

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: 20201-17-18

Child's Name: Q. G. **Date of Birth:** [redacted]

Date of Hearing:
3/23/2018

Parents:
[redacted]

Counsel for Parent
Morgen N. Black-Smith, Esquire
David J. Berney, Esquire
8 Penn Center
1628 JFK Boulevard, Suite 1000
Philadelphia, PA 19103

Local Education Agency:
Khepera Charter School
926 W. Sedgley Avenue
Philadelphia, PA 19132

Counsel for the LEA
Nigel S. Scott, Esquire
1500 Walnut Street
Suite 700
Philadelphia, PA 19102

Hearing Officer: Cathy A. Skidmore, M.Ed., J.D. **Date of Decision:** 4/11/2018

INTRODUCTION AND PROCEDURAL HISTORY

Student (hereafter Student)¹ is a middle elementary school-aged student attending the Charter School (School) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² based on an Other Health Impairment classification. Student enrolled in the School at the start of the 2016-17 school year and a special education evaluation was conducted, resulting in a determination of IDEA eligibility and recommendations for behavioral and other supports. An Individualized Education Program (IEP) developed by the School included provision of a one-on-one personal care assistant³ whose support benefitted Student. When the Parents learned that there was no personal care assistant provided at the start of the 2017-18 school year, they requested new meetings of Student's IEP team as well as confirmation that the School was or would be implementing Student's program.

Frustrated with the School's response to their inquiries, Student's Parents filed a Due Process Complaint in January 2018 asserting that Student was denied a free, appropriate public education under the IDEA, Section 504 of the Rehabilitation Act of 1973,⁴ and the Americans with Disabilities Act (ADA).⁵ Specifically, the Parents challenged the School's evaluation of and IEP for Student on both procedural and substantive grounds, and further asserted a failure to

¹ In order to provide confidentiality and privacy, Student's name, gender, and other personal 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).

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 The terms "personal care assistant" and "one-on-one" were used interchangeably at the hearing, and at times the term "support personnel" was also used. The term "personal care assistant" (or PCA) will be used in this decision because that is the language most closely aligned with Student's IEP.

⁴ 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.

⁵ 42 U.S.C. §§ 12101-12213.

produce Student's education records. As remedies, they primarily sought compensatory education and an independent educational evaluation. The case proceeded to a due process hearing which was completed in a single session⁶ at which the School claimed that no relief was due.

Following review of the record and for the reasons set forth below, the majority of the Parents' claims must be granted.

ISSUES

1. Whether the School's evaluation of Student was appropriate procedurally and substantively;
2. If the evaluation was not appropriate, should Student be provided with an independent educational evaluation;
3. Whether the School's IEP was appropriate procedurally and substantively;
4. Whether the School's IEP was properly implemented;
5. Whether the School should be directed to immediately convene an IEP meeting;
6. Whether the School complied with all requests for education records of Student;
7. If there are flaws with respect to Student's IEP, should the Student be awarded compensatory education;
8. If there are flaws with respect to implementation of Student's IEP, should the School be ordered to do so immediately; and

⁶ 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. 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.

9. If an independent educational evaluation and/or compensatory education are ordered, should they be provided in the form of a special needs trust?

FINDINGS OF FACT

1. Student is a middle-elementary school-aged student who has been enrolled in the School since the start of the 2016-17 school year and continuing through the date of the due process hearing. The School was the local educational agency (LEA) for Student throughout that time period. (N.T. 43-44, 47)
2. Student was diagnosed with Autism Spectrum Disorder at the age of three or four. (N.T. 114, 169, 172-73; P-2 pp. 7, 12-15)
3. Student has been identified as a child with a disability and a protected handicapped student for purposes of the IDEA, Section 504, and the ADA. (N.T. 43, 47; P-5 p. 11)
4. The School is a recipient of federal funding assistance. (N.T. 44-45, 47)
5. Student has a number of strengths especially in academic areas. (N.T. 117)
6. Student has difficulty with social skills including peer relationships. Student has sensory needs and also engages in concerning behaviors including impulsivity, distractibility, and disruption in the classroom. (N.T. 114-15, 135, 165)
7. Student has never been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). (N.T. 132)
8. Student attended a local school district for kindergarten and first grade. Student was not identified as in need of special education by that school district. (N.T. 116; S-1 pp. 3, 8)
9. Student was evaluated by a pediatric psychologist in April 2016 due to the Parents' concerns with Student's behaviors at school. The psychologist confirmed Student's diagnosis of Autism Spectrum Disorder, Low Level. Recommendations were made to address Student's social skill deficits and sensory needs, and to support Student's need for multisensory instruction. (N.T. 127; P-2)

ENROLLMENT 2016-17 SCHOOL YEAR

10. Student enrolled in the School in May 2016 for the start of the 2016-17 school year. (N.T. 44, 47, 116; S-1)
11. At the time Student was enrolled in the School, the Parents provided information about Student that included a reference to "ASD" on the enrollment forms that was an acronym for Autism Spectrum Disorder. (N.T. 171-72; S-1 p. 3)

