

*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: K. R.

Date of Birth: [redacted]

Dates of Hearing:

May 20, 2014

July 7, 2014

July 10, 2014

## CLOSED HEARING

ODR File No. 14830-1314KE

Parties to the Hearing:

Representative:

Parent[s]

Pamela E. Berger, Esquire  
434 Grace Street  
Pittsburgh, PA 15211

Slippery Rock Area School District  
201 Kiester Road  
Slippery Rock, PA 16057

Thomas E. Breth, Esquire  
Dillon, McCandless, King, Coulter, &  
Graham LLP  
128 West Cunningham Street  
Butler, PA 16001

Date Record Closed:

August 4, 2014

Date of Decision:

August 10, 2014

Hearing Officer:

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

## INTRODUCTION AND PROCEDURAL HISTORY

The Student (hereafter Student)<sup>1</sup> is a teenaged student in the Slippery Rock Area School District (hereafter District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parent filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,<sup>3</sup> as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing which convened over three sessions, at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District failed to provide Student with FAPE by failing to timely identify Student under the IDEA, and failing to provide an appropriate education in the least restrictive environment throughout the time period in question. The District maintained that its child find obligations as well as its special education program, as offered and implemented, did not violate the IDEA or deprive Student of FAPE.

Following review and consideration of all of the testimony and documentary evidence,<sup>4</sup> and for the reasons set forth below, I find in favor of the Parent and Student.

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<sup>1</sup> Student is named on the cover page of the original, unredacted decision. In the interest of confidentiality and privacy, Student's name and gender, as well as other potentially identifying information, are not used in the body of this decision to the extent possible.

<sup>2</sup> 20 U.S.C. §§ 1401 *et seq.*; *see also* 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>3</sup> 29 U.S.C. § 794; *see also* 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>4</sup> The testimony of every witness, and the content of each exhibit, was considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. The parties' written closings were also carefully considered. It should further be noted that although counsel for the District provided copies of the District's sign-in and sign-out sheets after the hearing concluded, as requested by the hearing officer, neither party asked that they be made an exhibit or that this hearing officer consider those documents. Consistent with this hearing officer's statements to counsel regarding submission and potential admission of those documents (N.T. 610, 617), they were not considered in this decision and are not part of the record.

## **ISSUES**

1. Whether the District failed in its Child Find obligations to appropriately and timely identify Student as eligible under the IDEA; and,
2. Whether the Student was provided with an appropriate educational program during the 2012-13 and 2013-14 school years; and,
3. If the District did not provide Student with FAPE, is Student entitled to compensatory education and, if so, in what form and amount; and,
4. Whether the Student requires an out of District placement.

## **FINDINGS OF FACT**

### **General Background**

1. Student is a teenaged Student who is a resident of the District. Student is eligible for special education services on the basis of an emotional disturbance. (Stipulation, Notes of Testimony (N.T.) 25-26; Parent Exhibit (P-) 11 pp. 25-26)
2. At the time of the due process hearing, Student was provided homebound instruction. (Stipulation, N.T. 26)
3. Student was adopted as a young child and began to attend school in the District in Kindergarten. Student attended school in the District for all school years to the present, except for a brief period of a half school year when Student resided with Student's [other Parent] in another school district. (N.T. 28-29, 80, 86-88; P-11 pp. 4-6; School District Exhibit (S-) 2 pp. 4-6)
4. At some point when Student was in late elementary school or beginning middle school, around the time of a change in the family circumstances, Student was diagnosed with depression and anxiety. (N.T. 28, 79-80, 98-99; P-11 p. 5; S-2 p. 5)
5. Student's final grades from the other school district for the 2011-12 school year ranged from 83 to 100%. Grades from prior school years in the District were somewhat variable, but all in the passing range with most in the 80-95% range. (P-11 pp. 6-8; S-6)
6. The District has a policy that a student who is arriving after the school day begins reports to the office to sign in. Students who are leaving school prior to the end of the school day are required to sign out in the main office, as is an adult who is approving the early dismissal. Students who are attending only half days of school follow the same procedure. However, it is possible for students to leave the high school building

