

*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:** 19914-17-18

**Child's Name:** H. D.                      **Date of Birth:** [redacted]

**Dates of Hearing:**  
2/6/2018, 2/20/2018, 2/27/2018, and 4/13/2018

**Parents:**  
[redacted]

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**Hearing Officer:** Cathy A. Skidmore, M.Ed., J.D.    **Date of Decision:** 5/10/2018

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a mid-teenaged student in the District (hereafter District) who has been found to be a protected handicapped student under Section 504 of the Rehabilitation Act of 1973 and Pennsylvania's implementing regulations.<sup>2</sup> Student has been attending privately-arranged therapeutic programs out of state since March of 2017, but was formerly enrolled in the District.

In November 2017, Student's Parents filed a Due Process Complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA),<sup>3</sup> Section 504, and the Americans with Disabilities Act (ADA),<sup>4</sup> as well as the federal and state regulations implementing those statutes. The case proceeded to a hearing convening over four sessions.<sup>5</sup> The Parents claimed that the District failed to properly identify Student as eligible under the IDEA, and further that it did not provide an appropriate educational program to Student between November 2015 and March 2017. As remedies, the Parents demanded compensatory education and reimbursement for tuition and related expenses as well as reimbursement for a privately obtained evaluation. The District

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

<sup>2</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

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

<sup>4</sup> 42 U.S.C. §§ 12101-12213.

<sup>5</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both, and to the singular Parent to refer to Student's mother who was more actively involved in the educational program during the time period in question.

maintained that its educational program was appropriate for Student based on all information known to it when Student attended school there, and that no relief was due.

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

### **ISSUES**

1. Whether the District failed in its Child Find obligation in not identifying Student as eligible for special education;
2. Whether the District failed in its obligation to provide Student with a free, appropriate public education between November 2015 and March 2017;
3. If the District did fail in its obligation to provide Student with a free, appropriate public education between November 2015 and March 2017, should Student be awarded compensatory education;
4. If the District did fail in its obligation to provide Student with a free, appropriate public education at the time Student transitioned to the out of state placements in March 2017, should the Parents be awarded reimbursement for tuition and related expenses for those placements;
5. Whether the Parents should be reimbursed for an Independent Educational Evaluation and expert witness fees; and
6. Whether the District should be ordered to develop an appropriate program for Student prospectively?

### **FINDINGS OF FACT**

1. Student is a mid-teenaged student who resided in and was enrolled in the District for the relevant time period. (N.T. 31)
2. Student is a protected handicapped student under Section 504 and Chapter 15. (N.T. 31)
3. The District receives federal funding assistance. (N.T. 32)
4. At the time of the due process hearing, Student was in a parentally-selected, out of state placement. (N.T. 32; S-62)

#### RELEVANT EDUCATIONAL AND OTHER BACKGROUND

5. Student has been a student in the District since the 2009-10 school year (first grade). Student's attendance in the District included a minimum of ten days of absence for each school year, going back to the 2011-12 school year. During the 2013-14 school year, Student also had twelve instances of arriving tardy. (S-41 p. 6)
6. Student began private counseling in 2009 at the age of six to address anxiety and Obsessive Compulsive Disorder (OCD). Between May 2015 and March 2017, Student was seeing or speaking with a therapist once or twice each month. (N.T. 827, 888-89, 950-52, 989, 1005-06)
7. During the time period in question, Student often exhibited anxiety at home related to homework, and Student sometimes had difficulty sleeping as well. (N.T. 855-56)
8. Student has had and continues to have anxiety with respect to peer relationships. (N.T. 830, 835, 860, 1048, 1089)
9. In January 2011, the District sought permission to evaluate Student for concerns with articulation. The Parents did not provide consent at that time. (N.T. 889; S-2)
10. [redacted]
11. Student's grades at the end of the 2014-15 school year (sixth grade) were all in the A to B range. Student had nineteen absences and fourteen reports of tardy to school. (S-7 pp. 2-3)

#### RELEVANT SCHOOL YEARS: 2015-16 AND 2016-17 (MIDDLE SCHOOL)

12. District professionals did not observe Student to exhibit atypical concerns with social skills at school that could not be met through the regular education support during the 2015-16 or 2016-17 school years. (N.T. 354-55; P-19 pp. 39-41)
13. District professionals did not observe Student to exhibit atypical concerns with Student feeling overwhelmed at school, exhibiting anxiety behaviors, participating in class, needing prompting, or having difficulties with the Parents during the 2016-16 or 2016-17 school years. (N.T. 535-36, 542, 635-36, 663, 675, 692)
14. The middle school principals did not consider Student's use of social media to be atypical for a middle school student. (N.T. 148-49, 167-68, 475-76)