12. Student began exhibiting behavioral difficulties at the start of the 2016-17 school year, and the Parents were frequently called. (N.T. 121-24; P-3, P-4)
13. The Parents discussed Student's Autism diagnoses with staff at the School by early November 2016, and provided a copy of records from the pediatric psychologist as well as a release for the School to communicate with that psychologist. (N.T. 126-29, 169-70, 172, 175-76, 200-01)
14. Also by early November 2016, the Parents returned a signed Permission to Evaluate form.⁷ (N.T. 126-29; P-5 pp. 2, 4)
15. The School issued an Evaluation Report dated November 30, 2016. Student's date of birth and age are incorrect by nearly four years, although the correct age is noted elsewhere in the document. (N.T. 129-30; P-5 pp. 1, 9)
16. The stated reason for referral for the evaluation is "behavioral concerns." (P-5 p. 1)
17. The ER states that Student had no previous evaluation history. (P-5 p. 1)
18. The ER reported the results of a cognitive assessment, the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V). Student's full scale IQ (FSIQ) was reported to be 110 at the 75th percentile and in the average range, despite the fact Student earned low average range scores on the Verbal Comprehension, Visual Spatial, and Fluid Reasoning Composites (18th, 10th, and 21st percentiles, respectively), and average range scores on the Working Memory and Processing Speed Composites (27th and 45th percentiles, respectively). (P-5 pp. 2-4)
19. The ER reported the results of the Wechsler Individual Achievement Test – Third Edition (WIAT-III). Student earned scores in the average range on all Composites and subtests with the exception of the pseudoword decoding subtest in the below average range. (P-5 pp. 4-7)
20. The Conners-3 Diagnostic Scales were completed by the Parent and a teacher, yielding concerns by the teacher with respect to Inattention, Hyperactivity/Impulsivity, Defiance/Aggression, and Peer Relations; the Parent's scales reflected concerns only with Peer Relations. (P-5 p. 10)
21. The ER did not include teacher observations or recommendations. The only teacher input into the ER was the summary of the Conners-3 scales. (P-5)

⁷ The Parent's memory was understandably unclear on precisely when permission was given for an evaluation. The discipline referrals indicate that by late October and early November, Student's behavior was becoming noticeably problematic, and it was at that time that the parties discussed an evaluation. (N.T. 121-26; P-4 pp. 1-2)

22. The ER concluded that Student was eligible for special education based on a classification of Other Health Impairment due to symptoms of ADHD. Student's need for special education was also indicated.⁸ (P-5 p. 11)
23. Recommendations were included in the ER for supports such as repetition and review of material; multisensory instruction; checks for understanding; assignment and test accommodations; chunking of instruction; strategies promoting attention, focus, and task completion; opportunities for movement; and a Positive Behavior Support Plan (PBSP). (P-5 pp. 11-12)
24. The school psychologist who prepared the ER and conducted the assessments did not speak with the Parents before or after completion of the evaluation. (N.T. 130, 133)
25. The Parent Input section of the IEP contains only information that was shared by them during discussions with School staff about Student's problematic behaviors that fall. (N.T. 213, 215)
26. The ER was provided to the Parents on January 31, 2017 when they met to discuss Student's IEP on January 31, 2017. The school psychologist did not attend that meeting. (N.T. 130-31, 137-38, 181-82, 201)
27. The IEP that was provided for discussion at the January 31, 2017 meeting provided the cognitive and achievement assessment results from the ER as well as those from the Conners-3. Student's strengths were noted to be reading and mathematical computation; the areas of concern were behaviors that impeded focus and task completion. (P-6)
28. Annual goals in the January 31, 2017 IEP addressed solving word problems involving addition and subtraction (from a baseline of grade level 1.7); reading comprehension, fluency, and accuracy of grade-level texts (from a baseline of grade level 1.1); and written expression (conventions) (from a baseline of grade level 1.9). (P-6 pp. 20-22)
29. Program modifications and items of specially designed instruction essentially mirrored the recommendations in the ER, including development of a PBSP. (P-6 pp. 23-25)
30. There is no PBSP in the January 31, 2017 IEP, nor are there behavioral goals. (N.T. 46, 47; P-6)
31. The IEP team discussed providing Student with a full time personal care assistant (PCA) to assist with Student's behaviors, and that service was included in the January 31, 2017 IEP. (N.T. 138-39; P-6 p. 26)
32. Weekly speech/language therapy was also included as a related service in the January 31, 2017 IEP. (P-6 p. 26)

⁸ The ER noted that the need for specially designed instruction went "beyond that which can be provided in the regular education classroom." (P-5 p. 11) As discussed more fully below, special education and related services must be provided in the least restrictive environment that is appropriate, which frequently means the regular education classroom. The majority of the recommendations in the ER are perfect examples (P-5 pp. 11-12).

