

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: S.M.

Date of Birth: [redacted]

Dates of Hearing:

March 4, 2014

April 28, 2014

June 5, 2014

CLOSED HEARING

ODR File Nos. 14550-1314KE and 14606-1314KE

Parties to the Hearing:

Parent[s]

Delaware Valley School District
258 Route 6 and 209
Milford, PA 18337

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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June 25, 2014

July 11, 2014

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

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a late teenaged student in the Delaware Valley School District (District) who is provided with services pursuant to a Chapter 15 Service Agreement/Section 504 Plan.² The District filed a due process complaint after Student's Parents requested an Independent Educational Evaluation (IEE) at public expense, seeking a determination that its evaluation was appropriate under the law. Student's Parents also 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)³ and Section 504, as well as the federal and state regulations implementing those statutes.

The cases were consolidated⁴ and proceeded to a due process hearing convening over three sessions, at which both parties presented evidence in support of their respective positions. The District sought to defend its November 2013 evaluation of Student, maintaining that Student was not eligible under the IDEA and that its educational program, as implemented, was appropriate for Student. The Parents sought to establish that the District erroneously failed to identify Student as eligible under the IDEA, as well as to provide Student with FAPE throughout the time period in question.

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

ISSUES

¹ In the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

² Section 504 refers to the Rehabilitation Act of 1973 and is codified at 29 U.S.C. § 794. Chapter 15 refers to the state regulations implementing Section 504, codified at 22 Pa. Code §§ 15.1 – 15.11.

³ 20 U.S.C. §§ 1401 *et seq.*

⁴ The two file numbers were consolidated by an Order dated January 25, 2014. That Order has been marked as Hearing Officer Exhibit (HO-) 1 and is hereby admitted.

1. Whether the District's November 2013 special education evaluation of Student was appropriate;
2. If the District's evaluation was not appropriate, whether the Parents and Student are entitled to an IEE at public expense to include a psychoeducational and speech and language evaluation;
3. Whether the District failed to provide Student with FAPE for the time period beginning on February 12, 2014 through the present; and
4. If the District did not provide FAPE, whether Student is entitled to compensatory education and, if so, in what form and amount.

FINDINGS OF FACT

1. Student is a late teenaged student who is a resident of the District. Student has not been identified as eligible for special education but has been provided services under a Chapter 15 Service Agreement/Section 504 Plan (hereafter Service Agreement). (Stipulation, Notes of Testimony (N.T.) 22)
2. The Parents noticed that Student exhibited difficulty with the transition to the high school in ninth grade. Specifically, Student obtained some failing grades and demonstrated difficulties with organization, frequently forgetting books and failing to complete homework assignments. Student also struggled at home with reading and writing assignments. The Parents did contact many of Student's teachers for assistance. (N.T. 445-47, 449-53, 457-58)
3. For many academic courses in the high school, the District offers four levels in decreasing level of difficulty: Advanced Placement, College Preparatory, Concepts, and Resource Room. The Concepts level classes were considered to be a "regular" level, were sometimes double periods, and moved at a slower pace than the College Preparatory level classes. Students are typically assigned levels based on grades and teacher recommendations from the previous school year. (N.T. 177-78, 233-34, 268-69, 349)
4. During the 2011-12 school year (ninth grade), Student was initially in a regular Geometry class; however, sometime in the third quarter when it was apparent that Student was not performing well, at parental request, Student moved into an Informal Geometry class, a Concepts level class. Student performed better in the Informal Geometry class after the change, obtaining a B and C grade in the third and fourth quarter and an overall grade of C-. (N.T. 266-69, 272-75, 454-54; J-13 pp. 60-64)
5. Student participated when called upon in the Informal Geometry class, but did not typically volunteer. That teacher did not believe that Student required any additional assistance or accommodations. (N.T. 276-78)

6. Student was in a regular level English class in ninth grade. Student did not consistently complete and turn in homework assignments, and achieved inconsistent grades on tests and projects ranging from A+ to F. (N.T. 373-81, 384-88; J-13 pp. 80-83)
7. Student participated when called on in the ninth grade English class, and sometimes appeared to be inattentive. This teacher provided extended time on tests for all students as needed, but did not believe that Student required further assistance or other accommodations. (N.T. 382-83)
8. During the 2011-12 school year, Student's performance was varied in many of Student's classes, including in American Studies assignments, tests, quizzes, and projects (A+ through F grades during the second half of the school year); in Science homework, quizzes, tests, and labs (A+ through F grades); in Computer Literacy assessments (A+ through F grades); and in Health and Physical Education assessments (A+ through F grades, with the exception of the fourth quarter where Student achieved all A+ grades in Physical Education). (J-13 pp. 60-88)
9. Student's report card during the 2011-12 school year ranged from A- to F, with final grades at a C- or above in all classes except Science 9 (D) and Computer Literacy 2 (D). Positive teacher comments were: Has demonstrated improvement (Informal Geometry, Science, and Computer Literacy); Pleasure to have in class (American Studies); and Cooperative attitude (Computer Literacy). Less favorable teacher comments were: Student must make up past work (Computer Literacy); Poor test scores, Capable of doing better (Geometry, Science, English); Fails to complete assignments outside of class (Science); Does not turn in homework assignments (English); and Frequently absent from class, Needs to seek additional help (Geometry). (J-13 pp. 7-11, 14, 60)

