

*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: B.C.

Date of Birth: [redacted]

Dates of Hearing:  
12/20/13, 12/30/13, 1/16/14, 2/6/14, 2/19/14, 2/20/14, 5/5/14

CLOSED HEARING

ODR File No. 14321-1314AS

Parties to the Hearing:

Representative:

Parent[s]

None

Camp Hill School District  
2627 Chestnut Street  
Camp Hill, PA 17011

Sharon M. O'Donnell, Esquire  
Marshall Dennehy Warner Coleman  
and Goggin, P.C.  
100 Corporate Center Drive, Ste. 101  
Camp Hill, PA 17011

Date Record Closed:

May 23, 2014

Date of Decision:

June 4, 2014

Hearing Officer:

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

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child in this matter (hereafter Student)<sup>1</sup> is an elementary school-aged student in the Camp Hill School District (hereafter District) who has been identified as a protected handicapped student under Section 504 of the Rehabilitation Act of 1973 (Section 504)<sup>2</sup> and the federal and state regulations implementing that Act.<sup>3</sup> In September 2013, Student's Parents<sup>4</sup> filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA)<sup>5</sup> as well as Section 504 and the Americans with Disabilities Act (ADA).<sup>6</sup>

The case proceeded to a due process hearing which convened over seven sessions,<sup>7</sup> at which the parties presented evidence in support of their respective positions. The Parents sought to establish that the District failed to properly identify Student as eligible under the IDEA and, in addition, failed to provide Student with FAPE. They also claimed that the District discriminated and retaliated against Student on the basis of Student's disability. The District maintained that its educational program, as offered and implemented, was appropriate for Student; it also denied the assertions of discrimination and retaliation.

For the reasons set forth below, I find in favor of the Parents on a portion of their claims, and in favor of the District on other claims.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifying characteristics, are not used in the body of this decision to the extent possible.

<sup>2</sup> 29 U.S.C. § 794.

<sup>3</sup> 34 C.F.R. §§ 104.1 – 104.61; 2 Pa. Code §§ 15.1 – 15.11.

<sup>4</sup> The term "Parents" refers to Student's biological mother and step-father. Student's biological father did not participate in this proceeding.

<sup>5</sup> 20 U.S.C. §§ 1401 *et seq.*

<sup>6</sup> 42 U.S.C. §§ 12101 *et seq.*

<sup>7</sup> This hearing was delayed for a variety of unavoidable reasons, including the medical condition of one of the Parents, a number of weather-related delays and cancellations, and Student's health. Several of the hearing sessions were abbreviated for similar reasons. In addition, the Parents agreed to their remote participation in several of the sessions to avoid further cancellations. The parties' efforts to conclude this hearing in a timely manner are noted and appreciated, despite the length of time it has taken to complete the record.

## **ISSUES**

1. Whether the District failed to properly identify Student as eligible for special education under the IDEA;
2. Whether the District failed to provide appropriate educational and related services to Student from September 2011 forward;
3. If the District failed to provide appropriate educational and related services to Student, is Student entitled to compensatory education;
4. If the District failed to provide appropriate educational and related services to Student, are Student and the Parents entitled to reimbursement for therapy obtained privately;
5. If the District failed to properly identify Student as eligible for special education, should the District be ordered to so identify Student and develop an appropriate Individualized Education Program (IEP) for Student; and
6. Whether the District discriminated and retaliated against Student in violation of Section 504 and the ADA.

## **FINDINGS OF FACT**

### **General Background Information**

1. Student is elementary school-aged and is a resident of the District. Student has attended school in the District since Kindergarten. (Stipulation, Notes of Testimony (N.T.) 30-31; N.T. 1496)<sup>8</sup>

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<sup>8</sup> The exhibits submitted by the parties will be referenced as “P-” for Parent exhibits, “S-” for School District exhibits, and “HO-” for the single Hearing Officer exhibit. It should be noted that all references to other children within the exhibits were disregarded (*see* N.T. 1620-22) and this hearing officer made every effort to redact all of those names throughout this record, although names were also mentioned in various witness’ testimony and the electronic version of the transcripts will not reflect this redaction. The Student’s own name was redacted from some of the exhibits by the Parents out of privacy concerns; however, the exhibits specific to a particular child do pertain exclusively to Student other than S-55 (*see* n. 11, *infra.*) P-1 through P-56 were admitted (N.T. 1613-15) and S-1 through S-57 and S-59 through 61, with the exception of S-6 and S-32 (on which ruling was reserved) were admitted (N.T. 1620-30). This hearing officer hereby sustains the objections to S-6 and S-32 and those exhibits are excluded from the record on the basis that S-6 lacks any relevance to the issues presented, and was not referenced by any witness throughout this hearing; S-32 was also not referenced by any witness, and the author of the document (dated well before the time period in question) is unknown. Additionally, there were two other District documents referenced at the beginning of the third hearing session: a signature page for what is admitted as P-51, and a four-page NOREP dated December 14, 2011; however, these pages were not marked or submitted into the record. (N.T. 490-92, 1616-19) For the parties’ reference, these two documents have been marked collectively by this hearing officer as S-62 for identification (on the basis that they were District-produced documents), but they have not been admitted into the record and were not considered in this decision. HO-1 is hereby admitted.

2. The District does not provide transportation to its schools. With the exception of students who are transported to vocational-technical, charter, or other out-of-District schools, and those with significant disabilities, students either walk, ride their bicycles, or are driven to school by parents or other caregivers. (N.T. 35-38, 338-42, 1120-21, 1452)
3. The District has a before- and after-school program for which parents pay tuition. Students in this program follow a schedule which includes free time, cooperative games and activities, and some time for homework. (N.T. 344-50, 351-52, 360, 840-41)
4. The District has a class period every day called What I Need, or WIN, which is part of the District-wide response to intervention program and is provided for all students. (N.T. 202-04, 1403-04)

