

*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: A.W.

Date of Birth: [redacted]

ODR No. 13543-12-13-AS

### CLOSED HEARING

#### Parties to the Hearing:

#### Representative:

Parent[s]

Jennifer Lukach Bradley, Esquire  
McAndrews Law Offices  
30 Cassatt Avenue  
Berwyn, PA 19312

Middletown Area School District  
55 West Water Street  
Middletown, PA 17057-1448

David F. Conn, Esquire  
Sweet, Stevens, Katz and Williams, LLP  
331 East Butler Avenue  
New Britain, PA 18901

Date of Hearing (ON REMAND): November 19, 2015

Record Closed: December 15, 2015

Date of Decision: January 11, 2016

Hearing Officer: William F. Culleton, Jr., Esquire, CHO

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> was a resident of the District named in this matter (District) during the time in question, and began twelfth grade this year at a different school district's high school. Student's mother and father (Parents)<sup>2</sup> filed this due process request in February 2013, asserting that the District had failed to perform its Child Find obligations under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504).

Parents asserted that the District had failed to identify Student as a child with a disability under the IDEA in Student's seventh, eighth and ninth grade years, consequently depriving Student a free appropriate public education (FAPE) under both the IDEA and section 504. Parents requested compensatory education from the first day of school in the 2010-2011 school year (Student's seventh grade year) until February 26, 2013 (in Student's ninth grade year), when Parents and Student moved from the District.

This hearing officer rendered a final administrative decision on Parents' due process request on June 15, 2013, denying Parents' claims and declining to order compensatory education. Parents subsequently appealed this decision by filing a complaint in the United States District Court for the Middle District of Pennsylvania, and on January 28, 2015, the Court partially reversed the administrative decision. The Court remanded the matter to this hearing officer to determine what compensatory education is due to Student in light of the Court's finding that the District had deprived Student of a FAPE from November 1, 2011 to December 14, 2012. A.W. ex

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<sup>1</sup> Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

<sup>2</sup> Parents are referenced herein in the plural; as Student's Mother conducted most of the transactions in the matter, I refer to her particularly as "Parent" in the singular.

rel. H.W. v. Middletown Area Sch. Dist., No. 1:13-CV-2379, 2015 U.S. Dist. LEXIS 9774, 2015 WL 390864 (M.D. Pa. Jan. 28, 2015).

I convened a hearing on the remand order, and the hearing was completed in one session. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I order the District to provide compensatory education in the amount and form specified in the order below.

### **ISSUE**

1. To what amount and form of compensatory education is Student entitled, for and on account of the District's failure to provide Student with a FAPE from November 1, 2011 to December 14, 2012?

### **FINDINGS OF FACT**

1. Student has a history of being diagnosed with Generalized Anxiety Disorder, Separation Anxiety Disorder, Social Phobia, Depressive Disorder and Oppositional Defiant Disorder. Student is classified under the IDEA as a child with the disability of Emotional Disturbance, manifesting as school phobia, and Speech or Language Disorder. (NT 645-647; S 13, S 23; P 21.)
2. Throughout Student's school career, Student's constellation of emotional needs has led repeatedly to school-avoidance behaviors that were reinforced and compounded whenever Student was successful in avoiding school-related situations and demands, whether by refusing to attend brick-and-mortar schools or by refusing to participate in school activities while in brick-and-mortar school buildings. Out of school suspensions for defiant and other behaviors also reinforced this avoidant behavior pattern. (NT 605-608, 632-633, 665, 715-718; P 5 p. 5; S 5 p. 1, S 6 p. 1, S 10, S 13 pp. 4 to 6, S 17 p. 3, S 20 pp. 4, 13 to 14, S 16.)
3. By the beginning of Student's eighth grade year, avoidance had become Student's habitual way of responding to any demand that Student did not want to fulfill; this included demands for attendance and performance in brick-and-mortar school buildings and other unwanted demands. Consequently, throughout Student's eighth and ninth grade years, Student's avoidant behaviors interfered with many areas of Student's development, including family and social relationships, and vocational opportunities that raised Student's anxiety. (NT 693, 715-718; S 13 p. 4 to 6, S 20 pp. 13 to 14, S 16.)