2012-13 School Year

10. In Student's tenth grade year, the Parents again contacted many of Student's teachers to help address Student's difficulty with organizational skills, reading and writing skills, completing assignments, and achieving passing grades in some classes. (N.T. 458-66)
11. Student was in a college preparatory English class in tenth grade. Student's performance was inconsistent in that class, particularly in submission of homework assignments and passing tests; grades ranged from A+ to F on all assessments. The teacher believed that Student was capable of achieving better grades but chose not to always complete assignments. (N.T. 209, 212, 213-20, 222, 226-33, 235; J-13 pp. 40-43)
12. Student did not generally participate in the tenth grade English class and at times was inattentive. This English teacher chunked long-term assignments as needed, and did not see Student as needing extended time for tests or other accommodations. (N.T. 216-17, 222-25, 232-33)
13. Student had a tenth grade Literacy class in the 2012-13 school year. That class was a reading intervention designed to help prepare students for the Keystone exams through reading and writing strategies which help to improve reading comprehension. Student was inconsistent in completing and turning in assignments in the Literacy class, and also

performed inconsistently on tests. Student achieved quite variable grades on assessments in the Literacy class. (N.T. 290-97, 301-04, 314-17; J-13 pp. 58-59)

14. The Literacy teacher did not believe that Student needed assistance or accommodations in that class. (N.T. 301-03)
15. Student had a Concepts level Algebra II class in tenth grade. Student was very inconsistent in turning in assignments and passing quizzes and tests, with performance ranging from A+ to F. Student at times was unprepared for class. The Algebra I teacher believed that Student lacked interest in, and motivation to do well in, the Algebra I class. (N.T. 320-28; J-13 pp. 32-35)
16. Student did not generally participate voluntarily in the Algebra II class but would do so when called upon. Student did not need extended time for tests, and the Algebra I teacher did not believe that Student required any assistance or accommodations. (N.T. 328-32)
17. At the start of the third marking period, Student's Parents attempted to motivate Student to improve Student's grades by providing an incentive. Although the Algebra II teacher believed this strategy was successful for a time, it did not provide long-term benefits, and Student's grades remained variable. (N.T. 322-23; J-13)
18. During the 2012-13 school year, Student demonstrated extremely variable performance in all classes including World Studies homework, tests, quizzes, and assignments (A+ through F grades); Introduction to Technology assignments (A+ through F grades); Introduction to Drawing assessments (A+ through F grades); Biology homework and tests (A+ through F grades); Driver's Education assessments (A+ through F grades); and AutoCADD assessments (A+ through F grades). (J-13 pp. 36-59)
19. Student's report card for 2012-13 school year reflected grades ranging between B- and F. Final failing grades were in Student's Introduction to Technology and AutoCADD classes. Positive teacher comments were: Courteous, cooperative, and respectful (World Studies); Pleasure to have in class (English); and Improvement in attitude (Literacy). Less favorable teacher comments, mainly in the third and fourth quarters, were: Needs to seek additional help (Algebra II); Does not turn in homework assignments, Fails to complete assignments (Introduction to Drawing); Poor test scores, Does not follow directions, Chronic procrastination (AutoCADD); Has not completed course requirements (Literacy); and Capable of doing better, Chronic procrastination (Introduction to Technology). (J-13 pp. 2-6, 14)

2013-14 School Year

20. The Parents requested a special education evaluation in September 2013, expressing particular concerns with Student's reading and mathematics. By that time, Student was

expressing Student's own concerns with school to the Parents. (N.T. 467, 471-72, 473-74; Joint Exhibit (J-)⁵ 6 pp. 21-22)

