residing within the Greensburg Area School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² based on identification as a child with Autism Spectrum Disorder, a Specific Learning Disability, and a Speech/Language Impairment. Student attended school in the District through the end of the 2014-15 school year when Student enrolled in a charter school where Student currently attends.

Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA),⁴ as well as the federal and state regulations implementing those statutes, beginning with the 2012-13 school year through enrollment in the charter school. Following an evidentiary hearing on the District's Motion to limit the scope of the time period at issue, the Parents were permitted to pursue claims from February 2015 through the end of the 2014-15 school year including extended school year (ESY) programming in the summer of 2015. Two sessions convened for substantive evidence on

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

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

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

⁴ 42 U.S.C. §§ 12101-12213.

the FAPE and discrimination claims⁵ that focused on the District's response to an incident involving Student that was disclosed in early February 2015.⁶

For the reasons set forth below, a majority of the Parents' claims must be granted.

ISSUES

1. Whether the District denied FAPE to Student following a February 5, 2015 disclosure about an incident involving a peer;
2. Whether the District discriminated against and acted with deliberate indifference toward Student in violation of Section 504 following the February 5, 2015 disclosure;
3. If the District did deny FAPE to Student, should Student be awarded compensatory education; and
4. If the District did deny FAPE to Student, should the Parents be awarded reimbursement for certain expenditures?

FINDINGS OF FACT

1. Student is a mid-teenaged student who was enrolled in the District from entry into kindergarten in the fall of 2010 through the end of the 2014-15 school year. (N.T. 32-34; S-31)
2. Student is a child with a disability and during the relevant time period was identified as eligible for special education under the classifications of Autism, Specific Learning Disability, and Speech/Language Impairment. (N.T. 32-33, 36; S-31, S-33)
3. The District is a recipient of federal financial assistance. (N.T. 34)

⁵ Citations to the record will be as follows: 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. Citations to duplicative exhibits may be to one or the other or both. HO-4, notice of cancellation of the final hearing session as not needed, was provided to the parties by email on January 11, 2018 and is hereby admitted. The term Parents in the plural is used in this decision when it appears that one or the other was acting on behalf of both.

⁶ The parties' tolling agreement dictated the beginning of the period of the scope of the claims. (HO-2; S-40)

RELEVANT DISTRICT POLICIES

4. The District's attendance policy specifies that, after a third unexcused absence, "parents/guardians/students will be notified that the truancy elimination process is being initiated," and after a fourth unexcused absence, the parents/guardians will be contacted for development of a truancy elimination plan. (P-17 pp. 5-6)
5. The District has policies regarding bullying and bus discipline and safety. (P-17)
6. The District's policy on unlawful harassment provides a complaint procedure when a student reports being a victim of an incident that he/she believes violates the policy. The procedure when a student reports such an incident includes notification of the building principal; notification of the superintendent; an investigation by the building principal; a written report to the superintendent; and notification to the victim and the accused of the outcome of the investigation and recommendations for disposition of the complaint. There is a procedure for appealing the disposition of the complaint. (P-17 pp. 18-22)

EDUCATIONAL HISTORY

7. Student was first evaluated by the District in the spring of 2009 in preparation for entry into school-aged programming from early intervention. Assessments of Student's cognitive ability, kindergarten-readiness, and speech/language skills (articulation and oral language) were part of the process. In the resulting Evaluation Report (ER), Student was determined to be eligible for special education as a child with a Speech/Language Impairment. The ER also recommended that the Parents seek wraparound services as well as assessment for Autism Spectrum Disorder or mental health diagnoses. (N.T. 145-46; S-29)
8. Student remained in early intervention programming for the 2009-10 school year at the election of the Parents. (N.T. 148-50; S-12)
9. A private developmental evaluation in early 2010 reflected diagnoses along the Autism Spectrum. Behavioral health services were recommended at that time. (S-31 pp. 2-3)
10. A reevaluation by the District in the spring of 2010 included assessment of cognitive ability and achievement in addition to occupational, physical, and speech/language therapy skills. The 2010 reevaluation report (RR) reflected additional IDEA eligibility categories: Autism Spectrum Disorder and Specific Learning Disability in mathematics calculation and mathematics problem solving, in addition to continued classification with a Speech/Language Impairment. (N.T. 149-51; S-31)
11. Student began attending school in the District at the start of the 2010-11 school year, kindergarten, pursuant to an Individualized Education Program (IEP) providing for itinerant learning support with related services including speech/language therapy. Goals addressed early reading and mathematics skills as well as occupational, physical, and speech/language therapy. Other identified needs were for a structured environment,

predictable schedule, monitoring of focus and attention, cues and redirection as needed, small group and individual instruction, repeated and clear directions, social skill development and improved peer relationships, and a behavior management system with positive reinforcement. (S-13, S-14, S-15)

