

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: 198911718

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

Dates of Hearing:
2/16/2018, 4/24/2018, and 5/3/2018

Parent:
[redacted]

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D. **Date of Decision:** 5/25/2018

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a mid-teenaged student who is enrolled in the Commonwealth Connections Academy Charter School (School). Student is a regular education student who has not been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² or a protected handicapped student under Section 504 of the Rehabilitation Act of 1973 (Section 504).³ Except for a portion of the 2016-17 school year, Student has been enrolled in the School since August 2014.

In November 2017, Student's Parent filed a Due Process Complaint against the School asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 as well as the federal and state regulations implementing those statutes. The Complaint was filed within a year of a private evaluation diagnosing Student with Autism Spectrum Disorder and Generalized Anxiety Disorder. Following an evidentiary hearing⁴ on the School's request to limit the temporal scope of the matter and a subsequent ruling that all of the Parent's claims going back to the 2014-15 school year were timely filed (HO-3), a substantive hearing convened. The Parent sought a determination that Student was and is eligible for

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

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 711.1 – 711.62.

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations expressly incorporate the majority of those federal regulations, including Sections 104.21 – 104.37. 22 Pa. Code § 711.3.

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School 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 another but not all. It should also be noted that the argument beginning at N.T. 515 L18 should be attributed to counsel for the Parent, not the School.

services under the IDEA and/or Section 504 and demanded compensatory education and other remedies. The School maintained that Student did not meet criteria under either statute, and that no relief was due.

For the reasons set forth below, the Parent's claims will be granted in part and denied in part.

ISSUES

1. Whether the School failed in its obligations to identify Student as eligible under the IDEA;
2. Whether the School failed in its obligations to identify Student as a protected handicapped student under Section 504;
3. If the School did fail in its obligations to identify Student under the IDEA or Section 504, whether it failed to provide Student with a free appropriate public education;
4. If the School did fail to provide Student with a free appropriate public education, whether Student should be awarded compensatory education;
5. Whether Student should be provided an independent educational evaluation at public expense; and
6. Whether the Parent should be awarded reimbursement for certain expenses?

FINDINGS OF FACT

1. Student is mid-teenaged and is currently enrolled in the School. (N.T. 25)

RELEVANT EDUCATIONAL BACKGROUND

2. Student was enrolled in a Pennsylvania school district beginning in the fall of 2008 (kindergarten) through the end of the 2013-14 school year (fifth grade). Student was in regular education throughout those years. (N.T. 28-29; P-7)

3. Student exhibited symptoms of separation anxiety since before starting first grade and throughout Student's tenure at the school district. Student would refuse to enter the school building or leave the Parent's side. (N.T. 72-75; S-1, P-3)
4. By the fall of 2013, Student began private therapy because of Student's anxiety that was manifested in the form of panic attacks. The therapy ended during the 2016-17 school year. (N.T. 74-76, 227-28)
5. In April 2014, Student's therapist provided the school district with a request for homebound instruction for the remainder of the school year for Student. The diagnosis on that request was Generalized Anxiety Disorder with Severe Panic Attacks. (N.T. 30, 80-81, 169-70; P-2; P-3; P-7 p. 1; S-2)

THE SCHOOL IN GENERAL

6. The School is a cyber charter school where all instruction is provided virtually via computer. All lessons are presented live with the opportunity to interact with the teacher, and are also recorded so that students can view them at a later date. The curriculum is asynchronous so that students may work at their own pace and on their own schedule. (N.T. 37, 102-03, 338, 344, 346-47, 396-98, 431-32, 454-55, 479, 487-88)
7. Many students do not attend the live lessons but instead view the recording. Teachers have the ability to determine who is attending live lessons but not recorded sessions. (N.T. 398-401, 432, 455, 479)
8. Teachers at the School make routine attempts to communicate with students and parents regularly through telephone calls. There is also an email system for communications between the home and the School as well as chat rooms. (N.T. 104, 346-49, 404)
9. It is not unusual in many teachers' experience for a student who is performing well not to communicate by telephone. (N.T. 403-04, 456-57, 466)
10. Students are required to log on to the School system at least five days each week. (N.T. 420-22)
11. The School logs all conversations and other communications regarding its students, as well as attendance at live lessons. (N.T. 317-18, 328, 399-400, 407, 498; P-23; P-25⁵)

ENROLLMENT AT SCHOOL FALL 2014

12. Student enrolled in the School at the start of the 2014-15 school year. The Parent believed that Student would be more successful in a cyber charter school because of

⁵ P-23 and P-25 together comprise a 1,080-page document containing the entire log for Student. Many entries are duplicative, and a significant number are global messages to an entire class or group of students. The parties did submit exhibits with much smaller excerpts from the entire log that were relevant to the issues in this case, which this hearing officer greatly appreciates.