#### 2009-10 and 2010-11 School Years

5. The District's elementary school guidance counselor has met with Student on several occasions since Student's entry into the District in Kindergarten to check in with Student. (N.T. 171-72, 178-79)
6. Beginning in first grade (the 2010-11 school year), Student began displaying problematic behaviors at home, including physical aggression toward family members. (N.T. 1455-56)
7. Student began participating in a friendship skills group, which is a regular education program addressing coping skills, identifying feelings, and friendship-building strategies, in first grade. Friendship skills groups met once every two weeks or once every other five-day cycle. (N.T. 199-202)
8. Student was initially evaluated by the District during first grade, at parental request,<sup>9</sup> and an Evaluation Report (ER) was issued in December 2010. Parent input reflected concerns with Student's communication and social skills. The ER noted some problems with other students at times, which the friendship skills group was addressing. The school psychologist observed Student on several occasions and did not notice behaviors which were atypical of peers. Teacher input did not reflect any significant concerns at school behaviorally or academically, but the ER noted that Student was provided with Title I reading intervention in the second half of Kindergarten. (N.T. 315-16; P-13, P-17 pp. 1-11)
9. The District school psychologist conducted cognitive and achievement testing for the ER. On the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), Student achieved scores in the average range on all Indices as well as an average range Full Scale IQ (103). She also administered select subtests of the Woodcock-

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<sup>9</sup> It appears that the Parents may have first requested an evaluation in January 2010, and a speech/language screening was conducted at that time. (N.T. 26-28; P-11, P-12, P-13, P-41 pp. 1-2; S-31)

- Johnson Tests of Cognitive Abilities – Third Edition (WJ-III-COG) due to concerns with possible auditory processing difficulties; Student’s scores on those subtests were all in the average to very superior range with the exception of the Pair Cancellation (on which Student obtained a score of 89), and all cluster scores were in the average range. Academic achievement was assessed using the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III-ACH), with Student scoring in the average or high average or superior range on all subtests; cluster scores were in the average to high average range with Listening Comprehension in the superior range. (P-17 pp. 11-17)
10. A speech/language evaluation was included as part of the ER. Student’s performance on the Language Processing Test – Third Edition and Clinical Evaluation of Language Fundamentals – Fourth Edition did not reveal any concerns with speech/language. Student also achieved scores on the Comprehensive Test of Phonological Processing in the average to above average range. (P-17 pp. 17-19)
  11. Student was not identified as a child with a disability following completion and review of the December 2010 ER. N.T. 315-16; P-17 pp. 20-22)
  12. In the spring of 2011, Student was admitted to a partial hospitalization program where Student began treating with a psychiatrist, and Student related an incident of past abuse. This admission occurred following a pattern of increased defiance and aggressive behavior by Student toward family members as well as self-injurious behavior. Student then was transferred to an inpatient hospitalization program before returning to the partial program, and did not return to school at the end of the school year. Diagnostic Impressions at discharge included Depressive Disorder, NOS (Not Otherwise Specified); Oppositional Defiant Disorder; and Posttraumatic Stress Disorder. Academic discharge recommendations included a Section 504 Plan with emotional support, anger management, and social skills group; a crisis plan; home-school communication; guidance counseling; and a reassessment after the 2011-12 school year began. Behavioral health services were also recommended, and Student was prescribed medication. District personnel received a copy of the discharge summary and participated in the discharge planning meeting at the end of that series of hospitalizations. (N.T. 186-89, 209, 317-19, 388-89, 398-400, 1456, 1457-58; P-5, P-6, P-7, P-36 pp. 28-31; S-45, S-46)
  13. Student’s first grade progress report reflected Satisfactory performance in all areas with the exceptions of “uses self-control” and some handwriting weaknesses in the first half of the school year. Student had five total absences and one tardy arrival. (P-40 pp. 3-4; S-13 pp. 5-6, S-53 pp. 4-5)
  14. Student was evaluated by a private psychologist within days of discharge from the partial hospitalization program. The psychologist diagnosed Oppositional Defiant Disorder and Mood Disorder, NOS. Behavioral health services were again recommended. The District received a copy of this evaluation report soon after completion. (N.T. 318, 403-04; P-8, P-10; S-44)

15. After Student returned home from the hospitalization programs, Student's violent and aggressive behavior continued. Student also had difficulty sleeping, exhibited anxiety, and was unable to perform activities of daily living; Student's sleep disturbances result in increased anxiety and inattention. Student was provided behavioral health services by a mobile therapist two or three times a week throughout the summer of 2011. (N.T. 1458-59, 1461-62, 1487)

#### 2011-12 School Year

16. A meeting convened in August 2011 to plan for Student's return to school and Student's mobile therapist attended the meeting. Student's safety was a concern. Student's first Section 504 Plan was developed for Student for the start of the 2011-12 school year, second grade. (N.T. 206-07, 421, 423, 1460-64; P-37; S-11, S-12, S-14)
17. The August 2011 Section 504 Plan noted Student's diagnoses of Oppositional Defiant Disorder, Posttraumatic Stress Disorder, and Mood Disorder, NOS. Student's satisfactory skill performance in all academic areas was noted with the exception of self-control. Accommodations were: relaxation time when Student needed a break; drawing and journaling to express feelings; a daily communication book; daily review of assignments with signatures; a recess monitor; a structured restroom routine; friendship and counseling sessions; monitored use of sharp objects; limitation on lunch portions; and a crisis plan. The Plan was very slightly revised in early September 2011 with respect to use of sharp objects. (N.T. 1462-63; P-37 pp. 1-5; S-16)
18. The District also sought permission in August 2011 to conduct a new evaluation of Student through conducting a record review, observations, and an occupational therapy assessment, because of Student's mental health treatment. At that time, some District personnel were considering Student's eligibility for special education. (N.T. 407-15; P-18; S-1 p. 18, S-33)
19. From the start of Student's second grade year, Student began to exhibit anxious behavior at home about going to school. Student can be regimented about what time Student leaves for school and what route is taken to get there. Student has engaged in avoidance behaviors such as eloping and exiting the car en route to school, and the Parents have been concerned for Student's safety. Student has also exhibited difficulty leaving the Parents when Student would be dropped off at school. (N.T. 1117-19, 1453-54, 1487-89, 1544-45, 1548-49, 1588-89, 1593, 1607-08; P-44 pp. 8-9, 27, 71-72)
20. As provided in the August 2011 Section 504 Plan, Student met with guidance counselor once per week, and sessions typically lasted twenty to thirty minutes. (N.T. 209-11)
21. Student exhibited significant aggressive behaviors during a mobile therapy session at the end of September 2011, was transported by ambulance to a local hospital, and was

