

*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: T.R.

Date of Birth: [redacted]

Date of Hearing: April 11, 2011, April 12, 2011

### CLOSED HEARING

ODR No. **1446-1011AS**

Parties to the Hearing:

Representative:

Parent

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Murphy & Murphy, P.C.  
106 N. Franklin St., Suite 2  
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Pen Argyl, PA 18072

Parent

General McLane School District  
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Date Record Closed:

April 21, 2011

Date of Decision:

May 5, 2011

Hearing Officer:

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

## **INTRODUCTION AND PROCEDURAL HISTORY**

[Student] (hereafter “Student”)<sup>1</sup> is a middle-school-aged student in the above-named school District (hereafter “District”). Student was evaluated by the District in the fall of 2010, and was determined not to be eligible for special education. Student’s Parents<sup>2</sup> filed a due process complaint in February 2011 under the Individuals with Disabilities Education Act (IDEA),<sup>3</sup> claiming the District failed in its obligation to identify Student as in need of special education and in providing an appropriate educational program from January 2009 forward. The District subsequently filed its own due process complaint in which it sought an independent educational evaluation (IEE), and that claim was resolved by agreement of the parties at the time of the hearing.

The hearing date on the Parents’ complaint was initially set for March 22, 2011, and a continuance of that hearing was granted. Both matters were scheduled for April 11 and 12, 2011, thereby extending the decision due date. The hearing convened to permit the parties to present evidence in support of their respective positions. For the following reasons, I find in favor of the Parents and award compensatory education for a portion of the time period at issue.

### **ISSUES**

1. Whether the Student is eligible for special education; and, if so,
2. Whether District failed in its obligation to identify Student as eligible for special education; and, if so,
3. Whether the Student is entitled to compensatory education for any portion of the 2009-10 and 2010-11 school years.

### **FINDINGS OF FACT**

1. Student is of middle-school age and resides within the District. Student has attended school in the District since kindergarten and is currently on homebound instruction pursuant to a doctor’s prescription. (Notes of Testimony (N.T.) 17, 108, 109, 171, 297-98)
2. Student’s behavior was a concern in kindergarten and first grade and Student was referred to the Instructional Support Team in kindergarten. (N.T. 109-14, 464-66; Parent Exhibit (P) 10, P 11, P 12; School District Exhibit (S) 1, S 11)

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<sup>1</sup> Student’s name and gender are not used in this decision to protect Student’s privacy. Other potentially identifying details are omitted from this decision for the same reason.

<sup>2</sup> Student’s mother was primarily involved in Student’s education and the term “Parent” is used to describe her; however, the term “Parents” will be used when the mother appeared to be acting on behalf of both parents.

<sup>3</sup> 20 U.S.C. §§ 1400 *et seq.*

3. Student has been receiving private counseling by a psychologist several times each month since March 2007. Initially the concerns were for aggression at home and at school. The psychologist has used cognitive behavioral therapy with Student with some success. (N.T. 39-40, 72, 85-86, 105, 107-08, 110, 129, 176; P 27)
4. Student has been diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) and/or Attention Deficit Disorder (ADD), and presents as a child who is impulsive and distractible and lacks the ability to self-regulate behavior. Additionally, Student has difficulties with peer relationships. Student's psychiatrist also suggested that Student may have Obsessive Compulsive Disorder (OCD). (N.T. 42-45, 74-75, 97, 105-06, 126, 207, 279-80, 316-17, 327-28, 337-38, 361, 415, 471; P 5)
5. Student had been prescribed medication for ADHD which did not appear to be helpful. (N.T. 106-07, 122-23)
6. Over the course of the 2009-10 school year, Student exhibited difficulty with self-control, respect for others, obeying school rules, accepting responsibility for own actions, and cooperating with others. The teacher used "reteachings" as a form of discipline, which meant that a student who misbehaved was lectured for a few minutes during recess on proper behavior. (N.T. 114-15, 121, 208-09; P 2; S 1)
7. Toward the end of that school year (fourth grade), Student's difficulties at school grew more significant. Specifically, Student was involved in an incident on the school bus which resulted in a bus suspension in late April; and Student began to experience stomach pains and other symptoms of anxiety by late May. (P 1) Student's Parent was advised at the end of May that Student had received more behavior reports that school year than did any other child, and she also learned at the end of the school year that Student was at risk for missing end of the year activities due to misbehavior. Student's Parent informed the District that she did not want anyone at the elementary school to discuss Student's behavior with anyone from the middle school so that Student could start the next school year with a "clean slate." (N.T. 40-41, 82, 115-18, 174-76, 209, 466-67; P 1, P 2; S 12)
8. Student achieved passing grades in all subjects for the 2009-10 school year and scored in the proficient range on the Pennsylvania System of School Assessment (PSSA) tests in Mathematics, Reading, and Science. (P 2; S 1, S 2)
9. Near the end of the 2009-10 school year, District employees at the elementary school did alert at least one administrator at the middle school that Student had presented with significant behavioral challenges in the elementary school. This information was not shared with the teachers for Student for the 2010-11 school year. (N.T. 119-20, 235-36, 239, 309, 355, 392, 470; S 6)

