

*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

DUE PROCESS HEARING

Name of Child: A.G.  
ODR #01801/10-11-JS

Date of Birth:  
[redacted]

Dates of Hearing:  
February 25, 2011  
May 2, 2011

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Cumberland Valley School District  
6746 Carlisle Pike  
Mechanicsburg, PA 17050

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:  
Phillip Drumheiser, Esquire  
2202 Circle Road PO Box 890  
Carlisle, PA 17013

Sharon O'Donnell, Esquire  
4200 Crumsmill Road Suite B  
Harrisburg, PA 17112

May 23, 2011

May 31, 2011

Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is a teen-aged Student formerly enrolled in the Cumberland Valley School District (District). Student's mother (Parent) requested this hearing under the IDEA and under Section 504 of the Rehabilitation Act alleging the District failed to offer Student a free appropriate public education (FAPE) through a failure to timely evaluate and identify Student as an eligible student or as a protected handicapped student. The Parent seeks an award of compensatory education for Student.

For the reasons presented below I find for the Parent.

## Issue

Did the School District deny Student a free appropriate public education (FAPE) from November 17, 2008 to June 8, 2010<sup>2</sup>, exclusive of the time Student was enrolled in a cyber charter school, and if so is Student entitled to compensatory education, in what form and in what amount?

## Findings of Fact<sup>3</sup>

### Background<sup>4</sup>

1. Student attended school in the District through the end of the 2009-2010 academic year, withdrawing on June 9, 2010.<sup>5</sup> [S-17]
2. Student experienced problems in elementary school in the areas of social skills, not being organized, being anxious, not wanting to go to school, and being bullied and hazed by other students. [NT 35]
3. Student was a fearful and anxious child who worried about what Student's parents and others thought about Student, about someone hurting Student's mother, and was afraid of heights, water and many other things. [NT 250-251]
4. Student was receiving psychiatric treatment in 5<sup>th</sup> grade for emotional issues. [NT 103-104]

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<sup>1</sup> The decision is written without further reference to the Student's name or gender to provide privacy.

<sup>2</sup> Prior to the parties presenting their cases in chief, there was an evidentiary hearing as to whether either of the two statutory exceptions to the IDEA's statute of limitations existed. [NT 33-163] The hearing officer, after listening to extensive testimony from the Parent and the District's psychologist, ruled on the record that neither exception existed. [NT 164-168]

<sup>3</sup> For reference, 2003-04 was 5<sup>th</sup> grade, 2004-05 was 6<sup>th</sup>, 2005-06 was 7<sup>th</sup>, 2006-07 was 8<sup>th</sup>, 2007-08 was 9<sup>th</sup>, 2008-09 was 10<sup>th</sup> and 2009-2010 was 11<sup>th</sup>.

<sup>4</sup> Although the relevant period for recovery does not begin until November 2008, extensive Background is provided to establish whether the District is entitled to a "reasonable rectification period" or not.

<sup>5</sup> Student spent a semester in a cyber charter school in the second half of the 2008-2009 school year, 10<sup>th</sup> grade.

5. In 5<sup>th</sup> grade, the 2003-2004 school year, Student was the subject of a Child Study Team meeting on September 30, 2003. Needs were identified by the Parent as homework, miscommunication, forgetting items, not wanting to come to school, and fear of participating in athletics. The Parent was also questioning whether Student may have a learning disability, obsessive compulsive disorder or Asperger's disorder. [NT 146, 158, 162; S-1]
6. The Parent also requested testing at this time because she thought Student might be gifted and boredom might be at the root of the needs identified, but also because there was a close family history of learning disabilities. Finally, the Parent was also concerned about Student's being bullied. [NT 91-93, 99-101]
7. At the Child Study Team level, which is a regular education intervention, verbal parental permission rather than written parental permission is sought, and procedural safeguard notices are not presented to parents. [NT 142-143, 150-152 154-155, 162]
8. Kaufman Brief Intelligence Test results from September 2003 yielded an estimated K-BIT IQ composite score of 120±6, falling into the High Average to Superior ranges of cognitive ability. The K-BIT is a cognitive screening instrument. [NT 140; S-1]
9. Wechsler Individual Achievement Test – Second Edition [WIAT-II] standard achievement scores from January 2003 were Reading Composite 130, Math Composite 117, Written Expression Composite 129, and Oral Language Composite 132. [S-1]
10. Teacher Rating Scales completed by three teachers<sup>6</sup> in January 2003 yielded significant scores on Attention Problems [2 teachers], Adaptability, Social Skills, and Externalizing Problems/School Problems. One teacher's ratings yielded no significant scores. [P-4]
11. In 5<sup>th</sup> grade Student at one point could not go to school for a week because Student was not eating and was just lying in bed. Student's physician advised the Parent to let Student stay in bed for the week. [NT 101-102]
12. In 5<sup>th</sup> grade the Parent would drive Student to school. On two or three occasions the principal had to drag Student, who was kicking and screaming, from the car and into the school building. [NT 102, 125-126, 254]
13. In 2005 Student was being bullied, for example peers wrote on Student's new jacket and in Student's backpack, and put ketchup and baggies of pudding into the backpack. Bullying, including physical aggression toward Student, recurred into high school. [NT 59-60, 264-267]