33. The January 31, 2017 IEP proposed that Student would fully participate in the general education curriculum with itinerant autistic and speech/language support. Student's school day was specified to be seven hours. (P-6 pp. 28-30)
34. The School has no record of any Notice of Recommended Educational Placement (NOREP) for Student, including one to accompany the January 31, 2017 IEP. The Parents have never been provided with a NOREP from the School. (N.T. 92, 212, 233-34, 240, 276)
35. The IEP team discussed Student participating in a social skills group at lunch. (N.T. 141-42)
36. The IEP team did not discuss the inclusion of speech/language therapy in Student's IEP. (N.T. 143)
37. The IEP team did not discuss development of a PBSP for Student. (N.T. 144)
38. The Parents asked for some changes to the January 31, 2017 IEP and understood that the school psychologist would contact them to review the ER and IEP. However, they did agree to the provision of the PCA, the social skills group, and a PBSP. The Parents were not contacted by the school psychologist. (N.T. 146, 179-81, 215-16)
39. A full-time PCA was provided for Student on or about March 1, 2017. The PCA was reportedly effective in helping Student manage behaviors, and the Parents were pleased with Student's success for the rest of that school year, including academically. (N.T. 46, 47, 139-40, 184, 190-91, 203)
40. Student did participate in the social skills groups approximately once per week after the IEP meeting. (N.T. 142-43)
41. Student's grades at the end of the 2016-17 school year were all in the A to B range, with the exception of two special classes where Student earned C grades. (S-2)

2017-18 SCHOOL YEAR

42. For the start of the 2017-18 school year (third grade), the School had an entirely new staff compared to the 2016-17 school year. (N.T. 83-84)
43. Student had two core teachers, one who taught mathematics and science and one who taught English and social studies, for third grade. Student also had specials classes. (N.T. 67, 84-85)
44. At the start of the 2017-18 school year, Student's name was not on the roster of students at the School who were eligible for special education. (N.T. 58-59, 86, 88-89, 218)
45. Staff at the School were not able to access the IEP software program used for developing special education documents at the start of the 2017-18 school year. (N.T. 88, 94, 233-34)

46. As the 2017-18 school year began, the Parents received a number of telephone calls from School staff about Student's problematic behavior such as fighting and disruption. The Parent went to the school to speak with someone about Student's special education program. (N.T. 147-50)
47. The Parent spoke with a School administrator, expressing concern about the telephone calls. She also advised that Student had an IEP and asked why Student was not provided with a PCA. (N.T. 148-51, 217-18)
48. On October 24, 2017, the Parents wrote a letter to a School administrator asking for an IEP meeting and describing concerns about implementation of Student's IEP, providing a copy of the document. Specifically, the Parents asked about the PCA since they understood there was not one assigned to Student, and questioned the status of the weekly social skills group. They also requested a Functional Behavioral Assessment (FBA), asking for a Permission to Evaluate form, as well as a PBSP. (N.T. 46-47, 152, 232, 248; P-7 p. 1)
49. After receiving the October 2017 letter, an administrator from the School spoke with the Parent and asked if the Parents would agree to a reevaluation of Student. The Parents were asked to make that request in writing. (N.T. 74-77, 152-53, 232-33, 235-36)
50. The School did not issue a Permission to Evaluate to perform the requested FBA. (N.T. 263)
51. Shortly after the October 24, 2017 letter, the telephone calls to the Parents stopped. (N.T. 153, 189, 197)
52. The Parents sent a second letter on December 11, 2017, reiterating their requests for an IEP meeting and a Permission to Evaluate form for an FBA. They also expressed concern again about the lack of a PCA and weekly social skills group, as well as other IEP implementation failures. The School did not respond to that letter. (N.T. 154-55; P-7 p. 3)
53. The School did not issue an invitation to or convene any IEP meeting for Student from the start of the 2017-18 school year through the date of the due process hearing. (N.T. 47, 74, 77, 159, 276)
54. The School did not issue any permission to evaluate form regarding Student during the 2017-18 school year. (N.T. 47, 78, 153-54)
55. During the 2017-18 school year, the School did not provide any related services but instead contracted with an outside provider to provide those services. (N.T. 53-54)
56. Student was never provided with speech/language services during the 2017-18 school year. (N.T. 46, 270)
57. The School never performed an FBA of Student. (N.T. 45, 47, 254-55)

