

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: M.M.

Date of Birth: [redacted]

Dates of Hearing:
May 12, 2010
July 6, 2010
July 23, 2010
August 12, 2010

CLOSED HEARING

ODR No. **00681-0910KE**

Parties to the Hearing:

Parent[s]

Ms. Virginia Deasy
Director of Pupil Services
Baldwin-Whitehall School District
4900 Curry Road
Pittsburgh, PA 15236

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Jeffrey J. Ruder, Esquire
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September 3, 2010

September 17, 2010

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

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a late teenaged former student in the Baldwin-Whitehall School District (hereafter District). Student's parents filed a due process complaint claiming that the District denied Student a free, appropriate public education under the Individuals with Disabilities Education Act (IDEA)² and Section 504 of the Rehabilitation Act of 1973 (Section 504),³ challenging its evaluation and identification of Student as well as the educational program provided to Student beginning in January 2008 through Student's graduation from the District at the end of the 2008-09 school year.

Four due process hearing sessions were conducted at which the parties presented evidence in support of their respective positions.⁴ The parents presented evidence on their claims seeking compensatory education for Student between January 2008 and June 2009. The District defended those claims, asserting that it did not deny FAPE to Student throughout that time period.

For the reasons which follow, I find in favor of the parents on a portion of their claims, awarding compensatory education for a specific time period, and in favor of the District on the remaining claims.

ISSUES

1. Whether the District violated its Child Find obligations to Student in failing to identify Student pursuant to the IDEA and Section 504; and
2. If so, whether the District denied Student a FAPE in the least restrictive environment between January 2008 and June 2009; and
3. Whether the District discriminated against Student in violation of Section 504.

¹ The name and gender of the student are not used in this decision in order to preserve Student's privacy.

² 20 U.S.C. §§ 1400 *et seq.*; *see also* 22 Pa. Code §§ 14.101 *et seq.* (Chapter 14).

³ 29 U.S.C. § 794; *see also* 22 Pa. Code §§ 15.1-15.11 (Chapter 15).

⁴ The District's motion to dismiss on the basis of *res judicata* was denied on February 18, 2010. (Hearing Officer Exhibits (HO) 1, 2, 3) It should be noted that the parties introduced as Joint Exhibits those documents marked as Parent Exhibit Nos. 1 – 11 inclusive, and 16. For ease of discussion and clarity, however, those particular documents will be referenced throughout this decision as Parent Exhibits, which is consistent with the actual marked pages.

FINDINGS OF FACT

1. Student is late teen-aged and is a graduate of the District. During the relevant time period, Student was a resident of the District. (Notes of Testimony (N.T.) 15-16)
2. Student attended a private school from kindergarten through the end of fifth grade where Student performed well academically. Beginning approximately in Student's third grade year, Student began exhibiting anxiety and started seeing a therapist who also provided family counseling. (N.T. 261-62, 405, 408)
3. Student entered the District middle school in sixth grade. Student performed well academically in the District through middle school, and achieved passing grades in all courses during Student's freshman and sophomore years in the District high school. Although Student continued with therapy throughout this time period, the District was not advised of this fact. (N.T. 262-63, 312-13, 406, 408-12; Parent Exhibit (P) 7)
4. In October and November of Student's junior year (2007-08), Student's parents and the District became concerned over Student's attendance. Student was often tardy to school or did not attend at all, and exhibited more defiance at home. The parents reported to the District that Student was anxious about attending school, and Student confirmed the anxiety about going to school to the school social worker, describing tension at home as the basis. Student did not reveal any reason for that anxiety at school, such as a conflict with other students or problems with academic work, but explained to the social worker that Student had difficulty getting up in the morning. Around this time period, Student's father accepted new employment which meant that, unlike before, Student was home alone in the morning when getting up and ready for school. The social worker was informed of this change in Student's home. (N.T. 263-67, 313-14, 589-91, 613-15)
5. In November 2007, Student's parents learned that Student had been engaging in self-injurious behavior after Student displayed that behavior in front of one of the parents during a confrontation. Student was hospitalized for a short time, then began seeing a new therapist. The District was not advised of this incident. (N.T. 267-68, 314-17, 414-15)
6. Later in November 2007, just before Thanksgiving, Student was admitted for psychiatric hospitalization for approximately one week. Student's parents advised the District that Student was hospitalized. Following Student's discharge, Student's mental health providers and the District discussed a plan for Student's gradual return to school part-time while attending a partial hospitalization program. (N.T. 272-78; P 1)
7. Through these hospitalization programs, Student began to acquire behavioral therapy skills to manage anxiety, which were helpful to Student. (N.T. 415-17)
8. Student returned to school on January 8, 2008 and was to spend the first part of the day at the high school and the second part of the day at the partial hospitalization program. The District provided transportation for Student from the high school to the partial hospitalization program. Student was frequently tardy to school or failed to attend

classes altogether, but Student did go to the partial hospitalization program more regularly in the beginning. Various schedules were attempted to allow Student to attend both. (N.T. 278-81, 417-24, 593-95; P 1)