12. Student has been provided with outside behavioral health services at least since the fall of 2010. Those services addressed, among other things, relationships with peers and with a sibling and Student's tendency to perseverate on Student's interests. One of Student's behavioral specialists typically attended meetings of Student's IEP teams through the spring of 2013. (N.T. 41-43; P-8, P-9, P-11, P-12, P-13, P-19, P-21, P-22, P-23, P-24, P-25, P-26, P-27; S-14, S-16, S-18, S-19)
13. An annual IEP developed in May 2011 contained annual goals addressing mathematics skills and reading comprehension as well as speech/language (articulation). Additional identified needs were for a structured environment, predictable schedule, clear expectations, monitoring of focus and attention, cues and redirection as needed, small group and chunked instruction, multisensory instruction, practice and repetition of instruction, repeated and clear directions, social skill development and improved peer relationships, and a behavior management system with positive reinforcement. Student's program continued as itinerant learning support with speech/language support. (S-16, S-17)
14. Another reevaluation was conducted in the spring of 2012, solely based on a review of records, input from the Parents and teachers, and reports of progress. The 2012 RR reflected the same eligibility classifications as in 2010. Needs identified were a structured environment and routine, and development of social skills, reading comprehension, and mathematics skills. (S-27, S-32)
15. An annual IEP developed in May 2012 contained annual goals addressing mathematics skills and reading comprehension as well as speech/language (articulation). Additional educational needs were identified for a structured environment, predictable schedule, clear expectations, monitoring of focus and attention, cues and redirection as needed, small group and chunked instruction, multisensory instruction, practice and repetition of instruction, repeated and clear directions, social skill development and improved peer relationships, and a behavior management system with positive reinforcement. Student's program continued as itinerant learning support with speech/language support. (S-18)
16. In the summer of 2012, Student was evaluated for continuation of the outside behavioral health services. At the time, Student's social deficits were noted, and the family reported concerns over potential conflicts with peers and/or bullying on the school bus during the previous school year. (P-8)

2012-13 AND 2013-14 SCHOOL YEARS

17. During the summer of 2012, before Student was to start second grade, Student reported to the outside behavior services consultant that a peer [exhibited sexualized behavior] on a school bus. After the Parents reported this incident to the District, it convened a meeting

with Student's Parents on September 18, 2012 to discuss the matter. (N.T. 37-39, 152-54; P-6, P- 22 p. 66, ; S-1)

18. The District agreed to separate Student and the peer on the bus and at school. The Parents and District did not decide to develop a written plan regarding Student's separation from the peer or limitations on interactions between the two as part of Student's educational program. (N.T. 38-39, 69-70, 162-64, 187-88; P-6; S-1)
19. Student continued to express concerns to the behavioral specialist consultant about the peer on the bus into September 2012. (P-22 p. 42)
20. A new annual IEP was developed for Student in April 2013. At the time, Student exhibited academic difficulties with mathematics, and continued to need a structured environment with a predictable schedule, but demonstrated appropriate social skills. The only reported behavioral difficulty was Student's failure to raise Student's hand before speaking during classroom discussions. Annual goals addressed mathematics skills and reading comprehension (including accuracy and fluency) and speech/language (articulation) needs. A number of program modifications and items of specially designed instruction were also included: preferential seating to monitor attention and understanding, frequent feedback and reinforcement, a combination of inclusion and small group instruction, intensive support and interventions for mathematics weaknesses, clear and concise directions repeated as needed, chunked presentation of instruction, test accommodations and adaptations, and regular communication between home and school. Student's program remained itinerant learning and speech/language support. (P-7; S-19)
21. There is no safety plan, nor reference to Student's safety or limitations on interacting with the peer who was the subject of the September 2012 meeting, in the April 2013 IEP. (P-7; S-19)
22. A new annual IEP was developed for Student in April 2014. At the time, the Parents were concerned with Student's anxiety relating to mathematics. Identified needs were for a structured environment and routine free from distractions, positive reinforcement, maintaining attention to tasks, and support for and practice of mathematics skills. Annual goals addressed mathematics skills, reading comprehension, and speech/language (articulation) needs. This IEP contains a number of program modifications and items of specially designed instruction: preferential seating to monitor attention and task completion, frequent feedback and reinforcement, redirection and strategies to maintain attention to task, advance notice of changes to routines, a consistent environment free from distractions, differentiated or supplemental mathematics instruction, chunking of instruction and tasks, and use of technology and calculators. Student's program continued as itinerant learning and speech/language support. (N.T. 47; P-10; S-20)
23. There is no safety plan, nor reference to Student's safety or limitations on interacting with the peer who was the subject of the September 2012 meeting, in the April 2014 IEP. (P-10; S-20)