- then admitted for psychiatric inpatient hospitalization for ten days at the beginning of October of 2011. Diagnoses included Posttraumatic Stress Disorder and Depressive Disorder, NOS. Behavioral health services were again recommended. District personnel received a copy of the discharge summary, which indicated that Student was ready to return to school. (N.T. 212-14, 422-23, 1466-67; P-9)
22. Following Student's discharge in October 2011, Student was provided family based behavioral health services by two therapists for approximately thirty-two weeks. (N.T. 1467-68, 1597)
23. The District completed the fall 2011 special education evaluation and issued an ER in December 2011. This ER included a summary of Student's mental health diagnoses and treatment, teacher input, and observations by a school psychologist and one of Student's teachers; it also summarized testing and other information from the 2010 ER including the WISC-IV, WJ-III-COG, WJ-III-ACH, and speech/language assessment results. Student's teachers and the Parents completed the Behavior Assessment System for Children – Second Edition (BASC-2) rating scales. Parental scales reflected clinically significant concerns by one or both parents on the Hyperactivity, Aggression, Conduct Problems, Anxiety, Depression, Atypicality, and Adaptability Scales, with at-risk concerns in the Somatization, Withdrawal, Social Skills, and Activities of Daily Living Scales; one or both of Student's parents also reflected clinically significant concerns on the Behavioral Symptoms Index and Externalizing and Internalizing Problems Composites with at-risk concerns on the Adaptive Skills Composite. Student's teacher did not reflect concerns on any of the Scales or Composites. Student was identified as a child with a disability,<sup>10</sup> but was not eligible for special education under the IDEA. Student was to continue to be provided services through a Section 504 Plan. (N.T. 214-18, 429-30, 438-40, 443, 445, 1217-19, 1229-30, 1248-49, 1260; P-19, P-20, P-51; S-47 pp. 1-3)
24. The NOREP which followed the December 2011 ER proposed that Student continue in general education with a Section 504 Plan. The Parents approved the NOREP. (P-20)
25. Around this same time during the 2011-12 school year, the Parents requested that Student be provided with homework assistance at school, because Student was getting upset and frustrated, and at times aggressive, when completing homework at home. This request was made at the suggestion of one of Student's mobile therapists. The team agreed to provide a time period after school, approximately twenty minutes, for Student to complete homework with an aide; mathematics homework was also limited. There was a period of approximately one week when the homework assistance was not provided sometime around the middle of that school year. (N.T. 226-30, 425-26, 841-42, 843-44, 1035, 1468-69; S-1 pp. 135, 137-40, 143-54, 156-62)

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<sup>10</sup> One version of the ER document states that Student "does not have a disability" (P-19 p. 27), but the testimony as a whole reflects that the team's actual determination was that Student did have a disability (emotional disturbance) but did not need specially designed instruction. See also P-20 p. 1, P-51 p. 28.

26. Student's Section 504 Plan was revised in December 2011. The drawing and journaling accommodation was removed, and the accommodation to provide Student with homework assistance was added. Homework assistance was to be provided only on days that Student had homework. The Plan also indicated that an occupational therapy evaluation would be conducted. (N.T. 214-16; P-37 pp. 6-7; S-15)
27. In January 2012, an independent occupational therapist conducted an evaluation to assess sensory processing and sensory regulation abilities, to which the Parents consented. Student's teacher completed a Sensory Processing Measure (SPM) questionnaire, and the occupational therapist observed Student in the classroom and consulted with the teacher and guidance counselor. In the classroom, Student was demonstrating some difficulty with social participation (willingness to participate and engage with peers), and definite difficulty with visual processing (was distracted by visual stimuli) and planning (not completing daily tasks consistently). The occupational therapist made a number of suggestions to address the difficulties discussed in her report. (N.T. 1149-51, 1153-54, 1160; P-21)
28. The evaluating occupational therapist recommended occupational therapy services with the guidance counselor, which the team agreed to add to the Section 504 Plan. The Plan was revised at that time to reflect additional sessions of homework assistance with the aide to three days per week, and to return the drawing and journaling accommodation to the Plan. Also around this time, Student's medication was changed. The Parents approved the revisions to the Plan. (N.T. 1157, 1469-70; P-37 pp. 8-11, P-43 p. 1)
29. A District occupational therapist met with Student and another student, and with the guidance counselor, six times in February and March 2012 for thirty to forty-five minutes to address self-regulation and to develop strategies to recognize emotions and work to regulate them at school as needed. Student reported success using specific tools for self-regulation including equipment such as a weighted blanket, therapy putty, and a therapand. (N.T. 1177-78, 1179-82; P-43 p. 8, P-54)
30. Student's Section 504 Plan was again revised in March 2012 to add the occupational therapy services that were recommended and were already being provided with the guidance counselor. (N.T. 1157, 1469-70; P-37 pp. 12-13; S-19, S-20, S-21)
31. Student's performance on the Otis-Lennon School Ability Test (OLSAT) in April 2012 was in the below average range on both the Verbal and Nonverbal Clusters as well as the Total Score. (N.T. 1536-37; P-40 p. 7; S-42)
32. Student's performance overall during the 2011-12 school year was generally satisfactory, although Student did exhibit some difficulties in the areas of organizational and spatial skills, and handwriting. Student also demonstrated appropriate peer relationship skills in the classroom. (N.T. 1521-30; S-13 pp. 3-4, S-53 pp. 2-3)