Student's anxiety and refusal to go to school. (N.T. 31, 86-87, 88, 163, 167, 172-73; P-6; S-4)

13. On the enrollment form, the Parent indicated that Student did not previously have an Individualized Education Program (IEP). (P-6; S-4)
14. None of the records from the former school district suggested that Student had anxiety or any other educational concerns. (P-7)
15. The Parent has acted as Student's learning coach and is responsible for inputting Student's attendance for the School. Learning coaches oversee the student's lessons. (N.T. 161, 174, 481; S-18)
16. The Parent was advised by someone at the School that she could report Student's attendance hours during the week even if Student did schoolwork on weekends or times other than those reported due to her work schedule. (N.T. 178-79, 222-23)

STUDENT'S GENERAL PERFORMANCE AT SCHOOL

17. Except for a short period of time in the fall of 2014, Student has experienced difficulty attending the cyber classes at the School. Student has required prompting by and attention of the Parent in order to attend the virtual classes and complete assignments, and the Parent has expended significant time and effort providing assistance to Student. (N.T. 35-37, 88-89, 175-76, 183-85, 224)
18. Student continued to require the Parent to be with Student in order to attend lessons or complete schoolwork into the 2015-16, 2016-17, and 2017-18 school years. (N.T. 196-97, 200-01, 204)
19. Student has experienced difficulty interacting with teachers and staff at the School because Student has been reluctant to use available technology to speak with or type text messages to them. (N.T. 36-38, 44; P-8; S-5)
20. The Parent and School staff communicated occasionally throughout the relevant school years about Student's incomplete work and difficulty with some assignments. The Parent on several occasions explained Students' anxiety over and reluctance to speak with teachers on the telephone (sometimes noted to be selective mutism), as well as her efforts to engage Student with schoolwork or attempt something new with Student. At times, the Parent suggested that teachers call her telephone number when she was present with Student. Some of the teachers interpreted Student's difficulty speaking on the telephone as shyness. (N.T. 181, 188-89, 193; P-23 p. 926 and *passim*; P-25 *passim*)
21. There were relatively few communications between the family and the School over the course of the 2014-15, 2015-16, 2016-17, and 2017-18 school years that reflected concerns that the Parent had, other than questions about coursework and assignments. (P-23 *passim*; P-25 *passim*)

22. The Parent frequently logged Student in to the School for lessons and sent email messages to teachers for Student in addition to sending messages from herself. (N.T. 196-97, 255-57; P-23 *passim*; P-25 *passim*)
23. Student's attendance was reported on most days for six to eight hours during the 2014-15 school year except for a vacation and two excused absences. (S-18 pp. 1-4)
24. Student earned all A to B+ grades in content classes during the 2014-15 school year. (S-17)

FALL 2015: SECTION 504 CONSIDERATION

25. After a truancy notification in the middle of September 2015, the Parent and School staff again communicated about Student's incomplete work and difficulty with assignments, as well as Student's reluctance to speak on the telephone. The Parent explained that Student had a Generalized Anxiety Disorder. (N.T. 45-58; P-8 pp. 41-46; S-19 p. 6)
26. On September 16, 2015, following the discussion about Student's anxiety and missing schoolwork, the School offered to complete what the Parent understood to be "504 paperwork" so that Student would be able to avoid telephone conversations with teachers. (N.T. 48-51; P-8 pp. 43-44; S-5 pp. 4-8)
27. The Parent responded with documentation of Student's anxiety diagnosis on or about September 23, 2015. (N.T. 213-14, 221, 251-52; P-8 p. 42)
28. The Parent was not aware that a written evaluation would be provided in order to develop a Section 504 Plan. (N.T. 55-56)
29. On or about November 30, 2015, the Parent was provided a number of documents by the former School Special Education Process Coordinator: a Section 504 Permission to Evaluate form; a Medical Information/Certification Form; and a Notice of Parent and Student Rights and Procedural Safeguards – Section 504. (N.T. 52-53, 195-96; P-8 p. 37, P-10; S-7; S-19 p. 25-30)
30. The Parent returned the required forms on or about January 13, 2016, granting permission to evaluate under Section 504. Medical information provided did not indicate any conditions or disorders that might impact Student's education. (N.T. 54-56, 99-100, 242, 248; P-10)
31. After the Section 504 forms were returned, the teachers used other means of communicating with Student. (N.T. 56)
32. No Section 504 Evaluation or Service Agreement was ever developed or provided to the Parent. (N.T. 56, 59)