24. The Parents signed the Notice of Recommended Educational Placement (NOREP) accompanying the April 2014 IEP, but did not check whether they approved or disapproved. However, they did not set forth any reasons for disapproval or request mediation or a due process hearing. (S-10)
25. Student's 2013-14 report card reflected that Student met or exceeded most expectations with some weaknesses in reading and mathematics skills. (S-24)

2014-15 SCHOOL YEAR THROUGH FEBRUARY 20, 2015

26. Student was in fourth grade during the 2014-15 school year in a regular education classroom. (N.T. 217)
27. A learning support teacher was present in the classroom for language arts and mathematics classes during the fourth grade school year. She worked with Student in the classroom or, at times, in a different setting as needed. (N.T. 315-16, 320)
28. A learning support aide was present in the classroom and assisted special education students in the class, including Student, with academic tasks as needed. (N.T. 218, 231)
29. During the 2014-15 school year, Student had difficulty with mathematics and expressed some anxiety and concerns to the teachers about that subject. The teachers provided reassurance that met with limited success. (N.T. 97, 219-20, 317-18; S-33 pp. 6-7)
30. Student's outside behavioral therapy services concluded in January 2015 based on scheduling concerns for the family including Student's activities. (N.T. 297-301; P-13)
31. At the very end of the school day on February 5, 2015, Student reported to a teacher that Student had been a victim of a peer's sexual abuse on the school bus. The teacher told Student that they would need to speak with the principal the following day, but did not contact the Parents. (N.T. 99-100, 105-06, 220-2, 2231; S-2)
32. The teacher spoke with a co-teacher about the disclosure, and planned to talk further with Student the next day before reporting to the building principal. (N.T. 100, 165)
33. The peer who was the subject of that disclosure was the same child involved in the incidents discussed at the September 18, 2012 meeting. (N.T. 58-59)
34. The peer was in the same classroom as Student during the 2014-15 school year, but the teacher had not noticed the two engaging in any negative or concerning interactions. (N.T. 220-21)
35. Student reported the same information about the peer abuse to the Parents on the same day, February 5, 2015. The Parents tried to learn the timeframe over which the incidents had occurred, but Student has difficulty with temporal concepts. Police soon determined the incidents occurred during the first half of the 2014-15 school year. (N.T. 49-52, 80-81; P-1 p. 5; S-3 p. 5)

36. The Parents took Student to the pediatrician on February 6, 2015. The pediatrician counseled the family about the reported sexual abuse, and suggested that the Parents inform District administrators of the conduct disclosed by Student. (N.T. 52; P-3 pp. 7-8; S-39 pp. 1-2)
37. The Parents reported the sexual abuse to local police on February 9, 2015.⁷ (N.T. 53-54; P-1; S-3)
38. The state police interviewed Student's teacher and the elementary school principal on February 10, 2015. In that interview, the elementary school building principal learned about the disclosure for the first time. (N.T. 165, 224; P-1; S-3)
39. The elementary school building principal spoke with the Parents on or about February 11, 2015 to discuss the information disclosed by Student. The Parents asked what steps might be taken for Student's safety returning to school and separation from the peer. In response, the building principal offered to the Parents to provide an alternative form of transportation to and from school, and to change Student's homeroom. They also discussed, and the District ultimately added, an aide on the bus. (N.T. 91, 172, 191-92, 206, 243-44, 267-68, 274-75)
40. The elementary school building principal promptly informed a District administrator of the incident after she learned of it from police. That administrator was also contacted by then-current counsel for the Parents by mid-February 2015 about the matter. (N.T. 239-40)
41. A County Child Advocacy Center conducted an interview of Student outside the presence of the Parents on February 20, 2015. Student related details of sexual and physically aggressive conduct toward Student by the peer over the 2014-15 school year. The forensic interviewer encouraged the Parents to discuss their "frustrations with the school and the district" with their legal counsel (P-2 p. 2; S-38 p. 2). (N.T. 54; P-2; S-38)
42. The elementary school building principal conducted an investigation into the disclosure made by Student by interviewing the school bus driver and several students who rode that school bus. She did not speak with Student because Student was not attending school, and did not interview the peer until some later date because of the ongoing police investigation. (N.T. 169-70, 172-73, 193-96)
43. The elementary school building principal spoke with the teachers of Student and the peer. Neither reported any negative interactions between the two. (N.T. 196)