#### 2015-16 SCHOOL YEAR – SEVENTH GRADE

15. The Parents alerted an assistant principal in September 2015 of text messages that Student exchanged with a peer, expressing concern with the peer's language and indicating that Student was upset by them. (N.T. 471-74, 429, 838; S-8, S-63, S-65)

16. Student, along with peers, received minor discipline during the 2015-16 school year. Some of these incidents involved behavior in the cafeteria. (N.T. 355-56, 431, 434, 458-59; P-8; P-18 pp. 2, 12; S-15; S-17; S-18)
17. The Parents and Student's school counselor communicated in seventh grade about Student's difficulty with homework in the evenings when Student was feeling overwhelmed. One occasion when Student reported a panic attack at school for similar reasons, the school counselor was not available to Student. (N.T. 342-45, 357-58, 404-05, 843-46)
18. Teachers occasionally reported Student having difficulties with written assignments, attention and focus, leaving class to go to the restroom, and participating in class during the 2015-16 school year. (P-18 pp. 2, 6-7, 9, 11; S-13)
19. The Parents reported reasons for incomplete homework as an incident involving the family pet and a medical appointment. (S-10 p. 1; S-19 p. 1)
20. Student visited the nurse for reported anxiety on one occasion during the 2015-16 school year. (S-53)
21. In the spring of 2016, Student's seventh grade school counselor asked the Parents for documentation of Student's Anxiety diagnosis for school nursing records. (N.T. 302-03, 305, 344, 370-72, 403-04, 847; P-18 pp. 23-24; S-53 pp. 5-6)
22. Based on concerns of the school counselor, in the spring of 2016, several District representatives also discussed the possibility for a Service Agreement for Student. (N.T. 36-37)
23. The school counselor then met with the Parents at the end of the 2015-16 school year to discuss Student's Anxiety and Depression symptoms. The Parents also described a conflict Student was having with a peer at that time. (N.T. 362-63, 373-74, 851; P-18; S-64 p. 1)
24. Student attained final grades of C- or better in all classes in the 2015-16 school year with the exception of Social Studies, for which Student earned a D grade. Most of Student's grades were in the A to B- range. (S-7 p. 1)
25. Student's absences (twenty six) and approximately sixteen tardy arrivals, with a number of other occasions of being merely late to school for some unspecified amount of time, all affected Student's grades over the 2015-16 school year. (N.T. 662, 668, 677, 679, 694-95; S-7; S-54 pp. 4-7)
26. The Parents reported as reasons for absences during the 2015-16 school year illnesses and unspecified planned days off. (P-17 pp. 15, 21; P-18 pp. 13-14, 17-19, ; S-10; S-11; S-13; S-53)

27. Student's scores on the Pennsylvania System of School Assessment (PSSA) decreased in the spring of 2016 when compared to the spring of 2015 and earlier school years.<sup>6</sup> (S-6)

FALL OF 2016-17 SCHOOL YEAR (EIGHTH GRADE)

28. A few minor disciplinary referrals for Student, along with peers, continued into the fall of 2016, including behavior in the cafeteria. (S-41 pp. 3-4)
29. On a morning in early September 2016, the Parent notified the school counselor that Student was entering the school building tardy because Student had been sitting in the car in the parking lot due to anxiety and feeling overwhelmed with classwork. The Parent also asked about Student taking a different foreign language class and seeking tutoring. (S-22 p. 4)
30. Student visited the nurse for reported anxiety on one occasion during the 2016-17 school year. That visit was two days after the Parents' report of Student sitting in the parking lot. (S-53)
31. The Parents met with a District school psychologist and Student's school counselor in mid-September 2016 to discuss the Parents' concerns with Student exhibiting anxiety that resulted in Student arriving at school late. The District was also concerned with Student's frequent tardy arrivals. (N.T. 176-77, 181, 184, 852, 854; S-22 pp. 2, 4)
32. Within a few days of the September 2016 meeting, the District issued a form seeking permission to conduct an evaluation of Student for a possible Service Agreement under Section 504. The form specified record review, teacher and Parent input, a classroom observation, and homework monitoring as the method of conducting the evaluation. The Parents provided consent. (N.T. 185; S-21)
33. On September 19, 2016, Student's therapist provided a note to the District recommending a "504 plan" to accommodate Student's anxiety. (N.T. 1004; S-30 p. 2)
34. Student moved from one foreign language class to another in mid- to late-September because Student was having difficulty with the original foreign language class. (N.T. 87-88, 608-09, 613)
35. The Parents attended a District presentation on Section 504 and special education in the fall of 2016. After that presentation, the Parents shared their views of Student's anxiety