9. By early January 2008, Student's parents asked the District to evaluate Student for special education. The parents remained concerned about Student's attendance at school and grades. The District sent a Permission to Evaluate form to the parents on January 15, 2008, indicating that the evaluation was to determine whether Student was eligible for special education by reason of an emotional disturbance. The parents signed and returned the form on January 18, 2008. (N.T. 43-44, 46, 242-43, 270-71, 283-85, 321, 463, 465-66; P 16; School District Exhibit (S) 1)
10. At the same time that it sent the Permission to Evaluate form to the parents, the District also sent a 4-page "Parent Report for Multidisciplinary Evaluation" form and the Parent Rating Scale form of the Behavior Assessment System for Children, Second Edition (BASC-2). The parents completed these two forms and personally submitted them several weeks later to the District high school office, but the forms never reached the school psychologist who was conducting the evaluation of Student. The District's school psychologist attempted to contact the family to obtain parental input into the evaluation, but those efforts were unsuccessful. (N.T. 47-53, 287-90, 321, 466-67, 478; S 2)
11. On February 22, 2008, Student was discharged from the partial hospitalization program for failure to attend. There were times when the District-provided transportation was not available due to Student's absence from school, but the family was often able to transport Student there. By the time of the discharge, Student no longer wished to participate in that program. (N.T. 278-83, 424-25, 628; P 1)
12. After Student's discharge from the partial hospitalization program, Student's parents and the District discussed options for Student and agreed that Student would attend the District's Alternative Education Program (AEP). That program is available for students who have difficulty attending school during the regular school day as well as for students who have faced disciplinary action or are disruptive. The AEP provides small student-teacher ratios in core academic classes which begin at 3:00 p.m. and end at 6:00 p.m. At the time Student left regular District classes, Student had failing grades in all subjects and attendance remained a concern. (N.T. 72-73, 285-86, 426-28, 537-40, 543-44, 597-98, 616-17; P 7)
13. Student finished the 2007-08 school year in the AEP, achieving grades of A and B in nearly all classes. Student believed the AEP to be less of a challenge academically than the regular high school classes, but found that the schedule and smaller class sizes decreased Student's anxiety when compared to the experience at the high school at the beginning of that school year. Student's parents believed that Student's attendance improved in the AEP in the spring of 2008, and Student was able to manage the anxiety related to going to school while attending the AEP. (N.T. 291-93, 323, 428-30; P 7)

14. Student's scores on the Pennsylvania System of School Assessment (PSSA) in the spring of 2008 (11th grade) were Reading – Basic, Mathematics – Below Basic, and Science – Basic. (P 10)
15. The District proceeded with Student's evaluation during the second half of the 2007-08 school year. The District's school psychologist administered the Woodcock-Johnson III Test of Cognitive Abilities to Student. Student scored in the average range for overall cognitive functioning, but demonstrated significant variability among subtests. Student achieved average scores in the areas of Verbal Ability and Thinking Ability, and borderline-low average scores in the area of Cognitive Efficiency. (N.T. 65-68, 471; P 1)
16. On the Woodcock-Johnson III Test of Achievement, Student demonstrated variability reflecting relative strengths and weaknesses, but overall scored within the average range. Student's cluster scores revealed average to low average ability in Broad Reading, average ability in Broad Written Language, and low average to average ability in Broad Math. (N.T. 68-72, 91-92, 471-72; P 1)
17. Student's social studies teacher⁵ reportedly completed the Teacher Rating Scale of the BASC-2, and indicated concerns with three areas within the Adaptive Scales: Adaptability, Social Skills, and Leadership Skills. No other areas of concern, including anxiety, were noted with respect to the Behavioral and Adaptive Scales. (N.T. 75-76; P 1) As noted, the school psychologist did not receive the completed Parent Rating Scale. (Finding of Fact (FF) 10) Additionally, the school psychologist decided not to ask Student to complete the BASC-2 Self-Report of Personality because he observed that Student was anxious and he did not want to add to Student's discomfort. (N.T. 57-59, 73-78, 468-69)
18. The school psychologist interviewed Student for approximately ten minutes for purposes of the evaluation. Student reported on the anxiety experienced with going to school but Student also indicated a desire to return to the high school. The school psychologist did not discuss Student's hospitalization with Student. (N.T. 55-57, 60)
19. A functional behavioral assessment (FBA) was attempted but could not be completed because of Student's absence from school. There is no indication in the ER what behavior was the target of the FBA. (N.T. 78-81, 478; P 1)
20. There was no classroom observation reported in the ER. The high school social worker attempted on several occasions to interview Student, but was not able to locate Student during any of those efforts. (N.T. 62-63, 478, 595-96, 626-27; P 1)
21. The District Multidisciplinary Team (MDT) completed its written Initial Evaluation Report (ER) on May 9, 2008 and provided it to the parents at a meeting held on May 13,

⁵ The school psychologist could not recall whether this teacher was the former teacher or a teacher in the AEP. (N.T. 73-74) However, Student identified another individual as Student's World Cultures teacher in the regular high school (N.T. 414), the subject which is most similar to Social Studies, and named Social Studies as an AEP subject (N.T. 427). This suggests that the teacher who completed the BASC-2 was a current teacher for Student in the AEP at the time of the evaluation.