SPRING 2016 THROUGH THE PRESENT

33. Student earned all A- to A+ grades in content classes during the 2015-16 school year. (S-17)
34. Student's attendance was reported on most days for six to eight hours during the 2015-16 school year except for three vacations and two excused absences. (S-18)
35. Because of Student's ongoing difficulties at home meeting the School's requirements, the Parent enrolled Student in a private school at the start of the 2016-17 school year. That placement was not successful because Student refused to enter the building, and Student re-enrolled in the School in February 2017. (N.T. 57, 64, 198-201; P-5; P-6; P-16; S-14)
36. The Parent obtained an evaluation of Student by [a hospital for children] in November and December 2016. Through that evaluation, completed on December 8, 2016, Student was diagnosed with Autism Spectrum Disorder for the first time and Generalized Anxiety Disorder was confirmed. (N.T. 58-59, 157-58; P-1)
37. The [hospital's] report was provided to the School in February 2017 when Student re-enrolled. (N.T. 200-01; P-5)
38. In March 2017, the Parent and Student were referred to a family service organization for children with autism by a private therapist. A therapist with that organization recommended a restrictive, out of state placement to address Student's anxiety. (N.T. 57, 62-64, 158-205, 158-59, 233-35; P-9; P-20)
39. In the spring of 2017, the Parent took Student to a location for the Pennsylvania System of School Assessments (PSSA) but Student refused to enter the building. The Parent then opted Student out of the PSSA. (N.T. 201-02; P-8 p. 23)
40. Student's Homeroom and Mathematics teacher for the second half of the 2016-17 school year communicated with Student via email. He also spoke with the Parent who told him that Student had anxiety but not about any difficulties Student had in completing work. Student earned an A grade and completed all assigned coursework. (N.T. 488-94)
41. Student's attendance was reported on most days for seven hours during the 2016-17 school year following re-enrollment, except for several vacation days and a number of absences. (S-18)
42. Student earned all A to A+ grades in content classes during the 2016-17 school year. (S-17)
43. The attendance policy changed for the 2017-18 school year so that hours were not reported but merely whether the student was present on a particular day. (N.T. 180-81; S-18; S-19 p. 6)
44. Student's Science teacher for the 2017-18 school year communicated with Student through email. She did not speak with Student or the Parent and was not advised of any

difficulties that Student may have experienced. Student attended at least six live lessons and participated in the class on those occasions, completed assignments, and earned grades in the A range throughout the school year. (N.T. 396, 401-04, 409-11, 415, 424-26)

45. Student's History teacher for the 2017-18 school year spoke with the Parent by telephone on a few occasions and she informed him that Student did not speak on the phone and had selective mutism. However, the teacher was not informed of any difficulties Student experienced. Student had a 99% average in that class at the time of the due process hearing with only one final project to complete. (N.T. 433-38, 443-45)
46. Student's English teacher for the 2017-18 school year communicated with Student through email but not the telephone. She spoke with the Parent on one occasion about an alternative test, and the Parent advised that Student had selective mutism and did not talk on the telephone. Student had an A grade in English at the time of the due process hearing and the teacher had no concerns that Student was having any difficulties. (N.T. 457-60, 462, 465-68)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion 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 Parent who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here. In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit, as well as the parties' closing arguments, were thoroughly considered.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be generally credible, and there were few discrepancies in their accounts. None of the witnesses' testimony was accorded substantially more or less weight than another, with the exception of the Parent's description of her compliance with the School's requests regarding the information sought in the fall of 2015 for development of a Section 504 Service Agreement (Findings of Fact (FF) 27 and 42), which is explicitly credited.⁶

However, it should also be noted as discussed more fully below that, while the Parent credibly recounted several conversations with teachers and administrators of the School over the years about difficulties Student was experiencing with attending classes, completing coursework, and speaking on the telephone, the extent of those challenges as described in her testimony was not clearly conveyed as they occurred. It is simply not logical to conclude that throughout the over one thousand pages of logs regarding Student, School professionals would have deliberately misstated or under-reported their understanding of the various but relatively infrequent communications with the Parent, particularly since there are details about, for example, the Parent's report of selective mutism. In addition, the Parent unmistakably lacked sufficient awareness of available services under Section 504 and the IDEA, and an inference may be and is

⁶ The School's argument regarding the Parent's lack of proof of that compliance is therefore rejected.

drawn that she did not persevere in pursuing the attention of the School staff to obtain specific programming or accommodations to assist her and Student.