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<sup>6</sup> A comparison of yearly PSSA scores may provide some useful information, but is by no means determinative of individual educational needs. "The purpose of the PSSA is to measure how well students acquire the knowledge and skills described in the *Pennsylvania Assessment Anchor Content Standards* (Assessment Anchors) as defined by the Eligible Content for mathematics, English/Language Arts, and Science." There are two intended uses of the PSSA: (1) to provide information for school and district accountability systems, and (2) to improve curricular and instructional practices to help students reach proficiency under Pennsylvania's Standards. See <http://www.education.pa.gov/Documents/K-12/Assessment%20and%20Accountability/PSSA/Technical%20Reports/2016%20PSSA%20Technical%20Report.pdf> (last visited May 9, 2018).

and how it was manifested in the home and school environments. (N.T. 859, 891-92; S-26 pp. 3-4; S-67)

36. Sometime prior to early November 2016, Student was involved in a physical altercation at school. There was no disciplinary referral following that incident and the middle school principal did not consider it serious. (N.T. 144, 151-52, 161, 167)
37. The principal of the middle school met with Student and a peer during the morning of November 2, 2016, when the District became aware of a potential physical altercation to take place that day. Both students assured the principal that the altercation would not occur and they returned to class. (N.T. 123, 133-37, 467-69, 478-79, 480-81; S-65 pp. 1, 3-5)
38. The physical altercation did occur on November 2, 2016. Student did not engage in the physical altercation but encouraged it to take place. (N.T. 137, 139-40, 460-61; S-25; S-33)
39. The middle school principal met with one of the Parents after the physical altercation, and imposed a two day out of school suspension. The previous physical altercation was also mentioned in that meeting. (N.T. 139-40, 152, 160, 866;P-3; S-24)
40. The middle school principal and an assistant principal telephoned Student and the Parents on the evening of November 2, 2016 because they had received reports of continued social media contacts regarding the physical altercation. The principal asked the Parents to take Student's cell phone but they would not do so. The Parents were upset during the telephone call and believed that the principal made inappropriate comments to Student and used a yelling tone of voice, resulting in Student feeling humiliated. (N.T. 140-42, 462-64, 869; S-28)

#### DISTRICT SECTION 504 EVALUATION

41. The District school psychologist did not administer any assessments to Student for the Section 504 Evaluation. (N.T. 179; S-30)
42. The Parents provided detailed input into the evaluation. They described Student's anxiety with respect to a number of educational and daily living skills, and indicated that Student exhibits OCD symptoms and sometimes experiences panic attacks. They also noted that Student "hides [] worries and anxiety at school" until returning home, and that private therapy was helping Student learn coping strategies and skills. (N.T. 827; P-2)
43. The Section 504 Evaluation Report stated that Student had been diagnosed with Anxiety Disorder and that concentration and sleeping were impacted by the disability; tardiness and a concern over incomplete assignments were also noted. That Report included a copy of the request from Student's therapist and a prescription page from a physician stating that Student was being treated for an Anxiety Disorder. (S-30 p. 2)

44. The Section 504 Evaluation Report provided a summary of benchmark and standards-based assessment performance including scores on the PSSA, as well as current grades and attendance. (S-30 p. 5)
45. The Section 504 Evaluation Report provided a brief summary of nursing records, including a diagnosis of Anxiety. (S-30 p. 6)
46. Teacher input into the Section 504 Evaluation Report reflected concerns with attendance, inattention, work completion, and fatigue. Student's work habits (task completion, homework, quality of work, attention to instructions, organization, classroom participation, self control, asking for help, and following directions) were variable among classes, with at least one teacher reporting concern with each of those. (S-30 p. 6)
47. Student's school counselor observed Student in the Science classroom. Student reportedly engaged in some off-task behaviors and did not participate in answering questions. (N.T. 325; S-30 p. 6)
48. Student's school counselor reviewed the Parents' input for the evaluation and included part of it in the report. Specifically, the Parents [had] concerns with Student completing homework (exhibiting anxiety); frustration and impatience with following directions; attending to tasks; communicating wants, needs, and feelings; and transitions and sleep patterns (due to anxiety). (N.T. 318-19; S-30 p. 7)
49. The District school psychologist did not consider that any behaviors, other than poor attendance and homework completion, were a concern at school at the time of the November 2016 evaluation based on teacher input. (N.T. 223, 236-38, 243)
50. Proposed accommodations listed in the Section 504 Evaluation Report were for homework limited to skills Student demonstrates independently; opportunity for alternatives to class presentation assignments; and a homework accommodation for extended time following a review of inaccuracies if graded on content rather than mere completion. (S-30 p. 7)
51. The District provided the report of the Section 504 Evaluation to the Parents on November 14, 2016 with an invitation to a meeting to be held on November 23, 2016. (N.T. 378-79; S-31; S-35 pp. 1-3)
52. In early November, the middle school principal suggested a psychological evaluation of Student. A pre-referral team of District professionals determined at a November 17, 2016 meeting that Student did not need an IDEA evaluation to determine a need for specially designed instruction. The team noted that Student's tardiness, but not anxiety, was affecting academic performance. (N.T. 125-26, 170, 180-81, 235, 300-01; P-19 p. 26; S-34 p. 2; S-36)