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<sup>6</sup> Mother's ratings were significant for Social Skills; father's ratings were significant for Attention Problems. [P-4]

14. The Parent recalls that although in 2005 Student was diagnosed with a panic disorder and separation anxiety disorder these conditions had been manifesting themselves for some time previously. [NT 101]
15. In April 2005 Student was invited to join a new private practice group for adolescents with depression, anxiety and self-harming/self-destructive behaviors [the Parent was concerned about this because Student was not being self-harming]. Student had been seeing a psychiatrist and having trials of psychotropic medication at this time as well. [NT 52-55, 257-259; P-8]
16. In April 2005 Student was in danger of not being promoted based on being at or near the failure cut off [70%] in social studies [70] and math [72]. [NT 57-58; P-9]
17. In April 2005 the Parent received letters expressing the District's concern about Student's attendance as Student had been absent at least 10 times, three or more of which were unlawful. The Parent was warned that any subsequent unlawful absences could result in a referral to the District Court Justice. [P-10]
18. In July 2005 Student's psychiatrist diagnosed Student with separation anxiety disorder. [NT 261]
19. In 8<sup>th</sup> grade Student was getting sick to the stomach, having headaches, vomiting and not wanting to go to school. [NT 62]
20. In 8<sup>th</sup> grade Student was seeing a psychiatrist and a psychologist. [NT 62-63]
21. In 8<sup>th</sup> grade the school nurse expressed a concern that Student seemed anxious and cried easily, and the District sought and received the Parent's permission for a student assistance referral. [NT 104-105]
22. In May 2007, at the end of 8<sup>th</sup> grade, Student had 8.5 excused absences and 2.0 unlawful absences. [P-11]
23. Starting in 9<sup>th</sup> grade Student would go to the school office with increasing frequency to ask if there would be a fire drill that day. [NT 72-73, 474]
24. In 9<sup>th</sup> grade the guidance counselor would walk Student out of the building when there was a fire drill. [NT 434, 459]
25. The high school guidance counselor never knew what Student's "issue of the day" would be. [NT 467]
26. The guidance counselor testified that she knew that Student had "many issues, both physical, mental psychological, emotional..." and struggled with migraines,

- hypersensitivity to loud noises, anxiety, and that Student's stature was also an issue. [NT 438]
27. In November 2007 Student's medical conditions were listed as migraine headaches, esophageal reflux and short stature. [NT 272]
  28. At some uncertain point Student was diagnosed with obsessive compulsive disorder, the symptoms of which had been present previously. Student constantly engaged in hand-washing, teeth brushing and was afraid of germs. [NT 274-277]
  29. Student seemed to the Parent to be overwhelmed with coming to the high school which was large, with the need to change classes, and with unsuccessful attempts to participate in a sport. Student would come home, be sick to the stomach, have a headache and go to bed almost every day after school. [NT 273-274]
  30. In an incident that began in school but continued off school property Student's nose was shattered and Student needed emergency room treatment and specialized after care. The guidance counselor was informed. [NT 64-65]

#### Absence History<sup>7</sup>

31. In 4<sup>th</sup> grade Student had 8 absences. [NT 106]
32. In 5<sup>th</sup> grade absences began to affect Student's educational performance. Student had trouble making up missed work from absences. Student had 16.5 absences in 5<sup>th</sup> grade. [NT 106-107, 109; P-30]
33. In 6<sup>th</sup> grade Student had 18 (15) absences and 14 tardies. [NT 107; P-30]
34. In 7<sup>th</sup> grade Student had 14 (12.5) absences and 6 tardies. [NT 107; P-30]
35. In 8<sup>th</sup> grade Student had 15 (13) absences and 15 tardies. [NT 107; P-30]
36. In 9<sup>th</sup> grade Student had 25.5 (31.5) absences and 10 tardies. [NT 107; P-30]
37. In 10<sup>th</sup> grade Student had 33.5 absences. [NT 107]
38. In 11<sup>th</sup> grade Student had 45 absences. [NT 107]
39. The District psychologist testified that "it was impossible for [Student] to keep up [academic grades] with that number of absences" and that the absences had a bearing on Student's overall ability to learn and compete in an academic environment. [NT 412-414]

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<sup>7</sup> District's counsel cross-examined the Parent and suggested numbers of days absent for a series of years. Some of these figures were not the same as those reported in P-30, the District's May 2010 ER. The figures put forth in the cross-examination are in parentheses when there was also a figure in P-30 and that figure was discrepant. [NT 106-107]

40. The Parent had many conversations over the years with the District about how to handle Student's absences, school refusal, and treatments. The Parent and the high school guidance counselor communicated often starting very early in 9<sup>th</sup> grade. [NT 66, 436, 467]
41. The guidance counselor testified that because Student was resisting school and therefore missing work, the Parent would often come to school and accompany Student to the ninth grade science classroom and sit with Student and the teacher to go over the work. [NT 436-437, 460]
42. In September or October of 9<sup>th</sup> grade the high school guidance counselor was already taking Student's case to the child staffing meetings. The District's chief psychologist<sup>8</sup> monitored the Students about whom the staff brought concerns. [NT 474-475]