58. Student was not provided with a full-time PCA during the 2017-18 school year through the date of the due process hearing. For some period of time beginning in late November 2017, a PCA was hired but worked with other students in the classroom, not just Student. The School does not have any records to confirm this related service for Student, but financial resources was one reason that the PCA was eliminated. (N.T. 46, 47, 56-57, 69-70, 89-92, 105, 230-31)
59. Because of Student's difficulty attending to task and distractibility, since approximately late September, Student has been pulled out of some regular classes to go to small group sessions with the special education teacher. Student has a significant portion of instructional time (typically beginning twenty minutes after the start of each of two forty-five minute class periods through the period end) with the special education teacher. The removal from classes was not an IEP team decision. (N.T. 85-86, 162, 206, 219-20, 223-26, 229-30, 250-52, 284-85, 288-89)
60. The Parents first learned of Student's removal from classes by the special education teacher at the due process hearing. (N.T. 156-57)
61. As of the day of the due process hearing, Student had not been suspended from school during the 2017-18 school year, and the Parents had received no referrals for discipline. (N.T. 115, 188-89)
62. During the 2017-18 school year, the School did not have its own school psychologist but contracted with an outside provider to perform that function. (N.T. 53-55)
63. During the 2017-18 school year, the School administrator who was responsible for ensuring that special education services were in place believed that resources, including financial resources, available to the LEA were a factor in implementation of special education programs. (N.T. 83, 91-92)

RECORDS

64. The Parents requested all of Student's education records on December 4, 2017 and January 8 and 19, 2018. The School did not fully comply with these requests or with an order compelling production of Student's education records. (N.T. 238-43; P-8; HO-4)
65. The School was not able to obtain and provide any records for Student that were used or maintained by outside providers, nor those of the school psychologist who conducted Student's evaluation or Student's former teachers. (N.T. 94-95, 240, 269)
66. The School did not provide any available work product of Student that it possessed during the 2017-18 school year. (N.T. 96, 99-101)
67. The School has never provided the Parents with any progress monitoring of Student. (N.T. 145, 198-99)

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 Parents 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.

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 both of the witnesses who testified to be credible, and their testimony was essentially quite consistent where it overlapped. The Parent was the only witness who had personal knowledge of Student’s experience, and her own, over the course of the 2016-17 school year, and her testimony was accorded significant weight due to its persuasive nature; it is also noteworthy that none of her testimony was contradicted in the record.

In reviewing the record, the testimony of both witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision. As noted more fully below, the

absence of many School records presented challenges to the parties as well as to consideration of this matter.

GENERAL IDEA PRINCIPLES: FREE APPROPRIATE PUBLIC EDUCATION

The IDEA and the implementing state and federal regulations obligate local education agencies (LEAs) to provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP that is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the U.S. Supreme Court was called upon to consider once again the application of the *Rowley* standard, and it observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

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

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

That the progress contemplated by the IEP must be appropriate in light of the child’s circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA.

Andrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted). The Court concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is wholly consistent with the above interpretations of *Rowley* by the Third Circuit.

As *Andrew*, *Rowley*, and the IDEA make clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. It has also 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). Furthermore, the IEP is developed by a team, and a child’s educational placement must be determined by that team based upon the child’s IEP and other relevant factors. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.116. Parents play “a significant role in the IEP process.” *Schaffer, supra*, at 53. Furthermore, a denial of FAPE may be found to

exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

LEAST RESTRICTIVE ENVIRONMENT PRINCIPLES

The IDEA further mandates that eligible students be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

GENERAL SECTION 504 AND ADA PRINCIPLES

Section 504 of the Rehabilitation Act of 1973 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). In Pennsylvania, Parents may request an administrative hearing under Section 504 and Chapter 15 to challenge an LEA’s identification, evaluation, or programming for a protected handicapped student. 22 Pa. Code § 15.8.

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

Charter schools in Pennsylvania are public schools, and required to comply with applicable laws including the IDEA and Section 504. 24 P.S. § 17-1703-A; 22 Pa. Code §§ 711.1 – 711.62. Thus, the School as the LEA is bound by all of the above principles in this case. Additional legal principles that apply more specifically to a particular issue will be included in the discussion below.

EVALUATION OF STUDENT

The Parents first challenge the School's evaluation of Student in January 2017 both procedurally and substantively. In conducting the evaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

- (i) Whether the child is a child with a disability under § 300.8; and
- (ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

Like other LEAs, charter schools have sixty calendar days to complete a special education evaluation, excluding summer breaks. 22 Pa. Code §§ 711.24(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1). The Parents must be provided with a copy of the evaluation

at least ten days prior to an IEP meeting absent a parental waiver. 22 Pa. Code § 711.24(d). An IEP must be developed within thirty calendar days of an initial determination that a child is eligible, with implementation beginning within a reasonable time and not more than ten school days after completion. 34 C.F.R. § 300.323(c); 22 Pa. Code § 711.41(c). IEP meetings must occur at least annually. 20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b)(i).

Of additional relevance here are the federal and state provisions for a parent-requested evaluation. If a parent makes a request for a reevaluation of the child, the LEA is required to ensure that one is conducted in accordance with the above substantive components of an evaluation. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303. Those provisions do include an exception for a reevaluation within one year of the most recent evaluation absent agreement of both the LEA and the parents. However, a refusal to conduct an evaluation is one of those actions that require prior written notice. 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503. Also pertinent is the Pennsylvania regulatory provision that requires an LEA to respond to a parent's verbal request to an employee, including an administrator, for an evaluation within ten calendar days by issuing a Permission to Evaluate Form. 22 Pa. Code § 711.24(c).