#### SERVICE AGREEMENT AND INTERVENTIONS NOVEMBER 2016 TO MARCH 2017

53. A meeting convened on November 23, 2016, to develop a Service Agreement. Accommodations specified were: homework limited to skills Student demonstrates

independently or a conference with the teacher to review requirements; modeling and clarification of homework expectations; opportunity for alternatives to class presentation assignments; a homework accommodation for extended time following a meeting with the teacher to review inaccuracies if graded on content rather than mere completion; frequent communication with the Parents when Student was below a C grade level or assignments were incomplete; and use of information technology for current homework expectations. Everyone present agreed with the Service Agreement that was created. (N.T. 232-34, 375-76, 378-79, 385, 509; S-30; S-38)

54. The District issued a Section 504 Prior Written Notice specifying that it proposed to identify Student as a child with a disability under Section 504, but not to evaluate Student under the IDEA. The Parents approved this action. S-34)
55. Student's teachers implemented the Service Agreement. (N.T. 554-60, 574-75, 622, 632, 639, )
56. Students were permitted to seek help or remediation from teachers during lunch period while the students would eat that meal. (N.T. 332, 386-87, 561-62, 585, 594-95, 651-52; P-20 p. 1)
57. Student sometimes took advantage of the lunch period to get caught up and review assignments and instruction. In early December, 2016, the District developed a schedule for Student to meet with specific teachers on certain days of the week. However, Student soon became overwhelmed with the lunch period remediation across classes. (N.T. 562, 585, 619, 633; S-40)
58. Also [in] early December 2016, Student's Science teacher asked former teachers about Student's performance and attendance due to then-current concerns with attendance and grades. (S-39 p. 1)
59. In January 2017, some of Student's teachers reported Student having missing assignments and poor grades. (P-20 pp. 1; P-24)
60. In February 2017, Student was among a number of students invited to participate in a regular education after school skill-building intervention. Students with weak PSSA scores were part of the targeted group. (N.T. 481-84; S-42)
61. On February 27, 2017, a meeting of a team of District professionals and the Parents convened to discuss concerns about Student. (N.T. 334, 627, 879)
62. The District issued a Permission to Evaluate form to the Parents on March 1, 2017, having considered that the Service Agreement was not meeting Student's attendance and academic performance needs. The Parents provided their consent ten days later. That evaluation was not completed because Student was out of state and not in the local geographic area. (N.T. 57, 60, 64, 227, 243-44; S-52)
63. The Parents arranged for Student to begin attending an out of state wilderness program (Wilderness Program) beginning on March 9, 2017, because they believed Student's

Anxiety and OCD symptoms were worsening, as was their relationship with Student, and that Student's ability to function was deteriorating; they were also concerned that Student was in danger of placement in a juvenile detention facility.<sup>7</sup> They notified the District that same date. (N.T. 873, 878-79, 899-900, 913; S-57; S-59 pp. 1-6)

64. Student was withdrawn from the District effective March 9, 2017. (S-50)
65. At the time of Student's withdrawal from the District, Student had accrued eighteen absences and approximately fifteen tardy arrivals, with a number of other occasions of being merely late to school for some unspecified amount of time. (N.T. 110-14; P-6; S-54 pp. 1-4)
66. The Parents had reported as reasons for absences during the 2016-17 school year illness and a planned vacation. (P-19 pp. 9, P-20 p. 4; S-22 p. 1; S-43; S-44)
67. The Parents had reported as reasons for Student's late arrival to school during the 2016-17 school year that Student was not sleeping well and was tired in the morning. (N.T. 586)

#### WILDERNESS PROGRAM

68. Student began attending a nomadic wilderness therapy program out of state in March 2017. (N.T. 1031-32)
69. Wilderness Program serves adolescents who are thirteen to eighteen years of age. (N.T. 1030)
70. When Student first arrived at Wilderness Program, Student exhibited extreme anxiety and was highly emotional. Staff were concerned for Student's safety. (N.T. 1035-36, 1065-66)
71. The Wilderness Program school curriculum has been accredited by the agency in that state that is responsible for doing so. (N.T. 1031)
72. The educational component of Wilderness Program is that Students are provided with a number of workbooks to complete during their stay. The education component is focused on physical activities, health and safety in the outdoor environment, art, and life skills. Completion of a workbook earns educational credit. (N.T. 1039-43, 1059, 1061; P-12)
73. There are no certified teachers at Wilderness Program. (N.T. 1059)
74. Students at Wilderness Program are provided with formal and informal therapy throughout the day, both individual and in groups. (N.T. 721-33, 1031-34)