- without complying with that policy. (N.T. 305-07, 325-26, 328, 440-41, 443-47, 460-62, 464, 477-78)
7. The District has a policy at the high school that if a teacher or other staff member has concerns with about a student, the student is referred to the SAP. The SAP members then obtain information from that student's teachers. The SAP members can make a referral for a special education evaluation. (N.T. 350-51, 353-54, 388-90, 430-31, 471-74, 483, 605-06)
  8. In the summer of 2012 (before entering high school), Student was [the victim of a crime]. Student subsequently was provided individual and group therapy by an agency several times a week as a victim of [crime], and also treated with a psychiatrist. The family also had a team of two therapists from another related agency who came to the home two or three days a week. (N.T. 29-31, 32-33, 83-84, 94-95, 156)

#### 2012-13 School Year

9. Following the [victimization], and prior to the start of the 2012-13 school year, the Parent notified the District of the incident by meeting with the school nurse and the guidance counselor, as well as speaking with the guidance counselor by telephone. Staff were notified of this circumstance, and Student was to be given access to the guidance counselor or nurse at any time Student became anxious during school. (N.T. 32, 102-05, 250-51, 286-88, 290-92, 374-75)
10. The Parent had regular contact with the school guidance counselor at the beginning of the 2012-13 school year, usually by telephone. Student would see the guidance counselor when Student became anxious or upset, and spend anywhere from five minutes to over an hour with the guidance counselor, but usually an entire class period. These visits to the guidance office occurred at least three days a week. At times Student was then able to return to class; however, on other occasions, Student would go to the nurse's office, or leave school for the day. (N.T. 105-06, 253-56, 264-65, 283-84, 291-92, 298-99, 380, 390-91)
11. After the 2012-13 school year began, the Parent drove Student to and from school. Student would send text messages to, or call, the Parent from Student's cell phone throughout the school day on a regular basis. The Parent advised the guidance counselor of Student's cell phone contacts from school. (N.T. 33-34, 37-38)
12. Student engaged in cutting behavior after the [victimization], with the first such incident resulting in a three-day psychiatric hospitalization in September 2012. Student told the guidance counselor that Student had been cutting Student's self. (N.T. 84-86, 89, 96-97, 265-66, 284)
13. In early September 2012, Student was caught by the assistant principal using the cell phone, which was a violation of the policy. Student's cell phone was removed from Student, who was taken to the nurse; Student was also given a disciplinary warning.