## 2012-13 School Year

33. Student's Section 504 Plan was reviewed by Student's teachers at the start of the 2012-13 school year, third grade. (N.T. 1364)
34. Student's Section 504 Plan was revised again in October 2012. At that time, the team determined that Student no longer needed the weekly sessions with the guidance counselor, who would meet with Student as needed; also removed from the previous Plan were the communication book, the crisis plan, the structured restroom routine, and the accommodation for sharp instruments. Homework assistance for twenty minutes per day was expanded to include Thursdays. Another revision in November 2012 added an occupational therapy observation. (N.T. 231, 233, 1591-92; P-37 pp. 16-22; S-1 pp. 207, 211; S-4, S-7, S-8, S-17, S-18)
35. In November 2012, the Parents observed an increase in Student's problematic behaviors, around the time of another medication change that impacted Student's sleep patterns. The Parents also learned that Student had not been staying for the homework assistance with the aide. (N.T. 1471-73)
36. Also in November 2012, the District occupational therapist again observed Student to assess Student's pencil grasp. (N.T. 1184-85; P-36 pp. 1-2; S-60)
37. In December 2012, representatives of the District made a report to a county Children and Youth agency (CYA) about Student after Student arrived at school without a coat and also reported [abuse] that morning. The school nurse examined Student at that time and observed small contusions and chafing on Student's arm. Student was crying when the nurse did the observation of the arm. Student, who also appeared to be tired, then slept in the nurse's office for several hours. (N.T. 78-81, 88, 90-92, 685-87, 690-93, 695, 699, 701-02, 849-54, 856-58, 860-61, 864, 865-66, 868, 945-56, 1473, 1481; P-28, P-44 pp. 29-30; S-48 p. 6)
38. The night before the CYA report, Student had gone to sleep very early and awakened at approximately 3:00 a.m. Student's Parents informed District personnel of this circumstance by an email message when Student was on the way to school, and suggested that this behavior may have been related to Student's medication. (N.T. 847-49, 1473; P-44 p. 26)
39. The CYA completed its assessment and determined that no further services of that agency were warranted. (N.T. 1473-75; P-45 p. 1)
40. Student began attending the before- and after-school programs in the second half of the third grade school year (2012-13). Student exhibited difficulties getting along with other children, including demonstrating aggressive behavior at times in this program. Student also had difficulty maintaining attention to tasks except when provided with individualized assistance. Student was not given the previous homework assistance with the aide from approximately mid-December 2012 through early April 2013. (N.T. 345, 350-52, 355-62, 363, 365-66, 1370-71, 1482-83, 1596; P-24, P-44 p. 44; S-24)

41. In the spring of 2013, the team determined that Student would benefit from a behavior plan. There was also a discussion of again providing sessions with the occupational therapist to address self-regulation skills, as well as social skills and the relaxation group. The team planned to meet at the beginning of the 2013-14 to finalize the Section 504 Plan but that meeting did not occur. (N.T. 234-36, 333-34, 472-73, 632, 838-39, 873, 875, 1114-15)
42. Beginning in April 2013, as a behavior plan, Student was eligible for a reward if Student had a successful week in the after-school program getting along with peers. The reward was usually an activity that Student enjoyed. Student earned the reward three or four times after this incentive began through the end of the school year. (N.T. 1365-66, 1369, 1489; P-25 p. 4)
43. Also in March or April 2013, Student was out of school and was receiving intensive therapy in another geographic area of the state. The Parents tried unsuccessfully to locate a partial hospitalization program for Student in that area. (N.T. 1484-85)
44. Since the spring of 2013, the District has at times offered the “Walking School Bus” to some students who reside in specific geographic areas, where groups of students meet and walk together with adult supervision along one of two recommended routes to and from school. Crossing guards are available at certain intersections along the Walking School Bus routes. The Walking School Bus can be unavailable during winter weather. (N.T. 67-70, 111-13, 266-67, 285-86, 739-40, 759, 1590; P-33, P-34)
45. The Walking School Bus originally was led by parent volunteers who were given a walk-through on their designated routes prior to leading groups of students. (N.T. 265-69, 285-86)
46. Due to distressing behaviors that Student was exhibiting in the after-school program and at home, the District obtained a psychiatric evaluation of Student in the spring of 2013 with parental consent. A report of that evaluation was issued for which the Parents provided input. (N.T. 320-21, 458-60, 465-66, 975, 979, 1042-43, 1485-86, 160304; P-22; P-39 pp. 1-3, 5-14; S-37, S-40, S-43)
47. The psychiatrist who conducted the spring 2013 evaluation of Student did not speak with Student’s treating psychiatrist or psychologists, although she reviewed and included information provided about the 2011 hospitalizations and subsequent mental health services provided, and summarized Student’s medication history. She did not observe Student at school, but conducted a clinical interview with Student, Student’s mother and father, and several District personnel. This psychiatrist noted that Student’s disruptive and aggressive behaviors at home were not exhibited at school or in the community. (N.T. 981, 987-88; P-22; S-43)
48. The evaluating psychiatrist noted Student’s reluctance, and ultimate inability, to be separated from Student’s parents during the interview. Student exhibited some concerning behaviors for Student’s age at times during the interview, including crawling on the floor and using “baby talk;” at other times, however, Student’s

- actions were as expected for Student's age; she also stated that "[Student's] affect fluctuated greatly." (P-22 p. 8; S-43 p. 4) The psychiatrist described Student as "highly explosive and labile" (P-22 p. 9; S-43 p. 5) with triggers to include separation from a parent and a desire for perfection. She diagnosed Student with Generalized Anxiety Disorder, Separation Anxiety Disorder, Posttraumatic Stress Disorder (by history), and Oppositional Defiant Disorder. This psychiatrist did not recommend that Student be identified as a child with an emotional disturbance under the state regulations implementing the IDEA, although she did recommend continued support through a Section 504 Plan. (P-22, S-43)
49. Student began participating in a social skills group three times per week in the spring of 2013, where the students worked on skills such as following directions, gaining attention appropriately, identifying emotions, and problem-solving. (N.T. 204, 497, 512-14; P-25 p. 4, P-44 p. 61)
  50. In May of 2013, the elementary school guidance counselor and occupational therapist met with Student to address and review self-regulation skills. Those sessions, which were thirty to forty minutes, occurred during the time that Student was scheduled to meet with the guidance counselor. (N.T. 195-96, 211-12, 225-26, 497, 898, 1185-86, 1190-92; P-36 pp. 2A-3; S-60 pp. 3-4)
  51. Student was again hospitalized at the very end of the third grade school year for ten days. Neither Students' Parents nor the District were provided a report of that psychiatric hospitalization. (N.T. 331-32, 334-35, 1489)
  52. The District issued a Re-evaluation Report (RR) on June 5, 2013 following the psychiatric and occupational therapy evaluations. New teacher input reflected concerns with Student's organization, confidence/self-esteem, and an indication by Student that Student "hates" the after-school program "because students are mean and hurt [Student's] feelings." (P-25 p. 3) Information from previous ERs was included as well as the various Section 504 Plans. (N.T. 1382-85; P-25)
  53. The District school psychologist did not conduct an observation of Student for the June 2013 RR. She also did not use any instruments specifically designed to assess executive functioning because Student had not historically demonstrated executive functioning deficits (including organization, focus and attention, impulsivity, and hyperactivity) in the school environment; in addition, she determined that previous BASC-2 Scale reports provided sufficient screening information about Student's executive functioning. (N.T. 1389-96)
  54. The multidisciplinary team concluded that Student has a disability but was not in need of specially designed instruction and, therefore, was not eligible for special education. (N.T. 1383-84; P-25 p. 25)
  55. The District occupational therapist conducted a limited evaluation of Student again in May 2013 to assess Student's sensory processing skills with the SPM completed by Student's teachers as well as a Recess/Playground Rating Sheet (REC) completed by