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<sup>7</sup> Student was on probation at the time. (N.T. 878-89)

75. Student had a treatment plan at Wilderness Program to address Student's Anxiety, Oppositional Defiant Disorder, and difficulty with family relationships. (N.T. 1038-39; P-11)
76. Student was provided individual and group therapy at Wilderness Program. (N.T.1044; P-11)
77. Student began to learn strategies and coping skills to manage anxiety, and to express self without resort to anger and oppositional behavior, while at Wilderness Program. (N.T. 1055-56; P-11)
78. Student earned A grades in the four academic subject areas (physical education, art, life skills, and health) at Wilderness Program. (P-12)
79. Student worked on building a better and stronger relationship with the Parents while at Wilderness Program. (P-11)
80. The clinical director at Wilderness Program who was also a therapist for Student recommended that Student enroll in a structured, residential treatment placement because of Student's significant anxiety. (N.T. 1050-51, 1055-56; P-11)
81. Student was discharged from Wilderness Program on May 25, 2017. (P-11)

#### INDEPENDENT EDUCATIONAL EVALUATION

82. An Independent Educational Evaluation (IEE) was conducted in April 2017 while Student was at Wilderness Program. The Parents arranged for that IEE. (N.T. 1063, 1080-81)
83. The private psychologist who conducted the IEE has experience providing comprehensive psychological evaluations of young adults and adolescents who are in treatment programs. (N.T. 1078-8; P-7)
84. The IEE Report included input from the Parents and Student and a summary of developmental, medical, psychological, and other history including substance abuse. Student's diagnoses of Anxiety and Depression were noted. (S-59 pp. 1-6)
85. On cognitive assessment for the IEE (Wechsler Intelligence Scale for Children – Fifth Edition), Student's Full Scale IQ (100) was solidly in the average range; Working Memory was a relative strength and Processing Speed a relative weakness (low average to average range). (S-59 pp. 7-9)
86. On the Wechsler Individual Achievement Test – Third Edition, Student earned average range scores on all subtests and composites, with the exceptions of a low average score on the Numerical Operations subtest, and high average scores on the Essay Composition and Spelling subtests that yielded a high average range score on the Written Expression Composite. (S-59 p. 9-10)

87. In assessment of Student's executive functioning skills (Delis-Kaplan Executive Function System and the Behavior Rating Inventory of Executive Function (self-report and parent ratings only)), the independent psychologist concluded that Student demonstrated overall strong skills with the exception of regulating emotions and shifting (attentional, behavioral, and/or cognitive), both related to Anxiety and Depression. (N.T. 1094-95, 1115; S-59 pp. 11-12)
88. In psychological and emotional functioning, the independent psychologist concluded that diagnoses of Generalized Anxiety Disorder and Persistent Depressive Disorder were indicated for Student. She also described a number of characteristic tendencies with which Student did or likely would struggle and had or would contribute to those diagnoses. (S-59 pp. 12-17)
89. The independent psychologist recommended that Student transition to a long-term residential treatment program for Student's Anxiety and Depression. Educational recommendations included a therapeutic, highly structured educational program in a residential setting; small class sizes; preferential seating; and test and assignment accommodations. (N.T. 1099-1100; S-69 pp. 17-19)
90. The independent psychologist concluded that Student's anxiety and depression impacted Student's performance at school based on information from the Parents. She did not seek any information from the District but was aware that Student's anxiety and behaviors were more prominent at home than at school. (N.T. 1100-02, 1108-09)
91. The independent psychologist concluded that Student did not exhibit any learning disability in reading, mathematics, or written expression. She did not otherwise reach any conclusion with respect to Student's potential eligibility under the IDEA or Section 504. (S-59)

#### RESIDENTIAL PROGRAM

92. Student has been attending the long-term residential treatment program (Residential Program) since May 2017. Residential Program is therapeutic with academic components. (N.T. 723-24, 788, 792)
93. Residential Program serves adolescent [residents] between the ages of twelve and eighteen. (N.T. 716-17)
94. Residential Program is a year round program, and the [residents] attend school through the summer. (N.T. 790, 1141-42)
95. Residential Program staff work with the [residents] in the mornings to help get them ready for and to school; assist them in the classroom and on breaks; and arrange for activities before assisting them to turn in for the night. (N.T. 718-19)
96. The educational program at Residential Program is licensed by the Department of Education in the state where it is located. (N.T. 717, 1140)