#### Relevant Period

43. From the time of the evaluation in 2003 up until November 2008 the District did not suggest to the Parent that Student be evaluated for special education to address academic, emotional, health-related or attendance issues. [NT 69]
44. During the entire period leading up to November 2008 the Parent kept the District informed about Student's private service providers as Student advanced from grade to grade and new staff were involved. The Parent would make phone calls, and send physician's notes and other relevant materials. The Parent cannot recall exactly which materials she may have sent. [NT 68, 113-114]
45. The Parent had many communications with the high school guidance counselor about Student's various problems and the Parent felt that the guidance counselor was supportive. [NT 278-279]
46. The guidance counselor testified that she was communicating to the District's chief psychologist about her concerns regarding Student. [NT 464]
47. During the period leading up to November 2008 Student was visiting the nurse's office more and more and was visiting the guidance counselor as well. [NT 70-72]
48. In November 2008, 10<sup>th</sup> grade, the Parent was advised by letter that a Truancy Elimination Plan had been begun following six unlawful absences that school year. The Parent was not sure if she received a copy of an actual Truancy Elimination Plan at that time. There was none in the record. [NT 173-177; P-14]

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<sup>8</sup> I have used the designation "chief psychologist" since this individual headed the child staffing meetings in the high school and made the final decisions regarding referrals for evaluations. This is not the psychologist who evaluated Student and who testified in this hearing.

49. In 10<sup>th</sup> grade, Student had 10.5 excused absences, 1 unexcused absence, and 17 unlawful absences. [P-12]
50. Student developed mono in 10<sup>th</sup> grade and this exacerbated attendance problems and failing grades. [NT 67]
51. In high school Student's disorders were becoming more a problem as Student got older. [NT 125]
52. In 10<sup>th</sup> grade, the guidance counselor recommended that the Parent enroll Student in a cyber charter school. The counselor knew that if Student transferred to a cyber charter school the District would no longer be the responsible LEA. [NT 439-440, 471-472]
53. Because she "didn't know what else to do", in 10<sup>th</sup> grade the Parent followed the recommendation of the guidance counselor and withdrew Student from the District in January 2009 to attend the cyber charter school. Upon withdrawal Student was failing PE, Computer Literacy, Geometry, World Cultures, Biology and German and had a D in English. [P-30]
54. At the beginning of 11<sup>th</sup> grade, Student wanted to return to the public high school so the Parent re-enrolled Student in the District with Student's promises of a positive attitude toward trying to make it work for the 2009-2010 school year as an 11<sup>th</sup> grader. [NT 286, 444-445; P-30]
55. In 11<sup>th</sup> grade Student's teachers called the Parent to tell her Student was in the bathroom for up to a half-hour at a time. [NT 300-301]
56. About six weeks into the 11<sup>th</sup> grade school year, when the Parent saw Student's absences pattern starting up again she had a conversation with the guidance counselor. The Parent asked, "What are our options? How about an IEP?" The Parent also asked about testing. [NT 177, 181]
57. The guidance counselor replied that Student did not need an IEP, because Student is bright, and that this was about discipline. The guidance counselor told the Parent that there was nothing wrong with Student, Student was just being defiant and did not want to come to school. The Parent met with the guidance counselor and the principal and they advised the Parent to stop sending doctors' notes and to let Student be cited for being truant. [NT 177-178, 182-183, 301-302]
58. In October 2009, Student's 11<sup>th</sup> grade school year, almost one year from the date that the District first mentioned a Truancy Elimination Plan, the Parent was advised in two letters two weeks apart that the District had a Student Assistance Team and additional services that could be available to address absences. [P-16, P-17]

59. A week after the second letter, the Parent received another October 2009 letter noting that two more days of unlawful absence would result in a referral to the Magisterial District Judge. [P-18]
60. As of October 29, 2009 the Parent was advised by letter that Student had accumulated 6 excused absences and 5.5 unlawful absences in 11<sup>th</sup> grade. [P-19]
61. As of November 2009 Student began to cut classes and on at least one occasion was disrespectful to a teacher. [P-20, P-21, P-25, P-27]
62. On November 13, 2009 the District issued a Truancy Elimination Plan. The Goals were to eliminate unlawful absences, improve overall attendance, attend all classes while in school, and provide doctors' notes for absences. [P-22]
63. The November 2009 Truancy Elimination Plan noted that Student's absences were an indication of school phobia, long term illness, mental health issues and defiance. [P-22]
64. The Plan does not indicate any provisions to assist Student in achieving the Goals of the Plan. [P-22]
65. On December 4, 2009 the District filed a Private Summary Complaint for Truancy Violations with Student's County of residence, and a Notice of Trial was issued for December 22, 2009. [P-23]
66. Two Attendance Conferences were held at the District on December 4, 2009, one with the principal and Student, and another with the Parent, the Student, the principal and the guidance counselor present. The conference form noted that attendance policy, impact of absences, future steps for recurrence and credit denial were discussed in both conferences. There is no notation of steps the District would take to assist Student to come to school. [NT 199-202, 217-218; P-24]
67. At the end of the second marking period in 2009-2010 Student had 45 absences, 8 tardies and was failing several classes. [NT 286-288]
68. During 2009-2010 Student visited the nurse's office 31 times. Many times Student's mother or father came to school to pick Student up from the nurse. [NT 298-299]
69. The guidance counselor's communication with the family was "constant". [NT 448]
70. In order to help Student turn in missed assignments Parent would watch Student do the assignments, but learned that sometimes the assignments "never made it to school". The Parent learned that when Student made a mistake Student would