- the after-school program provider. Some problems were noted with respect to Social Participation, Touch, and Planning by at least one teacher, with specific weaknesses with respect to organizing materials. The REC rating scale reflected clear difficulties with using imagination and creativity in play and free time and in resolving peer conflicts without teacher intervention; frequent difficulties with distress after accidental touch, inability to physically keep up with peers, and playing too roughly with peers; and occasional difficulty with choosing to be with friends rather than with Student's self and noticing nearby actions of others. Student continued to express an interest in using therapy as well as another type of fidget ball, which were provided to Student. At the conclusion of the occupational therapy assessments, the occupational therapist made suggestions for the school environment but did not recommend continued services. (N.T. 1186-97, 1199-1200, 1435-39; P-23, P-54)
56. Overall, Student's performance during the third grade school year met academic expectations. Student did demonstrate some difficulty with handwriting and written assignments which the teacher attributed to Student not taking Student's time or lacking motivation or a positive attitude. In that school year, Student accumulated 19.5 absences and was tardy 9 times; several notices were sent to the Parents about the number of unexcused absences and tardy arrivals. (N.T. 1347-51, 1353-58, 1372; P-16, P-23; S-7 p. 4, S-13 p. 2, S-23, S-54)
57. Student did not use the various tools for self-regulation during the 2012-13 school year, although several of those tools were available to Student. However, Student did use the pencil grips and was able to write in Student's journal. (N.T. 1374-77, 1440)
58. By the end of the 2012-13 school year, Student no longer participated in many of the sports activities that Student previously enjoyed due to Student's anxiety. (N.T. 1489-90)

#### 2013-14 School Year

59. Student's team met over the summer of 2013 and discussed Student's most recent hospitalization, as well as a number of strategies to be implemented at the start of the 2013-14 school year. Transportation options were also discussed. District staff chose Student's fourth grade teacher to match Student's needs for a structured environment and an appropriate style of discipline. (N.T. 467-72; P-44 pp. 83-84)
60. The Parents gave permission for the District to resume the relaxation and social skills group at the beginning of the 2013-14 school year. (N.T. 236)
61. Student began participating in a relaxation skills group in September of 2013. Student also continued in the social skills group during the 2013-14 school year, once a week. The special education teacher who runs the social skills groups has observed Student interacting appropriately with peers and performing the social skills taught; this teacher does not believe Student continues to need the social skills group. (N.T. 204, 504-07, 519-22, 530-31, 559, 920-21)

62. Student began participating in a second skills group using the Coping Cats program in the fall of 2013 to address Student's anxiety and help Student manage it. This program provides a workbook with a sequence of activities for students to complete in order to recognize their feelings, and introduces strategies to use when the student becomes anxious and tense. Student and two other students participate in this group once each five-day cycle during the WIN period. (N.T. 309, 463, 471, 920-21, 1001, 1404-06; S-41, S-55<sup>11</sup>)
63. In September 2013, the Parents requested assistance from the District with transportation of Student to and from school. District personnel did not consider Student's transportation to and from school to be its responsibility; however, the possibility of Student participating with the Walking School Bus was discussed at that time. (N.T. 66-67, 69-70, 115-18, 338-39)
64. In the fall of 2013, District personnel took over the responsibility of leading the Walking School Bus. (N.T. 270, 296-97, 738-39; P-46 p. 14)
65. Student began walking to school with the Walking School Bus in September of 2013. At times, some of the children, including Student, engaged in disruptive behavior such as grabbing each other but usually not aggressively. On two or three occasions, Student [engaged in problematic behavior on the route]. [Redacted.] (N.T. 272-73, 275-76, 286-95, 297-300, 302-03, 373-75, 739, 741-44, 745-56, 760, 766, 768, 1315-16, 1318-23, 1478-79; P-46 pp. 1, 5-6, 9-11; S-51)
66. The team decided to discontinue homework assistance while Student participated on the Walking School Bus, because the Walking School Bus groups left the school at the same time that the homework assistance would begin. The homework assistance with the aide resumed when Student stopped participating on the Walking School Bus in late September. The amount of time for homework assistance was increased to approximately thirty-five or forty minutes each day until Student completed all homework. (N.T. 235, 237-38, 586-88, 611-12, 667-68, 883-84, 922-23, 1035-36, 1051-52, 1056, 1478-79, 1571; P-46 pp. 5-6; S-1 pp. 349-61, 371, 379)
67. Student made some inappropriate comments toward peers, and sometimes became upset, during recess early in the 2013-14 school year. At that time, a learning support aide was assigned to supervise to observe Student during lunch and recess to address any bullying behaviors by Student or any other students directed toward Student. As a result, the aide would observe all of the students of Student's gender at those times. This aide did not observe Student engaging in any problematic behaviors, or behave differently than Student's peers. (N.T. 569-80, 596-601; P-44 pp. 1, 17)
68. In an incident that occurred in early September 2013, Student made an inappropriate comment to another student on the playground at recess. Student's teacher and

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<sup>11</sup> The Parents objected to S-55 because it was not the "best evidence"; namely, that the workbook included in the exhibits was not Student's actual workbook. (N.T. 1626-27) This hearing officer notes that there are a few handwritten entries in what she believed was a copy of a blank workbook, but it appears that the entries do not pertain to Student.