2008. The District MDT members determined that Student was not eligible for special education based upon Student's achievement and grades as well as teacher report, concluding that Student's emotional difficulties did not adversely affect Student's academic functioning. However, the ER did recognize that Student demonstrated behaviors indicating emotional difficulties, and listed needs for Student to increase attendance at school and manage emotions which prevented Student from attending school. The District MDT members recommended accommodations in the regular education environment. Student's parents disagreed with the ER. (N.T. 43, 86, 92-100, 109, 206-08, 216, 249, 474-75, 485-86; P 1, P 2)

22. By letter dated June 5, 2008 from the psychiatric hospital to which Student had been admitted, the District was provided with the following diagnoses for Student: Major Depressive Disorder with psychotic features, Panic Disorder with Agoraphobia, and Attention Deficit Hyperactivity Disorder (ADHD) Combined Type. The psychiatrist also noted an Eating Disorder in Remission and Oppositional Defiant Disorder (Rule Out). A suggestion was made in this letter to provide a "high level of care" in Student's education to meet emotional needs since functioning at school was impaired by Student's anxiety. This letter was the first time the District was formally advised of Student's mental health diagnoses. (N.T. 106-07, 208-12, 224-25, 246, 331, 486; S 7)
23. The District and Student's parents, as well as Student, discussed and agreed to develop a Section 504/Chapter 15 Service Agreement (Service Agreement). A Service Agreement was developed in August 2008 which provided for the following accommodations: extended time on assessments, homework, and projects; access to a social worker to manage emotions; a modified schedule to allow breaks during the day; a location within the school for breaks; identification of a staff member to provide support at school; and the opportunity to arrive early to school and view a video tape for relaxation. (N.T. 218-24, 434-35, 487-88, 514-16; P 3, P 4)
24. As part of the Service Agreement, Student was to arrive early at school and be permitted to go to the guidance office and remain there until the halls had cleared for the first period classes. Student would then go to Student's assigned first period class. On the first day of the 2008-09 school year, however, a District security guard who was unaware of Student's Service Agreement did not permit Student to enter the school to go to the guidance office. Student became very upset and remained so for the entire school day. (N.T. 295-98, 434-36, 606-07)
25. After that first day of school, Student found several of the Service Agreement accommodations to be helpful. Student also sometimes had the assistance of a home-based therapist to accompany Student to school which was supportive. Student's Service Agreement was also modified to permit Student to leave classes five minutes early to avoid the crowded hallways, which Student found to be a beneficial accommodation. (N.T. 227-30, 436-445, 446-49, 488-89, 602, 618-19; P 5)
26. During the first marking period of the 2008-09 school year, Student had six excused absences, eight unexcused absences, and was tardy on 15 occasions. Student was failing five of seven subjects. (P 7, P 9)

27. Student took a re-test of two of the PSSA tests in the fall of 2008, achieving scores of Basic in Reading (no improvement from the spring) and Basic in Mathematics (improvement from Below Basic in the spring), as well as attaining a score of Proficient in Writing (no comparison since there was no Spring 2008 PSSA writing score). (P 10)
28. Sometime in November 2008, Student was hospitalized for a period of two weeks. (N.T. 161-62; P 12)
29. Student's Service Agreement was again revised in December 2008 to add individuals at school to whom Student could go for support, since sometimes the persons named in the Service Agreement were not available when Student needed to talk to them. The Agreement also added that Student could participate on [a sports] team if attendance improved. Student only participated with the team on one occasion but experienced too much anxiety to continue. Student did frequently seek the support of the various named individuals as necessary to manage anxiety at school. (N.T. 232-36, 442-45, 448, 599-604, 619-20, 637-38; P 6)
30. By the end of the second quarter in the 2008-09 school year, Student was failing four out of seven subjects. During the second marking period, Student had 7.5 excused absences, 7.5 unexcused absences, and was tardy on 11 occasions. (P 7, P 9)
31. On February 17, 2009, Student came to school under the influence of prescription medication. Student became unresponsive and was taken by ambulance to a local hospital, where Student was admitted and remained for approximately two weeks. (N.T. 301-05, 325, 450-51; S 3)
32. Student's parents asked the District to re-evaluate Student after the February 2009 incident, but were advised there was not sufficient time before the end of the school year. (N.T. 309-10)
33. After Student's discharge, Student was suspended for ten days. Student's parents and the District then met to determine whether Student would return to the AEP or face expulsion for violating the District drug and alcohol policy. The parties agreed that Student would attend the AEP where Student remained until the end of the 2008-09 school year, graduating from the District. Student did not need any of the accommodations in the Service Agreement at the AEP in order to attend the program successfully because the small class size and the scheduled hours helped Student manage anxiety. (N.T. 257, 303-06, 323, 451-58, 542-43: S 6)

DISCUSSION AND CONCLUSIONS OF LAW

Burden of Persuasion

The U.S. Supreme Court has made clear that in an administrative hearing, 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 in this

case rests with the parents who requested the hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D.Pa. 2009). Except as otherwise explained in this opinion, this hearing officer found the testimony of the witnesses as a whole to be generally credible and forthright.