97. Residential Program follows the core curriculum of the state where it is located. (N.T. 1141)
98. Residential Program has twelve certified teachers in addition to other non-certified staff. All of the teachers are certified by the state where it is located. (N.T. 1180-81)
99. Student entered Residential Program as an eighth grader then quickly was advanced to the ninth grade. (N.T. 1141-42)
100. At Residential Program, Student had ninth grade core classes in English, Algebra I, U.S. History, and Biology; Student also had Physical Education and Fine Arts classes. (N.T. 1155-56; P-15)
101. Residential Program has been implementing Student's Service Agreement and is able to provide and suggest additional academic interventions as needed. Student does not have an Individualized Education Program (IEP) at Residential Program. (N.T. 770, 812-13)
102. Students receive a grade, and can receive education credit, for a psychology course that is applied psychology based on individual therapy. (N.T. 765, 1159, 1179)
103. Academic tutoring is available if needed at Residential Program. There is a learning center where the [resident] can seek additional one-on-one support or study independently. (N.T. 729-30, 764, 770, 1155-56)
104. Students at Residential Program are able to miss classes for reasons such as anxiety, to provide an opportunity to work through the difficulty alone or with a therapist. (N.T. 1162-63)
105. Student has exhibited significant anxiety in the classroom at Residential Program but was improving with the structured environment. (N.T. 1143-46)
106. At the end of the third quarter of the 2017-18 school year at Residential Program, Student had grades of A- or better in all classes, with the exception of Algebra for which Student had a D grade. (P-15)
107. Residential Program provides its students with a list of academic recommendations that includes information on whether certain interventions have been successful. For Student, effective interventions have been regular meetings with the academic advisor; chunking and pacing of expectations; regular monitoring of supports; decreased distractions; flexible discipline; clear and concrete directions; monitoring of behavior; and external rewards for completed tasks and grades. (N.T. 1149-50, 1166; P-14)
108. Student had a treatment team at Residential Program comprised of two primary therapists, the clinical director, a psychiatrist, and residential supervisors. The treatment team met weekly to discuss progress on goals for all of the [residents] assigned to that team, and an academic advisor participated in those meetings. The academic advisor communicated with the teachers about interventions that should be implemented in the classroom. (N.T. 720-22, 817-20, 1151)

109. A treatment plan was developed for Student at Residential Program and was updated monthly. Student worked on managing OCD and Anxiety symptoms (N.T. 732, 1147-48; P-13)
110. Student has had weekly individual therapy and weekly group therapy at Residential Program, as well as weekly family therapy with a therapist who is a social worker. Additional group therapy was also provided. (N.T. 716, 730-31, 771-72)
111. Student has seen a psychiatrist at Residential Program on a monthly basis. (N.T. 774)
112. The [residents] at Residential Program have also engaged in recreational therapy participating in various activities throughout the week. (N.T. 791-92)
113. The [residents] at Residential Program complete individual tracking sheets of exhibiting appropriate skills and behaviors throughout the day, such as completing assigned chores, engaging in class, and adhering to schedules. (N.T. 744-45, 776-77)
114. Residential Program planned on discharging Student in April 2018 to return home with the support of a Residential Program therapist and Student's previous private therapist. (N.T. 790, 805)

## **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. In an administrative hearing such as this, 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 Parents who initiated this action. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v.*

*County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

This hearing officer found the witnesses who testified to be generally credible, testifying to the best of his or her recollection. None of the witnesses exhibited a demeanor that suggested a lack of trustworthiness or evasion. There were also relatively few inconsistencies in the testimony, with the exception of the nature of the November 2, 2016 evening telephone call, and the discrepancies are attributed to imperfect memory and the clearly emotional perspectives of those participating rather than on any intent to deceive. The knowledgeable testimony of the District professionals who worked with Student, and that of its school psychologist, was accorded heavy weight with respect to how Student presented in the educational environment. Credibility is discussed more fully below as necessary.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' closing arguments. Before proceeding to address the issues, however, this hearing officer finds it prudent to observe that when the Parents made what was clearly a very challenging decision about Student in March 2017, they believed that Student was at or near a crisis stage and that immediate and drastic measures were needed. One cannot question the sincerity of their belief that urgent steps were required at that time. The issues in this matter, however, are limited to the District's obligations to Student based on its actual or constructive knowledge under applicable law.

## SECTION 504 PRINCIPLES

Because Student was identified under Section 504, a review of its requirements at the outset is appropriate. In the context of education, Section 504 and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, an “appropriate education” means “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy” all of the requirements of each of the related subsections of that chapter: §§ 104.34, 104.35, and 104.36. *See* 34 C.F.R. § 104.33(b). 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. Significantly, “[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002).