10. Student was evaluated at a private clinic in another state in July 2010, and Student was given a diagnosis of a specific type of ADD.<sup>4</sup> Based upon the recommendations of the psychiatrist who conducted that evaluation, all medications were discontinued and Student was placed on a strict diet. This psychiatrist made several recommendations for possible future treatment but none that were educational in nature. (N.T. 122-26, 198-99, 201, 215-16; P 3)
11. Prior to the start of the 2010-11 school year, Student's middle school core content area teachers contacted all parents of incoming fifth graders to ask for their input on their children's strengths and weaknesses. They also invited parents and students to visit the school. Student's Parent wrote a letter to the teachers, describing the type of ADD with which Student had recently been diagnosed. She also took Student to the middle school to see where the classrooms were, and they met the two teachers. (N.T. 119-20, 127, 173-74, 354-55, 374-76, 390-92, 406; P 4 at 1-2; S 6)
12. In the middle school, the teachers use "retrainings" for misbehavior which are similar to the reteachings used in elementary school. Student received the first retraining during the first week of the 2010-11 school year and had accumulated three retrainings by September 16, 2010. After three retrainings, students move on to the next level of the school-wide behavioral pyramid at which time parents are contacted. Student's core content area teachers reported behavioral concerns with Student to Student's Parent on September 10, 2010, asking for her suggestions. Between September 10 and 29, 2010, Student was reported for five disciplinary incidents for inappropriate behavior, noncompliance, and inappropriate physical contact with other students. (N.T. 127-29, 239-41, 311-12, 357-59, 376-81, 392-94, 406-09; P 4, P 14)
13. According to that behavioral pyramid, which is based on a response to intervention model, the first or lowest level is Time-Out 1 – Verbal Warning. At the next level, students are provided with three retrainings for inappropriate behavior. At the third level, Time-Out 2, students are removed from the class activity to complete a Plan for Change form describing the inappropriate behavior and how that behavior should be changed, and a parent's signature on the form is required. After three of those occurrences, students move on to the fourth level, Time-Out 3, where students report to the Student Support Room to complete a Plan for Change Form. Discipline is progressively increased up the pyramid through After-School Detention, Saturday Detention, In-School Suspension, Out-of-School Suspension, the Student Assistance Program, culminating in expulsion and an alternative education setting or referral for special education. (N.T. 240-41, 244-46, 248-50, 312-13, 357-58; S 16)
14. In early October 2010, one of the middle school principals<sup>5</sup> was contacted by a parent who was having difficulties with Student. The principal conducted a mediation with

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<sup>4</sup> The specific type of ADD with which Student was diagnosed is not contained in the Diagnostic and Statistical Manual of Mental Disorders. *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision (DSM-IV-TR) (2000).

<sup>5</sup> The same principal was involved with Student throughout the 2010-11 school year, and all references to the principal or the middle school principal in this decision refer to this same person.