⁷ This hearing officer takes notice that February 5, 2015 was a Thursday, and the report to police on February 9, 2015 was the following Monday.

2014-15 SCHOOL YEAR – FEBRUARY THROUGH SUMMER 2015

44. With a potential but limited exception,⁸ Student did not return to school after February 5, 2015, because the Parents were concerned for Student's safety and anxiety, and conveyed those reasons to the District. The Parents did not agree with the proposed changes to transportation and Student's homeroom. (N.T. 57, 87, 202, 228-29, 241, 322, 340; P-4; S-41)
45. On February 26, 2015, the Parents' then-current counsel requested a meeting with the District to discuss Student's return to school. That communication also advised that the family would not permit Student to return to school until after the District's investigation had been completed, and included a list of the Parents' concerns including Student's anxiety resulting from the disclosed interactions with the peer. (N.T. 244, 258-59; S-42)
46. The District sent letters to the Parents about Student's absences from school, both excused and unexcused, in March 2015. The unexcused absences began with February 6, 2015. (N.T. 174-75, 197-99; P-4)
47. The District never finalized or completed its investigation, and never issued a written report to the family. (N.T. 169-73, 206)
48. The offered accommodations regarding transportation and change in homeroom were not made part of any IEP or otherwise documented in writing. (N.T. 213)
49. The District did not meet with the Parents about Student's truancy from school. (N.T. 176-77)
50. The District did not make an exception to its attendance policy for Student, but also did not pursue truancy charges with a magistrate regarding Student because of the circumstances that had led to the absences. (N.T. 176-78, 258-59, 342)

APRIL 2015 EVALUATION AND IEP

51. Because Student was due for a new triennial evaluation,⁹ the District conducted a reevaluation consisting of a review of records and input from teachers, the Speech/Language Pathologist, and the Parents, in the spring of 2015. The resulting RR was completed on and dated April 17, 2015. (N.T. 154, 157, 249-50, 320-21; P-14; S-33)
52. The Parents' input summarized for the April 2015 RR included needs for assistive technology and one-on-one assistance. The Parents also noted that Student could not

⁸ The only evidence that Student may have attended school in the District after the February 2015 disclosure is a reference to an observation in May 2015 of two classes by an assistive technology consultant (S-45) and two teachers' admitted lack of certainty as to whether Student did return for a brief period of time (N.T. 221, 228-29, 234-35, 320). Student's attendance record produced for the hearing does not go beyond April 2, 2015 (P-18, S-41).

⁹ Under the IDEA, students must generally be evaluated at least once every three years. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303(b)(2).

return to school until Student's safety was addressed, including Student's anxiety about the incident previously disclosed. (P-14; S-33)