Lastly on the issue of witness credibility, the Parent's expert psychologist who offered opinions about Student's eligibility status and programming flaws based his conclusions solely on reports of the Parent, without benefit of input from the School or an evaluation of Student (N.T. 270, 274-75, 285, 289-90, 296, 297-98; P-22).⁷ Thus, while his conclusions were certainly not incredible, the persuasive value of his testimony was diminished for that reason for purposes of this decision.

IDEA CHILD FIND PRINCIPLES

The first issue is whether the School complied with its obligations under the IDEA in its failure to identify Student as eligible for special education, commonly called "Child Find." The IDEA and its implementing state and federal regulations require local educational agencies (LEAs) to locate, identify, and evaluate children with disabilities who are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 711.21 – 711.25. LEAs are required to fulfill that Child Find obligation within a reasonable period of time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, LEAs are obligated to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests that a disability may exist that requires specially designed instruction. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). LEAs are not, however, required to identify a disability "at the earliest possible moment." *Id.* (citation omitted).

⁷ The record establishes that Student refused to cooperate with an evaluation, not that the expert failed to consider performing one (N.T. 274-75).

A “child with a disability” is defined by the statute to mean a child who has been evaluated and identified with one or more of a number of specific disability classifications, and “by reason thereof” needs to be provided with special education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8(a). The IDEA classifications or categories for purposes of this definition are “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a).

Merely having an identified disability, however, does not automatically mean that a child is eligible for special education, since that is merely one prong of the two-part test. The other step to IDEA eligibility is a determination that the child needs special education because of that disability. And, “special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). More specifically,

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

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

34 C.F.R. § 300.39(b)(3).

SECTION 504 PRINCIPLES

In the context of education, Section 504 and its implementing regulations “require that [LEAs] provide a free appropriate public education to each qualified handicapped person” for

whom it is responsible to educate. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, an “appropriate education” means “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy” all of the requirements of each of the related subsections of that chapter: §§ 104.34, 104.35, and 104.36. *See* 34 C.F.R. § 104.33(b). The Third Circuit has interpreted the phrase “free appropriate public education” (FAPE) to require “significant learning” and “meaningful benefit”. *Ridgewood, supra*, 172 F.3d at 247.

Section 104.35 of the applicable regulations implementing Section 504 requires that an evaluation “shall” be conducted “before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 C.F.R. § 104.35. An initial evaluation under Section 504 must assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id.*

Critically, consideration of whether an educational program for a child with a disability is appropriate “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). In addition, an 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); *see also Andrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 197 L.Ed.2d 335, 350 (2017).

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 *Ridgewood* Court also 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.

ELIGIBILITY UNDER IDEA

The first issue is whether the School should have identified Student as eligible for special education under the IDEA. Quite simply, the present record does not support such a conclusion. Here, there is no question that Student has Anxiety and other mental health diagnoses. It is also true that 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). Manifestations of Student’s disabilities currently suggest that Student requires, at a minimum, accommodations and related services including some form of counseling in order to attend classes and complete work for School courses. There is at this point at least a suspicion that Student has a disability that requires special education services. However, the evidence is not preponderant without a comprehensive evaluation, with or without Student’s participation, that specially designed instruction is a need for Student in order to

benefit from the School's program.⁸ Conversely, it may well be that Student requires an intensive level of mental health services that go far beyond those available through an LEA's educational program, rather than specially designed instruction and related services. The independent educational evaluation ordered below will provide the parties with the information they need in order to determine IDEA eligibility as well as prospective programming needs.

SECTION 504 AND CHAPTER 15 STATUS

Despite the above conclusion, Student clearly has a disability that affects major life activities including the ability to participate in an educational program, entitling Student to FAPE under Section 504. The School recognized that possibility in the fall of 2015, and the Parent provided all of the information necessary to complete the process of evaluating Student and developing a Service Agreement.