Eligibility under the IDEA – Spring 2008

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 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 to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need 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. This obligation is commonly referred to as child find. Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995).

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications including specific learning disability and OHI, and who, “by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). Further,

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).

In conducting the evaluation, the law imposes certain requirements on local education agencies 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.

(c) *Other evaluation procedures.* Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed 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;

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is 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.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

34 C.F.R. § 300.304(b).

The parents contend that the District improperly failed to identify Student as eligible for special education based upon an emotional disturbance and that its evaluation process was not appropriate under the law. The parents presented two expert witnesses to support these contentions.

The first expert, a special education consultant, opined that the District's evaluation was not sufficient to determine whether Student was eligible under the IDEA and Chapter 14 as a student with an emotional disturbance and possibly under the category of other health impairment (OHI) due to Student's diagnosis of ADHD. (N.T. 139-43, 145; P 12) This expert set forth a number of deficiencies in the District's ER, including the failure to obtain medical records from the psychiatric hospitalization, the failure to conduct an FBA, the decision to obtain only one teacher report for the BASC-2 while neglecting to also obtain the Parent Rating Scale and the Student Personality Report or equivalent, and the absence of a classroom observation. (*Id.*) This witness further opined that Student required specially designed instruction to support Student "far more than the Service Agreement ... [which] didn't go far enough" (N.T. 147; *see also* N.T. 152-55), through teaching Student to self-advocate and manage the stress and anxiety Student experienced at school. (N.T. 147-48).

This witness' testimony, while extremely credible, as well as his report, must be viewed with some caution because, as will be discussed more fully below, he was in possession of critical information that the District did not have at the time it completed its ER in May 2008.

The parents' other expert, a certified school psychologist who also holds a Ph.D. in school psychology, similarly pointed to perceived deficiencies in the District's evaluation of Student. (N.T. 349-60, 363-67, 383, 385, *e.g.*; P 14 at 2-6) He further opined rather strenuously that Student qualified for special education under the IDEA as a student with an emotional disturbance. (N.T. 370-71, 374) This expert did not, however, address the second prong of eligibility under the IDEA, namely the need for specially designed instruction. (N.T. 391-92; P 14) This witness also criticized the District for failing to conduct an evaluation immediately upon learning of Student's hospitalization in early December 2007. (N.T. 367, 379, 393-94; P 14 at 1-2) While this expert's testimony was presented with firm conviction, it was also based upon what he referred to as "best practice" (N.T. 346, 365), and was less than persuasive in light of the fact that his conclusions regarding the sufficiency and timeliness of the District's evaluation ignored the second prong of IDEA eligibility and, further, are not wholly supported by the law or the evidence as a whole. Districts are required to fulfill the child find obligation within a reasonable time. *W.B., supra*. Where a school district learns of a student's psychiatric hospitalization and acts promptly to begin the evaluation process, it has fulfilled its obligations under the IDEA.⁶ *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235 (3d Cir. 2009).

In developing their opinions in this case, both of the parents' experts had information about Student's hospitalization in the fall of 2007 (N.T. 125-25, 381; P 12, P 14) which the District, through no fault of its own, had no access to at the time the ER was completed.⁷ (FF 10, 22) The District's school psychologist testified credibly that he attempted to contact the parents to obtain information from them, that he did not recall whether he issued releases to the parents in this case but that his practice is to provide releases in circumstances such as this to obtain medical records. (N.T. 88, 243-46) While the parent understandably lacked specific recollection of whether records were provided to the District before the ER was completed, there was no evidence presented that the District was provided with this information to contradict the District's school psychologist's testimony on this crucial point (N.T. 272-73) and, indeed, the evidence from both parties demonstrates that communication between them was less than ideal and open. (N.T. 244, 267, 315, 322) The lack of any indication in the ER that the District had medical records lends further support to the District's position on this question. (P 1) Consequently, the record establishes that the District did not have specific information about Student's psychiatric hospitalization and diagnoses until June 5, 2008, after its ER was completed. Thus, the conclusions of the parents' experts which were based, more than tangentially, upon those records, cannot be conclusively determinative of whether the District's ER reached an appropriate conclusion about Student's eligibility for special education in May 2008.