- The assistant principal called the Parent to pick Student up from school. (N.T. 34-36, 251, 336-37, 425, 428, 459-60, 613; P-8 pp. 6, 11)
14. Student's Parent arrived at school to pick up Student and met with the assistant principal. The Parent advised the assistant principal of Student's need for the cell phone, but he would not make an exception to the District's policy against cell phone use by any student at school. (N.T. 35-36, 250-51, 428-29, 455-56)
  15. The guidance counselor suggested that Student could use a telephone in her office, the nurse's office, or the main office, as needed during the school day. (N.T. 251-52)
  16. The guidance counselor referred Student to the Student Assistance Program (SAP) in late September 2012 because of the cutting behavior, and the Parent gave permission for Student's participation. Student was among the students discussed at the SAP meetings held every other week, but the team did not discuss Student extensively or at every meeting. (N.T. 265-67, 269-71, 288-89, 384, 385-86, 397-99, 429; P-1 p. 1; S-10 p. 1)
  17. Student's Parent was frequently called to pick up Student early from school in the fall of 2012. The calls to the Parent typically came from the guidance counselor or the school nurse. (N.T. 34-35, 38-39, 110-13, 253-54, 375)
  18. Student was admitted to a local Psychiatric Center in late September 2012, which notified the District through its guidance counselor of the dates that Student was an inpatient (September 24, 2012 through October 2, 2012). Student was also diagnosed with post-traumatic stress disorder at that time. (N.T. 38-40, 96-100, 120-21, 257-58; P-2 p. 3; S-7 pp. 24-26)
  19. The local Psychiatric Center recommended that Student move to a partial hospitalization program following discharge; however, the Parent was not able to arrange for transportation. Student was provided with additional therapy following discharge. (N.T. 40-42, 99-100, 113-14)
  20. In October 2012 after Student entered the SAP program, Student was contacted for assessment regarding Student's suicidal ideation. (N.T. 267, 270; P-1 p. 2; S-10 p. 2)
  21. The guidance counselor took Student to the nurse in late October 2012 and again in early November 2012 after Student reported cutting Student's self. The guidance counselor did not examine Student to see if Student had such marks on Student's body. The nurse documented the incidents and discussed them with Student, who was not upset at the time. (N.T. 314-15, 375-76, 378-79, 394, 418; S-11 p. 2)
  22. Student was placed on homebound instruction following the October 2012 discharge based on a prescription from Student's treating psychiatrist. Student's SAP file was closed at that time because Student was no longer attending school in the building. (N.T. 41-44, 398-99, 409, 413-14; P-1 p. 3; S-7 p. 11.1, S-10 p. 3)

23. The District sent the Parent several notices of unexcused absences for Student, including notice that it intended to pursue truancy proceedings, in November 2012. (P-3; S-7 pp. 18-21)
24. There was a delay in arranging for a tutor to provide Student's homebound services in the fall of 2012. Student had no homebound, or other services, until Student began attending school for half days in the winter of 2013. Student did have access to the District's online program for assignments, grades, and communication with teachers. (N.T. 44-45, 47-49)
25. The Parent requested a special education evaluation of Student in late 2012 or early 2013 via a letter given to the guidance counselor. This letter was never given to the Director of Special Services and Coordinator of Special Education. (N.T. 46-47, 307, 594-95)
26. Student was hospitalized again in December 2012 in a different psychiatric facility than previously. The District was made aware of this hospitalization, and the guidance counselor spoke with a representative of an after-care program that was following Student about partial hospitalization. (N.T. 155-56, 259-61)
27. The team of home-based therapists began providing services twice each week in December 2012, and sometimes three times per week. At that time, Student was exhibiting significant emotional deregulation and would get upset very quickly. Student reported anxiety at school to those therapists, and would worry that peers were talking about Student. After Student returned to school, Student also reported feeling overwhelmed with schoolwork. Student at times called these therapists from school, usually from the guidance counselor's office. (N.T. 154-56, 159-61, 163, 165, 168, 176, 185-86, 191, 199-201, 204, 255-56)
28. During calls from Student at school, the home-based therapists would speak with Student and often also speak with the guidance counselor. Student usually wanted to leave school at the times of these calls. (N.T. 160-61, 200-01, 298-99)
29. In January 2013, the Parent met with the guidance counselor as well as Student's two in-home therapists to discuss the lack of homebound services. At the suggestion of the guidance counselor, the team decided that Student would return to school for half days, and a crisis plan was developed for Student's return to school to help Student regulate Student's emotions. (N.T. 46-49, 118, 160, 164, 170-71, 275-76, 278, 308-09)
30. Following that conversation, Student's psychiatrist made a change to the homebound instruction prescription for half days at school. (N.T. 118-19)
31. Student began to attend half day sessions at school in January 2013 which lasted until another psychiatric admission in late March or early April 2013. (N.T. 48-50, 117-18, 316)