The Parent contends that the School was on notice as early as September 2014 that Student had a disability that was impacting Student's ability to access the School's educational programming. As noted above, the severity of Student's anxiety and the extent of the efforts the Parent was undertaking in order to support Student at home were not clearly conveyed to the School professionals, some of whom understood merely that Student was shy. Nothing in the enrollment records suggested that the School should have suspected a need to evaluate Student for services. Student began the 2014-15 school year participating in live lessons and continued to do so throughout the time period in question. Those teachers who testified unanimously believed that absence from live lessons and refusal to communicate by telephone were common rather than unusual. Student logged in to the School system on a regular basis, and earned excellent grades during all of the school years that Student attended School. While the Parent

⁸ It is noteworthy that Student is not currently receiving any therapeutic support (FF 4).

apparently played a significant role in Student's success, there is little in the record to support a conclusion that the School had notice that it needed to act under either statute, and failed to do so, at least during the 2014-15 school year. *See, e.g., D.K., supra*, 696 F.3d at 251 (finding no child find violation where the student's difficulties were not unusual for the child's age and grade) and cases cited therein; *see also G.H. v. Great Valley School District*, 2013 U.S. District LEXIS 70853 (E.D. Pa. 2013) (concluding that many factors including presentation in the school environment outweighed concerns regarding behavioral manifestations in the home).

Clearly, though, former administrators at the School did not promptly respond following communications in mid-September 2015, allowing two months to elapse before providing the Parent with the necessary forms for what it recognized as a likely need for accommodations and related services. This hearing officer concludes that a reasonable time to complete a Section 504 evaluation is sixty calendar days, with approximately ten school days to meet and develop the plan of accommodations and related services in the form of a Service Agreement for immediate implementation.⁹ Thus, Student should have been provided with the necessary accommodations and necessary related services no later than December 1, 2015. Consequently, Student was denied FAPE by the School under Section 504 from that date through the present,¹⁰ with the possible exception of the period of time Student was enrolled in a private school during the 2016-17 school year and it had no direct involvement. For the very same reasons, the School discriminated against Student under Section 504.

⁹ This conclusion borrows the timelines for completion of an evaluation and developing a program under Pennsylvania's Chapter 14. 22 Pa. Code § 14.131.

¹⁰ There is no evidence indicating that the Parent should have taken steps to follow up on the forms, since the most pressing need to eliminate telephone conversations was resolved. Even if she had constructive notice that an evaluation and Service Agreement should follow, a disabled child's right to an appropriate educational program "should not depend upon the vigilance of the parents[.]" *M.C., supra*, 81 F.3d at 397.

REMEDIES

COMPENSATORY EDUCATION

As one remedy, the Parent seeks compensatory education, which is an appropriate form of relief where an LEA knows, or should know, that a disabled child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C.*, *supra*, 81 F.3d at 397 (3d Cir. 1996). 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 more recently also endorsed an alternate 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); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014) (accepting the *Reid* Court’s more equitable, discretionary, and individually tailored calculation of this remedy). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

There was no evidence presented in this case that would guide or support a “make whole” compensatory education award. The standard method of providing an award equal to the amount of the deprivation similarly lacks evidentiary support. Nevertheless, there is existing case law in this field that compels a remedy even under these circumstances. *See, e.g., Reid, supra*, at 526 (explaining that a District Court may either accept additional evidence or remand to the hearing officer for further proceedings for a determination on the amount of compensatory education to

remedy FAPE denial); *Butler v. D.C.*, 275 F.Supp.3d 1 (D.D.C. 2017) (remanding to the hearing officer for evidence on appropriate compensatory education in light of deprivation of FAPE).

Student's anxiety no doubt impacted Student each school day that Student attempted to attend a lesson or complete an assignment or assessment. However, the Parent's efforts in helping Student manage anxiety and perform academic tasks clearly enabled Student to derive meaningful educational benefit over the course of the relevant time period. Through the dates of the hearing, Student's teachers communicated directly with Student through email, Student continued to attend lessons both live and recorded, and Student achieved very high marks in all classes. Under these circumstances, it is impossible to calculate with any certainty an appropriate amount of compensation education. Lacking any real guidance, this hearing officer equitably estimates that approximately two hours on each day that the School was in session (approximately one third of each school day) is reasonable to remedy Student's significant and ongoing anxiety that was not addressed through accommodations and related services, impacting Student's ability to access the School's program on a daily basis but without preventing Student from meeting all course expectations. The cases on which the Parent relies to support a more significant compensatory education award, including *New Milford Board of Education v. C.R.*, 2010 U.S. Dist. LEXIS 61895 (D.N.J. 2010), *aff'd*, 431 Fed. App'x 157 (3d Cir. 2011), are distinguishable from the facts presented here where the expectation was that Student would complete all coursework at home with the assistance of a learning coach.