Review of the ER as well as the law cited above reveals a number of procedural and substantive flaws with the evaluation. Estimating November 1, 2016 as the date permission was given for the evaluation by the Parents, the ER was provided to them approximately ninety days later, and on the same day that the IEP team met on January 31, 2017. There is no explanation in the record for the delay in completing the evaluation and providing it to the Parents. In addition, the participation of the Parents in the IEP meeting was certainly impeded by the failure to provide the ER ten days prior to the meeting, as well as by the absence of the school psychologist at the meeting to discuss the results and answer their questions.

The substance of the ER is troublesome and not in compliance with the above requirements. Student's most basic demographic information, the age and date of birth, are incorrect on the first page of the document.⁹ The spring 2016 evaluation of the pediatric psychologist's evaluation that was provided by the Parents to the School was not made part of the report, and apparently was not considered since the document states that there was no prior history of evaluations. The express reason for the evaluation was to assess concerns with Student's behavior, but no classroom observations or input from the teacher were included to provide insight into what behaviors were problematic, when and where they were exhibited, and how the learning of Student or others was impacted. The ER included no input from the Parents specific to the evaluation, and the school psychologist did not speak with them at any time before or after its completion. Critically, the conclusion regarding Student's eligibility was not made during any team discussion that included the Parents.

In addition to the questions regarding Student's age for the assessments conducted, the reported results do not engender confidence. For example, the FSIQ calculation in the WISC-V is not congruent with the reported Composite scores.¹⁰ The only true assessments were the WISC-V and WIAT-III, with one set of rating scales (Conners-3) provided to the Parents and a teacher to evaluate behavioral concerns. With behavior specified as the primary purpose of the evaluation, and the widely disparate results reported between the Parents and teacher rating scales with the latter reflecting "significant maladaptive behaviors" (P-5 p. 10), a truly

⁹ Although the correct age is noted elsewhere in the ER, one must question the validity of the results as interpreted in the document.

¹⁰ Although specific to the Fourth Edition of the WISC, broadly speaking, the FSIQ is a calculation of the mean of specific scaled scores obtained from select subtests for each of the Composites. Sattler, J. M., *Assessment of Children: Cognitive Applications* (5th ed. 2008) at 365, 377.

comprehensive assessment of Student's behavior would have included additional measures, including an FBA, to guide the IEP team.

Also significant is that, despite the information provided to the School about Student's Autism diagnosis, there was no assessment related to that potential category of IDEA eligibility, yet the IEP proposed some autistic support. Instead, the ER found Student eligible as a child with an Other Health Impairment based in large part on the ADHD symptoms reflected in the Conners-3 results. Viewed in its entirety, the School's ER was fundamentally inappropriate both procedurally and substantively. Finally on evaluation issues, the School's insistence that the Parents provide a written request for an evaluation in the fall of 2017 beyond the letters seeking an FBA was not in compliance with the regulations.

STUDENT'S EDUCATIONAL PROGRAM

The Parents also challenge the educational program provided to Student from the date that an IEP was or should have been developed and implemented until the School provides an appropriate program. As with the ER, the record supports a finding that Student's special education program was deficient both procedurally and substantively.

At the outset, because there is significant uncertainty whether the ER properly identified all of Student's special education needs, consideration of whether and to what extent Student was denied FAPE is rather complicated. The ER identified Student as eligible for special education on the basis of an Other Health Impairment due to symptoms of ADHD. The WIAT-III reflected academic weakness only in the area of pseudoword decoding. While the IEP as proposed provided a number of program modifications and items of specially designed instruction to assist Student with focus and remaining on task as well as a multisensory instructional approach, and one annual goal addressed reading fluency and accuracy, it is unclear why there were goals for

mathematics problem solving and written expression. The IEP, as did the ER, recommended development of a PBSP, but none was included in the document and apparently was never drafted, let alone implemented. In short, the content of the IEP does not appear to be driven by Student's unique strengths and needs. There is also little evidence of whether and how the School implemented the agreed provisions of the January 31, 2017 IEP. While it is unfortunate that the entire staff from the 2016-17 school year was no longer with the School in the fall of 2017, the near complete absence of records, including special education programming documentation, strongly substantiates the finding that only minimal supports and services were provided to Student in the spring of 2017.

The School argued that because there was no signed NOREP, it could not implement the January 31, 2017 IEP. However, the record is preponderant that the Parents approved certain provisions in that draft IEP and were expecting a response from the school psychologist, if not someone else from the School, regarding their desire for changes to that draft IEP. The duty to ensure a student's right to FAPE lies with the LEA, not the Parents. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996) (explaining that, "a child's entitlement to special education should not depend upon the vigilance of the parents[.]")