32. By the end of the second marking period of the 2012-13 school year, Student had accumulated 12 absences despite being on homebound instruction for a significant portion of that time, and was failing almost all classes. (S-6 p. 5)
33. In April 2013, a meeting convened that included the home-based therapists and the District school psychologist as well as the Parent. The team discussed a special education evaluation at that time, but the District did not provide the Parent with a Permission to Evaluate form. (N.T. 182-83, 589-90)
34. A Service Agreement pursuant to Section 504/Chapter 15 was also developed for Student in April 2013. That Agreement provided for 30 minutes of study strategies and support per day, with additional time on tests and assignments. Student was also able to check-in and check-out with the emotional support teacher.<sup>5</sup> The Parent approved the Service Agreement. (N.T. 50, 586-88; P-7; S-12)
35. Sometime after the Service Agreement was developed, the Parent received a call from the District Superintendent and the two discussed the possibility of an online program for Student. (N.T. 51-53)
36. Also in April 2013, Student was involved in an incident with the physical education teacher. Student became very upset after the incident and made suicidal statements. Student's home-based therapists were contacted by the District. Student was ultimately transported for a psychiatric hospitalization for a period of seven days. The District was aware of this hospitalization. (N.T. 52, 54, 101-02, 121-22, 163, 179-80, 311-12)
37. Student was disciplined on several other occasions in the spring of the 2012-13 school year for which Student received 11 days in the Alternative Learning Center (ALC) (similar to in-school suspension). Those incidents involved two or three incidents of inappropriate language and one incident for insubordination (refusing to go to class). Although Student had a prescription for homebound instruction, Student could not serve the detentions imposed when on homebound instruction, so Student returned to school. (N.T. 52, 55-56, 431-40, 448-50, 474-77; P-8 pp. 3-8, 12-13; S-8 pp. 5-6, 9-10, 13-15)
38. The guidance counselor did not monitor Student on a regular basis, ask Student's teachers about how Student was doing, or check Student's attendance. Student did at times visit the guidance counselor to check in. (N.T. 252-53, 255)
39. The cyberschool/online program did not begin for Student until May 2013, by which time Student had missed a considerable amount of material and instruction. (N.T. 58-59)

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<sup>5</sup> The record is unclear for what period of time Student was able to access the emotional support teacher, but it appears this accommodation was available to Student for only a very short period of time. (N.T. 588-89; P-14)

40. In the late spring of 2013, the District sent the Parent a Notice of Recommended Educational Placement/Prior Written Notice (NOREP) form, which the Parent signed and dated June 1, 2013. The District's stamp indicates this form was received on August 19, 2013. The subsequent Permission to Evaluate form dated August 19, 2013 was signed and dated by the Parent September 5, 2013, and stamped received by the District on September 6, 2013. (N.T. 56-57, 125; P-4 pp.1-4; S-9 pp. 1-2, 5-6)
41. Student failed most of Student's classes during the 2012-13 school year (ninth grade), and accumulated a number of early dismissals as well as excused and unlawful absences. (S-6 p. 5, S-7 pp. 11.1-11.4)
42. During the summer of 2013, Student [developed a non-life threatening physical condition of limited duration]. The home-based services ceased at around this same time, and Student at that time appeared to be managing Student's emotions better than before. (N.T. 57-58, 185, 186, 189)

#### 2013-14 School Year

43. Student was placed on homebound instruction at the beginning of the 2013-14 school year pursuant to a prescription. However, homebound instruction did not begin until the end of September 2013. Student was repeating ninth grade. At the beginning of the homebound instruction that school year, Student was required to go to the school building for approximately one hour at the end of the school day, rather than have the homebound teacher come to Student's home. That period of homebound instruction was stressful for Student. Homebound instruction at Student's home began in late November 2013. (N.T. 60, 61-67, 69, 551, 576-77; P-5, P-9, P-10 pp. 1-2; S-4)
44. The homebound instructor worked with Student to make sure tests and assignments were completed, and provide any necessary tutoring. This teacher prompted Student to maintain communication with the other teachers and check assignments and grades online. (N.T. 554-62; S-4)
45. The District completed its Evaluation Report (ER) of Student at the end of October 2013, and provided it to the Parent. The Parent attended a meeting to discuss the ER. (N.T. 67-68, 129; P-11; S-2)
46. The District school psychologist requested information from Student, Student's Parent, and teachers. The Parent provided information, although she had inadvertently not fully completed one rating scale. Most of the teachers who were requested to provide input reported an inability to do so. (P-11 pp. 1; S-2 p. 1, S-9 pp. 3-4)
47. Student's cognitive functioning was assessed using the Woodcock-Johnson Tests of Cognitive Abilities, Third Edition, where Student's General Intellectual Ability score was in the average range. All of Student's Index scores were also in the average range; however, Student's scores on various subtests reflected high variability. (P-11 pp. 11-15; S-2 pp. 11-15)