⁶ It is not insignificant that the parents' special education expert agreed with this premise. (N.T. 172-73)

⁷ Even the June 2008 letter to the District did little more than provide Student's mental health diagnoses and codes from the Diagnostic and Statistical Manual of Mental Disorders (DSM). (FF 22)

That leads to a discussion of whether the District's ER was both timely and appropriate. The District learned sometime in December 2007 that Student had been psychiatrically hospitalized (FF 6), and such an event would reasonably lead a school district to initiate the evaluation process. The District in this case did just that (FF 9, 10). The fact that the parents made a request for an evaluation sometime after Student was hospitalized (FF 9) does not obviate the fact that on January 15, 2008, a week after Student returned to school, the District issued a Permission to Evaluate form to the parents (*Id.*) It is also noteworthy that during this time, the District and the parents had been working with the medical professionals to transition Student back to school on a part-time basis and that Student's return was delayed for a number of weeks with the approval of all participants. (FF 8; P 1) Given all of these circumstances, I conclude that the District began the evaluation process within a reasonable time of both the parents' request and its own child find obligations.

At the time of this evaluation, the Pennsylvania regulations required that special education evaluations be completed within sixty school days of the receipt of written parental consent.⁸ Sixty school days from the District's receipt of the parents' consent dated January 18, 2008 (FF 9), assuming no days when school was not in session, ended approximately on April 18, 2008. The short delay between that date and the May 18, 2008 dissemination of the ER (approximately 20 school days) is not unreasonable given the absence of parental input into the report and the District's efforts to obtain that information. (FF 10, 22) Moreover, by that time, there were not enough days left in the school year to develop either an Individualized Education Program (IEP)⁹ or Service Agreement¹⁰ before the start of the 2008-09 school year, so FAPE was not denied to Student at the end of the 2007-08 school year by this short delay. Even if the ER was not technically provided within 60 school days, procedural violations of the IDEA, standing alone, do not constitute a basis for finding a denial of FAPE. *Winkelman v. Parma City School District*, 550 U.S. 516 (2007) (quoting 20 U.S.C. 1415(f)(3)(E)).

The substance of the ER, however, is not so easily assessed. The stated Reasons for Referral reflect parental concerns over Student's emotional, mental, academic, and behavior needs. (P 1 at 1) Student reported anxiety to the school psychologist which made it difficult for Student to go to school. (P 1 at 1) Student's absenteeism following the return to school on January 9, 2008 is well documented in the ER (P 1 at 1-2, 6, 7), as is Student's involvement with a counselor and the high school social worker in working on attendance and the transition back to school. (P 1 at 1-2) The social worker was not able to interview Student for the ER and therefore did not provide social and behavior history. (N.T. 595-96; P 1 at 1) It is unclear why the social worker could not provide some input into the evaluation since she had a history of familiarity with Student's attendance problems going back to the fall of 2007. (N.T. 589-91)

Also troubling to this hearing officer is what appears to be a lack of adequate behavioral information in Student's ER. (P 1) The District was aware that Student had been experiencing anxiety which caused Student difficulty in going to school. (FF 4, 8, 9; P 1) It also was aware

⁸ 22 Pa. Code §14.123, as effective June 9, 2001, *amended* effective July 1, 2008.

⁹ An IEP meeting must be conducted within 30 days of determining a child is eligible for special education. 34 C.F.R. § 300.323(c).

¹⁰ There has been no contention that the District was dilatory in developing the Service Agreement for Student which was in place at the start of the 2008-09 school year.

that Student had been psychiatrically hospitalized. (FF 6) Nevertheless, the school psychologist chose to obtain only one form of behavioral information (FF 17, 19, 20), a single Teacher Rating Scale, for the BASC-2, which is a “multimethod, multidimensional system”¹¹ providing “an integrative approach to the assessment of children and adolescents across multiple informants.”¹² On the other hand, it is important to recall that there was no parental input into the ER, or medical information about Student’s mental health. (FF 10, 22) Additionally, while it may have been reasonable for the District’s school psychologist to decide that Student’s comfort was paramount to asking Student to complete the BASC-2 Student Personality Report, that decision resulted in yet another missing piece of the puzzle of what were Student’s behavioral needs.

Still, by May 2008, there was little information made available to the District which should have obligated it to determine that Student was eligible under the IDEA as a student with an emotional disturbance or other health impairment. The regulations implementing the IDEA define those disabilities as follows.

§ 300.8 Child with a disability.

(a) *General.* (1) *Child with a disability* means a child evaluated in accordance with §§ 300.304 through 300.311 as having ... a serious emotional disturbance (referred to in this part as “emotional disturbance”), ... an other health impairment, ... and who, by reason thereof, needs special education and related services.

* * *

(4)(i) *Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

* * *

¹¹ Reynolds, C.R. & Kamphaus, R.W., *Behavior Assessment System for Children-Second Edition-Manual*. 1 (2004).

¹² Sattler, J.M., *Assessment of Children: Behavioral, Social, and Clinical Foundations* 280 (5th ed. 2006). This description is also consistent with the testimony of the parents’ expert school psychologist. (N.T. 356-59) This hearing officer finds this portion of his testimony to be credible and persuasive as well as supported by the test authors.