21. The District's school psychologist is a certified school psychologist and has both undergraduate and graduate degrees in psychology. (N.T. 25)
22. The District agreed to the requested evaluation, which the school psychologist conducted in the fall of 2013 following parental consent to psychological and educational assessment. The evaluation also included parent and teacher input and rating scales relating to Attention-Deficit/Hyperactivity Disorder (ADHD). (N.T. 26, 431; J-6 pp. 19-20, 23-25)
23. The District school psychologist met with the Parents prior to the evaluation in order to understand their concerns about Student. Those concerns were Student's reading comprehension and mathematics, as well as lack of focus and attention. They also noted Student's inconsistent effort and lack of motivation to complete schoolwork. (N.T. 26-28, 31-32; J-6 pp. 1-2)
24. Student's teachers reported concerns with Student's lack of academic consistency as well as a failure to complete assignments and turn in homework. Student's Algebra II and Trigonometry teacher reported that Student struggled with the class and was forgetful, distracted, and disorganized. A few teachers also reported Student's inattention at times as well as lack of effort and preparation/studying and difficulty with organizational skills. The District school psychologist also noted that Student demonstrated inconsistency in class participation. (N.T. 29-30, 56-59; J-6 pp. 2-3, J-24, J-26 pp. 15)
25. The District school psychologist administered the Stanford Binet Intelligence Scales, Fifth Edition, which was an instrument requested by the Parents. Student obtained a Full Scale IQ in the High Average range, with a Verbal IQ in the High Average range and a Nonverbal IQ in the Average range. (N.T. 28; S-6 p. 3-5)
26. The School Psychologist also administered two instruments to assess achievement: the Woodcock Johnson Tests of Achievement, Third Edition (WJ-III-ACH) and select subtests (all relating to reading) of the Wechsler Individual Achievement Test – Third Edition (WIAT- III). Student's performance on the WJ-III-ACH reflected scores in the average range on all clusters with the exception of Reading Comprehension (low average) and Academic Fluency (low average). Subtest scores were in the low average range in Reading Fluency, Math Fluency, and Writing Fluency, reflecting difficulty with fluency tasks requiring speed and accuracy, and in Passage Comprehension. Student's performance on the WIAT-III similarly demonstrated weaknesses in Reading Comprehension and Reading Fluency. (N.T. 37-38; J-6 pp. 5-7)
27. The Conners Comprehensive Behavior Rating Scales (Conners) were completed by Student's Parents and four of Student's teachers. Three of the teachers' scales reflected

⁵ This hearing officer greatly appreciates the single joint exhibit book prepared by counsel for both parties. Although the exhibit pages were marked with "SD" and at times during the hearing were referenced that way, all exhibits cited in this decision will use the "J" designation.

scores in the mildly atypical range for Cognitive Problems/Inattention, and in the moderately to markedly atypical range with respect to the diagnostic criteria for ADHD, Predominantly Inattentive Type under the DSM-IV-TR.⁶ One of four teachers' scales also were in the mildly atypical range for Social Problems and on the ADHD Index. One of Students' Parents' scales similarly reflected concerns with Cognitive Problems/Inattention and on the ADHD Index (both in the moderately atypical range). (J-6 pp. 7-8)

28. The District school psychologist did consider whether Student exhibited characteristics of ADHD, but did not consider himself qualified to determine whether or not Student had ADHD except in the school setting. He did believe that Student exhibited characteristics of ADHD, Predominantly Inattentive Type. (N.T. 46-48, 93-98, 100-03)
29. The District school psychologist did not conduct an observation of Student in the classroom setting. (N.T. 83-84; J-6)
30. The ER reported Student's scores on the Pennsylvania System of School Assessment (PSSA) in grades 3 through 8, all of which were in the Proficient or Advanced range. On the Keystone Exams in ninth grade, Student scored in the Proficient range in both Algebra and Literature. Student's grades, by contrast, varied widely, ranging between 43% and 83%. (J-6 pp. 8-9)
31. Although not reflected in the ER, the District school psychologist also considered Student's performance on various standardized summative, benchmark, and diagnostic assessments administered to all students, concluding that Student scored in the advanced or proficient range on the majority of those. (N.T. 52-57)
32. The majority of Student's scores on the various summative, benchmark, and diagnostic assessments were in the advanced or proficient range through the end of the 2010-11 school year; during the 2011-12, 2012-13, and 2013-14 school years, however, Student's scores varied, with the majority in the below basic and basic range or below average. (J-15)
33. The District school psychologist did not see a need to conduct any speech and language assessments in the evaluation, although he was aware that Student had received speech/language services as a young child. (N.T. 50, 63, 107; J-6 p. 2, J-27)
34. The District school psychologist determined that Student did have specific learning disability in reading comprehension, but was not in need of specially designed instruction. The reasons for that conclusion as stated in the ER are, specifically, "[Student's] performance on the Reading section of the PSSA's and more recently [] performance on the Literature section on the Keystone exam," (J-6 p. 11), and that "[Student] does not require specially designed instruction to be successful in the classroom setting." (J-6 p. 13) The District relied heavily on Student's performance on the PSSA and Keystone exams in making this determination. (N.T. 39-41, 52-54, 77, 431, 433; J-6)

⁶ Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision (2000).