48. The District school psychologist determined that Student's intellectual functioning was unevenly developed and suggestive of executive functioning weaknesses, which were likely related to Student's emotional difficulties. (P-11 p. 15; S-2 p. 15)
49. The District school psychologist used the Kaufman Test of Educational Achievement, Second Edition, to assess Student's academic achievement. Student's performance was in the average range on all subtests, with the exception of Written Expression in the low average range. (P-11 pp. 10-11; S-2 pp. 10-11)
50. The District school psychologist administered the Behavioral Assessment System for Children, Second Edition (BASC-2) by providing Parent, Teacher, and Self-Report Rating Scales. He determined that the BASC-2 Teacher Rating Scales (TRS) completed by the guidance counselor and a teacher chosen by Student as one who knew Student were invalid based the Response Pattern Validity scale, and were also inconsistent with information known to the District. A third teacher declined to complete a BASC-2 TRS. His efforts to obtain more information from the guidance counselor were unsuccessful, as the guidance counselor refused to provide additional input in the evaluation.<sup>6</sup> (N.T. 219, 244-45; P-11 pp. 15-16; S-2 pp. 15-16)
51. The BASC-2 Parent Rating Scales and Student Self-Report reflected clinically significant or at-risk scores by one or both in the following areas: Attention Problems, Hyperactivity, Depression, Anxiety, Sense of Inadequacy, Somatization, Withdrawal, Attitude toward School, Locus of Control, Social Stress, Adaptability, Leadership, Interpersonal Relationships, Relations with Parents, Self-Reliance, and Self- Esteem. (P-11 pp. 17-21; S-2 pp. 17-21)
52. The District school psychologist interviewed, and conducted an observation of, Student. At the time of the evaluation, Student continued to report anxiety at school and a concern that peers were talking about Student. (N.T. 220, 223; P-11 pp. 21-22; S-2 pp. 21-22)
53. The District concluded that Student was eligible for special education on the basis of an emotional disturbance. Recommendations in the ER included itinerant emotional support to address Student's significant emotional needs, with a contingency plan for necessary supports at school; it was also suggested that Student be provided with direct instruction in social problem-solving skills and modifications and accommodations to address executive functioning needs. (N.T. 213; P-11 pp. 25-26A; S-2 pp. 25-27)
54. After the ER, the District provided a Notice of Recommended Educational Placement (NOREP) for itinerant emotional support. The Parent approved the NOREP and indicated she would attend the meeting to develop an Individualized Education Program (IEP). (P-4 pp. 5-6, 9-10; S-9 p. 7-8)

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<sup>6</sup> The description of the guidance counselor's BASC-2 TRS responses was also not consistent with her testimony at the due process hearing. (*Compare* P-11 pp. 16-17 and S-2 pp. 16-17 *with* N.T. 253-317)