- start all over again from the beginning because Student believed Student had to be perfect. This perfectionism had also been present in 9<sup>th</sup> and 10<sup>th</sup> grade as well. The guidance counselor noted this same type of behavior as well. At some unspecified point Student developed tics such as hand-wringing and throat clearing. [NT 116, 291-294, 296, 451]
71. The guidance counselor testified that Student's situation "just escalated, escalated, escalated until – and all this time we were having – [Student's] always involved in our child staffing meeting...with [the District chief psychologist] constant conferences with what the update is." [NT 447]
72. The guidance counselor does not independently make a decision about when it's time to initiate an evaluation. The guidance counselor took all the information she was receiving about Student to the chief psychologist who made the decision about when to evaluate. [NT 463-465]
73. The District waited to initiate the evaluation process, "until it really started impacting the grades, [the District's chief psychologist] and the team, the staff team...and finally [the District's chief psychologist] just said – she said to me we need to do something because now [Student's] not passing. [Student's] starting not to pass". [NT 447-448]
74. Student was referred by District personnel for evaluation "due to emotional concerns and some failing grades as well as lack of school attendance". [NT 385; P-28]
75. The District's evaluating psychologist testified however that the driving force for which Student was referred for evaluation was Student's truancy. She testified, "In my mind it was truancy, and why [Student] was truant..." and [some of the other educational problems] were byproducts or natural consequences of Student's truancy. She testified that truancy "was the main concern that brought [Student] to the forefront". [NT 405-407, 412]
76. At the end of January 2010 the District issued a Permission to Evaluate (PTE). The Parent signed the PTE on February 3, 2010. [NT 304; P-28]
77. A Parent Report form completed in January 2010 noted concerns as bored easily, sometimes too advanced with peers, self-destructive, depression, no direction, wants to fit in, sometimes gets taken advantage of. [S-1]
78. The Parent Report of January 2010 notes Student was in weekly counseling, overate and slept at least 13 hours a day. [S-1]
79. Student received Notices to appear before a Magistrate Judge on February 11, 2010 and on October 2010. [P-23, P-26]

80. Student's mental health issues became worse around this time. [NT 304]
81. The Parent sought help several times from the truant officer, a District employee, but did not hear back. [NT 304-305]
82. The Parent was still communicating with the guidance counselor very frequently. [NT 305, 382]
83. After offering considerable resistance, Student was admitted to a psychiatric Partial Hospitalization facility in March 2010 and discharged a little over a month later. Student was admitted because of increasing anxiety and ongoing school refusal, and was not improving with outpatient therapy services. [NT 305-309; S-3]
84. A draft copy of an Evaluation Report [ER] dated March 31, 2010 notes that "due to [Student's] lack of attendance and emotional fragility that led to [Student's] need for a partial hospitalization program", the evaluation could not be completed within 60 calendar days. [P-28]
85. Nevertheless, the ER concludes that "The student does not have a disability and therefore is NOT ELIGIBLE for special education" (emphasis in the original). The ER noted however that further assessment would be done upon Student's discharge from the partial hospitalization program. [P-28]
86. The District's psychologist testified that she checked the box marked Not Eligible because Student was in the partial hospitalization program, there were few testing days available, more information was needed, and the timeline for completion of the evaluation was pending. [NT 386-388]
87. Student's discharge diagnosis was panic disorder with agoraphobia, obsessive compulsive disorder, and migraine headaches. Medication was listed as Zoloft 150 mg daily. The psychiatrist recommended that the District identify Student as a child with an emotional disability and that Student receive emotional support in the school setting. [S-3, P-29]
88. Although Student did well emotionally in the partial hospitalization program Student did not do well academically. When Student returned to the public school Student had the same emotional and academic issues as were present previous to the hospitalization. [NT 311-315]
89. Another PTE was sent and approved, and another ER was issued on May 18, 2010. The psychologist included teachers' comments verbatim. The Algebra teacher noted that "when [Student] is in class [Student] is so far behind that [Student] struggles to focus because [Student] really has no idea what we're doing in class. [Student] is almost never completing homework. Since [Student] is rarely in class, [Student] does not have the basic math skills." The Physical