Student and four peers, and Student was instructed to stay away from those four classmates. Student was also moved to a different lunch table. Student was asked to, and did, identify approximately twelve other peers with whom Student would like to sit at lunch, and the principal approached each of those students, all of whom indicated feeling uncomfortable around Student. The principal arranged for a different lunch table for Student and a few peers. (N.T. 252-56, 315, 324-25; P 9; S 6)

15. In October 2010, Student was reported for five more disciplinary incidents for inappropriate physical contact with other students, inappropriate language, and inappropriate behavior. By October 15, 2010, Student moved up to the Time-Out 3 level on the pyramid. (N.T. 129-30, 251-52; P 15)
16. Also in October 2010, Student's private psychologist contacted the middle school principal, asking if any social skills training or support was available to help Student with getting along with peers. The principal responded and explained the pyramid of behavioral interventions. (N.T. 52-55, 78-79, 87-88, 135-36, 280-82; P 26)
17. A meeting convened in October 2010 with Student's Parent, teachers, and several other District personnel. Student's Parent brought records from the private clinic where Student had been evaluated in July, and gave the District information about the specific type of ADD with which Student had been diagnosed. That information was shared with the principal and Student's core content area teachers. The District requested permission to evaluate Student for special education, specifically with respect to Student's social and behavioral functioning, to which the Parents agreed. (N.T. 131-35, 187-90, 203, 213, 228-29, 260-61, 276-78, 284-86, 318, 338-41, 349, 365, 399; P 22)
18. Following the October 2010 meeting, a behavior plan was developed for Student with the Parent's input. According to that plan, Student's teachers would monitor Student's behavior every twenty minutes, using a five-point scale, and record the results. The behaviors targeted were (a) appropriate interactions with peers; (b) appropriate behavior in class; (c) completing homework; and (d) completing class assignments. Student would earn points for appropriate behavior which could be used for an activity of interest at the end of the school day if Student earned 50% of the total points possible. Student's teachers found the behavior plan difficult to implement and time-consuming, but sometimes added notes to the daily charts to specify what types of inappropriate behaviors Student engaged in during classes. (N.T. 138-39, 143-49, 202-03, 260-61, 264-68, 329, 331-35, 361-64, 382-85, 396-99, 409-13; P 8, P 13, P 21; S 9)
19. After the behavior plan was developed, Student would report in the morning to the Student Support Coordinator who gave Student a daily tracking chart. The teachers marked a score on the chart every twenty minutes. At the end of the day, Student would return to the Student Support Coordinator, who added up the points and determined whether Student achieved the targeted percentage. Occasionally, however, Student was not able to participate in the activity designated as the reward despite attaining the designated percentage of points. (N.T. 148, 268-69, 272-73, 336; P 20, P 21; S 10)

20. In late October 2010, the District suggested that Student participate in a lunch group held in a classroom with only a few students who would work on social skills with the Student Support Coordinator. Student agreed to the lunch group but only for one or two days each week. Nevertheless, Student did not return to the cafeteria and instead was in the lunch group every day because Student had not earned entry back to the cafeteria. Student disliked having lunch in that setting. (N.T. 150-52, 204-05, 256-60, 326-27; P 6, P 8)
21. By the middle of November, Student's teachers suggested that the behavior plan should be changed so that Student was required to earn 75% of the total points possible per day to earn a reward. Student's Parent agreed. However, in November and December 2010, Student was rarely successful in attaining a 75% or better, but the District did not agree to reduce the percentage. (N.T. 149-50, 274-76; P 8 at 32-35, P 20, P 21; S 10)
22. In mid-November 2010, Student's Parents were sent a form letter from the middle school principal which advised them that Student's participation in a three-day camping event was at risk because of unspecified behavior during the first part of the school year. (N.T. 142; P 7)
23. Student received behavior reports for November 2010 which included an In-School Suspension for inappropriate physical contact; Time-Out 2 for inappropriate and noncompliant behavior; a Recess Retraining for lying to a teacher; and a Time-Out 3 for inappropriate language. In December 2010, Student had a Recess Detention for inappropriate physical contact with another student. (N.T. 153-54; P 16, P 17)
24. In late November 2010, the middle school principal asked two of Student's teachers to provide the names of other students who had complained about Student. (N.T. 154-55, 315-16; P 9)
25. Teacher notes on Student's behavior charts during November and December 2010 included a number of problematic behaviors and concerns including difficulty with transitions, talking out, fidgeting, inattention, lack of focus, and disruptive behavior. (P 21)
26. By the middle of the 2010-11 school year, the private psychologist was regularly helping Student rehearse appropriate classroom behavior and expectations. However, Student continued to experience behavioral difficulties and a declining self-image. (N.T. 41-42, 57-58, 83, 107-08, 129-30)
27. Student's treating psychiatrist provided a letter regarding Student in early December 2010, and the Parent in turn relayed it to the District upon her receipt. The letter described Student and Student's symptoms and diagnoses, and made a number of recommendations to help Student succeed in school. Those recommendations included: keeping a schedule/routine with notice of changes; permitting time for physical activity; use of calm, patient tones by teachers; correction/discipline outside of the presence and attention of peers; preferential seating; hands-on learning experiences; and development of coping skills. (P 5)