35. The District school psychologist did recommend a Section 504 Plan for Student to provide accommodations for Student's reading comprehension weaknesses and inattention in the classroom as well as inconsistency in turning in assignments. Specifically, the following were recommended: extended time on tests and quizzes based on teacher recommendations; chunking of longer assignments; a copy of teacher notes when available; monitoring of Student's attention to task with redirection as needed; and asking Student to repeat or paraphrase directions to ensure understanding. Other suggestions related to active reading strategies for comprehension. (N.T. 59-63; J-6 p. 11)
36. A meeting convened to discuss the ER. Following the meeting, the District issued a Notice of Recommended Educational Placement (NOREP) indicating the District's proposal to retain Student in full time regular education. The Parents did not approve the NOREP. (N.T. 476-77, 480; J-7)
37. In late November 2013, at the Parents' request, the District's reading specialist administered the Scholastic Reading Inventory, an assessment of reading comprehension, to determine whether the Read 180 program was indicated for Student. Because Student scored at the proficient level for Student's grade, the reading specialist concluded that Student did not need Read 180. (N.T. 130-38, 155, 480-81; J-16, J-18)
38. The reading specialist also reviewed the ER and noted Student's weaknesses in reading fluency and reading comprehension, but agreed that Student was not in need of specially designed instruction. She did make recommendations for Student's Section 504 Plan. (N.T. 138-42, 144-46)
39. In late November 2013, many of Student's teachers continued to report that Student was forgetful, was not motivated, lacked organizational skills, and was easily distracted as well as inconsistent in effort. (J-18 pp. 36-38)
40. In early December 2013, the Parents requested, in writing, an IEE at public expense. The District denied their request through a NOREP dated December 10, 2013, and subsequently filed a Due Process Complaint. (N.T. 432, 440-41, 485-86, 487; J-1, J-8, J-9)
41. A meeting convened after completion of the ER to develop a Service Agreement. On or about that same date, the District sought permission to evaluate Student for possible identification as a Protected Handicapped Student under Pennsylvania Chapter 15, and also identified Student as a Protected Handicapped Student. The Parents gave permission to proceed with the evaluation and to so identify Student "temporarily." (J-9 p. 5; J-11) (N.T. 432-33, 489-90; J-9, J-10, J-11, J-12)
42. The guidance counselor who drafted the Service Agreement used information from the ER as well as input from Student's teachers in drafting that document. The Service Agreement, however, repeated verbatim most of the suggestions from the ER (extended time on tests and quizzes based on teacher recommendations; chunking of longer assignments; a copy of teacher notes when available; monitoring of Student's attention to

task with redirection as needed; and asking Student to repeat or paraphrase directions to ensure understanding) with no new additions. The Parents approved the Service Agreement, again as a temporary measure. (N.T. 396-99, 489-90; J-12)

43. The team that drafted the Service Agreement intended that Student would have access to teacher notes “as needed” (N.T. 400), and those are typically made available by logging onto the District’s website. All students have the same access to teacher notes. (N.T. 19, 255-56, 360, 400-01, 418)
44. The Parents filed their own Due Process Complaint in January 2014, followed by an Amended Complaint the next month. (J-2, J-4)
45. Sometime around the time of implementation of the Service Agreement, the Parents made inquiry into the possibility of additional support such as a resource room or a directed study class. However, those options were not available because they are only offered to students who are eligible for special education and have Individualized Education Programs (IEPs). (N.T. 407-09; 434-35, 477-78)
46. After the Service Agreement was completed and implemented, Student’s guidance counselor met with Student to check in, review Student’s grades, and offer assistance. The frequency of those meetings started at approximately every other day, decreasing as the school year went on to every few weeks. These informal meetings were not part of the written Service Agreement, but the guidance counselor usually initiated those meetings. (N.T. 401-04, 412, 420-21)
47. After the Service Agreement was implemented, Student continued to demonstrate difficulty with completing homework as well as remembering and keeping track of assignments and other organizational skills. Student did not wish to use a suggested check-in sheet that required Student to give a form (indicating whether Student was prepared, participated in class, and completed work) to the teachers at the end of each class, and then review that document at the end of the day with the guidance counselor. The guidance counselor believed that Student could perform better in classes with more effort. (N.T. 405-07, 410-11, 414; J-19)
48. Student had an eleventh grade college-preparatory American Literature class. Student at times forgot to complete or forgot to turn in homework assignments, and overall had variable performance on tests and quizzes, achieving A+ through F grades. Student performed inconsistently on vocabulary assessments, particularly at the beginning of the school year; notably, Student performed markedly better on matching vocabulary words to meanings than on filling vocabulary words into blanks in sentences taken from the textbook. The teacher attributed Student’s poorer scores to a lack of preparation including reading the required materials, and sometimes to the interest level in the content. (N.T. 177-79, 181-89, 191-92, 197-201, 204-05; J-13 pp. 17-18 and 89-90, J-17)
49. Student would voluntarily participate in class in at times in the eleventh grade American Literature class, and did not generally demonstrate inattention or a lack of organizational skills. Student’s American Literature teacher gave all students copies of her notes as well