4. Student's cognitive ability is generally in the average range, with significant deficits in language processing with which Student struggled throughout Student's eighth and ninth grade years. (S 20 pp. 11 to 12; J 2 p. 14.)
5. Throughout Student's eighth and ninth grade years, Student's language processing deficits impeded Student's ability to comply with directives in school and interact with peers in school, for collaborative learning opportunities, extracurricular opportunities and social opportunities. (S 20 pp. 13 to 15.)
6. Throughout Student's eighth and ninth grade years, Student struggled with significant depression. (S 20 pp. 13 to 14.)
7. Throughout Student's eighth and ninth grade years, Student experienced significant difficulties with attention and hyperactivity in academic settings due to anxiety and depression. (NT 673-674; S 20 p. 13.)
8. Repeatedly throughout Student's school career, the District attempted to provide Student with behavioral plans that addressed Student's extended absences from school by offering transitional programs providing gradual re-entry into the brick and mortar school environment, such as providing for participation on a partial-day basis with emotional supports provided in the school building, and then gradually increasing the time of daily attendance. (P 12; S 13 pp. 4 to 6, S 17 p. 1, S 20 pp. 5 to 6, S 10.)
9. Repeatedly throughout Student's school career, Student returned to avoidance behavior after brief participation in gradual reentry transition plans. (P 11-14; S 20 p. 10.)

#### Eighth Grade

10. From the beginning of Student's eighth grade year (2011-2012 school year), Student exhibited a high level of anxiety, including separation anxiety, social anxiety, and generalized anxiety, including fears with regard to becoming ill. Student's absences increased significantly. (NT 97 – 98; P 17.)
11. During the first half of Student's eighth grade year, Student was absent approximately 71 days, most of which were attributable to Student's anxiety disorder. (S 13 p. 3.)
12. Between October 2011 and February 2012, student received three-day suspensions on four occasions and detention on one occasion, for defiant and uncooperative behavior. Suspensions were all out of school, rather than in school, due to District policy. (NT 101-102, 118-120; P 19.)
13. Student engaged in disruptive behaviors in mathematics class, leading to reassignment to a different mathematics class. (P 25.)

14. Student's grades for the first quarter of eighth grade were failures or "D" grades in all major subjects. (NT 104; P 17.)
15. During the first three quarters of Student's eighth grade year, Student's absences continued at a high rate, and Parent did not comply with a District direction to provide medical excuses only through a medical doctor's note. Thus, many absences for psychological therapy conducted by a non-physician were recorded as unexcused, leading to citations of Parent for violations of state compulsory attendance laws. (P 18; S 11 p. 1.)
16. In November 2011, Student applied for acceptance in the local county technical school for ninth grade; however, Student was unable to enroll because of Student's poor attendance, and because District personnel submitted a negative reference. (NT 110-112, 120-126; S 10, P 20, P 25.)
17. In February 2012, a District-retained psychiatrist recommended that Student attempt to return to full-time school attendance on a graduated plan, including a six week period with gradually lengthening partial days; supports in school including breaks from the classroom as needed; behavioral consequences for disruptive behavior; and truancy charges should Student not comply with the gradual plan. (NT 142-143; S 7, S 13.)
18. Shortly after receiving the psychiatrist's recommendation, Parent began sending Student to the middle school for half days, based upon those recommendations; however, this strategy ultimately was unsuccessful. (NT 149-152.)
19. In February 2012, the District notified Parent that Student's grades continued to place Student in danger of failure for the school year. (P 17.)
20. On March 29, 2012, Parent placed Student in a District cyber school program connected with the District middle school that Student had been attending. This program was computer-based, and all learning occurred in Student's home. There was no contact with school staff. (NT 146-164; S 18.)
21. Student attended the District cyber school program from March 2012 through the second quarter of Student's ninth grade year (the 2012 -2013 school year). (NT 161-167; S 16.)
22. By April 30, 2012, Student had been absent from school for 103 days. (P 23 p. 2.)
23. While Student attended the District cyber school program, the District did not implement Student's section 504 service agreement or provide any specially designed instruction or related services. (NT 163.)
24. Student did well academically in the District cyber school program, attaining good grades. (S 15.)

25. The cyber school curriculum included two post-secondary transition courses: Career Explorations and Introduction to Office Applications. (S 15.)

### Ninth Grade

26. In ninth grade, Student's attendance in the cyber school program was approximately 100%; in addition, Student logged on to classroom work during weekends. (S 20 p. 7.)