- Education teacher noted, “Although [Student] has not been present in many classes I feel that [Student] often exaggerates the truth and reality of certain situations.” The English teacher noted, [Student] has been involved, focused and concentrated in class.” [P-30]
90. Teachers noted weaknesses in work habits, peer relationships, teacher relationships, class preparation, organizational skills, test taking, class participation, listening comprehension, following directions, and attention to task. [P-30]
  91. Grades in 11<sup>th</sup> grade for the fourth quarter of the 2009-2010 school year included F’s in Health/PE 10, Algebra II, Economics, and Computer Literacy. [P-30]
  92. From the time Student was discharged from the partial hospitalization program in April until the issuance of the May 18<sup>th</sup> ER Student had 10 more absences and one more tardy. [P-30]
  93. Student’s Wechsler Adult Intelligence Scale – Fourth Edition [WAIS-IV] scores from the May 2010 evaluation were Verbal Comprehension Index 116, Perceptual Organization Index 100 Working Memory Index 131 and Processing Speed Index 81, with a Full Scale IQ of 108. [P-30]
  94. Student’s Wechsler Individual Achievement Test – Second Edition [WIAT-II] scores obtained in May 2010 compare unfavorably with those obtained previously during a first administration of the same instrument as recorded above. Scores from 2003 juxtaposed with scores from 2010 were: Reading Composite 130/108, Math Composite 117/99, Written Language Composite 129/109. [S-1, P-30]
  95. The Parent’s endorsements of symptoms on the Achenbach Behavior Checklist completed in February 2010 yielded clinically significant scores on Anxious/Depressed, Somatic Complaints, Thought Problems, Affective Problems, Anxiety Problems, and Somatic Problems. [P-30]
  96. The District evaluator concluded that Student was a student with a disability, Emotional Disturbance, and was a student in need of specially designed instruction. [P-30]
  97. The May 18, 2010 ER notes that Student “meets the criteria as a student with a serious emotional disturbance, due to physical symptoms and fears that have been present to a marked degree for a significant period of time”. All school staff who participated on the multidisciplinary evaluation team agreed with the report and indicated such by checking after their names. [P-30]
  98. The IEP team, meeting on June 8, 2010, recommended Itinerant Emotional Support programming. Student was distraught during and following the meeting

and had a meltdown. Student “wanted nothing to do with emotional support services”. [NT 318-323, 429-431, 454; P-32, P-33]

99. On June 9, 2010 the Parent withdrew Student from the District. [NT 234-235, 330-331; S-17]
100. A June 16, 2010 letter to the Parent from the District noted that Student had failed Basic Economics, College Algebra 2, Basic Computer Literacy, Health and PE 10 and Health and PE 11. Student was being required to repeat 11<sup>th</sup> grade. [NT 210; P-34]
101. The Parent requested and was granted an Independent Educational Evaluation [IE] at public expense. [NT 210-211, 332; P-35, P-38]
102. The independent evaluator’s report, dated August 12, 2010, identified inconsistent cognitive abilities; neurobehavioral disorders; executive functioning disorder; awareness of the discrepancy between intellectual ability and school performance resulting in anxiety, sadness and anger; and social history as factors contributing to Student’s difficulties in school and at home. [P-38]
103. Student is finishing the current year [2010-2011] at a different cyber charter school from the first one attended. Student has repeated 11<sup>th</sup> grade and will be considered a 12<sup>th</sup> grader next year with expected graduation being in 2012. [NT 336-337]

### Discussion and Conclusions of Law

#### Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome determining rule applies only when the evidence is evenly balanced in “equipoise,” as otherwise one party’s evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

Here, the Parent requested this hearing and was therefore, assigned the burden of persuasion pursuant to *Schaffer* and also bore the burden of production. The Parent met her burden of persuasion and prevailed, given the preponderance of the evidence in her case and the resulting lack of evenly balanced evidence between the parties.

### Credibility of Witnesses

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003).

In this hearing I found the Parent to be credible, despite some memory issues, and gave her testimony considerable weight. She clearly struggled to answer what was asked of her to the best of her ability and convinced me that she had been trying every avenue she could think of to get help for Student. She established that she had consistent communication with District personnel, in particular the guidance counselor and shared all relevant information. She was cooperative with the District’s suggestions, to the point of allowing Student to be taken to court for truancy and removing Student to a cyber charter school.

The District psychologist established that from her point of view, Student’s truancy was the salient problem from which all other of Student’s difficulties flowed. Given the wealth of history available from the Parent and from other District personnel, this viewpoint, taken in the context of Student’s numerous mental health and physical health problems, seems rather circumscribed to the point of being surprising coming from a school psychologist. Given clear indications of Student’s long-standing school avoidance and long-standing outpatient treatment by private providers, I found that her statement that Student, “when in school...didn’t have a significant behavior history...not frequently in the guidance office with crying or things like that...And until we had that panic disorder with agoraphobia diagnosis from [the partial hospitalization program] like there’s ...we can pin it [truancy] on that” [NT 427-428] missed or ignored the role that school psychologists must play in examining the IDEA education-related disability categories, (in this case emotional disturbance and other health impairment), to decide eligibility under the IDEA rather than looking for a diagnosis given by a mental health professional under the DSM-IV<sup>9</sup>. As she herself testified, “The function of [Student’s] school avoidance appears to be to avoid the feelings of anxiety that the social and academic demands of school produce in [Student]...[and this] has led to a cycle where the pressure of performing in school and [Student’s] perception of being ineffective in school fueled [Student’s] avoidance of school which further complicates [Student’s] academic situation.” [NT 428] There could be no better formulation of the nexus between Student’s emotional disturbance and Student’s need for special education emotional support, and this condition had been present for much of Student’s educational career.