- another teacher spoke with Student and the other student about the remark, and Student became visibly upset and began to cry. Student did return to the classroom shortly afterward. Student's Parents were advised of this incident by email the next day. (N.T. 600-07; P-46 p. 1)
69. In an incident that occurred on the school playground at the end of October 2013, Student was touched by another student on the back; Student believed Student had been hit by the other student and began to cry. Student did not see the nurse on that day, but several District personnel met with Student the next day to discuss the incident. (N.T. 544-56, 780, 787-90, 794-95, 799-806, 808-11, 814-15, 818; P-46 p. 42, P-48)
70. Student's fourth grade teacher for most classes (reading, spelling, grammar, writing, social studies, and science) for the 2013-14 school year was provided with a copy of Student's Section 504 Plan. She provided Student with relaxation breaks as needed, and Student was able to go to the guidance counselor or another adult when necessary, but this teacher did not implement a specific behavior plan for Student. This teacher also checked in with all students in the class each morning and with Student in the afternoons to be sure that Student was aware of all homework assignments. (N.T. 584-85, 589-90, 607-10, 614-16, 640-41, 877-78, 921-22, 1560-61)
71. Student was demonstrating grade-level performance in the main classroom in the middle and end of the school year, but the teacher believed that Student did not always give Student's best efforts at times. The class, including Student, had assistance with bigger projects. Student also exhibited difficulties with organizational and study skills as well as with written expression and, at times, handwriting. Student did not exhibit problematic behavior or difficulty with peer relationships in that classroom, but did in unstructured settings. (N.T. 589-90, 614-18, 622-25, 629, 646-49, 654, 1555-56, 1559-61, 1562-65, 1570, 1583-84, 1587; P-40 p. 9)
72. Student also has a regular education mathematics class, and that teacher was also provided with a copy of Student's Section 504 Plan. Student is performing well in that class and does not engage in problematic behaviors, although the mathematics teacher does find it necessary to redirect Student to pay attention on occasion. (N.T. 663-64, 671, 673, 921-22)
73. Student did not use the various tools for self-regulation during the 2013-14 school year, although several of those tools were available to Student. Student also did not use a pencil grip during the 2013-14 school year. Student can be distracted at times but not to an extent that is different from that of peers, and Student is easily redirected after a short break when necessary. (N.T. 1559, 1577, 1583)
74. Student had a number of absences, tardy arrivals, and early dismissals in the 2013-14 school year, many attributable to Student's medical appointments and treatment. (N.T. 1475, 1484; P-52, P-53)

75. The Parents arranged for a neurodevelopmental evaluation by a neuropsychologist, who is also a certified school psychologist, in November 2013. She issued a report which included results of her testing as well as input from parents and teachers. The input from two of Student's teachers reflected concerns with Student's behavior in class, attention to tasks and information, organizational and study skills, participation in class, handwriting and written expression skills, and task avoidance, poor social studies and science test scores. (N.T. 1492; P-49, P-56)
76. The neuropsychologist administered a number of measures to assess behavioral and emotional functioning, including the BASC-2; for attention and response regulation, assessments included the ADHD-IV Symptom Checklist and the Conners' Parent Rating Scale; for executive functioning, instruments included select subtests of the Delis-Kaplan Executive Functioning Scale (D-KEFS) and the NEPSY-II (Developmental Neuropsychological Assessment - Second Edition); for memory and learning, the California Verbal Learning Test – Children's Version and select subtests of the NEPSY-II; for language, select subtests of the NEPSY-II and the D-KEFS; for visual-spatial functioning, select subtests of the NEPSY-II and the D-KEFS; and for perceptual motor skills, select subtests of the NEPSY-II and the D-KEFS. Student exhibited difficulty with attention and low frustration tolerance, and was restless and fidgety at times during the assessments. (P-49)
77. The neuropsychologist concluded that Student exhibited clinically significant inattention and hyperactive/impulsive behaviors, despite the fact that the teacher input and Student's self-report did not support a diagnosis of ADHD. She also concluded that Student demonstrates significant executive functioning deficits, specifically with respect to planning and organization, behavioral and cognitive shifting, problem solving, and working memory. She also determined that Student continued to manifest behavioral and emotional dysregulation, particularly at home. (P-49)
78. The neuropsychologist made a number of recommendations for Student both in and out of school. Specifically with respect to school-related recommendations, she suggested that Student's eligibility for special education as a student with an Other Health Impairment (OHI) be reconsidered based on ADHD and Anxiety Disorder. She also provided a variety of strategies and interventions to address Student's weaknesses and learning characteristics. (P-49 pp. 13-18)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62

(2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing.

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

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible. While there were some inconsistencies in various witnesses’ recall, possibly due in part to their differing perspectives, the testimony as a whole on matters important to deciding the issues in this case was essentially uncontradictory. Furthermore, it must be noted that the Parents as well as all of the District personnel presented as dedicated individuals who care about Student and Student’s education, despite their conflicting positions at the hearing.<sup>12</sup>

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Local

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<sup>12</sup> This hearing officer explicitly finds no basis for the expressed concerns that any witnesses discussed his or her testimony in violation of admonitions not to do so. (See, e.g., N.T. 242-45, 1047-50)



education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

#### Eligibility for Special Education/Child Find

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. Section 504 has a similar requirement. 34 C.F.R. § 104.32; *Ridgewood, supra*, 172 F.3d at 253. This obligation is commonly referred to as “child find.” Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, school districts are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

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

disabilities.” 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a). The regulations further define emotional disturbance as follows.

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

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i).

With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction which is designed to meet the child’s individual learning needs.

34 C.F.R. § 300.39(a). Further,

*Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child’s disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

The first issue is whether the District should have identified Student as eligible for special education under the IDEA. At the outset, this hearing officer must agree with the Parents that as of September 2011, Student was a child with a disability having met the criteria for an emotional disturbance; the District does not now dispute that determination. The next question is the

second prong of eligibility, namely whether Student, by reason of Student's disability, was in need of specially designed instruction. It is quite apparent that Student behaves very differently at home than at school. The District also correctly notes that Student achieved passing grades over the course of the school years in question; Student's teachers generally testified to Student's overall grade-level performance in most subjects. (District Closing at 2, 5-6, 7; Findings of Fact (FF) 13, 32, 56, 71, 72)<sup>13</sup> Nevertheless, education is much more than academics. Nearly thirty years ago, the U.S. Supreme Court recognized that a child with a disability who is "advancing from grade to grade" is not necessarily a child who has been provided with an appropriate education. *Rowley, supra*, at 203 n.25; *see also* 34 C.F.R. § 300.101(c)(1) ("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.") An appropriate education, thus, encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010). Moreover, a child's educational performance can be affected in ways other than achieving grades, such as by engaging in social relationships with peers or refusing to attend school.