Furthermore, there was never any progress monitoring provided to the Parents regarding Student, nor was any such information made part of the record. While there is some anecdotal evidence that the PCA assigned to Student in or around March 1, 2017 assisted Student behaviorally, and that Student did participate in a weekly social skills group, it is impossible to gauge with any confidence that Student's program was reasonably intended to confer, and/or whether Student actually received, meaningful educational benefit during the second half of the 2016-17 school year. It is true that an IEP must be judged "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). Nevertheless, the educational professionals must monitor whether or not a child’s program is providing FAPE, and to make changes to the program as needed. Here, there is no concrete indication that any oversight of the effectiveness of interventions agreed to for Student was made.

The same flaws continued into the 2017-18 school year, and were certainly magnified. While it is apparent that the School was presented with new challenges as that school year began with all new staff, it is unconscionable that Student was not recognized as a special education student until the Parents made repeated inquiries. Even then, with letters sent in late October and early December 2017, no response to the written requests for an IEP meeting and an FBA was forthcoming. The annual IEP meeting was never held. Student was not provided with the full-time PCA that had been present for the final months of the 2016-17 school year. Most glaringly, the School made a decision, without consulting the Parents, to remove Student from regular education classes on a routine basis to eliminate behaviors, rather than develop an individual PBSP, and without making the requisite determinations that the nature or severity of Student’s disability “is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A). As with the 2016-17 school year, there is no progress monitoring; indeed, there is no evidence that Student was provided with any individualized special education services at all. There can be no question that Student was denied FAPE during the 2017-18 school year as well.

The School presented testimony that appeared to suggest that, because other general education students were also “pulled out,” the ongoing removal of Student from the regular

education classroom did not violate LRE principles (*see, e.g.*, N.T. 224-25, 279-80). This contention misses the mark. Even if the School's response to difficult behaviors, whether a child is eligible for special education or not, was to remove him or her from the classroom, doing so does not make that practice appropriate for Student. If Student continued to exhibit behaviors that impeded Student's learning or that of others, as was clearly the case, Student still needed a PBSP and the use of supplementary aids and services to support Student in the regular classroom. Routine removal from instructional time was wholly inappropriate for Student.

In sum, the Parents have met their burden of establishing a denial of FAPE during the 2016-17 and 2017-18 school years. Finally, having fully addressed the denial of FAPE claims, the above applies equally to the related Section 504 and ADA claims and need not be discussed further.

REMEDIES

IEP MEETING AND IMPLEMENTATION

The Parents first seek a directive to the School to convene an IEP meeting for Student. Even if the January 31, 2017 IEP and meeting convened to discuss it and the ER could be considered compliant with all of the above cited law, Student's annual IEP is long overdue. The School will be ordered to convene a meeting of Student's IEP team to address interim services pending completion of evaluations discussed and ordered below. In addition, the School shall be ordered to immediately begin implementing two of the agreed upon special education services in the January 2017 IEP, namely the dedicated full time PCA and weekly social skills group. Development of a PBSP will more effectively await completion of an FBA, also discussed below.

COMPENSATORY EDUCATION

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 special education 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 shall therefore be utilized.

Because the ER should have been completed by early January, and the IEP should have been developed within thirty days and implemented within ten school days thereafter, the starting point for compensatory education shall be estimated to be February 13, 2017. In light of the

evidence that, except for the PCA in March 2017, the School essentially sat idly after the January 31, 2017 IEP meeting, there shall be no reasonable rectification period. The award shall continue through the 2017-18 school year to the current time and prospectively.

As discussed above, there is only brief anecdotal evidence in this record about whether and to what extent Student was provided with elements of an individualized special education program. Despite Student's relatively good grades over the 2016-17 and 2017-18 school years, the significant flaws in Student's ER, and the IEP as developed in January 2017, are reflective of a lack of meaningful response to Student's unique educational needs. Moreover, while it is possible that the PCA provided in March 2017 helped Student to avoid discipline referrals, there was never a PBSP developed to enable Student to learn to manage behaviors, a need Student had that certainly pervaded Student's entire school day of seven hours. As a matter of equity, then, Student will be awarded full days of compensatory education. *See Keystone Cent. School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). The relevant period begins on February 13, 2017 and continues through the end of the 2016-17 school year; and from the first day of the 2017-18 school year until the Parents approve a NOREP for the remainder of the current school year, or the 2017-18 school year ends, or Student disenrolls from the School. The amount of compensatory education shall not be reduced during the prospective period when the School shall be ordered to provide the PCA and social skill services at this late point in the school year when the success of those interventions will be difficult to gauge, particularly with the lengthy gap in services and the likelihood of a period of transition.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents 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 through Student's IEP 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 Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty one (21).