28. For the evaluation, the District's school psychologist interviewed Student in her office; administered intelligence and achievement tests; and obtained behavioral input from the Parent, two teachers, and Student; she also administered the Children's Depression Inventory (CDI). (N.T. 427-29, 438-39, 446; P 23; S 7)
29. The Parents provided input into the District's evaluation, completing all forms including the Structured Developmental History and Parent Rating Scales for the Behavioral Assessment System for Children – Second Edition (BASC-2). The Parent noted, *inter alia*, that Student had been treated with medication for ADHD and an antidepressant; that Student was treating with a psychologist; and that Student had been evaluated for ADD. (N.T. 192-97, 214-15, 423-27; S 8)
30. There was no functional behavior assessment (FBA) conducted as part of the evaluation. (N.T. 320-22)
31. On the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), Student achieved a Full Scale IQ in the average range, with all Indices in the average range except on the Perceptual Reasoning Index which was in the low average range. (P 23; S 7)
32. On the Woodcock-Johnson Tests of Achievement (WJ-III-ACH), Student's scores were in the high average to average range on the Broad Reading, Broad Mathematics, and Broad Written Language Clusters as well as on the individual subtests. (P 23; S 7)
33. The District's school psychologist observed Student in a Mathematics class and obtained teacher information. Student's teacher's reported that difficulty with peer interactions was Student's most significant challenge, in addition to difficulty accepting responsibility for behavior. (P 23; S 7)
34. Information on Student's current levels of academic achievement and functional performance revealed average performance, with a noted strength in Language Arts and a weakness or below-grade-level expectation in Mathematics. (P 23; S 7)
35. Results of the BASC-2 reflected a clinically significant score on the Anxiety Scale and in the at-risk range on the Internalizing Problems Composite (Parent); in the clinically significant range on the Externalizing Problems Composite, in the at-risk range on the Internalizing Problems and Adaptive Skills Composites, and in the clinically significant range on the Adaptability and Aggression Scales (Teacher); overall scores in the clinically significant range, which were viewed with caution due to a preponderance of negative responses, reflected a clinically-significant score on the Externalizing Problems Composite (Second Teacher); and clinically significant scores on the Attitude to School and Attitude to Teachers Scales (Student). (P 23; S 7)
36. The CDI, a self-reporting instrument, did not reveal clinically significant scores on any of the scales it assesses. (P 23; S 7)

37. An Evaluation Report (ER) issued on December 15, 2010. The District convened a meeting but provided Student's Parent with a copy of the ER before that meeting at her request. At the meeting, the school psychologist reviewed the ER. The District team members had determined that Student did not have a disability and Student's Parent left the meeting before it was formally concluded. (N.T. 155-60, 213-14, 288, 292, 295, 429, 431-35, 439, 443; P 23; S 7)
38. The ER did not contain comprehensive information about Student's behavioral difficulties or the resulting disciplinary actions over the course of the 2010-11 school year. (N.T. 452)
39. The District mentioned Student's ADD diagnosis in the ER, as well as symptoms of and treatment for Depression, but it did not seek confirmation of Student's diagnoses by any treatment professionals or providers. (N.T. 455-59; P 23; S 7)
40. The ER further recommended that if Student's behavior plan should not result in a "gradual and acceptable increase in desired behaviors" (P 23 at 8; S 7 at 8), the team should reconvene to discuss a behavioral/emotional support program/placement. (*Id.*)
41. Student's Parent disagreed with the ER and subsequently rejected the Notice of Recommended Educational Placement (NOREP) proposing full-time regular education, which was mailed to her after the ER meeting. (N.T. 160-61, 344-46, 460; P 24)
42. In January 2011, Student was assigned After-School Detention, In-School Suspension, and Out of School Suspension for a number of separate behavioral incidents, and in February 2011, was assigned After-School Detention and Saturday Detention for several other behavioral incidents. (P 18, P 19; S 6)
43. Student showed some improvement in behavior according to the behavior point sheets for the end of January and February 2011, achieving 75% or better of the possible points on more days than not. However, the teachers continued to note that Student was talking, wasting time, and was disengaged, inattentive, and distracted; had "kicked" a classmate (P 21 at 34); was serving suspensions so could not accumulate points (P 21 at 35, 36, 37); was "not paying attention" and failed to follow directions (P 21 at 40); was "bullying a group of students" (P 21 at 44); and was "loud and bothering others in the library" (P 21 at 46). (P 21; S 10)
44. In March 2011, Student was required to report to the school for a Saturday detention on two occasions. Ordinarily, Students bring classwork to do during Saturday detentions,. However, on one of those occasions, rather than do classwork which Student had brought, Student and another student were instructed to clean a classroom and its adjacent restroom. Student was also directed to write an apology to the Parent because of the Saturday detention. Student was extremely upset after that Saturday detention. (N.T. 166-69, 299-301; P 29; S 6)
45. Around the same time, another incident occurred when Student was disciplined for purportedly [redacted]. (N.T. 161-63, 170)