(9) *Other health impairment* means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.8.

Here, in the spring of 2008, the District was aware that Student was experiencing anxiety associated with getting up in the morning and going to school, and that Student had problems with attendance as a result. (FF 4, 8, 9; P 1) The high school social worker was advised by Student that the anxiety related to tension at home, not school, and that Student was home alone in the morning and responsible to get up and ready for school. (N.T. 590-91, 613-15; FF 4) Moreover, by all accounts, during the spring of 2008 when the Student was in the AEP, Student's attendance had improved. (FF 12, 13)

Nevertheless, it is disconcerting that the District seemingly believed that a student cannot be eligible for special education by reason of an emotional disturbance unless the student demonstrates a significant discrepancy between ability and achievement. (N.T. 90-97, 490-503) This determination mirrors the criteria set forth in one of the available processes for assessing whether a student has a specific learning disability in Pennsylvania. 22 Pa. Code § 14.125(2)(ii). While I do not agree with the parents' expert school psychologist that the District improperly focused on whether Student had a specific learning disability, and perhaps unnecessarily administered cognitive and achievement testing (N.T. 349-52; P 14 at 2-3), a child's educational performance can be affected in ways other than exhibiting an ability-achievement discrepancy, such as by refusing to go to school.

In any event, the information which the District had by the time of its May 2008 ER did not establish that Student had an emotional disturbance as defined by the IDEA and its implementing regulations. The parents' expert school psychologist opined that Student exhibited three of the five possible characteristics: inappropriate behavior or feelings under normal circumstances, a general pervasive mood of unhappiness or depression, and a tendency toward fears associated with personal or school problems. (P 14 at 5) Once again, it merits mention that the District did not have detailed information about or records from the psychiatric hospitalization. (FF 10, 22) Even assuming any one of those characteristics was demonstrated and known to the District in the spring of 2008, the evidence does not establish that Student exhibited a condition "over a long period of time and to a marked degree that adversely affect[ed]" Student's educational performance. 34 C.F.R. § 300.8(4). During the spring of 2008, by agreement of the parties, Student was in the AEP program, achieving grades much improved

from the first two quarters of that school year and with improved attendance. (FF 12, 13) Thus, Student's anxiety and resultant attendance problems were not evident for a long period of time or to a marked degree at the time of the completion of the District's ER in May 2008. Furthermore, in May 2008, the record establishes no basis on which the District should have determined that Student required specially designed instruction to address Student's needs and permit Student to access the general curriculum. For all of these reasons, I cannot conclude that the District erred in finding Student ineligible for special education by reason of an emotional disturbance.

Lastly with respect to Student's eligibility under IDEA in the spring of 2008, there was very little evidence presented on whether Student might have qualified as OHI based upon a diagnosis of ADHD. (P 12) As explained above, the evidence reflects that the District was unaware of this, or any other, diagnosis until June 2008 after the evaluation had been completed.¹³ Furthermore, there is nothing to support a finding that Student required specially designed instruction by reason of the ADHD. Accordingly, I am unable to conclude the District should have found Student eligible on this basis.

Section 504 Accommodations – Fall 2008

The obligation to provide a "free appropriate public education" is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm. 2005). 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 order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is "disabled" as defined by the Act; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood at 253. "In addition, the plaintiff must demonstrate that defendants know or should be reasonably expected to know of his disability." *Id.* 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." *Id.* (citation and quotation marks omitted); *see also* 34 C.F.R. § 104.33(a). That obligation includes the duty of child find under Section 504. 34 C.F.R. § 104.32; *Ridgewood*, 172 F.3d at 253. Under Section 504, "an appropriate education is 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 the

¹³ It merits repeating that the existence of one or more DSM-IV diagnoses does not automatically equate to IDEA eligibility.

requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). “There 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).

Similar to Section 504, Pennsylvania’s Chapter 15 regulations require a substantial limitation with respect to education, defining a “protected handicapped student” as:

A student who meets the following conditions:

- (i) Is of an age at which public education is offered in that school district.
- (ii) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program.
- (iii) Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under § 15.10 (relating to discrimination claims).

22 Pa. Code § 15.2.

As with the child find obligation under the IDEA, the District had a reasonable period of time within which to fulfill that duty under Section 504. *W.B., supra*. Section 104.35 of the applicable regulations require that an initial evaluation under Section 504 assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. 34 C.F.R. § 104.35. Here, the District’s evaluation, while not perfect as described above, was provided within a reasonable time frame after Student returned to school and, I conclude, contained sufficient information based upon what was known to the District at the time to permit development of a Service Agreement with input from the parents and Student.