COMPLIANCE WITH PROVISION OF EDUCATION RECORDS

The Federal Education Rights and Privacy Act, (FERPA, 20 U.S.C. § 1232g; *see also* 34 C.F.R. §§ 99.1 – 99.67), provides that parents must be provided with an opportunity to inspect and review a student's education records. "Education records" are defined as those records that are "[d]irectly related to a student" and "maintained by an educational agency or institution." 34 C.F.R. § 99.3. The IDEA makes specific provision for parental access to records for their own children, as provided for in and defined by FERPA. *See* 20 U.S.C. §§ 1417(c); *see also* 20 U.S.C. §§ 1412(a)(8), 1415(b)(1); 34 C.F.R. §§ 300.501, 300.611, 300.613. Under both the IDEA and FERPA, children with disabilities are also afforded a right to privacy, so that any particular student's personally identifiable information is not made available to those who do not possess the right to it. Charter schools in Pennsylvania are required to comply with FERPA. 22 Pa. Code § 711.8.

It is quite concerning that the School does not have some of even the most basic education records for Student in its possession. With the exception of some possible work samples for the current school year, however, it does appear that the School has provided the Parents with all records that are available at this time. While it is unfortunate that the Parents had to resort to retention of counsel as well as hearing officer intervention in order to obtain the records that they now have, the Parents have established both procedural and substantive FAPE denials on other (and some related) grounds for which remedies will be ordered. It is therefore unclear what, if any, further relief for the failure to produce all of Student's records may be available; nevertheless, the global remedy is also intended to provide relief for this claim.

IEE

The next issue is whether the District should be ordered to provide independent psychoeducational, speech/language, and occupational therapy evaluations, and an FBA. When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). 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. If the LEA's evaluation was not appropriate for Student under the applicable law, parents are entitled to a publicly funded IEE.

As discussed above, the School's initial ER of Student was not in compliance with the procedural and substantive requirements of the IDEA in numerous respects. Thus, the District will be ordered to provide an IEE of Student. The IEE shall be comprehensive and include

recommendations for Student's program and placement for consideration of the IEP team upon its completion. Accordingly, an IEE to encompass comprehensive psychoeducational, speech/language, and occupational therapy assessments, as well as an FBA, will be ordered. Additional evaluations as recommended by the professional who conducts the psychoeducational evaluation must also be provided by qualified independent evaluators at public expense.

FORM OF REMEDIES

The final issue is the form of the remedies awarded. The Parents seek to have the relief provided through payment into a special needs trust because there is apparent uncertainty whether the School will continue its operations into the future, and its financial stability is far from certain. The two remedies to which this request applies, compensatory education and the IEE, shall be discussed separately and in that order.

First, and as noted above, compensatory education is an equitable remedy. As such, hearing officers, like courts, have broad discretion in fashioning such relief. *See, e.g., Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009); *Ferren C. v. School District of Philadelphia*, 612 F.3d 712 (3d Cir. 2010) (relying on *Lester H., supra*, and *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985)). "Appropriate remedies under the IDEA are determined on a case by case basis." *D.F. v. Collingswood Borough Board of Education*, 694 F.3d 4888, 498 (3d Cir. 2012) (recognizing a compensatory education trust fund as one available remedy for a FAPE violation). Nevertheless, such an award is unusual, and, in this hearing officer's judgment, is one that requires extraordinary circumstances. *See, e.g., J.R. v. Khepera Charter School*, 19757-1718KE (2017); *I.M. v. School District of Philadelphia*, 16189-1415KE (2016).

With respect to the compensatory education, the law is clear that, should the Charter School fail in its obligation to provide the ordered relief, the Parents have other avenues of obtaining such a remedy that is essentially designed to make up for past denials of FAPE. A state educational agency (SEA) maintains obligations under the IDEA to ensure that its provisions are met. 20 U.S.C. § 1412; *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981). The IDEA provides for SEA oversight of LEAs and their responsibilities under that statute. 20 U.S.C. §§ 1413(d), (g). Under Section 1413(g)(1)(B), “if the State educational agency determines that the local educational agency or State agency ... is unable to establish and maintain programs of free appropriate public education,” the SEA may directly provide special education and related services to the child. *See also* 34 C.F.R. § 300.227. Thus, Parents are not foreclosed from taking other courses of action to obtain the ordered compensatory education based on uncertainty in the School’s future.

Second, with respect to the IEE, however, that remedy will serve a number of critical functions, including considerations for Student’s now-current and future educational programming needs. *See Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 698 (11th Cir. 2012) (explaining that the remedy of a publicly funded IEE services to “guarantee meaningful participation [of the Parents] throughout the development of the IEP” and placement decision going forward) (quoting *Schaffer, supra*, 546 U.S. at 60-61 (noting that an IEE can afford parents “a realistic opportunity to access the necessary evidence” and information relating to an appropriate program and placement for their child)). In this case, it is crucial for Student that a comprehensive evaluation be undertaken immediately so that the Parents may make necessary decisions regarding Student’s future and also to assist them in deciding upon potential uses of compensatory education. In addition, there is evidence in this record that at least one

component of Student's programming, discontinuation of the PCA, was made by the School unilaterally and at least partly based on financial resource considerations. On balance, and in recognition of the obligation to fashion an appropriate remedy under the IDEA, this hearing officer concludes that the extraordinary directive to place the funds for an IEE into a special needs trust is necessary to guard against the risk that Student will be adversely impacted by another fiscal determination that is unrelated to Student's needs, as well as to minimize further delay in developing an appropriate program going forward.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the School did not comply with its obligations in conducting an evaluation and developing and implementing Student's educational program, and that Student must be awarded compensatory education and an IEE at public expense.