The high school guidance counselor testified candidly, and it was manifest that she certainly tried to help the Parent and gave generously of her time to the mother, Student, and at times the father as well, in addition to offering assistance to the partial hospitalization teacher. [NT 441-442, 479] She is to be commended for this level of

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<sup>9</sup> Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition, the handbook used for psychiatric diagnosis.

involvement, however it seems that the hierarchy for referral for an evaluation may have made it difficult for her to recommend testing, or in the alternative, that she was simply too focused on Student's being smart and on the role of outside private providers, and thus missed that Student was in significant need of in-school emotional support in order to access the curriculum. Her testimony that "I became very aware that from my perspective there was some deeply imbedded family issues, from my perspective, again, which they were dealing with professionals outside of the district, whether that was a psychiatrist or a physician – I knew [Student] had many issues, both physical, mental, psychological, emotional, yes" [NT 438] should have triggered a referral for an evaluation as Student's issues, whatever their origin, were impacting significantly on Student's education. The guidance counselor's suggesting to the Parent to send Student to cyber charter school instead of the counselor's insisting that the District's chief psychologist initiate the referral process for a special education evaluation was unfortunate, offering only a short-term, poor, solution to a long-standing problem that did not go away.

#### Child Find – Legal Basis

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* The IDEA sets forth the responsibilities (commonly referenced as "child find" responsibilities) borne by school districts for identifying which children residing in their boundaries are in need of special education and related services such that "[all] children with disabilities residing in the State...regardless of the severity of their disabilities...are identified, located and evaluated..." 20 U.S.C. §1412(a)(3).

Having found that the Parent could not establish that either of the two exceptions to the IDEA's 2-year statute of limitations existed, I turn to the question of whether there is a carve-out for Child Find in the statute of limitations. Although the IDEA is silent on this issue, the Federal Court for the Eastern District of Pennsylvania applied the IDEA's two year statute of limitations to a child find claim in *Daniel S., ex rel. Michael S. v. Council Rock School District*, 2007 WL 3120014, \*2 (E.D.Pa. October 25, 2007) (IDEA's two year statute of limitations is applicable to child find claim). Additionally, although arguably no longer binding, Appeals Panel decisions analyzing child find claims are instructive as the underlying statute has not changed. The Appeals Panels have consistently held that the statute of limitations is equally applicable to child find claims as to any other kind of claim under the IDEA. In *In re the Educational Assignment of D.H.*, Special Education Appeals Panel Opinion No. 1672 (2005), the Appeals Panel noted that the statute of limitations "provides no exception for child find claims." See also *In re the Educational Assignment of J.L.*, Special Education Appeals Panel Opinion No. 1763 (2006); *In re the Educational Assignment of C.H.*, Special Education Appeals Panel Opinion No. 1750 (2006); *In re the Educational Assignment of D.S.*, Special Education Appeals Panel Opinion No. 1740 (2006); *In re the Educational Assignment of E.F.*, Special Education Appeals Panel Opinion No. 1733 (2006); *In re the Educational Assignment of B.B.*, Special Education Appeals Panel Opinion No. 1728 (2006); *In re the Educational Assignment of D.H.*, Special Education Appeals Panel Opinion No. 1672 (2005).

We now examine the issue of whether the District should have suspected that Student was eligible for special education prior to its May 2010 evaluation. Child Find is a positive duty requiring a school district to begin the process of determining whether a student is exceptional at the point where learning or behaviors indicate that a child may have a disability. *Ridgewood Board of Education v. M.E.*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999). A district is on notice of the *possibility* of a disability where a student is experiencing failing grades, or where it has notice that the student has been identified for ADHD. *See S.W. v. Holbrook Public Schools* 221 F.Supp.2d 222, \*226 -227 (D.Mass. 2002). The possibility that the student's difficulty *could* be attributed to something other than a disability does not excuse the district from its child find obligation. *See Richard V. v. City of Medford*, 924 F.Supp. 320, 322 (D.Mass.1996) The United States Supreme Court held early on that merely passing from grade to grade and achieving passing grades is not dispositive that a student has received a FAPE. *Board of Educ. v. Rowley*, 458 U. S. 176, 203, n.25 (1982). 34 C.F.R. §300.101(c)(1) provides: "Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade."

The District found Student eligible and classified Student as having an Emotional Disturbance in May 2010, but asserts that it had no basis for so finding prior to the issuance of the April 2010 discharge summary from the partial psychiatric hospitalization program. The applicable regulations define Emotional Disturbance as follows:

- (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.
- (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that

they have an emotional disturbance under paragraph (c)(4)(i) of this section.

34 C.F.R. § 300.8(a)(4).

Although Student has not been so classified, a consideration of Other Health Impairment also needs to be raised. The applicable regulations define “Other Health Impairment” as:

“ . . . 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(a)(8) (emphasis added)

34 C.F.R. § 300.8(c)(9).

The IDEA requires the State to provide eligible children with a “free appropriate public education”. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). Special education is defined as specially designed instruction . . .to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child . . .the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26.