46. Student became extremely anxious about school after the recess and Saturday detention incidents. (N.T. 168-71)
47. On March 22, 2011, Student's psychiatrist wrote a letter stating that due to the recent events at school, Student needed home-based tutoring effective March 28, 2011. (N.T. 170, 297-98; P 28)
48. At the end of the third marking period of the 2010-11 school year, Student had all passing grades of C or above. (S 1)

## **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);<sup>6</sup> *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 are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible, and the inconsistencies in the testimony is discussed as necessary in this decision.

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 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).

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<sup>6</sup> The burden of production, "*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

## 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. This obligation is commonly referred to as “child find.” Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995).

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications 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 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).

“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). “A determination of whether the District failed to identify a student eligible for special education services in a timely fashion requires a finding that the District knew, or should have known, that the child was disabled or in need of special education.” *D.K. v. Abington School District*, 2010 WL 1223596, \*6 (E.D.Pa. 2010).

The first issue is whether the District should have identified Student as eligible for special education during the 2009-10 school year, fourth grade. The record reflects, however, that Student’s problematic behavior did not become significant until the end of that school year. (Finding of Fact (FF) 7) While Student did demonstrate some behaviors throughout that school year which resulted in discipline through frequent retrainings, and the Parent was told near the end of May 2010 that Student had had more behavior reports than any other child in the school (FF 6, 7), the burden was on the Parents, difficult though it may be, to establish when the District knew or should have known that intervention was warranted during the 2009-10 school year. Based on this record, it is impossible to determine when that level was reached to conclude that the District knew, or should have known, that Student’s increasingly challenging behavior was

having an adverse effect on Student's education and that some action was indicated to evaluate Student for special education eligibility. Even assuming that by May 2010 the District should have taken some steps in the final days of the school year to address the behaviors which apparently everyone then recognized as significant, there was insufficient time for the evaluation process, since the intervening summer months stayed the sixty-calendar-day requirement for completing an evaluation. 22 Pa. Code § 14.123(b). Moreover, the record is clear that the Parent wanted Student to start the following school year with a clean slate in the new school and, thus, commencement of the evaluation process in May would have accomplished little prior to the beginning of the 2010-11 school year.

The start of Student's first year at the middle school at the start of the 2010-11 school year, however, presents a much different picture. From the first week of September, Student was given verbal warnings for behavior and quickly progressed up the behavior pyramid for Time-Outs. (FF 12, 13) The parents of other students were complaining to administrators about Student's behavior, causing a change first in which table Student ate lunch and then to seemingly permanent removal from the cafeteria. (FF 14, 20, 24) The District and Parent decided to try to develop a behavior plan, since clearly the school-wide plan was not successful for Student, yet the plan proved to be difficult to implement and, significantly, Student was not able to consistently achieve the desired percentage. (FF 18, 19, 21) By the middle of November, Student was in danger of missing a camping experience because of behavior. (FF 22) Even with continuation of the individual behavior plan, Student was still subject to the ever-increasing consequences of the school-wide pyramid. (FF 21, 23) By all accounts, the plan could simply not be considered appropriate at helping Student decrease problematic behaviors.