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, a local educational agency (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); *Andrew F.*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 988, 197 L.Ed.2d 335 (2017).

With respect to the ADA, the substantive standards for evaluating claims under that statute and Section 504 are essentially the same. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012; *Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, the discussion below serves as a final determination of all Section 504 and ADA claims which will be considered together in this matter, although Section 504 will be the primary reference.

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.

#### IDEA CHILD FIND PRINCIPLES

The first issue is whether the District 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 LEAs to locate, identify, and

evaluate children with disabilities who are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. LEAs are required to fulfill that Child Find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, LEAs are required 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). Nor are LEAs required to formally evaluate “every struggling student” under the IDEA. *Id.* (citations omitted).

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

Here, there is no question that Student has Anxiety and other mental health diagnoses. It is also true, as the Parents observe, 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). 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).

The Parents claim that the District ignored signs of Student’s disability and asserted need for specially designed instruction beginning in the 2015-16 school year. The evidence that might support this contention for seventh grade is relatively sparse. The District did have notice of Student’s Anxiety diagnosis and Student visited the nurse one time that school year because of an anxiety episode. Student also had a few difficult experiences with social media, peer relationships, and minor disciplinary infractions over the course of that school year. The Parents and District professionals communicated about homework concerns and Student becoming overwhelmed. Yet the pattern of Student’s absences and late arrivals to school was not markedly different than the previous school years, with non-anxiety reasons provided for some of those days. In addition, the District professionals working with Student provided persuasive and compelling testimony that they did not observe Student to behave differently than other middle

school students with respect to exhibiting anxiety, participating in class, needing to be prompted, or expressing feelings of being overwhelmed.

Although Student's presentation at home was clearly much different, it was not until the end of the 2015-16 school year that the subject of a Service Agreement was first mentioned due to concerns. Prior to the meeting with the Parents at the end of that school year, there simply was not sufficient reason for the District to initiate a Section 504 or IDEA evaluation when Student was not exhibiting signs of a need for accommodations or special education. *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. When the record is viewed in its entirety, the claims regarding Child Find and a denial of FAPE for the 2015-16 school year must therefore fail.

The start of the 2016-17 school year presents a quite different set of circumstances. Beginning in early September 2016, Student was manifesting significant anxiety regarding school, causing tardy arrival, and the Parents communicated those details to the District. Student also visited the nurse around the same time and for much the same reason. A meeting was quickly convened with the Parents to discuss those concerns, and within a matter of days the District sought permission to conduct a Section 504 Evaluation. Other, regular education interventions were also implemented, including Student's move to a different foreign language class and use of the lunch period remediation. Upon completion of the Section 504 Evaluation, a Service Agreement was developed to provide accommodations that were designed to alleviate the concerns expressed by the Parents and District professionals: expectations for homework assignments; anxiety and feelings of being overwhelmed; attendance; understanding instructions and directions; and opportunities for alternatives to class presentations. When viewed along with

the needs Student was demonstrating and the knowledge that the District had, the Service Agreement was reasonably calculated to provide Student with meaningful educational benefit and did not deny Student the benefit of FAPE.

Student did incur an out of school suspension around the time the Service Agreement was created, and by December 2016 was struggling in Science class. Additional concerns with missing assignments and poor grades were noted in January 2017. Student was considered for a skill building intervention, and lunch period remediation sessions continued. While it is clear that the latter aggravated Student's anxiety, it was certainly reasonable for the District to continue regular education interventions while implementing the Service Agreement for a period of time in order to assess whether it was or was not effective. By late February 2017, approximately sixty calendar days after the Service Agreement was finalized, the District convened a meeting with the Parents to discuss continued concerns about Student and to consider a special education evaluation that would have proceeded had Student remained in the District. This hearing officer concludes that the District's actions were appropriate in response to Student's needs throughout the 2016-17 school year, based on information known at the time, until the first unilateral placement.

The Parents contend that the District did not conduct a sufficiently comprehensive evaluation of all areas of potential disability. The District proposed, and the Parents consented to, an evaluation under Section 504. 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.* However, neither Section 504 nor the implementing regulations mandate an evaluation that meets IDEA criteria.

Although the Section 504 Evaluation did not include any formal assessments, the team gathered input from the Parents and teachers, and a classroom observation was conducted. Student's Anxiety Disorder was noted as well as how it was manifested at home and at school. Student's difficulties with homework, attention, frustration, and following directions were described from the Parents' and District's perspectives. Recommendations were made for accommodations to address the needs exhibited in the school environment. This hearing officer concludes that, based on information known to the District in the fall of 2016, the Evaluation met the requirements of Section 104.35 of the Section 504 implementing regulations and was sufficiently comprehensive.