53. The April 2015 RR retained Student's eligibility for special education on the same bases (Autism, Specific Learning Disability, and Speech/Language Impairment). This RR noted needs for inclusive programming, advance notice of changes in routine, social skills, support in mathematics, and self-monitoring in speech/language (articulation). (P-14; S-33)
54. The District convened a meeting with the Parents on April 20, 2015. The recent April 2015 RR was provided to them at or around that time. (N.T. 60, 246; P-14; S-8, S-33)
55. Prior to the April 20, 2015 meeting, the District made a request in writing for evidence to support allegations that Student had been subject to abuse while in the care of the District. (N.T. 244-45; P-16)
56. A new IEP drafted as the "annual IEP update" (S-11 p. 1) was also discussed at the April 20, 2015 meeting. The Parent input reflected that Student would not return to school until the classroom was made safe for Student, and they shared their concerns with Student returning to school at the meeting. Reported teacher concern was for Student's anxiety over mathematics. Other needs identified were a structured environment and routine free from distractions, positive reinforcement, strategies for maintaining attention to tasks, support for and practice of mathematics skills, and self-monitoring skills for articulation. (N.T. 242-44, 246-48; P-15; S-11, S-21)
57. Annual goals in the April 2015 IEP addressed mathematics skills and reading comprehension, and speech/language (articulation) needs. This IEP included a number of program modifications and items of specially designed instruction for Student: proximity to teacher for monitoring attention and task completion, frequent feedback and reinforcement, redirection and strategies to maintain attention to task, notice of changes to routines, a consistent environment free from distractions, differentiated instruction and targeted intervention as needed, chunking of instruction and tasks, and use of technology and calculators. (P-15; S-21)
58. The April 2015 IEP again proposed a program of itinerant learning and speech/language support. (P-15; S-21)
59. The Parents did not believe that the April 2015 IEP addressed their concerns about Student's safety, and they did not decide that Student should return to school. (N.T. 341-42)
60. The IEP team did determine in April 2015 that Student was eligible for Extended School Year (ESY) services because of Student's absences. The ESY services were specified as 2.5 hours/day, 4 days/week, for 6 weeks. (N.T. 183; P-15 p. 25; S-21 p. 25)
61. The April 2015 IEP did not contain any information on or plan to address Student's absences from school, and the team did not discuss concerns about attendance. (N.T. 184, 230-31)

62. There is no safety plan, nor reference to any limitations on Student interacting with the peer who was the subject of the September 2012 meeting, in the April 2015 IEP. A safety plan was also not discussed at the April 2015 IEP meeting. (N.T. 341; P-15; S-21)
63. Student was provided with weekly homebound instruction/tutoring for some period of time after the April 2015 IEP meeting. Student's sibling was also provided the same services along with Student. (N.T. 184-86, 247, 262-63)
64. Another meeting convened at the end of April 2015 to discuss a plan for transitioning Student back to school. No formal plan was developed at that time and no revisions were made to the April 2015 IEP. (N.T. 259-61; S-43)
65. The Parents approved a Notice of Recommended Educational Placement (NOREP) for itinerant learning support and speech/language services on April 30, 2015. (S-11)
66. The District also sought permission to reevaluate Student again in late April 2015. The Parents gave consent to a reevaluation to include a review of records, including parent and teacher input, and behavior rating scales. (S-28)
67. Toward the end of the school year and after the April 2015 IEP meeting, the peer who was the subject of the 2012 and 2015 disclosures was transferred to a different school. (N.T. 202, 229, 248-49, 267)
68. An assistive technology evaluation was completed in May 2015. The evaluation and an action plan were provided to the Parents in June 2015 after the school year ended. (S-44, S-45)
69. Student's 2014-15 school year report card reflected that Student met or exceeded expectations with respect to characteristics of successful learners, but a number of weaknesses in language arts and mathematics content area skills were reported. (S-25)
70. Student's 2014-15 school year report card reflected 49 unexcused and 6 excused absences for Student during the final two quarters. (S-25 p. 1)¹⁰
71. Student did not participate in the District's ESY program in 2015. (N.T. 342)

ENROLLMENT IN CHARTER SCHOOL

72. Student enrolled in a cyber charter school in August 2015 where Student currently attends. (N.T. 33-34, 263, 307, 331, 342-43)
73. Student began attending the charter school in September 2015. From the start of the 2015-16 school year, Student had a learning support teacher who worked individually with Student once a week, assisting Student as needed in navigating the virtual

¹⁰ It is unclear whether Student attended school on any day after February 5, 2015, or was credited with attendance for tutoring services, or was simply not marked absent for report card purposes.

environment and working on reading and mathematics goals. The learning support teacher was also available three days a week for students who needed help completing lessons and assignments, and Student frequently participated in those sessions. (N.T. 308-09)

74. During the 2015-16 school year, the Parents arranged for an adult facilitator to assist Student with focus and completing assignments for the charter school, and to aid Student with the transition to, and anxiety over, the new program and placement. (N.T. 36-37, 343-46)
75. As of the date of the final hearing session, Student continued to manifest and express anxiety over the February 2015 disclosure and the peer involved, and Student remained concerned about seeing the peer again. (N.T. 345-46)

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 rests with the Parents who requested this hearing. Nevertheless, application of this 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.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found

each of the witnesses to be credible, testifying forthrightly to the best of his or her recollection. There were few discrepancies in the testimony, although there were understandable gaps in witness memories of what occurred in and before the spring of 2015.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the closing arguments of the parties.