as extended time on tests when needed. For Student, the teacher provided chunking of long-term assignments. (N.T. 189, 192-94)

50. Student was in a regular level eleventh grade Environmental Science class. Student achieved some passing marks in that class, but performance was extremely variable on homework, projects, other assignments, tests, and quizzes. Student failed the first three quarters and was failing the fourth quarter at the time of the due process hearing. Student frequently failed to complete and turn in assignments without explanation. The Environmental Science teacher believed Student's performance reflected Student's lack of effort and motivation rather than a need for assistance or accommodations. (N.T. 240-48, 250, 257-58, 262; J-13 pp. 29-30)
51. Student did need redirection in the Environmental Science class at times, and did not participate in class voluntarily. A copy of the teacher's notes was available on the District website, and the teacher did ask Student to rephrase or repeat directions, but Student did not typically need the other accommodations in the Section 504 Plan. (N.T. 250-54, 255-56, 262-64)
52. Student had a Concepts level Algebra II – Trigonometry class in eleventh grade. Student was inconsistent in completing or turning in assignments at the beginning of the school year, often forgetting them at home and generally showing a lack of organizational skills, particularly at the beginning of the year. Student's overall progress on assignments, tests, and quizzes was extremely variable (A+ through F). (N.T. 349-59, 364-67; J-13 pp. 23-24)
53. Student did not participate voluntarily in Algebra II, and was sometimes inattentive. A copy of the teacher's notes was available on the District website. The Algebra II teacher did provide Student with extended time on tests as needed, but she did not believe Student required any other assistance or accommodations. (N.T. 355-56, 359-62)
54. Student had a Scholastic Aptitude Test (SAT) preparation course for one quarter in eleventh grade. Student performed inconsistently in this class, sometimes neglecting to complete or turn in assignments. Student would participate if called upon but did not volunteer in class. (N.T. 286-89)
55. During the first half of the 2013-14 school year, Student demonstrated extremely variable performance in all classes including Computer Art projects (A+ through F grades); Health assignments (A+ through F grades); Computer Art (A+ through F grades); American Government Economics tests, quizzes, assignments, and projects (A+ through F grades); and Intermediate Foods tests, assignments, and labs (A+ through F grades). (J-13 pp. 12-35)
56. Student's report card for the first half of the 2013-14 school year reflected mostly Cs and Ds, with a B- in Intermediate Foods and an F in Environmental Science. Positive teacher comments were: Cooperative attitude (Computer Art) and Has demonstrated improvement (Algebra II – Trigonometry). Less favorable teacher comments were: Capable of doing better; Does not take sufficient notes; Inconsistent effort (American

Government Economics); and Does not complete assignments; Does poorly on open notes/book assignments (Environmental Science). (J-13 p. 1)

57. The Parents have worked with Student on homework every evening. They have tried various forms of motivators, such as earning a reward, to encourage Student to complete assignments and improve Student's grades. They also reviewed Student's assignments with Student after school. All of those efforts have been largely unsuccessful. (N.T. 447-48, 523-25)
58. Student has a goal for a college education following graduation from high school. (N.T. 531-32)

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 both parties in certain respects. The District bears the burden of persuasion on its defense of the evaluation, and the Parents bear the burden of proof on their claims related to FAPE. Nevertheless, these claims are intertwined; and, 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 *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown*

Community School District, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible and forthright, despite their differing perspectives and viewpoints. Furthermore, it is not insignificant that the Parents, as well as all of the District personnel, presented as dedicated individuals who care about Student and Student’s education.

Evaluation/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.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). 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 IDEA sets forth two purposes of the required special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child [.]” 20 U.S.C. § 1414(a)(1)(C)(i). The law imposes certain specific requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services

needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Assessments must be used for the purposes for which the instruments are valid and reliable, and be administered by trained and knowledgeable personnel in accordance with the test-maker’s instruction. 34 C.F.R. § 300.304(c)(1).