The Service Agreement developed prior to the start of the 2008-09 school year does contain some accommodations which do not appear to be individualized for Student. (FF 23) For example, there is no indication that Student needed extended time for assignments and tests, and Student utilized that accommodation on only one or two occasions. (N.T. 104-06, 441-42) As a whole, however, the Service Agreement appeared, at the time and based upon information known to the District, to provide Student with appropriate strategies to permit Student to manage the anxiety associated with going to school for the regular school day, and everyone including Student was in agreement with the plan. (N.T. 434-35)

It is extremely unfortunate that, on the first day of the 2008-09 school year, not all school personnel were familiar with Student’s Service Agreement and Student had a very poor experience with returning to the regular school day. (FF 23, 24, 25) The District did act promptly to remedy the problems with implementing the Service Agreement and, even according to Student, the Service Agreement initially appeared to be helping Student manage anxiety. (FF

24, 25) Nevertheless, there is no indication of who, if anyone, would be monitoring the implementation of Student's Service Agreement and assessing its effectiveness. Although some additions and deletions were made to the accommodations in the Agreement during the fall of 2008 (FF 25, 29), by the end of the first quarter (or no later than November 3, 2008, counting approximately 45 school days into the school year assuming an early September start date),¹⁴ Student had been tardy on fifteen occasions and had missed fourteen days of school; additionally, Student was failing most subjects. (FF 26) Without a doubt, by the end of that first marking period, the District had clear notice that the Service Agreement was not sufficiently addressing Student's anxiety about school as exhibited in the pattern of poor attendance and failing grades. Additionally, the District had had the important information of Student's psychiatric diagnoses since prior to the start of the 2008-09 school year (FF 22), and the link between Student's anxiety and school attendance/ performance was, by the end of the first quarter, well within the District's knowledge. All of this, taken together, should have prompted some action on the part of the District sometime during the first quarter and certainly no later than the beginning of the second quarter to address Student's increasingly significant difficulties with attendance and academic performance. Giving the District a short period of time to resume the process of assessing Student's needs, this hearing officer finds that some form of additional interventions should have been developed and implemented no later than December 12, 2008, when the Service Agreement was last modified,¹⁵ to address Student's declining mental health and anxiety and resulting rapidly declining academic performance and attendance.

Furthermore, as noted, Student's attendance and grades showed no improvement in the second quarter of the 2008-09 school year from that shown in the first quarter, as Student missed another fifteen days of school and was tardy on eleven occasions. (FF 30) The modification to the Service Agreement in December 2008, adding more named individuals to whom Student could turn for support (FF 29), was certainly a small step in the right direction. It is, however, implausible to believe that this minor adjustment to the Service Agreement could have been deemed sufficient to appropriately accommodate Student's significant difficulties with attending school and attaining educational benefit from doing so. Student's disability plainly substantially limited Student's access to education during the 2008-09 school year, and Student was, accordingly, entitled to an appropriate education which, though supports and accommodations, met Student's individual needs including Student's disability. The failure to do so amounts to discrimination under Section 504 and constitutes a denial of FAPE to Student.

Compensatory Education

The next issue is what remedy is warranted to remedy the deprivation. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional*

¹⁴ This 45 day period assumes a 180-day school year generally accepted in Pennsylvania. By comparison, for the 2010-11 school year, the District's second quarter marking period ends November 3, 2010 and there are 182 days of school for Student. See <http://www.bwschools.net/index.php> 2010-11 calendar, last visited on September 15, 2010.

¹⁵ This date also accounts for a delay due to the two-week period in November 2008 when Student was re-hospitalized, although the specific dates of that hospitalization do not appear in the record. (FF 28)

School District, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.*¹⁶ Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

The District's inability to permit Student to access the accommodations in the Service Agreement on the first day of the 2008-09 school year, which affected Student for that entire school day (FF 24)), merits relief. Further, having found that the District should have taken additional action no later than December 12, 2008, this hearing officer finds that is equitable to award Student full days of compensatory education to remedy the denial of FAPE beginning with that date. During the first half of the 2008-09 school year, Student had missed 29 days of instruction and arrived late on 26 occasions, all during a period of 90 school days. (FF 26, 30) Additionally, Student had failing grades in most of Student's subjects (*id.*) and it is difficult to conclude that Student was deriving meaningful educational benefit during the time Student was in school, particularly considering Student's history of anxiety and other mental health diagnoses. The compensatory education award shall be stated in terms of six hours per day.¹⁷

This award must be limited in duration, however. It should be further explained that following the February 17, 2009 incident, the District's ten-day suspension of Student for violating its drug and alcohol policy would not invoke the protections afforded to eligible students facing disciplinary action in excess of ten school days under the IDEA.¹⁸ Similarly, this suspension did not discriminate against Student in violation of Section 504 since it was precisely the same as, or lesser, punishment than that the District would impose on any non-disabled student. (S 6) The District did not expel Student, as its policy would permit,¹⁹ but agreed to allow Student to attend the AEP. (FF 33) While it is clear that Student was thereby not able to attend full school days or participate in electives and extracurricular activities at the high school, Student was able to complete the requirements for graduation in the AEP even without the benefit of any accommodations. (N.T. 453-58; FF 33) Of course, attendance in the AEP is certainly not optimal for any high school senior, but it is important to recall that this placement occurred just a few short months before the end of Student's tenure at the high school and after

¹⁶ *Compare B.C. v. Penn Manor School District*, 906 A.2d 642 (Pa. Cmwlth. 2006), which rejected the *M.C.* standard for compensatory education, holding that "where there is a finding that a student is denied a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *Id.* at 650-51. *B.C.* was a case involving a gifted student, however, and is, thus, distinguishable. There was also little if any evidence which would permit a determination of what position Student would have been in had the District provided FAPE. I therefore conclude that the *M.C.* standard is the appropriate method of determining the amount of compensation education owed to Student in this case.