The Third Circuit articulated its position that education is more than academics and involves emotional and social progress in its holding that an IEP is appropriate if it offers meaningful progress in *all relevant domains under the IDEA* (emphasis added). *M.C. v. Central Regional S. D.*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996), cert. den. 117 S. Ct. 176 (1996). Less than one year ago, when deciding *Breanne C. v. Southern York County School District*, 2010 WL 3191851, M.D. Pa, Aug 11, 2010 the Federal Court for the Middle District noted that when an eligible child receives an IEP, that IEP must be reasonably calculated to afford the child the opportunity to receive a “meaningful educational benefit” [*Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) ; *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir.1999)] and that an IEP confers a meaningful educational benefit when it is more than a trivial attempt at meeting the educational needs of the student, and it is designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social and emotional.



If schools must address behavioral, social and emotional domains in public education when educating disabled students, then a student with a disability in these domains who has not benefitted from regular education programming to address these domains necessarily requires specially designed instruction in these areas. Clearly Student did not profit from regular education initiatives in this regard, such as the Truancy Elimination Plan, detentions, and even referral to the court system for truancy. Student's disabling conditions clearly affected Student's educational performance as demonstrated by an inability to attend school regularly and on time, an inability to make up missed work, and a corresponding inability to earn grades commensurate with Student's excellent cognitive ability. Notwithstanding Student's standardized achievement test scores, assessments which look at reading, math and writing mastery, Student's disability is affecting the acquisition of *content* in high school subjects, content which is designed to lay the foundation for the body of knowledge Student will carry into a post-secondary setting. Despite good cognitive endowment, Student requires specially designed instruction in order to access the general education curriculum.

The Third Circuit set forth a clear rule that courts and hearing officers cannot engage in "Monday Morning Quarterbacking" whereby armchair "quarterbacks" take what is known after the outcome of the game to criticize the play-calling that occurred during the game the preceding day. *Fuhrman v. E. Hanover Bd. of Educ.*, 993 F.3d 1031 (3d Cir. 1993). Keeping in mind this down-to-earth counsel, I find that as far back as the end of 6<sup>th</sup> grade, when Student had completed a second straight year of excessive absences, if not in 5<sup>th</sup> grade when Student had to be dragged kicking and screaming into school, the District should have suspected that Student may have a disability. The Parent was in frequent communication with the District and was making the District aware of Student's physical and emotional difficulties leading to absences. Possible classifications of emotional disturbance and other health impairment were evident and should have been explored. There is some evidence in the record that Student did a little better in middle school because of involvement in [a specific extracurricular activity] and although absences continued some of the symptoms abated. However, Student's problems came bounding back very early in 9<sup>th</sup> grade, the Parent was in frequent communication with the guidance counselor, and the guidance counselor was taking Student's case to the child staffing meetings regularly. Without doubt, since it seems to have been her prerogative, the District's chief psychologist should have initiated the referral process for an evaluation at the very latest, by the middle of the fall in 9<sup>th</sup> grade given the behaviors being demonstrated and the extensive history going back to elementary school.

#### Compensatory Education

Student is entitled to compensatory education as Student was eligible for special education during the relevant period and was denied a free appropriate public education.

For eligible students, special education and related services are the critical constituents of a free *appropriate* public education (FAPE). Special education has at its focal point specially designed instruction (SDI), which to be *appropriate* adapts to an eligible child's unique needs the content, the methodology, or the delivery of instruction, with access to the general curriculum that allows the meeting of state education agency standards for all.

In-kind compensatory education is a remedy for a span of FAPE denial by district action or inaction, less a reasonable period when it could have been rectified, its form and timing to be a matter of parental discretion as long as costs are commensurate with what was denied and it does not replace otherwise currently “entitled to” programming.

The IDEA authorizes hearing officers and courts to award “such relief as the Court determines is appropriate” 20 U.S.C. § 1415(h)(2)(B), and compensatory education is an appropriate remedy only when a school district has failed to provide a student with FAPE. *Lester H. v. Gilhool*, 916 F.2d 865, 871-73 (3d Cir. 1990) The purpose of compensatory education is to replace those educational services lost because of the school district’s failure. [*Id.*] I must therefore determine the “reasonable time” for fulfilling the District’s duties under the IDEA,<sup>10</sup> and estimate the reasonable rectification deduction for compensatory education.<sup>11</sup> In this case, I find that the District should have taken notice of Student’s possible disability well prior to the relevant period defined by the IDEA’s statute of limitations, and for this reason will calculate no reasonable rectification deduction.

This hearing officer expressly asked to hear the opinion of the independent evaluator regarding what form compensatory education could take, were it awarded. [NT 361-367] Although I appreciate the complexity Student presents, I find the independent evaluator’s opinions do not provide sufficient guidance to fashion an unambiguous order for an award that would bring Student to the place where Student would have been but for the denial of FAPE, the *B.C.* standard. *B.C. v. Penn Manor Sch. Dist.*, 805 A.2d 642 (Pa. Commw. 2006) I therefore find that the most reasonable calculus is the *M.C.* standard, and I will therefore award hours of compensatory education to match as best as possible hours of FAPE denied. I do however accept the independent evaluator’s estimate as to how long it will take for Student potentially to make use of compensatory education services and will order that the fund of hours may be used for five years, that is during high school and four years beyond. [NT 367] Therefore all compensatory education must be used prior to June 30, 2016.