IDEA PRINCIPLES

The IDEA and state and federal regulations obligate local educational agencies (LEAs) to provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has long 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 IEP that is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’.” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Making this determination requires consideration of the student’s “intellectual potential.” *Id.*

Quite 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.”

Andrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(italics in original)(citing *Rowley* at 206-09)(other citations omitted). 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.” *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. Stated another way, the Court 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.” *Id.*, 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.

As *Andrew*, *Rowley*, 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. Nevertheless, the LEA is not obligated to “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) (citations omitted); *Andrew, supra*. Critically, “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); *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same). Furthermore, and as the Parents observe, it has been long recognized that education is much more than academics; an appropriate education encompasses “all relevant domains under the IDEA, including behavioral, social, and emotional.” *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010)(citation omitted). Moreover, a child’s educational performance can be affected in ways other than achieving grades, such as through engaging in social relationships with peers or being unable to attend school.

DENIAL OF FAPE CLAIM

The first issue is whether the District violated its obligation to provide FAPE to Student from February 17, 2015 through the end of the 2014-15 school year and over the 2015 ESY program. This claim must be evaluated in light of the February 5, 2015 disclosure by Student and the District’s response. At the outset, it is important to recognize that the information conveyed was quite sensitive, and that the District was required to consider not only Student but also the peer in choosing and taking actions based on that disclosure. The District professionals who were involved clearly attempted to proceed carefully and cautiously, particularly after police and legal counsel became involved.¹¹ However, an LEA’s obligations under the IDEA

¹¹ It should be noted that the conclusions reached in this decision are based on application of the law to the circumstances presented as a whole, rather than on the judgment, or actions or inactions, of any specific District individual.

and Section 504 do not evaporate merely because it is facing a unique and delicate situation with a particular student or students.

Here, the District was made aware of Student's disclosure at the same time that the Parents learned of it. The District was also immediately informed that the Parents were concerned about Student's safety as well as Student's anxiety that was manifested after the disclosure, and that Student could not return to school until those matters were addressed. Additionally, although anxiety had been part of Student's educational profile in the classroom setting because of the disability in mathematics, the Parents' report suggested the potential of new educational needs. Furthermore, the District knew of the past history of difficulty between Student and the peer that was remarkably similar in nature, as well as Student's underdeveloped social skills and peer relationships throughout Student's tenure in the District.

Although the District did offer a few suggestions for making changes designed to allow Student to return to school, none of those proposals were put into writing or documented in an IEP. No meeting convened to discuss Student's absences and how they might be addressed, or whether revisions to the IEP should be considered or other instructional services provided. And, the District's own investigation into the incident that was the subject of the disclosure was never completed, despite its knowledge that the Parents had stated an intention to wait for those results before moving forward. Not only was the failure to conclude the investigation a violation of its own policy, the lack of any finality by the District served to ensure that Student would be left without educational services indefinitely.

Although the District contends that the Parents did not seek an evaluation or outside opinion about Student's education-related needs after the February 5, 2015 disclosure and resulting new manifestations of anxiety, the burden is not on the Parents to do so. *M.C. v.*

Central Regional School District, 81 F.3d 389, 397 (3d Cir. 1996) (explaining that, “a child's entitlement to special education should not depend upon the vigilance of the parents[.]”) It is the District as the LEA that is required to assess a child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). As noted above, the LEA is obligated to develop programs that are responsive to identified needs, which is done through comprehensive evaluation. The District did not seek to reevaluate Student upon learning of Student’s newly manifested anxiety and inability to attend school, but rather waited until April 2015 when Student’s triennial evaluation was due. Even then, the District did not seek permission to conduct any assessments.¹² In short, the District failed to take a proactive approach to addressing Student’s absences that were rooted in Student’s experiences on school-based transportation and resulting disability-based anxiety;¹³ and, Student was left with no educational services at all until the end of April when minimal tutoring was provided and behavior rating scales were proposed. At that point, the sixty calendar day timeline for completing an evaluation¹⁴ would have extended beyond the end of the 2014-15 school year; and the lack of a consensus during the April meetings suggested that it was necessary to fully but promptly examine all options for ensuring Student had access to FAPE. Thus, the actions and inactions by the District collectively amounted to a denial of FAPE from the February 17, 2015 tolling date through the end of the 2014-15 school year.

¹² It is noteworthy that the last evaluation of Student by the District that went beyond a record review was in 2010.

¹³ Though the District did not question whether the incidents described by Student actually occurred for purposes of this hearing, it merits mention that any such inquiries would be immaterial given Student’s perceptions and anxiety manifestations resulting from those perceptions.