55. An IEP was developed for Student on November 20, 2013. The IEP noted that Student did exhibit behaviors that impeded Student's learning or that of others. No transition to post-secondary education is included in this IEP, although Student was of transition age and provided input into transition planning. (N.T. 488; S-3, S-9 pp. 9-13)
56. The November 2013 IEP included annual goals to improve coping skills, develop and practice self-advocacy skills, and use positive coping strategies in the homebound instruction setting. Items of specially designed instruction addressed extension of time for tests and assessments, assistance with chunking assignments, use of visual aids and reminders, assistance with organizational skills, and unspecified assistance from support staff. (S-3 pp. 11-12)
57. The November 2013 IEP included a Positive Behavior Support Plan (PBSP) relating to Student's withdrawal from peers, difficulty adapting to change, physical symptoms or fears due to personal or school problems, inability to focus, and inability to complete work. (S-3 pp. 13-16)
58. The November 2013 IEP provided for itinerant emotional support with participation in the general education curriculum through home instruction. (S-3 pp. 20-21)
59. Following implementation of the IEP, Student was provided with emotional support for two hours per week as part of the homebound instruction. This teacher worked with Student on improving coping skills through role play, assisted Student with self-advocacy, and talked with Student when Student had emotional difficulties. This teacher also assisted Student with organizational skills and chunking assignments. Some weeks, the emotional support teacher provided more than two hours of support, since Student and the teacher also exchanged text messages and phone calls. (N.T. 68, 487-93, 495, 516-17, 523-24, 526-28, 531-335; S-5)
60. The emotional support teacher has also worked with Student to go on community outings. Student had concerns in the community that other people thought about Student, similar to how Student felt about peers at school, and this teacher worked with Student on those anxious feelings. This concern that Student had was not due to an event that occurred in December 2013 (N.T. 58 LL 8-11; S-5 p. 14). (N.T. 518-20, 524-25, 536-37, 544-46)
61. The regular education homebound instructor worked with Student on organizational skills and initiating conversations with others after the IEP was developed. This teacher also worked with Student on Student's anxiety and concerns about other people including teachers. (N.T. 553-54, 567-68)
62. Student remained on homebound instruction through the end of the 2013-14 school year, with the Parent providing new prescriptions every nine weeks. (N.T. 75, 128-29, 584-85)

63. Student's two homebound instructors had little communication with each other about the services they were providing to Student. (N.T. 493, 573-74)
64. The Parent has kept the District apprised of Student's medications and physical conditions of concern. (N.T. 42-43)
65. Student attended a winter dance at the high school in early 2014 which was a good experience for Student. The emotional support teacher worked with Student to develop a plan for checking in from the dance, for contacting the emotional support teacher if Student became anxious, and for contacting the Parent when Student was ready to leave. (N.T. 71-72, 130, 496-500; S-5 pp. 25-26, 28-29)
66. Student attended several sporting events in the spring of 2014. The emotional support teacher worked on a plan with Student to help Student attend those events. (N.T. 72, 130, 501-04)
67. Student went to school for Activity Day at the end of the 2013-14 school year at the high school. The emotional support teacher worked with Student to develop a plan for attending that event. Student did not stay all day for Activity Day because Student got upset with another student. (N.T. 505-10, 511-12)
68. The Parent has not had any meetings with the District to discuss Student's transition back to school-based programming during the 2013-14 school year. (N.T. 131)
69. Student took the Keystone Exams over a two-week period in May 2014, in a small group of approximately six students. Student worked with the regular homebound teacher to prepare for those exams. Although Student was anxious about the exams, Student did successfully stay at school to complete them. (N.T. 138-39, 338-39, 347, 513-15, 571-72)
70. Student passed all classes during the 2013-14 school year repeating ninth grade, although Student's grade point average was less than a 2.0. Student wants to graduate on time with Student's peers. However, the plan getting back to grade level to graduate with Student's peers would include summer classes, and would be extremely difficult for Student. (N.T. 141-42, 530, 563-65, 568-69, 575-76; S-6 p. 6)
71. Student continued with monthly psychiatric sessions as well as weekly therapy including home-based counseling services at the time of the due process hearing. (N.T. 127-28)
72. Student was excused from school for therapy sessions with the outside agencies. (N.T. 31, 32-33; P-2 pp. 1-2, 4-5; S-7 pp. 14-17, 22-23, 27-31, 33)

## DISCUSSION AND CONCLUSIONS OF LAW

### General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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 most of the witnesses to be generally credible although there were some inconsistencies in various witnesses’ recall, possibly due in part to their differing perspectives. The testimony of the Parent, in particular, was quite forthright and matter of fact, yet not accusatory, and was therefore accorded significant weight. Furthermore, it must be noted that the Parent, as well as the District personnel, all presented as dedicated individuals who care about Student and Student’s education, despite their conflicting positions at the hearing.