In evaluating a student suspected of having a disability, he or she must be observed “in the child’s learning environment (including the regular classroom setting) to document the child’s academic performance and behavior in the areas of difficulty.” 34 C.F.R. § 300.310(a). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1). In interpreting evaluation data and making these determinations on eligibility and educational needs, the team must:

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

34 C.F.R. § 300.306(c). "There is no precise standard for determining whether a student is in need of special education, and well-settled precedent counsels against invoking any bright-line rules for making such a determination." *Chelsea D. v. Avon Grove School District*, 2013 U.S. Dist. LEXIS 98125 *24 (E.D. Pa. July 15, 2013) (quoting *West Chester Area School District v. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002)).

When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 34 C.F.R. § 300.502(b); 20 U.S.C. § 1415(b)(1). When a parent requests an IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). In this case, the District filed a request for due process seeking a determination that its reevaluation was appropriate.

FAPE

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).

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).

The Parties’ Claims

The Parents contend that the District failed in its Child Find obligations in two ways: first, in neglecting to conduct an evaluation of Student no later than the second half of the 2011-12 school year, and second, in refusing to identify Student as eligible for special education following completion of the fall 2013 ER. These claims will be addressed in reverse order, the latter together with the District’s argument that its evaluation was appropriate.

After careful review of the record, this hearing officer concludes that the District's evaluation, while appropriate in many respects, was sufficiently inappropriate so as to entitle the Parents and Student to an IEE at public expense. Notably, the District school psychologist did not conduct any observation of Student in the classroom, instead relying solely on Student's behavior during the administration of standardized ability and achievement testing. (Finding of Fact (FF) 29; N.T. 49-50) The absence of an observation is contrary to the requirements for evaluating a child suspected of having a specific learning disability. Moreover, those minimal observations in a one-on-one testing situation were in stark contrast to the concerns expressed by nearly all of Student's teachers that Student was forgetful, inattentive, easily distracted, and disorganized in the school environment. (FF 24) Certainly those remarkably universal reports required an observation in one or more classrooms by a trained professional who was not actively engaged in instruction to document Student's behavior and performance, and even the District school psychologist conceded that his observations of Student were of limited utility in determining whether and to what extent Student had difficulties in that reported area of weakness. Second, although the teachers unanimously attributed Student's extreme inconsistency in performance on assessments to lack of motivation or effort (*e.g.*, N.T. 188-89, 241-42), there was very limited inquiry into whether this assumption was accurate or whether Student's behaviors were a manifestation of executive functioning weaknesses. (N.T. 58-59, 93-95, 96-97, 100) Given the noted and pervasive characteristics of concern both at school and at home, and even accepting the reluctance of the District's school psychologist to make an ADHD diagnosis, the testimony as a whole did not establish how these aspects of Student's profile were adequately considered in the evaluation. Third, and rather significantly, the basis for the conclusion in the ER that Student was not eligible for special education, despite a learning

disability in reading comprehension, was fatally flawed. Specifically, while the District emphasized Student's performance on the PSSA and Keystone Exams (FF 34), a review of Student's overall performance both on standardized and classroom-based assessments do not reflect a student who is proficient, or who is "successful in the classroom setting." (J-6 p. 13) And, once again the District school psychologist appeared to concede that Student's variable performance overall could not be clearly attributed to Student's efforts. (N.T. 58-59)

For all of these reasons, this hearing officer finds preponderant evidence that the evaluation of Student by the District in the fall of 2013 did not adequately assess all areas of suspected disability and was not sufficiently comprehensive to determine if Student is eligible for special education and to provide information on how to meet Student's educational needs. The District shall, therefore, be required to fund an IEE at public expense that includes assessment of Student's academic achievement and social/emotional/behavioral functioning, including executive functioning. The District will not, however, be required to provide a speech/language evaluation at public expense, as there is nothing in the record to suggest that Student has demonstrated any speech or language weaknesses or concerns since entering school-age programming. Although this hearing officer did not dismiss this claim as requested by the District (NT. 11-13), the mere suggestion that Student "may have speech/language needs" (Parents' closing at 2) falls far short of meeting the burden of proof in this respect.

The next, related issue is whether the District violated its Child Find obligation in failing to evaluate Student earlier than in the fall of 2013. The evidence for the 2011-12 school year, which was Student's first year in high school, establishes that Student struggled in a Geometry class and, for the second semester, was placed into a more basic Geometry class where Student was more successful. (FF 3) Student achieved passing final grades in all courses, and teacher

comments were both positive and less favorable, with the latter merely reflecting a need to complete and turn in assignments, attend class, and seek help. (FF 9) Although Student's performance on standardized assessments in Reading and Mathematics did begin to decline during that school year, scores on those measures were quite variable. (J-15) Moreover, Student's difficulty with the transition to the high school appeared to manifest itself more at home than in school. As a whole, the record fails to establish that the District should have begun to suspect during the 2011-12 school year that Student had a disability or was in need of additional supports in order to be successful.