27. In December 2012, the IEP team, with Parent participating, produced an IEP, which the District offered, to be implemented on December 14, 2012. The IEP offered itinerant emotional support, with up to 60 minutes per six-day cycle of emotional support services, and inclusion in all general education classes. It offered direct instruction in coping and self-regulation skills. It also offered goals addressing communication, school participation and self-regulation needs. It offered modifications and specially designed instruction including a positive behavior support plan, processing time, preferential seating, refraining from calling on Student except as a volunteer, permitted breaks from class, study hall time and positive reinforcement. (NT 173; S 21, S 23.)

28. On December 21, 2012, the IEP team revised the IEP to offer speech and language support in the amount of 40 minutes per six-day cycle. In January 2013, the IEP was revised to offer this service in the amount of 30 minutes per week. (NT 174-176; S 23 p. 29, S 24.)

29. In January 2013, the District revised the IEP to reflect that Student would attend the local county technical school on probationary status, for all subjects, projected to begin on January 25, 2013. (NT 552-553; P 24 p. 5; S 23 p. 32, S 24; J 3 p. 5.)

30. Student began at the technical school on January 28, 2013. (NT 176 to 177.)

31. In February and March, 2013, Student and Student's family moved out of the District. Parents dis-enrolled Student from the District. (P 24 p. 5.)

32. Student attended the technical school for approximately one year, with increasing attendance problems, then withdrew and returned to a cyber program offered by the Student's new school district. (NT 552-553, 576-577, 644-645; J 4 p. 8, J 5 p. 12 to 14, J 6 p. 1 to 2, J 7 p. 6, J 8 p. 1.)

33. Student withdrew from the technical school in January of tenth grade due to anxiety and school avoidance behaviors. (NT 552-558; J 8, J 9.)

34. Student's avoidant behaviors continue, secondary to anxiety and phobias. Student has been unable to sustain employment due to these behaviors. (NT 565-571, 654, 660-662, 680-682.)

35. Student has social relationships, but they are limited by Student's phobias and avoidance behaviors. Student is not in need of social skills training presently. (NT 584-589, 646-648, 650-655, 658, 680-682, 685-686.)
36. Student's present receptive and expressive language functioning is in the low average to average range, consistent with Student's cognitive abilities. Student does not need speech or language therapy at this time. (NT 656-657, 686; J 2 pp. 9-10.)
37. Student's achievement in mathematics is within the average range and Student is not in need of special education services in mathematics, although compensatory education should include additional instruction or tutoring in mathematics calculation to help student with basic calculation skills that Student has forgotten over time. (NT 647-648, 671, 686, 725; J 2 pp. 9, 15.)
38. Student has withdrawn from counseling and therapy that is connected with a public school district. (NT 594-599, 656-658.)
39. Therapeutic intervention in Student's emotional condition is substantially more difficult now than it would have been during Student's eighth and ninth grade years, because the compounding effect of years of avoidance behavior, along with the new developmental needs of adolescence, have made Student's anxieties and avoidance behaviors less amenable to intervention. (NT 632-640, 665, 680-681, 705-706, 716, 729-730; J 2.)
40. This compounding effect continued after December 14, 2012, and has continued during Student's tenure in the present school district. (NT 706-707, 719-722.)
41. The period from November 1, 2011 to December 14, 2012 was a substantial cause of the Student's present educational deficits, but periods of time both before and after that period also substantially contributed. (NT 720-722, 725.)
42. Student remains motivated to overcome Student's emotional disorders and to graduate from high school; Student has learned some coping skills that enabled Student to travel outside the home to look for employment and to attend a psychological evaluation that was not located in a school district's facilities. (NT 657-659, 701; J 2.)
43. Student presently needs post-secondary transition services, including aptitude and career interest assessment, and exploration of the alternative of attending college-level courses. (NT 676-680, 688-689; J 2.)
44. Student presently needs post-secondary transition services in the form of vocational training for Student's chosen vocation in the construction industry, either in a cyber setting or a brick and mortar setting not connected with a public school district, or in some combination of such settings. (NT 659-662, 676-678, 699-701, 726-727; J 2 pp. 15-16.)