¹⁷ The length of the school day was not specifically established; however, Student testified that the regular high school day was 7:45 a.m. to 2:25 p.m. (N.T. 414) Allowing for time to change classes, six hours appears to be a reasonable estimate of the amount of instructional time in a school day.

¹⁸ Where controlled substances are involved, a school district may remove a student from school, without regard to whether the behavior is a manifestation of the student's disability, for up to 45 school days pursuant to 34 C.F.R. §§ 300.530(g) and (i).

¹⁹ S 5, S 6.

several hospitalizations necessitating Student's transition back to school.²⁰ Even if the District had begun the process of re-evaluating Student by early December 2008 and determined Student to be eligible for special education under the IDEA, under ordinary timelines any program which would have been developed in response to that evaluation would not have been completed until after the time of Student's February 2009 hospitalization and would very likely have had to be reassessed following Student's return. Furthermore, by the time Student would have completed the ten-day suspension and 45-day disciplinary alternative placement, any special education program would have been implemented for six weeks or less prior to the end of that school year.²¹ It is also important to recall that Student had had a very difficult experience making the transition back to the regular high school day during the prior school year. (FF 8, 11) For these reasons, it is simply implausible for this hearing officer to conclude that the District could have completed the development of an appropriate program, and implemented it for more than a *de minimis* period of time, prior to the very end of the 2008-09 school year and Student's graduation. Accordingly, I find that compensatory education is not owed for this period of time. The award of compensatory education will thus be limited to the first day of school for the 2008-09 school year and the time period of December 12, 2008 through February 16, 2009.²²

The compensatory education award is subject to the following conditions and limitations. Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device. The hours of compensatory education for compensatory education services/products/devices created by this provision may be used at any time from the present to beyond Student's 21st birthday, if necessary.

There are financial limits on the parents' discretion in selecting the compensatory education. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

The Spring 2008 AEP Placement

Finally, the parents raise a contention that Student was discriminated against by the AEP placement in March 2008. I cannot agree. While Section 504 does not make reference to manifestation determinations, students who are protected under Section 504 have been afforded certain procedural protections when facing disciplinary proceedings. *Centennial School District v. Phil L.*, 559 F.Supp.2d 634, 643 (E.D. Pa. 2008). First, the AEP is not strictly a disciplinary placement. (FF 12) Further, the parents agreed with the AEP placement after Student was discharged from the partial hospitalization program and attendance remained an issue even after a period of transition. (FF 8, 11, 12) While the parents apparently believed that Student faced

²⁰ This hearing officer does not construe the parents' claims to cast any responsibility on the District for Student's behavior in February 2009.

²¹ The parents' special education expert conceded that there would have been only approximately six weeks of school remaining after Student would have completed the permitted disciplinary placement. (N.T. 160-63)

possible expulsion from school if they did not agree to the AEP (N.T. 283-87), it is evident that the meeting to discuss Student's placement at the end of February/beginning of March 2008 was based upon, and convened to address, Student's lack of attendance. (FF 11, 12) The only evidence in the record regarding the District's attendance policy relates to a prohibition against certain extra-curricular activities (N.T. 636-38), and school districts are required to enforce Pennsylvania's Compulsory School Attendance law, 24 P.S. §§ 13-1326 *et seq.*, not expel students who are not attending school. Based upon a review of the record as a whole, this hearing officer concludes that the decision to place Student in the AEP in the spring of 2008 was made by mutual agreement of the parents and District based upon Student's unique and individual needs at the time, and did not amount to a disciplinary change of placement requiring procedural protections. Accordingly, I cannot find that the District denied Student FAPE on this basis.

CONCLUSION

For the foregoing reasons, I find that the District did not fail to identify Student as eligible under the IDEA; that it properly identified Student under Section 504; and that it denied Student FAPE on the first day of the 2008-09 school year and from the time period December 12, 2008 through February 16, 2009, for which compensatory education will be awarded.

ORDER

1. Student is awarded six hours of compensatory education for the first day of school for the 2008-09 school year, and for each day that school was in session beginning on December 12, 2008 and ending February 16, 2009. The compensatory education award is subject to the conditions and limitations set forth above.
2. The District is not ordered to take any further action.

Any claim not addressed in this decision and order is denied and dismissed.

Cathy A. Skidmore

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

September 17, 2010
ODR 00681-0910KE