Finally on this issue, the record does not establish by a preponderance of the evidence that Student is eligible under the IDEA. Even the private psychologist who relatively recently conducted the IEE declined to reach such a conclusion. Moreover, Student has been in therapeutic residential programming for over a year, learning a variety of skills and strategies for managing Student's mental health diagnoses, and it is unknown what needs Student will exhibit upon a return home to a less structured and non-clinical environment and what the District's obligations will be.

For all of the above reasons, the District did not discriminate against Student or violate any of its obligations to Student under the IDEA or Section 504.

#### REQUESTED REMEDIES

As one remedy, the Parents seek compensatory education, which is an appropriate form of relief where an LEA 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 LEA fails to resolve the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). A compensatory education award is designed to remedy a deprivation of educational services. *Id.* Here, having found no denial of FAPE, no such award is warranted.

The Parents also seek reimbursement for the costs of tuition and related expenses for the two unilateral out of state placements. Consideration of this claim requires 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. v. School District of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009). Again, having determined that the District did not deny Student FAPE, the first prong of the test has not been met so there is no need to address the second and third elements.

Next, the Parents seek reimbursement for the IEE they procured in the other state. Ordinarily, 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). In this case, the District in March 2017 took initial steps toward, but did not begin much less complete, an evaluation of Student for special education because Student was out of state. Although a District's failure to evaluate may be considered the functional equivalent of providing an inappropriate evaluation for purposes of considering an IEE issue, here, the District was not required to arrange for assessments of Student in the other state while attending the Wilderness and Residential Programs. *Great Valley School District v. Douglas M.*, 807 A.2d 315 (Pa. Commw. 2002)(collecting cases and holding that, "a school district cannot be compelled to

assume any responsibility for evaluating a child while he remains outside Pennsylvania in a unilateral placement.”). Moreover, while there were educational recommendations offered, the private psychologist who conducted the IEE and issued the report declined to reach any conclusions on Student’s eligibility under the IDEA or even Section 504. Although the IEE must be considered by the District if and when Student returns to be educated in its schools, there is no basis for awarding reimbursement to the Parents for its cost.

A related issue is the Parents’ request for reimbursement for the fees incurred by them for their private psychologist, who was qualified as an expert, to testify at the hearing. Her testimony was certainly knowledgeable, and provided insight into Student’s needs as of April 2017. However, the basis for this requested remedy is Section 504, which provides in relevant part that, “*the court*, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs.” 42 U.S.C. § 2000e-5(k)(emphasis added). Similar language in the IDEA has been construed as not applying to administrative hearing officers. *B. ex rel. M.B. v. East Granby Board of Education*, 201 Fed. Appx. 834, 837, 2006 U.S. App. LEXIS 27014, \*6 (2d Cir. 2006)(concluding that an attorney fee award “is a district court function” under 20 U.S.C. § 1415(i)(3)(B), which provides district courts with discretion to “award reasonable attorneys’ fees as part of the costs to the parents of a child with a disability who is the prevailing party”). Accordingly, this hearing officer shall not address that remedy.

The final issue is whether the District should be ordered to develop a special education program for Student prospectively. This hearing officer declines to do so because the record simply is not preponderant that Student is in need for specially designed instruction at this time. As discussed above, Student has been in structured residential placements for over a year, and as of the final hearing date, it remained unknown what strengths and needs Student would exhibit in

a less restrictive environment. If and when Student is again available for the District to conduct an evaluation as it proposed in March 2017, its professionals and the Parents, as a team, will be in a position to consider all available information including the IEE, and determine Student's eligibility status and needs under Section 504 or the IDEA.

Lastly, by way of dicta, this hearing officer makes the following observations. With the benefit of hindsight, one can almost always question whether certain events or behaviors should have been given more significant meaning or attention. But the law does not permit us to view FAPE claims in that manner. It is also important for the parties to be able to work together as a team moving forward so that Student's needs can be appropriately met both at school and in the home. By the time an evaluation is completed and the team members meet to review it and decide on eligibility and programming, there will be a wealth of valuable information available so that informed team decision-making can occur to plan Student's important transition to high school.

### **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did not fail in any of its obligations to Student under Section 504 or the IDEA, and it is not required to take any further action that it did not already plan to do.

## **ORDER**

AND NOW, this 10<sup>th</sup> day of May, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not fail in its Child Find or other obligations to Student under the IDEA.
2. The District did not fail in any of its obligations to Student under Section 504.
3. The Parents and Student are not entitled to any of their requested remedies.
4. The District is not ordered to take any action.

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

*Cathy A. Skidmore*

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HEARING OFFICER  
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