45. Student presently needs direct, therapeutically designed support services delivered by a job coach or other qualified person, to assist Student in overcoming fears through gradual transition to any physical location required for training, for a period of two to four years. (NT 660-662, 665-666, 680-682, 725-734; J 2 pp. 15-16.)
46. Student presently needs a program of private psychological therapy for Student's generalized anxiety disorder and depression, including both individual and group therapy through a qualified therapist, either a psychologist or licensed social worker, to be delivered twice per week as necessary for up to four years, and to be coordinated with vocational training program and one-to-one support services. This therapy needs to be supported by psychiatric services for purposes of medication management. (NT 646-647, 661-664, 670-671, 671-672 680-682, 725-730, 733-734; J 2 pp. 14-15.)
47. Student needs a plan, accepted by Student's present school district, and supported if necessary through the use of compensatory education provided by the District, to ensure that Student will be able to obtain the necessary credits for physical education in order to be able to graduate from high school in the current academic year. (NT 704; J 2 pp. 13, 15.)

## **CONCLUSIONS OF LAW**

### **BURDEN OF PROOF**

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>3</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>4</sup> that the

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<sup>3</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>4</sup> A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based



moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, the original administrative findings were based upon the above rules; the burden of persuasion rested upon the Parents. Having met their burden of proof before the District Court on appeal from the administrative decision, Parents have continued to bear the burden of going forward in the subsequent remand hearing.

I asked the parties to brief the applicable allocation of the burden of persuasion on remand, because Schaffer might be distinguishable in the remand context, which was not the context before the Supreme Court in Schaffer. I am satisfied that the analysis in Schaffer applies here, as well; there is no reason to reach for a different standard on the burden of proof, because the underlying posture of the matter remains as to the remanded question, which is limited as defined above by the District’s Court’s order. Therefore, with regard to the remand question, if the Parents fail to produce a preponderance of the evidence in support of Parents’ claims, or if the evidence is in “equipoise”, the Parents cannot prevail under the IDEA.

Consistent with this evidentiary standard, the District Court’s findings establish as a matter of fact that Parents did prove by a preponderance of the evidence that the District had deprived Student of substantive educational benefits during the period in question. To that extent, the Court

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upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

has reversed my assignation of weight to the evidence before me at the close of evidence on the third hearing session. Consequently, in my view, the burden of production has shifted to the District with regard to the period in question, to adduce evidence tending to show that the deprivation of benefits was only partial in nature.

Moreover, the remanding Court directs that I consider whether or not Student needs more services than the traditional hour-for-hour order for compensatory education in order to be restored to the position that Student would have occupied if the District had provided Student with a FAPE during the period in question. On this issue, again applying the principle set forth in Schaffer, I conclude that the burden of persuasion rests upon Parent in the event that the evidence is in “equipoise”, Schaffer, above.

#### CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this matter, I heard testimony from Parent and Parents’ expert evaluator. I found Parent’s testimony to be credible and reliable, as fully supported by the documentary record.

I found the Parents’ expert witness to be credible and reliable also. This witness made an extensive review of the documentary record, interacted with Parent and Student, and administered psychological tests whose results she then correlated with the previous evaluation reports. I found her professional qualifications and experience to be relevant to the issues in this matter, and her demeanor to exhibit objectivity and confidence. The witness based her opinions on the data and repeatedly declined to give opinions not supported by that data.

## COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865, 872 (3d Cir. 1990); Jana K. ex rel. Tim K. v. Anneville-Cleona Sch. Dist., 39 F.Supp. 3d 584 (M.D. Pa. 2014); rev'd on other grounds, G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015). In the Third Circuit, it is common to order the District to make up such services on an hour-by-hour basis; however, there is support also for a “make whole” approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010).

For this matter, the Court has adopted the analysis set forth in Jana K., above, for determining the amount of compensatory education that the District should provide to Student on account of its failure to provide Student with a FAPE during the period specified herein. A.W. above, at slip op. 43-44. Under the Jana K. analysis, I must award an amount of compensatory education sufficient to “match the quantity of services improperly withheld throughout [the relevant] time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district’s deficiencies.” Jana K., above, 39 F. Supp. 3d at 605-608; A.W. above, at slip op. 43. Therefore, I must determine the quantity of free appropriate educational services that the District failed to provide to Student during the period specified by the Court, and then determine whether or not the evidence shows that the child requires more or less educational service to restore Student to the position that Student would have occupied absent the denial of a FAPE.

The Court also recognized, consistent with longstanding Third Circuit precedent, that the above entitlement to compensatory education is reduced by the “amount of time after November 1, 2011 that the District reasonably required to evaluate A.W. and develop an appropriate IEP.”

A.W above, at slip op. 43. Therefore, I must assess the evidence in three steps: first, reach a conclusion as to the total of educational services owed to Student during the relevant period and not provided; second, reduce that total by a reasonable period for remediation; third, add or subtract from that net award consistent with the “make whole” approach set forth in the Court’s decision.