¹⁴ 22 Pa. Code § 14.123(b).

With respect to ESY, however, the record is clear that Student was only deemed eligible because of absences, and not based on the factors in Chapter 14.¹⁵ Thus, there was no substantive denial of FAPE for ESY services in 2015. The remedy in the attached order will compensate Student for the missed instruction and other educational services that were not provided from February 17, 2015 to the end of the 2014-15 school year.

DISCRIMINATION AND DELIBERATE INDIFFERENCE UNDER SECTION 504

Section 504 further prohibits discrimination on the basis of a 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). The Third Circuit has explained the elements of a Section 504 violation as proof that:

(1) [the claimant] is “disabled” as defined by the Act; (2) [the claimant] is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) [the claimant] was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood, 172 F.3d at 253. Here, there can be no question that Student has a disability under Section 504 or that Student was qualified to receive educational services, and that the District receives federal funding. The denial of FAPE discussed above also amounts to discrimination.

Intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met by establishing “both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge.” *S.H.*

¹⁵ 22 Pa. Code § 14.132

v. Lower Merion School District, 729 F.3d 248, 265 (3d Cir. 2013). However, “deliberate choice, rather than negligence or bureaucratic inaction” is necessary to support such a claim. *Id.* at 263.

On the one hand, it could be argued that the District’s failure to take steps to attempt to return Student to school after the February 5, 2015 disclosure was mere inaction. Conversely, the delays in responding to Student’s continued need for special education services as the investigations proceeded and Student remained out of school could constitute a choice not to act. Case law on deliberate indifference in this context is not extensive, but a number of cases provide persuasive and instructive guidance.

In *S.H.*, *supra*, 729 F.3d 248, the Third Circuit addressed as an issue of first impression what standard to apply to a claim of deliberate indifference. Following a careful review of the two competing tests, the Court adopted the standard quoted above that requires both knowledge and a failure to act despite the knowledge, while also adhering to the element of deliberate choice. *Id.* at 263-65. In *S.H.*, however, the knowledge element was absent and, thus, the Court did not go on to discuss the alleged failure to act. *Id.* Very recently, the Third Circuit rejected a claim that a school district's failure to inform parents of a policy that it did not hold IEP meetings or respond to parent email messages during the summer was a deliberate choice instead of mere negligence or bureaucratic inaction. *School District of Philadelphia v. Kirsch*, 71 IDELR 123, 2018 U.S. App. LEXIS 2819, at *31 (3d Cir. 2018). Here, however, unlike in *Kirsch*, and as discussed more fully below, there is evidence that the District did not merely fail to act.

In *S.H.*, the Court cited to, *inter alia*, *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139-40 (9th Cir. 2001), which provided reasoning that mere negligence or inaction did not amount to deliberate indifference:

Because in some instances events may be attributable to bureaucratic slippage that constitutes negligence rather than deliberate action or inaction, we have stated that deliberate indifference does not occur where a duty to act may simply have been overlooked, or a complaint may reasonably have been deemed to result from events taking their normal course. Rather, in order to meet the second element of the deliberate indifference test, a failure to act must be a result of conduct that is more than negligent, and involves an element of deliberateness.

(Citations omitted.)

The *S.H.* Court also cited to *Loeffler v. Staten Island University Hospital*, 582 F.3d 268 (2d Cir. 2009), where the plaintiffs challenged the defendant's failure to provide a sign language interpreter to them, and the defendant acknowledged that it had a duty to do so by law and did not. In discussing the plaintiffs' claims, the *Loeffler* Court noted that, in another context, deliberate indifference to discrimination may be found where an official has the authority to address the alleged discrimination through corrective measures but fails to respond effectively. *Id.* at 276 (citations omitted). Significantly, the plaintiffs in *Loeffler* had made numerous attempts to contact the defendant to arrange for an interpreter. The Court concluded that the evidence that the defendant had actual knowledge of discrimination against the plaintiffs, and had the authority to correct the discrimination, but then failed to provide an appropriate response, could establish deliberate indifference. *Id.*

In this case, the District clearly had an obligation to Student as a child with a disability, and had actual knowledge that Student was not attending school and that Student was manifesting new signs of anxiety that were disability-related. Student was not only without special education services to which Student was entitled under the IDEA and Section 504, Student was not provided with any instruction at all until the end of April 2015 when some tutoring with a sibling was arranged. The District had every reason to suspect that Student's special education needs required a new evaluation followed by intervention and programming to

address them, and it chose instead to do nothing until the law required a reevaluation and updated IEP, neither of which meaningfully considered Student's current functioning and needs. This hearing officer concludes that the District had not only the authority but the obligation to take action to correct the discrimination against Student, and that its lack of an appropriate response amounted to a deliberate choice under the law. Moreover, the District made an informed and intentional decision not to pursue truancy charges because of the circumstances, while ignoring the impact of the lengthy period of absences on Student's special education needs, all of which evidences more than mere a failure to act.