The award shall include the period of time that Student was enrolled in the private school, because Student's struggles due to the absence of accommodations and related services from the School were the very reasons for that temporary enrollment. Further, because the school year is almost over and an evaluation is necessary in order to provide information for developing an

appropriate program prospectively, the award shall extend to the end of the current school year. The School's official calendar of days in session for the relevant school years shall be used rather than Student's attendance because of the nontraditional means of accessing the School's system based on scheduling convenience and the ongoing continual availability of the program throughout any given school year.

The award of compensatory education is subject to the following conditions and limitations. Student's Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services 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 School to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age twenty one (21).

INDEPENDENT EDUCATIONAL EVALUATION

The next issue is whether the School should be ordered to provide an independent educational evaluation (IEE). 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). Typically, 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). In this case, it appears that the first request to the School for an IEE was through the pending Due Process Complaint, but the

same inquiry applies. Although there was no evaluation with which the Parent could disagree, this hearing officer concludes that the School's failure to evaluate was the functional equivalent of performing an inappropriate evaluation. In addition, it is evident that Student will require an evaluation by a professional with experience in assessing children who cannot or refuse to participate in the process. Moreover, the statute expressly grants to hearing officers the authority to order an IEE at public expense as part of a due process hearing, 34 C.F.R. § 300.502(d). This hearing officer concludes that the remedy of a publicly funded IEE will serve the crucial function of "guarantee[ing] meaningful participation" of the Parent in the prospective development of an appropriate program, something that was denied from December 1, 2015 through the present. *Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 698 (11th Cir. 2012); *see also Schaffer, supra*, 549 U.S. at 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). Accordingly, the School shall be ordered to provide an independent psychoeducational evaluation and a functional behavioral assessment at public expense, in addition to any additional evaluations that the professionals who are engaged recommend.

REIMBURSEMENT OF COSTS AND EXPENSES

The final issue is the Parent's request for reimbursement of costs and expenses under Section 504. The nature and basis of those expenditures are not specified in the Complaint, nor was evidence developed that would suggest this hearing officer has any authority to order such relief. Accordingly, while the Parent has preserved those claims, no reimbursement shall be ordered.

SUMMARY AND CONCLUSIONS

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the School denied Student FAPE from December 1, 2015 through the present. Compensatory education and an IEE at public expense are appropriate remedies, with the latter informing the Parent and School professionals on needs to be addressed prospectively.

ORDER

AND NOW, this 25th day of May, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Student is entitled to and awarded an independent evaluation at public expense to include a comprehensive psychoeducational evaluation and a functional behavioral assessment.
 - a. Within seven calendar days of the date of this Order, the School shall provide to the Parent, in writing, a list of not less than three qualified individuals to perform a comprehensive psychoeducational evaluation of Student in the geographic area where Student resides. The qualified individuals shall have experience in performing evaluations of children who have not participated in the process.
 - b. Within seven calendar days of the date of this Order, the School shall provide to the Parent, in writing, a list of not less than three qualified Board Certified Behavior Analysts to perform a Functional Behavioral Assessment of Student in the geographic area where Student resides.
 - c. Within ten calendar days of receipt of the School's lists of qualified individuals to perform the Independent Psychoeducational Evaluation and Functional Behavioral Assessment, the Parent shall notify the School, in writing, of her selections.
 - d. The selected evaluators shall determine the scope of his/her evaluation including what assessments and observations are necessary. The selected evaluators may recommend further assessments by other professionals that shall also be provided at the School's expense.
 - e. If the selected evaluators do recommend further assessments by other professionals, the process for identifying those evaluators shall be the same as described in the above provisions.

- f. The selected evaluators shall provide written reports of the Independent Psychoeducational Evaluation and Functional Behavioral Assessment within a reasonable time, not to exceed sixty days from the date of engagement.
 - g. Following completion and receipt of all of the components of the Independent Educational Evaluation report, and within ten business days of receipt by the School and Parent, a meeting shall convene for both parties to together review the results and recommendations for consideration of appropriate prospective programming.
2. Student is entitled to compensatory education in the amount of two hours per day for each day that the School was or is scheduled to be in session from December 1, 2015 through the end of the 2017-18 school year.
 - a. Student's Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services 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 School to assure meaningful educational progress.
 - b. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age twenty one (21).
 - c. The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The cost to the School 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 Student resides.
3. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
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