The Parents contend that Student should have been identified and provided with special education supports and services beginning no later than September 2011. At that time, however, Student had just returned to school following the hospitalizations at the end of the previous school year. The District responded to Student's return by convening a meeting to develop a Section 504 Plan, following its participation in Student's discharge planning. (FF 12, 16) As noted above, merely because a student has a mental health or other diagnosis does not

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<sup>13</sup> By contrast, the Parents point to Student's below average OLSAT performance in second grade as evidence of Student's academic difficulties. (Parents' Closing at 4; FF 31) While certainly a reason for some concern, Student's performance on that single standardized assessment does not establish an education-related disability.

automatically equate to IDEA eligibility. Here, Student had made satisfactory progress in all academic areas prior to the hospitalizations in the spring of 2011, with few areas of concern. (FF 13) The Section 504 Plan was developed through consultation with Student's mental health providers, and revised over the fall of 2011 as needed, particularly following the October 2011 hospitalization. (FF 12, 14, 16, 17, 21 26) The preponderant evidence establishes that the District's response in considering Student in need of a Section 504 Plan, based on the information it had available at the time, was not inappropriate.

The other response of the District was to conduct a new special education evaluation in the fall of 2011. (FF 18, 23) As a result of that evaluation, the District has recognized, since December 2011, that Student has a disability, and developed and revised a Section 504 Plan to address Student's needs related to that disability during the 2011-12 school year. (FF 23, 26, 30) The record establishes preponderantly that that Section 504 Plan, including its revisions, appropriately and successfully addressed each of Student's disability-related needs over the course of the 2011-12 school year. When the Parents requested homework assistance in late 2011 or early 2012, the District agreed and, except for a very short period, provided Student with that assistance and also limited mathematics homework expectations. (FF 25, 26) Student's occupational therapy needs were assessed and the recommended occupational therapy services were provided, as were tools for self-regulation that Student had access to and used. (FF 26-30) Student was not exhibiting difficulty with peer relationships, and finished the school year with overall satisfactory academic performance with only a few areas of weakness. (FF 32) In sum, Student did not present as a child who was in need of special education, or additional Section 504 accommodations, throughout the 2011-12 school year.

At the start of the 2012-13 school year, it was also reasonable for the District to continue with and revise the Section 504 Plan based on Student's slightly changing needs. Although there was a significant period of time when Student was not attending homework assistance (FF 35, 40), the evidence did not suggest cause for significant concerns about Student until the second half of the school year, when Student began demonstrating problematic behavior during participation in the after-school program as well as in unstructured situations at school. (FF 40-43, 46, 52) The record as a whole establishes preponderantly that, by the start of the third quarter in January 2013, Student's disability was adversely impacting Student's education. Yet, Student was not identified as IDEA-eligible then, or to date.

The report of the District-obtained psychiatric evaluation (P-22; S-43) in the spring of 2013 must be considered, as it was one basis for the team's conclusion in the June 2013 RR that Student was not eligible. (FF 47, 48, 54; P-25) The psychiatrist testified in some detail to characteristics of, and her basis for, Student's mental health diagnoses. (N.T. 983-87) She also related in her report that Student's emotional and developmental regression was "striking" (P-22 p. 9; S-43 p. 5) and that Student exhibited an ability to contain emotions in some settings but not others. (*Id.*) It merits repeating that the psychiatrist did not observe Student at school and, from this hearing officer's review of her report and her testimony, as well as the record as a whole, she apparently was not made aware of the extent of the problematic behaviors that Student was demonstrating in unstructured settings, including going to and from school and at recess, and in the after-school program.

Again, the mere fact that a student has a mental health diagnosis does not automatically lead to IDEA, or Section 504, eligibility. However, Student's disability is manifested through characteristics such as a high level of worry, anxiety, and fears; difficulty with societal

expectations; an inability to comply with adult requests; and difficulty to regulate behavior and contain emotions in some settings. (N.T. 983-87; P-22; S-43) All of these behaviors, as well as ongoing difficulty with peer relationships, were displayed throughout the second half of the 2012-13 school year and continued through the 2013-14 school year.

Although some of Student's weaknesses such as organizational skills were appropriately addressed, Student's problematic behaviors, aggression, and difficulty with peers demonstrate that the regular education and Section 504 interventions provided to address social skills and anxiety were not sufficient throughout the second half of the school year and the entire 2013-14 school year. The District was concerned enough about Student's behaviors in the spring of 2013 to request and obtain the psychiatric evaluation. (FF 46) The team had also determined that a "Behavior Plan" was necessary, but its effectiveness was not consistent and it appears that Student successfully earned the reward less than 50% of the time. (FF 41, 42) And, staff reported difficulties with the after-school program. (FF 52) By the fall of 2013, a monitor was assigned to observe Student at recess, and problematic behavior was reported in a number of settings. (FF 52, 65-67) In short, Student's disability was clearly adversely impacting at least the social and emotional aspects of Student's education; specifically, Student's social skills deficits, difficulty with peer relationships, and challenging behaviors, as well as Student's own perceptions of peer interactions. The record is, thus, preponderant that Student was and is in need of specially designed instruction by reason of Student's disability access to the general curriculum, from the beginning of the second half of the 2012-13 school year through the end of the 2013-14 school year, beyond what was provided, unsuccessfully, in regular education with the Section 504 Plan.

With respect to the time period before January 2013, the obligation to provide FAPE is

substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

*Ridgewood* at 253. Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). “There are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002).

Other than the periods of time when Student was not provided with specific services in the various Section 504 Plans, discussed below, there is simply insufficient evidence that the District failed to provide Student with FAPE during the 2011-12 school year and the first half of the 2012-13 school year. Consequently, this hearing officer

cannot conclude that Student was denied FAPE under Section 504 or the IDEA for those time periods.