Further, and directly related to Student's behavior, the evidence of Student's difficulty with peer relationships at school was overwhelming in its consistency. (FF 4; N.T. 279-80, 316-17, 327-28, 337-38, 361, 415, 471) Complaints from other students about Student continued into the first semester of the 2010-11 school year, as did Student's disciplinary consequences for engaging in inappropriate behavior with other students. (FF 12, 13, 14, 15, 22, 23, 24) Student's perception of relationships with classmates was, at best, mistaken. (FF 14) Furthermore, Student's social skills and peer relationships did not show improvement even with the forced participation in the lunch group where social skills were addressed. (FF 20, 21, 25) The impact of this difficulty for Student is particularly striking given the vital need of middle-school-aged students to have positive relationships with, and be accepted by, their peers.

The District did, nevertheless, commence the process of evaluating Student for special education in October 2010. There was some inconsistency in the testimony of whether the District first suggested an evaluation in early October (N.T. 187, 254-55) or later in the month (FF 17). Regardless of whether an evaluation was discussed a few weeks before the Parent agreed on October 22, 2010, its timing has little relevance since the District concluded that Student was not eligible for special education.

The ER itself provides information which suggests that the District was only seeking to determine whether Student had an emotional disturbance (ED). (FF 40) Eligibility under the category of Other Health Impairment (OHI) was not considered because the District, while aware of Student's ADD diagnosis, did not have "documentation" of that. (N.T. 456) Even if the

District was not provided with the treating psychiatrist's letter (FF 27) until after the ER was completed, it had more than adequate information to explore whether Student was eligible for special education under a category other than ED, including the Parent's letter prior to the start of the 2010-11 school year, the information provided from the private clinic, and input into the evaluation itself. (FF 11, 17, 29, 39) Additionally, the results of the BASC-2 from all who completed the rating scales provided further data warranting additional investigation. (FF 35) It is also not insignificant that the District's school psychologist testified repeatedly to her efforts to defer reaching a conclusion on Student's eligibility for special education until after the meeting to discuss the ER. (N.T. 433, 443-44., 459-60) While not determinative, this factor, coupled with the statement in the ER recommending a possible need to return to the determination, suggests that the District was not necessarily convinced of its conclusion on Student's eligibility.

Taken as a whole, the evidence is preponderant that Student is a child with a disability in the category of Other Health Impairment. That category is defined in the IDEA as

[H]aving limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

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

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

34 C.F.R. § 300.8(c)(9).

As set forth above, Student's ADD/ADHD and other diagnoses were known to the District. Its own behavior charts noted Student's ongoing difficulties with paying attention, and staying engaged and focused on tasks. (FF 44, 45, 46, 47) Had further evaluation been conducted to determine whether Student's diagnoses met the definition for OHI, this hearing officer has little doubt that the District would have concluded that Student did exhibit limited alertness to the educational environment which adversely affected Student's educational performance. The record as it exists wholly supports this determination.

The District correctly notes that Student achieved passing grades over the course of the 2010-11 school year. (FF 8, 48) The school psychologist also testified that in her evaluation, she did not find any adverse impact on Student's academic achievement. (N.T. 443) However, education is much more than academics. Nearly thirty years ago, the U.S. Supreme Court recognized that merely because a child "advances from grade to grade" is not necessarily dispositive. *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).

As Student progressed through the behavior pyramid, Student incurred progressively more serious disciplinary measures including detentions and suspensions. (FF 12, 13, 15, 23, 42, 44) As noted, peer relationships continued to deteriorate and remained a concern. By March of 2011, Student was suffering serious enough anxiety about school that the treating psychiatrist prescribed homebound instruction. (FF 44, 45, 46) Even if Student's grades may not have reflected academic challenges after the beginning of 2011, it is difficult to imagine a more serious adverse impact upon a child's education than an inability to go to school.