As Student’s disabilities, in the absence of special education delivered under an IEP, affected Student’s educational progress across nearly all major subjects, and since the record does not establish that the District offered Student support in the form of regularly scheduled counseling, social skills groups, assistance in organization and task completion, tutoring, homework or other accommodation, Student is entitled to 4 hours per school day from November 17, 2008 to June 8, 2010. Given that Student’s absences and latenesses were a function of Student’s disability, and may have been successfully addressed through an IEP providing emotional support, there will be no deduction for days Student was not in school and therefore the 4 hours per day will be granted for every day school was in session for the entire relevant period, excluding however the time Student was enrolled in the cyber charter school and excluding as well the time Student was in the partial psychiatric hospitalization program.

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<sup>10</sup> *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995).

<sup>11</sup> *M.C. v. Cent. Reg’l Sch. Dist.*, 81 F.3d at 397.

The Parent may select the form of the compensatory education so long as it provides any appropriate developmental, remedial, transitional, psychoeducational or therapeutic service that addresses the needs identified in the District's ER and in the independent educational evaluation. There are financial limits on the parent's discretion in selecting the appropriate developmental, remedial, transitional, psychoeducational or therapeutic services. The costs to the District of providing the awarded hours of compensatory education may not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services and the actual costs for salaries, tuition and transportation for contracted services. This principle sets the maximum cost of all of the hours of the compensatory education awarded. The parent may balance expensive and inexpensive instruction or services so long as the total cost and hours do not exceed the maximum amount. The parent also may use fewer hours of expensive services so long as the maximum dollar amount of the award is not exceeded. Finally, the parent must not be required to make co-payments or use personal insurance to pay for any part of these services.

Student may use the compensatory education award through June 30, 2016; any remaining hours not used by that time shall be forfeited. Student may use the award while attending college or a trade school, but the services chosen must be tutorial, remedial, transitional, psychoeducational or therapeutic, in support of Student's post-high school work, and may not be used for tuition, textbooks, fees or transportation related to college or trade school coursework. A computer and appropriate tutorial software are allowable, however, as are professional tools and devices should Student decide to enroll in a trade school.

#### Section 504

To establish a violation of §504 of the Rehabilitation Act of 1973, 29 U.S.C. §793 *et seq.* the Parent must demonstrate that (1) Student is disabled as defined by the Act;<sup>12</sup> (2) Student is "otherwise qualified" to participate in school activities; (3) the school or the Board receives federal financial assistance; and (4) Student was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *Ridgewood Board of Education v. N.E.* 172 F.3d 238, 253 (3d Cir. 1999); *J.F. v. School District of Philadelphia*, 2000 U.S. Dist. LEXIS 4434, No. 98-1793, (E.D.Pa. 2000); *Nathanson v. Medical College of Pennsylvania*, 926 F/2d 1368, 1380 (3d Cir. 1991; C.F.R. §104.4(a)..

Section 504 requires a recipient of federal funds to make "reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped" person. 34 C.F.R. §104.12 (a). Although the Third Circuit has not specifically addressed what is a "reasonable accommodation" in relation to the Rehabilitation Act's requirement of an "appropriate" education", Courts have concluded that a reasonable accommodation analysis comports with the Third Circuit's explanation that an "appropriate" education

<sup>12</sup> A "Handicapped person" under Section 504 of the Rehabilitation Act is defined as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 34 C.F.R. §104.3(j).

must "provide significant learning' and confer 'meaningful benefit,'" *T.R. v. Kingwood Township Bd. of Educ.* 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988), but that it "need not maximize the potential of a disabled student." *Ridgewood*, 172 F.3d at 247; *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002).

The Parent did not argue that the evidence established a separate and distinct claim under §504 in addition to the District's alleged violations of IDEA. The Parent's 504 claim was based entirely upon the same facts that were asserted in support of the IDEA claims. As the Parent prevailed on the IDEA claims, this decision satisfies the 504 claims as well. *See West Chester Area School Dist. v. Bruce C., et al.*, 194 F.Supp.2d 417, 422 n.5 (E.D.Pa. 2002) (court found issue of whether student was entitled to Section 504 Service Plan to be moot because court found student eligible for IDEA services).

## Order

It is hereby ordered that:

The School District denied Student a free appropriate public education (FAPE). As the District denied Student FAPE, Student is entitled to 4 hours of compensatory education per school day from November 17, 2008 to June 8, 2010 in accord with the parameters above. Given that Student's absences and latenesses were a function of Student's disability, there will be no deduction for days Student was not in school and therefore the 4 hours per day will be granted for every day school was in session for the entire relevant period, excluding however the time Student was enrolled in the cyber charter school and excluding the time Student was in the partial psychiatric hospitalization program. The compensatory education hours may be used through June 30, 2016.

Any claims not specifically addressed by this decision and order are denied and dismissed.

May 31, 2011

Date

*Linda M. Valentini, Psy.D., CHO*

Linda M. Valentini, Psy.D., CHO  
PA Special Education Hearing Officer  
NAHO Certified Hearing Official