### Remedies

Having determined that Student should have been identified as eligible for special education as a child with an emotional disturbance in the second half of the 2012-13 school year, the District will be ordered to convene a multidisciplinary team meeting to consider Student's needs, determine if additional information and assessments are necessary, and thereafter develop an appropriate IEP for Student that addresses all of those identified needs. Specific direction to the team will be made part of the Order in this case to include consideration of the privately obtained neuropsychological evaluation.<sup>14</sup>

The next issue is the Parents' request for compensatory education. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed a scheme that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure

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<sup>14</sup> It merits mention that the District has already indicated a willingness to consider this evaluation report as a team. (N.T. 1409-10) Although the District objected to introduction of this evaluation report into the record (N.T. 1613-14; District Closing at 9-10), this report was not the basis for concluding that Student is a child with a disability under the IDEA as explained above. Clearly, the District did not have the benefit of this report until after the Due Process Complaint was filed.



to provide a FAPE.” *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); see also *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.”)) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

With respect to the 2012-13 and 2013-14 school years, the record supports a conclusion that Student was at times denied some of the necessary appropriate programming with respect to identified needs that were part of the Section 504 Plan<sup>15</sup> but not provided, as well as emotional support. Specifically, Student was not provided with homework assistance for several months in the 2012-13 school year, and for approximately one month at the beginning of the 2013-14 school year when it was not made available during the time that Student participated with the Walking School Bus. Additionally, while the decision was made to remove the weekly sessions with the guidance counselor from the Section 504 Plan in November 2012, Student’s need for this type of counseling and emotional support was clearly necessary in the second half of the 2012-13 school year and the 2013-14 school year for the reasons explained above. Having found a denial of FAPE in these respects, compensatory education shall be awarded for the missed homework assistance in the form of individual academic tutoring or social skills services (eighty minutes per week for fourteen weeks in the 2012-13

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<sup>15</sup> It merits mention that the actual Section 504 Plan Accommodations in place for Student between November 2012 and the conclusion of this due process hearing was, at best, uncertain. (N.T. 498-99, 931-32, 1490-91; P-55) This hearing officer does not reach the question of whether the lack of clarity on what was and was not provided to Student throughout the time periods in question, as the Order will include a remedy based on substantive grounds.

school year, plus four weeks at the beginning of the 2013-14 school year), totaling twenty-four hours; and for the lack of counseling in the form of individual counseling and emotional support services (thirty minutes per week for the second half of the 2012-13 school year (18 weeks) and the entire 2013-14 school year (36 weeks)), totaling twenty-seven hours.<sup>16</sup>

The Parents also requested compensatory education for the times when Student was absent from school, since Student clearly was not provided with any educational services during those periods. However, on this record, Student's absences cannot be attributed to failures on the part of the District which would warrant full days of compensatory education. As a matter of equity, while it is very unfortunate that there are periods of time when Student is not available for education due to Student's disability, this hearing officer is not persuaded that the District must be required to compensate for each of those hours merely because Student has not able to obtain appropriate and necessary medical services outside of the school day. Nevertheless, because Student's absences are directly related to Student's disability, it is the conclusion of this hearing officer that, also equitably, the compensatory education award shall not include any deduction for times when Student was absent from school.

With respect to the Parents' related claim for reimbursement for therapy, this remedy is not addressed in the Parents' closing and, more importantly, the record does not reflect any basis for awarding this remedy for the time period in question.

#### Section 504 Discrimination and Retaliation

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<sup>16</sup> The evidence does not support a conclusion that other areas of weakness that Student has demonstrated, such as organizational skills and handwriting, were not appropriately addressed, even if Student continues to exhibit such needs.

With respect to the claims of discrimination under Section 504, this hearing officer concludes that Student was “excluded from participation in, denied the benefits of” the educational services to which Student was entitled during the second half of the 2012-13 school year and throughout the 2013-14 school year with respect to homework assistance and emotional support/guidance counseling. However, these claims are identical to, and addressed and remedied by, the discussion above relating to denial of FAPE and the award of compensatory education. To the extent that this claim alleges intentional discrimination or deliberate indifference on the part of the District, this hearing officer cannot conclude that the record supports such assertions.

This hearing officer also does not make a finding that the District engaged in retaliation against Student and/or Student’s Parents on the basis of Student’s disability. While the Parents contend that the District’s actions, including reports to the CYA and reports of truancy, were made in retaliation against Student in violation of Section 504, the Parents have not met their burden of establishing this claim, and the record does not provide support for such a determination. Even assuming that this contact with the CYA could have been handled differently (N.T. 948-50, 952-54, 1473-74; S-1 p. 46), and recognizing that the relationship of the parties has shifted following the filing of the Due Process Complaint, this hearing officer cannot conclude that the District’s actions in this matter amounted to retaliation.

### **CONCLUSION**

Based on the foregoing findings of fact, and for all of the above reasons, this hearing officer concludes that the District denied FAPE to Student in failing to identify Student as eligible for special education, and in provision of necessary services, for the second half of the 2012-13 school year and the 2013-14 school year, for which compensatory education will be

awarded; and, that the District did not discriminate or retaliate against Student or Student's Parents in violation of Section 504.

## **ORDER**

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

1. Within fifteen days of the date of this Order the District shall convene a multidisciplinary team meeting to consider the privately obtained neuropsychological evaluation report and to determine what additional information and assessments are necessary in order to confirm Student's eligibility for special education and develop an IEP that addresses all of Student's needs.
2. Following receipt of all necessary information and assessment results, and not later than thirty days prior to the first day of school for the 2014-15 school year, the IEP team shall convene to develop an appropriate special education program for Student that addresses all identified special education and related service needs.
3. The District did not provide FAPE to Student during the second half of the 2012-13 school year and throughout the 2013-14 school year, and Student is entitled to compensatory education, as follows:
  - a. 24 hours of individual academic tutoring or social skills services; and
  - b. 27 hours of individual counseling and emotional support services.
  - c. Student's Parents may decide how the hours of compensatory education are spent, but the services shall be limited to those specified in Paragraphs 3(a) and 3(b) unless the parties otherwise agree. The Parents shall also select the provider of those services. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. There are financial limits on the parents' discretion in selecting the compensatory education; the costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.
4. The District did not retaliate against Student on the basis of Student's disability.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: June 4, 2014