Regarding the last step of the analysis, I take particular note of the Court’s reason for remand to the administrative process. The Court indicated that it was unable to determine an appropriate amount of compensatory education on the record before it because “the court cannot extrapolate from these IEPs the amount of additional services, if any, that are needed to cure the District’s protracted deprivation of benefits. Indeed, the period of deprivation may have had an adverse compounding effect on A.W.’s educational progress.” A.W above, at slip op. 43. I read this to direct my attention to any compounding effects that occurred during the period in question due to the deprivation of a free appropriate public education.

As noted above, the relevant period begins on November 1, 2011 and ends on December 14, 2012. I have assessed the evidence and my prior findings not reversed by the court to determine Student’s status as of the start of this period. I believe that this factual determination obviates the Parent’s principal argument on remand: that I must tally up all of the Student’s needs and educational deficits throughout Student’s educational history, because all of that history necessarily contributes to the degree of Student’s needs – and therefore deprivations of FAPE – during the period of time defined by the Court. I believe that such an exercise would be both contrary to the remand order and unnecessary to accord Student the education due on account of the deprivation of FAPE.

The Court’s remand opinion is not ambiguous in this regard. The Court upheld my previous findings that the District did not deny a FAPE to Student until November 1, 2011. Moreover, the

Court held, consistent with my previous findings, that the District offered an IEP on December 6, 2012, effective December 14, 2012, that was reasonably calculated to provide Student with those supports needed to enable Student to receive meaningful educational benefits. I am not at liberty to augment or alter the terms of this remand, which is the law of the case. Therefore I see no basis to factor previous years' alleged deprivations into the compensatory education calculus.

Parent argues that the Third Circuit's decision in G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015), alters my obligations in this regard, arguing that the Third Circuit has now directed remediation for all previous years of deprivation, regardless of the bar of the IDEA's statute of limitations. G.L., 802 F.3d at 625 (stating that children are "entitled to be made whole with nothing less than a complete remedy", adding that courts should award compensatory education "to restore the child to the educational path he or she would have traveled but for the deprivation.")

I do not feel free to interpret the G.L. decision to require me to adjudicate the alleged deprivations, or their effects, arising in the times prior to the period specified in the Court's directive on remand. Rather, I conclude that the above language of the Third Circuit, is consistent with that of Judge Rambo in Jana K., quoted above, and was not intended to expand upon the rule for determining compensatory education that the remanding Court has directed.

Notwithstanding the above, I believe that a determination of Student's needs, and the degree to which Student's disability and educational needs debilitated Student at the start of the relevant period, will necessarily take into account any historical compounding effects. Thus, an appropriate remediation of the District's failure to offer a FAPE during the relevant period, if based upon an understanding of how profoundly Student was disabled at the beginning of the relevant period, will produce a result that is equitable and compliant with the District Court's remand.

## TOTAL DEPRIVATION DURING THE PERIOD BEFORE ENTERING CYBER SCHOOL

In this matter, I find that the Student began the month of November 2011 with a profound disability that was preventing Student from receiving any benefit of the educational services that the District was offering to Student. Student's phobias and fears were impacting Student's behavior significantly in many areas of functioning. Student was extremely uncomfortable about going to school. Student was struggling with an as-yet undetected language processing deficit that disrupted and significantly burdened Student's every effort to participate in educational activities that relied heavily upon receptive and expressive language – in other words, classroom-based learning, which requires the processing of lectures, oral directions, oral explanations, peer interactions about the subject matter, and collaboration with both adults and peers in classroom assignments. Student's anxieties also interfered with Student's ability to concentrate on work.

The evidence is preponderant that Student had learned by this time to avoid anxiety-producing situations by simply staying home from school, or displaying oppositional and irritable behavior in which Student became disruptive in the classroom and at home. By November 2011, these behaviors were so ingrained and debilitating that the District had already failed in repeated attempts to encourage - and even to force - Student's re-entry into the brick and mortar setting.

The result was that Student was absent for the bulk of the time between November 1, 2011 and March 29, 2012, when Parent removed Student to the District's cyber school. Even when Student was in school during this initial part of the relevant period, Student was not accessing much of the instruction, due to inattention, hyperactivity, non-participation and oppositional and disruptive behavior.