The District's reliance on *M.J.G. v. School District of Philadelphia*, 2017 U.S. Dist. LEXIS 181602, 2017 WL 5010033 (E.D. Pa. Nov. 2, 2017), in its argument that deliberate indifference has not been established, is misplaced. In *M.J.G.*, the Court rejected a claim of deliberate indifference after a disabled student was allegedly sexually assaulted by a peer on two different occasions and the District failed to separate the two students. The Court found that the measures that the District did take were not unreasonable and therefore could not amount to deliberate indifference. Here, this hearing officer does not conclude that the District was deliberately indifferent because of its response to the peer's allegedly engaging in improper contact with Student in 2012 and again in approximately the fall of 2014. Indeed, the record in this case lacks any indication that Student and the peer had any noteworthy interactions, including difficult or inappropriate ones, over that approximate two-year time period. Rather, the basis for deliberate indifference is the refusal to take any steps to address Student's disability-related educational needs after the February 5, 2015 disclosure and subsequent truancy from school. Accordingly, *E.D. v. Colonial School District*, 2017 U.S. Dist. LEXIS 50173, 2017

WL 1207919 (E.D. Pa. Mar. 31, 2017), where the school district continually sought to revise its programming based on the student's needs, is also distinguishable.

REMEDIES

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 also 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).

There is no evidence in this record to support a qualitative compensatory remedy; thus, the hour for hour method must be applied. Except for some minimal tutoring shared with a sibling, Student was denied all educational services from February 6, 2015 through the end of the 2014-15 school year. By the initial date of the scope of the claims, February 17, 2015, the District was aware of the Parents' concerns, Student's anxiety, and the need to take immediate action to address Student's absences for more than ten days. As such, there is no equitable basis for a period of rectification. Because Student's April 2015 IEP provided for six hours of

instruction each school day (S-21 p. 29), Student shall be awarded six hours of compensatory education for each day that school was in session from February 17, 2015 through the end of the 2014-15 school year.

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 academic, speech/language, or social/emotional/behavioral needs and skills. The compensatory education services may occur when convenient for Student and the Parents, and may be used at any time from the present until Student turns age twenty-one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

The Parents also seek reimbursement for the private professional services they obtained to assist Student in the transition to the cyber charter school. The parties do not appear to dispute that the test for reimbursement for such parentally-provided services rests upon a traditional private school tuition reimbursement analysis, and includes three separate inquiries: first, a finding must be made that the LEA's program did not provide FAPE; second, it must be determined that the private placement or services are 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.

The District did deny Student FAPE. However, while the professional services were undoubtedly beneficial for Student, and most likely quite necessary, the record does not adequately establish the extent of Student's need for those supports. Moreover, there was little evidence presented as to what those services entailed to permit any determination that they were appropriate for Student in the context of a reimbursement analysis. Thus, this claim must be denied.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that Student was denied FAPE from February 17, 2015 through the end of the 2014-15 school year and is entitled to compensatory education; and that the District acted with deliberate indifference. However, the Parents may not recover the cost of their expenditures for professional services after Student withdrew from the District.

ORDER

AND NOW, this 15th day of February, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did fail in its FAPE obligations to Student under the IDEA from February 17, 2015 through the end of the 2014-15 school year, but not including 2015 ESY programming.

2. The District shall provide Student with six (6) hours of compensatory education for each day that school was in session beginning on February 17, 2015 and continuing through the end of the 2014-15 school year.
3. The compensatory education award is 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 academic, speech/language, or social/emotional/behavioral needs and skills. The compensatory education services may occur when convenient for Student and the Parents, and may be used at any time from the present until Student turns age twenty-one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.
4. The District is not required to reimburse the Parents for expenses incurred with Student's enrollment in the cyber charter school.
5. The District discriminated against and acted with deliberate indifference toward Student.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
19230-1617AS