At the beginning of Student's tenth grade (2012-13) school year, and similar to the previous school year, the Parents expressed concerns over Student's organizational and academic skills and assignment completion. (FF 10) Teacher comments on the report card were also not unlike those during the previous school year. (F 9, 19) However, by the end of the second quarter, Student was failing three of seven classes (J-13 pp. 2, 5) and, during the third quarter, began to manifest inattention and a lack of preparation in some classes which was significant enough to comment upon. (FF 19) Parental motivations based on rewarding Student, in addition to the large amounts of time the Parents worked with Student at home, were not successful in helping Student achieve overall passing grades, and the District was aware of these efforts in the home. (FF 46-57) Additionally, Student's performance on standardized assessments became more variable, with more results in the Basic and Below Basic categories in Literature, Algebra I, and Biology, demonstrating a lack of proficiency in most of the areas assessed. (J-15) Overall, by sometime during the third quarter of the 2012-13 school year, Student, with high average cognitive potential, was not achieving grade level success⁷ nor

⁷ This conclusion is not, however, based on the evidence and arguments relating to grade levels from the standardized assessments conducted for the ER. It merits mention that grade-level scores are a type of

proficiency based on state standards, and was exhibiting concerning behaviors throughout the school day that warranted inquiry.

The 2013-14 school year, eleventh grade, showed a continuation of this trend. By the time of the evaluation report, Student's teachers were almost unanimously endorsing concerns with Student's academic performance, attention, preparation for class, and organizational skills. (FF 24, 39; J-13 pp. 3-4) With respect to academics, the conclusion that Student has a specific learning disability in reading comprehension is clearly reinforced by the testimony of Student's American Literature teacher, which revealed that while Student was able to match vocabulary words to definitions, Student was not able to insert those very same words into sentences taken directly from the text. (N.T. 197-201; J-17) Student's performance on those vocabulary assessments unequivocally supports the District's school psychologist's conclusion that Student has a specific learning disability in reading comprehension. Furthermore, Student, overall, was not demonstrating appropriate achievement in the classroom or deriving educational benefit from the regular education instruction Student was being provided; indeed, Student continued to demonstrate deficient weak reading comprehension skills that adversely impacted Student's education. Having determined that the eligibility determination based on that specific learning disability in the evaluation was flawed, and further considering that the District school psychologist made recommendations for accommodating this disability, it is the conclusion of this hearing officer that Student, by reason of the specific learning disability in reading comprehension, requires specially designed instruction.

The Parents also contend that Student is eligible on the basis of a specific learning disability in mathematics. The record, however, does not support such a conclusion. The

developmental score must be interpreted cautiously and carefully, as they can be misleading for many reasons. Salvia, J., Ysseldyke, J., & Bolt, S., *Assessment in Special and Inclusive Education* (11th ed. 2010) at 40-41; Sattler, J. M., *Assessment of Children: Cognitive Applications* (5th ed. 2008) at 104-106.

District's evaluation assessed Student's mathematics achievement and determined it to be commensurate with Student's abilities. With the exception of Mathematics Fluency, Student did not demonstrate weaknesses in this subject; and, Student achieved passing grades in all mathematics courses during the 2012-13 and 2013-14 school years. In short, while it is difficult to determine why Student was not excelling in mathematics classes, there was little evidence presented from which this hearing officer could find a specific learning disability in mathematics and, thus, Parents have failed to meet their burden of establishing that particular claim.

The Service Agreement developed and implemented merits discussion at this juncture. This Service Agreement was not a carefully considered document addressing Student's unique needs. On the contrary the accommodations in the Service Agreement were repeated verbatim from the ER, and did not include any of the recommendations for Student's reading comprehension weaknesses. Additionally, many of the enumerated accommodations were available to all students, and it is unclear how and when, or if, Student accessed those accommodations (*e.g.*, N.T. 85-91, 262-64; FF 42, 43). The record also does not support a conclusion that the Service Agreement appropriately addressed Student's need to actually learn and develop organizational skills, despite the additional efforts by the guidance counselor (N.T. 410-12), and instead focused on Student's accountability (N.T. 415-16). Finally, it appears that the Service Agreement was suggested and provided merely as an effort to appease the Parents, rather than to provide necessary supports to Student.

Remedies

As previously noted, the Parents and Student will be awarded an IEE at public expense. The other relief sought by the Parents is 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 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).