All of this had an adverse impact upon Student's social relationships, as well. Student's social skills were not mature for Student's age to begin with. Student's unusual behavior in school

made it harder to fit into the social fabric, according to the psychologist who evaluated Student in August and September 2012. This professional expressed the reliable opinion that Student's social skills and relationships were not satisfactory or typical, due to Student's disabilities. Moreover, there is no evidence that Student ever benefitted from extracurricular opportunities available in the brick and mortar setting.

I conclude that Student received no meaningful educational benefit from November 1, 2011 to March 29, 2012, when Parent placed Student in the District's cyber school. Student was absent from school on 103 occasions from the first day of school in 2011 until April 2012. The evidence is preponderant that Student's marks were failing or severely below Student's expected average level throughout this period of time. Student's school avoidant behaviors - and thus Student's emotional regulation skills according to expert opinion - were not improved; rather, they regressed from the year before, when Student had been able to stay in school sufficient to pass Student's courses with some average and above average grades. Student's social skills did not advance during this period of time.

I conclude that Student is entitled to compensatory education in the amount of full days<sup>5</sup> of compensatory education for every school day from November 1, 2011 to March 29, 2012, excluding a reasonable period for District evaluation and offer to remediate. I find that, during this period of time, Student was unable to benefit at all from District educational services, because the District had failed to address Student's disabilities through special education services reasonably calculated to provide Student with meaningful educational benefit. See Jana K. 39 F.Supp.3d above at 610 (awarding full days of compensatory education where a district's failure to provide special education services "permeated the student's education and resulted in a widespread and

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<sup>5</sup> A full day at this time was seven hours per day, based upon the Penndata portion of the December 6, 2011 IEP. (S 21 p. 28.)

decline in her academic and emotional well-being”); Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist., 963 F.Supp. 2d 427, 439 (E.D. Pa. 2013)(ordering full days of compensatory education).

Student is finishing high school in the cyber setting, and will not return to classroom setting; therefore I will order these hours to be provided in the form of a regular education teacher’s services, provided on an individual basis to Student, for seven hours per school day. For the same reason, in place of the approximately one hour per week of emotional support classroom time, I will order the same quantity of individual psychological therapy.

Student no longer needs speech and language services, which were provided successfully after the relevant time period. Therefore, I will order an additional 30 minutes per week of psychological therapy in place of the speech and language therapy that should have been provided during this period of time.

In addition, Student was deprived of opportunities to develop social skills. Therefore, I conclude that the District should have offered specially designed social or extracurricular opportunities to Student during this time, in the amount that a typical eighth grader can be expected to utilize in the general education setting; I conclude that one hour per week of a regular education teacher’s services is an appropriate amount of social or extracurricular activity.

#### PARTIAL DEPRIVATION WHILE ATTENDING CYBER SCHOOL

On March 29, 2012, Parent removed Student from the District’s offered brick-and-mortar setting and enrolled Student in the District’s cyber school. From this date until the end of the relevant period of time on December 14, 2012, Student attended almost perfectly, logged into



cyber-school on weekends, and attained good grades; therefore, Student received substantial academic educational benefit.

Yet, as the Court has found, Student received no benefits in the educational realms of emotional and behavioral self-regulation or social skill development. Student was completely detached from the brick-and-mortar environment. Thus, Student did not receive educational benefits in all relevant realms of education as required by Pennsylvania law.

The Court has concluded that, during this period of cyber-school attendance, the District should have provided Student with special education services to address all of these needs that the cyber-school could not address. As Student was within the District's jurisdiction, and had an IEP, the District should have made such emotional, behavioral and social educational opportunities available to Student while in the cyber setting, as set forth later in Student's December 2012 IEP, for about one hour per week. In view of Student's changed circumstances, as explained above, I will substitute one hour per week of psychological therapy for the emotional support services, eventually offered appropriately in the December 2012 IEP, which should have been provided during this period of time.

In addition, I find that during this time Student needed and was deprived of speech and language therapy services, later offered in the amount of 30 minutes per week. Since Student no longer needs speech and language therapy, I will order additional hours of psychological therapy, which Student does need at present, in place of these hours.

Regarding social skills opportunities, I conclude that the District should have offered specially designed social or extracurricular opportunities to Student during this time, in the amount that a typical eighth grader can be expected to utilize in the general education setting; I conclude that one hour per week of a regular education teacher's services is an appropriate amount of social

or extracurricular activity. The record does not support any additional award by a preponderance of the evidence.