Having found that Student meets the criteria as a student with OHI, the next question is whether Student, by reason of Student's disability, was in need of specially designed instruction. Student's disability is manifested through impulsivity, distractibility, difficulty with peer relationships, and an inability to self-regulate behavior. (FF 4) In order to address those unique needs and to ensure Student's access to the general curriculum, Student unmistakably required specially designed instruction beyond what was provided, unsuccessfully, in regular education. The concept is not novel that a student who demonstrates a need for social skills instruction and emotional/behavioral support beyond that which is routinely provided in the course of regular education and through contact with peers in the classroom requires specially designed instruction in those areas. *M.M. v. Rose Tree Media School District*, 01394/10-11JS (Valentini, December 5, 2010), 111 LRP 6194 (2010). Here, Student's inattention, distractibility, social skills deficits, difficulty with peer relationships, and challenging behaviors were a concern from the beginning of the school year, and were clearly were not sufficiently addressed in the regular education setting. The record is, thus, preponderant that Student was and is in need of specially designed instruction by reason of Student's disability.<sup>7</sup>

### Remedies

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 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

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<sup>7</sup> It is noted that the District objected to some testimony by Student's treating psychologist as to what she would recommend for Student's educational program. (N.T. 59-68, 99-101) This hearing officer reserved ruling on the admissibility of her recommendations and has now determined that this evidence is admissible, and was considered. Nevertheless, the conclusions reached in this decision would not be any different had the treating psychologist's recommendations been disregarded.

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).

In this case, there was little if any evidence which would permit a determination of what position Student would have been in had Student been provided with appropriate educational services. Thus, this hearing officer concludes that the *M.C.* standard is appropriate. Here, Student’s behavior presented difficulty to Student, Student’s peers, and Student’s teachers and principal, throughout the school day. It would be impossible to review Student’s day-to-day education and determine what amount of time Student was or was not denied FAPE. It is, therefore, the conclusion of this hearing officer that because of the denial of FAPE which pervaded Student’s school day, Student is entitled to compensatory education for the entire school day. See *Keystone Cent. School Dist. v. E.E. ex rel. H.E.* 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education).

In calculating the period for which compensatory education is warranted, this hearing officer finds that the District knew or should have known that Student required some type of intervention beyond the regular education curriculum by the end of September 2010. Allowing a reasonable period of time to do that, this hearing officer further finds that the development of an individual behavior plan in the middle of October and contemporaneous request to evaluate Student for special education were appropriate responses. The ER was completed in a timely manner and, giving the District a reasonable rectification period to develop and begin to implement an Individualized Education Program (IEP), this hearing officer concludes that Student should have been provided with an appropriate program no later than the first day of school in January 2011. Compensatory education is therefore awarded for five hours per day<sup>8</sup> for each day that school was in session from the beginning of January 2011, and continues until an appropriate IEP is developed and implemented for Student addressing all needs. In consideration of the equitable nature of the award, the District will be given credit for the hours of homebound instruction actually provided in the spring of 2011. However, given the circumstances under which the treating psychiatrist determined this temporary placement was necessary, and further upon consideration that Student’s significant needs for developing peer relationships cannot easily be addressed in this restrictive setting, the time period during which Student was and has been receiving homebound instruction is not excluded from this award.

The hours of compensatory education are subject to the following conditions and limitations. Student’s Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that addresses Student’s behavioral, social, and/or emotional needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the 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

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<sup>8</sup> See 22 Pa. Code § 11.3.

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.

Further, the District will be ordered to promptly convene a meeting of an IEP team to develop a special education program that addresses Student's needs.

Lastly, the Parents and District have advised that they have agreed to an IEE as well as to a Functional Behavior Assessment to be completed promptly. In light of this agreement, this hearing officer will make no further order with respect to further evaluation of Student. It goes without saying, of course, that Student's educational program may well need revision upon completion and consideration of the IEE and any other available information.

### **CONCLUSION**

For all of the foregoing reasons, this hearing officer concludes that Student is eligible for special education; that the District did deny FAPE to Student for a portion of the 2010-11 school year, and that Student is entitled to compensatory education. The District must also convene a meeting of an IEP team to develop an appropriate program for Student.

### **ORDER**

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

1. Student is eligible for special education.
2. The District did not provide FAPE to Student, and Student is entitled to five (5) hours of compensatory education for each day that school was in session from the beginning of January 2011 and continuing through the date that an appropriate educational program is implemented for Student. The District is given credit for the actual hours of homebound instruction provided to Student during this time period.
3. The compensatory education hours are subject to the conditions and limitations set forth above.
4. The District is ordered to convene, within fifteen days of this decision, a meeting of Students' IEP team to develop an appropriate special education program for Student.

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: May 5, 2011