Equity compels the conclusion that this college-bound student with high average intelligence must be provided the means to acquire necessary reading comprehension and organizational skills, known deficits, to function independently at the conclusion of high school. The Parents seek full days of compensatory education to remedy all of Student’s needs, arguing that these needs are pervasive and extend from early 2012 forward.

With respect to duration, this hearing officer concludes that the District had sufficient information sometime during the third quarter of the 2012-13 school year to trigger its obligation

to initiate a special education evaluation and thereafter develop an IEP that addressed Student's needs in reading comprehension and organization. Allowing for the regulatory sixty (60) calendar days to complete an evaluation and an additional thirty (30) days to develop and begin to implement the IEP,⁸ it is reasonable to conclude that all of this could and should have been completed by the end of the 2012-13 school year. Accordingly, the compensatory education award shall begin at the start of the 2013-14 school year, and shall continue over the entire 2013-14 school year and through the date that an IEP is developed and implemented.⁹

The more difficult question is how to calculate the hours based on the special education Student was denied. Certainly reading comprehension has a significant impact on courses that depend on understanding of written materials. Student's schedule for the end of the 2012-13 school year and the entire 2013-14 school year, however, included many classes in which Student did well, and for which Student's disability in reading comprehension had minimal impact, likely due at least in part on the Parents' efforts to work with Student each day. The same is true of Student's organizational weaknesses. It is this hearing officer's considered conclusion that Student should equitably be awarded compensatory education of ninety minutes per day to remedy the denial of FAPE with respect to the reading comprehension disability, which would equate to approximately one class period of forty-five (45) minutes for direct instruction in reading comprehension, and an additional forty-five (45) minute class period to assist Student with understanding content materials as the Parents were doing at home. Student should also be provided with compensatory education of one hour per week to remedy the denial

⁸ 22 Pa. Code § 14.23(b); 34 C.F.R. § 300.323(c).

⁹ Although the District sought to place an end date on the compensatory education award (N.T. 23-24), it would not be logical to do so, particularly since both parties introduced evidence through the end of the school year, which is approximately when the final hearing session convened. The equitable compensatory education award is designed to provide to Student the services that Student should have been receiving throughout the 2013-14 school year. Once an appropriate IEP is developed, even while the IEE is pending, the compensatory education award will have an end date.

of FAPE relating to organizational skills deficits for the same time period. The award, therefore, is ninety (90) minutes per day for each school day that Student attended school during the 2013-14 school year, in addition to one (1) hour of compensatory education per week for that school year.¹⁰

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 furthers Student's reading comprehension and organizational skills. 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. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21).

Section 504 Claims

The Parents' complaint also raised a claim under Section 504. The obligation of a local education agency to provide a "free appropriate public education" is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Because all of the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

¹⁰ Had the Service Agreement appropriately addressed these needs, the award would likely be reduced. As discussed above, however, these needs were not addressed for Student during the 2013-14 school year.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the Parents and Student are entitled to an IEE at public expense; that the District denied Student FAPE; and that the Student is entitled to compensatory education.

ORDER

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

1. The District shall fund an IEE at public expense to include a complete psychoeducational evaluation to include assessment of Student's executive functioning. Within five (5) days of the date of this Order, the District shall provide the Parents with a list of at least three (3) qualified evaluators. Within ten (10) days of receipt of the list, the Parents shall select the person to conduct the evaluation and notify the District of their selection. The IEE must be scheduled and completed as soon as reasonably practical.
2. Unless otherwise agreed, upon completion of the IEE, or within thirty (30) days of the date of this Order, whichever is sooner, Student's IEP team shall meet to develop an IEP to address all of Student's educational needs, including Student's specific learning disability in reading comprehension and organizational skill deficits. If the IEE is not complete before the initial IEP is developed, the team shall convene again within ten (10) days of the completion of that evaluation to consider its conclusions and recommendations, to confirm Student's eligibility for special education, and to determine whether it is necessary to revise Student's IEP.
3. The District shall provide Student with ninety (90) minutes of compensatory education to address Student's reading comprehension needs for every day Student attended school during the 2013-14 school year, and continuing until the District begins to implement an IEP addressing those needs, subject to the conditions and limitations set forth above.
4. The District shall provide Student with one (1) hour per week of compensatory education to address Student's organizational skill needs for the entire 2013-14 school year, and continuing until the District begins to implement an IEP addressing those needs, subject to the conditions and limitations set forth above.

5. Nothing in this Order precludes the parties from mutually agreeing to alter any of the directives regarding the IEE and timelines, or the form of compensatory education, set forth herein.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: July 11, 2014