In sum, compensatory education for this part of the relevant period will not consist of seven hours of teacher time. Rather, it shall consist of an extension of the one and one-half additional psychological therapy hours, and the one additional teaching hour attributable to missed extracurricular opportunities, minus the reasonable period of rectification.

#### REDUCTION OF AWARD FOR REASONABLE EVALUATION AND RECTIFICATION

The above amount of compensatory education will be reduced, as the remanding Court has directed, by the amount of time reasonably required for the District to evaluate and determine the appropriate services to offer in an initial IEP. Here, the Court has upheld this hearing officer's finding that the first date on which the District reasonably knew that Student needed an evaluation for special education services was November 1, 2011. As this was an initial evaluation, I conclude that it is reasonable to allow for the statutory time frame for initial evaluation.

The IDEA requires provision of an initial evaluation within 60 days of the date of written authorization, 34 C.F.R. §300.301(c)(1)(i); under the circumstances, I deem it inequitable to allow any additional time for the receipt of written authorization as required under Pennsylvania regulations, 22 Pa. Code §14.123(b), since, as the Court has concluded, Parent cannot be charged with any delay in the provision of special education services due to the District's failure to communicate that option by November 1, 2011. Therefore, I will reduce the amount of compensatory education by the number of school days included within the sixty calendar day period starting on November 1, 2011.

Similarly, the IDEA allows the local education agency up to 30 days to convene an IEP meeting. 34 C.F.R. §300.323(c)(1); however, I do not find it appropriate to accord a rectification period this lengthy, especially in view of the extremity of Student's need by November 1, 2011. I would expect the District to have expedited the IEP meeting in this case. Nevertheless, I will accord an additional ten days, as required at parent's option by Pennsylvania regulations. 22 Pa. Code §14.123(d). In short, the District will be responsible for compensatory education hours beginning seventy calendar days from November 1, 2011: January 10, 2012.

#### "MAKE WHOLE" ADDITIONAL SERVICES

As set forth above, I conclude that the exercise of equity requires an order for additional services, above and beyond an hour-for hour award.<sup>6</sup> The parties adduced extensive testimonial and documentary evidence as to the present needs of Student, who is now finishing up senior year in another district's cyber school program, and looking for work.

The fact that the Student has been within the jurisdiction of another school district for over three years is a complication that bears upon the relevance and import of this evidence. The record is preponderant that Student's current condition is the product of not only the period of deprivation but also the period subsequent to that which the Court has remanded for my consideration. While I have found that the relevant period had a compounding effect upon Student's anxieties and avoidance behaviors, the evidence also shows that subsequent periods of time created a similar

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<sup>6</sup> I am not persuaded by the District's argument that some of these services – the academic teaching services and the speech and language therapy services - should be calculated in such a manner as to reduce the amount of services to be ordered (pursuant to the Jana K. analysis), because Student's needs are presently resolved in those areas. Such an approach would be inequitable in my view. Student was entitled to such services during the period in question, and the District's failure to provide them at that time forced Student to make them up later, at a time when Student needed to be available for more advanced learning. Moreover, I have found that the omission of these services had a compounding effect, such that Student's needs at present are more intense and more hardened to intervention due to the fact that the services in question were not provided during the relevant period.

compounding effect. For example, Student's school avoidance began to increase shortly after the relevant period, when Student was admitted to the county vocational technical school. Absenteeism gradually increased until, approximately one year later, in January 2014, Student once again withdrew from brick-and-mortar schooling and returned to the cyber setting full time. At that point, another district was responsible for providing a FAPE, and it is neither appropriate nor possible on this record to determine whether or not that district's offer of FAPE was sufficient to address the compounding effects of Student's withdrawal from the technical school setting.

Nevertheless, Parents provided an expert report and testimony that credibly and reliably set forth the Student's present academic, developmental, emotional and social status. The expert also opined as to the quantity of services that Student would need to be made whole at the present time. The expert testified that Student does not need special education for academic needs, and that Student's speech and language needs have been ameliorated by therapy provided subsequent to the relevant period.