ORDER

AND NOW, this 11th day of April, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Within five school days of the date of this decision, the School shall provide Student with a dedicated PCA and weekly social skills group. The School shall also begin to communicate daily with the Parents, in writing, to report on Student's performance at school with the implementation of those services.
2. Within ten calendar days of the date of this Order, the School shall convene a meeting of Student's IEP team to discuss interim programming pending completion of the IEEs. The

School shall offer no less than three meeting dates and times to the Parents to allow for their participation.

3. The School's evaluation of Student did not comply with its obligations under the law, both procedurally and substantively.
4. Student is awarded independent evaluations at public expense to include comprehensive psychoeducational, speech/language, and occupational therapy evaluations, and an FBA.
 - a) Within seven calendar days of the date of this Order, the School shall provide to the Parents, in writing, a list of not less than five qualified individuals to perform a comprehensive psychoeducational evaluation of Student. The qualified individuals shall have experience in making recommendations for educational programming for elementary school-aged students with Autism.
 - b) Within seven calendar days of the date of this Order, the School shall provide to the Parents, in writing, a list of not less than three qualified individuals to perform a comprehensive speech/language evaluation of Student. The qualified individuals shall have appropriate certifications in conducting speech/language evaluations.
 - c) Within seven calendar days of the date of this Order, the School shall provide to the Parents, in writing, a list of not less than three qualified individuals to perform a comprehensive occupational evaluation of Student. The qualified individuals shall have appropriate certifications in conducting occupational therapy evaluations.
 - d) Within seven calendar days of the date of this Order, the School shall provide to the Parents, in writing, a list of not less than three qualified Board Certified Behavior Analysts to perform a comprehensive FBA.
 - e) Within five business days of receipt of the School's list of qualified individuals to perform each component of the Independent Educational Evaluation, the Parents shall notify the School, in writing, of their selections.
 - f) Within five business days of receipt of the Parents' written selections of the independent evaluators, the School shall obtain from those professionals a written estimate of the cost of their services for conducting the evaluation and providing a written report within sixty calendar days.
 - g) Within two business days of confirmation of the estimated cost of each component of the Independent Educational Evaluation, the School shall deposit into a special needs trust an amount equal to the sum of those estimates and provide proof of such deposit and the estimates to counsel to the Parents. The special needs trust shall be administered by a third party mutually agreed upon by the parties or, absent such agreement, selected by the Parents.
 - h) The selected evaluators shall determine the scope of his/her evaluation including what assessments and observations are necessary, including at the School. The

- professional who conducts the psychoeducational evaluation may recommend further assessments by other professionals that shall be provided at the School's expense.
- i) If the professional who conducts the psychoeducational evaluation does recommend further assessments by other professionals, the process for identifying those evaluators shall be the same as described in Paragraph No. 4(b), (c), (d), and (e).
 - j) The selected evaluators shall each provide a written report of the Independent Educational Evaluation within a reasonable time, not to exceed sixty days from the date of engagement.
 - k) Following completion and receipt of the all of the components of the Independent Educational Evaluation Report, and within ten business days of receipt by the School and Parents, Student's IEP team shall meet with the participation of the independent evaluators (in person, remotely, or otherwise at the election of the Parents and based on the availability of the evaluators). The attendance or other participation of the evaluators at the IEP meeting shall also be at the School's expense.
 - l) The IEP team shall consider the IEE Reports and all other relevant information at that meeting. If there is any possibility that Student will attend the School for the 2018-19 school year, or qualify for and attend Extended School Year services at the School in the summer of 2018, the team shall make a decision on revisions to Student's IEP and an appropriate placement. Any newly revised IEP shall be completed and provided to the Parents within ten business days of the date of the meeting to consider the IEE Reports.
 - m) The School is responsible for all expenses associated with the IEE that exceed the amounts deposited into the special needs trust.
5. The School denied Student FAPE in its development and implementation of special education programming to Student during the 2016-17 and 2017-18 school years.
 6. Student is entitled to compensatory education in the amount of seven hours per day for each day that the School was in session from February 13, 2017 through the end of the 2016-17 school year, and from the first day of the 2017-18 school year until (a) the Parents approve a NOREP for the remainder of the current school year, or (b) the 2017-18 school year ends, or (c) Student disenrolls from School. The compensatory education is also subject to the following conditions.
 - a) Student's Parents 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 through Student's IEP 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 Parents. 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 Parents. 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 the School is located.
7. 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
20201-1718KE