Student's primary needs are twofold. Student needs post-secondary transition services with specially designed delivery in the form of individual support for physically engaging in vocational training services and job searching outside the home, and Student needs substantial psychological therapy through a qualified psychologist or social worker, under the direction of a psychiatrist for medical management purposes.<sup>7</sup>

The evidence shows that Student will need these services for anywhere from two to four years. I conclude that it would be equitable to require the District to provide a portion of the needed therapy and vocational services, commensurate with the amount of time during which it can be charged with a remedial obligation as set forth above. I base this upon the finding, by a

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<sup>7</sup> I conclude that psychiatric services of this nature are not authorized by the IDEA and therefore I will not order the District to provide them. 34 C.F.R. §300.34(c)(5).

preponderance of the evidence, that the relevant period of deprivation produced a compounding of Student's disabilities and needs that manifests itself in the profound and recalcitrant nature of Student's present disability. Therefore, I conclude that it is necessary to order such additional services in order to cure the District's protracted deprivation of benefits during the period in question. A.W., above, slip op. at 42.

Therefore, I will order the District to provide compensatory education in the additional amount of two hours per week of psychological therapy by a qualified practitioner for the period of deprivation defined above, during parts of two school terms from January 10, 2012 to December 14, 2012. Thus, the order below provides for two hours more per week than is ordered to remediate the deprivation of emotional support and speech/language services applicable to the relevant period – for a total of three and one-half total hours per week of psychological therapy, which is expected to be provided at a pace that Student can meaningfully tolerate.

I conclude that such services are authorized by the IDEA as related services. 34 C.F.R. §300.34(a) defines related services as those required to assist a child to benefit from special education, and I conclude that such services are needed to help Student to benefit from specially designed post-secondary transitional services and vocational services. 34 C.F.R. §300.34(c)(2)(10) and (14) include services by psychologists and social workers in this requirement, including counseling, which in my experience is often provided in the form of therapy. Moreover, I conclude that the services described by Parent's expert witness in the hearing on remand are necessary in order to remediate the deprivation that the court has found.

I will also order the District to provide vocational training appropriate to Student's age and vocational needs, in the amount of five hours per week during the relevant period of deprivation, starting on the first day of school in 2012, and ending on the day of Student's entrance into the

vocational technical school in 2013.<sup>8</sup> I conclude that Student was deprived of vocational services for this part of ninth grade due to Student's disabilities, and the avoidance behavior and absenteeism that Student's disabilities directly caused, when Student's November 2011 application to the local vocational technical school was rejected due to Student's absenteeism. Moreover, I conclude that such services, defined for a later period of time than has been defined as relevant herein, are needed because that period of time was lost because of the District's failure to provide a FAPE during the relevant period.

Student's present needs should govern the form in which ordered compensatory education services should be provided. Therefore, I will direct that the ordered services take the forms delineated by Parents' expert witness in the hearing on remand, including individual tutoring rather than full class teacher time; therapy by a psychologist or social worker; and vocational training services obtainable at a vocational school, with job coaching.

### **CONCLUSION**

In sum, I find that the Parents have born their burden of persuasion that compensatory education is owed in the amount and forms set forth in the order below.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows:

1. The District shall provide compensatory education to Student in the form of one regular education teacher's services, provided individually to Student, in the amount of seven hours of per day for every school day on which Student's

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<sup>8</sup> This is intended to include the services of a vocational education teacher in a field of Student's choice, as well as the services of a job coach or other appropriate trainer to assist Student in physically going to job interviews, job sites, and other appointments necessary as part of training, as described by Parents' expert witness in the hearing on remand.

assigned District school was open, from January 11, 2012 to and including March 29, 2012.

2. The District shall provide compensatory education to Student in the form of psychological therapy services appropriate to Student's current needs, provided by a qualified psychologist or social worker, in the amount of three and one-half hours per week for every full or partial week on which Student's assigned District school was open, from January 11, 2012, to and including December 14, 2012.
3. The District shall provide compensatory education to Student in the form of one regular education teacher's extracurricular program services, provided individually to Student, in the amount of one hour per week for every full or partial week on which Student's assigned District school was open, from January 11, 2012 to and including December 14, 2012.
4. The District shall provide compensatory education to Student in the form of vocational training services appropriate to Student's age and vocational needs, in the amount of five hours per week for every full or partial week on which Student's assigned District school was open, from the first day of school of the District's 2012-2013 school year, to and including January 28, 2013.
5. The educational services ordered above may occur after school hours, on weekends, or during summer months when convenient for Student or Parent, and may be provided after Student attains the age of 21 years.
6. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.
7. The cost of any ordered service may be limited to the current average market rate within a fifty-mile radius of the District's administrative offices for privately retained professionals qualified to provide such service.

It is FURTHER ORDERED that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

January 11, 2016