## IDEA Principles

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 v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). This obligation is commonly referred to as “child find.” Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, school districts are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. Those classifications or categories are “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a). The regulations further define emotional disturbance as follows.

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

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i).

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

34 C.F.R. § 300.39(a). Further,

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

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

Once identified as eligible, the IDEA further requires the states to provide a “free appropriate public education” (FAPE) to a student who qualifies 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, supra* at 247. 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). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

Also critical is the IDEA obligation for eligible students to be educated in the “least restrictive environment” which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the school has included the child with non-exceptional children to the maximum extent possible. *Id.* In evaluating the first prong, the efforts the school district has made to include the child, a comparison of the benefits to the child of placement in a regular classroom versus a separate special education classroom, and the effect on the other students, must be considered. *Id.*

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). Relevant to this matter, the obligation to provide FAPE to a child with a disability 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.Comm.w. 2005).

### The Parent’s Claims

The first issue is whether the District should have identified Student as eligible for special education under the IDEA earlier than it did. The Parent asserts that an evaluation was warranted as early as the fall of 2012. The District contends that its actions in evaluating, and providing special education to, Student beginning in April 2013 was appropriate.

In addition to the IDEA principles set forth above, it is important to recognize that education is much more than academics. Nearly thirty years ago, the U.S. Supreme Court recognized that a child with a disability who is “advancing from grade to grade” is not necessarily a child who has been provided with an appropriate education. *Rowley, supra*, at 203 n.25; *see also* 34 C.F.R. § 300.101(c)(1) (“Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.”) An appropriate education, thus, encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (citing *M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir.

1996)). Moreover, a child's educational performance can be affected in ways other than achieving (or not achieving) passing grades, such as by an inability to engage in appropriate social relationships with peers or refusing to attend school.

The record reflects that for the first half of the 2012-13 school year, despite conflicting evidence on how often Student left school early, Student was missing a considerable amount of class time due to Student's emotional difficulties. The District was aware of Student's two psychiatric hospitalizations in the fall of 2012, and was in regular contact with the Parent and Student's home-based therapists by the time of the January 2013 meeting to discuss Student's educational needs. By the end of the second marking period, Student was failing almost all classes, unlike in any previous school years, and Student's anxiety had been adversely impacting Student's education for a lengthy period of time. SAP assistance was minimal, and despite Student's clear emotional difficulties, that process did not continue to the stage where an evaluation was discussed and recommended.<sup>7</sup> The District's former school psychologist provided very candid and persuasive testimony that he should have been advised of Student's circumstances in the fall of 2012, and been part of the team of District personnel who were making decisions about Student. (N.T. 230-32, 242) This hearing officer agrees. Certainly by the time of that January 2013 meeting, whether or not the Parent had requested a special education evaluation, the District had sufficient information to trigger its obligation to consider whether Student was eligible for special education. While it is fortunate that Student was able to return to school for half days following the January 2013 meeting, by that point the special

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<sup>7</sup> It is concerning that this ineffective SAP process was considered to be a necessary step before Student could be evaluated; even the Parent's request for an evaluation did not trigger an appropriate response until some months later.

education evaluation process should have been initiated so that an IEP was developed and ready for implementation no later than the middle of April 2013.<sup>8</sup>

The above determinations lead to the next issue, the Parents' request for compensatory education. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. supra*. 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).

The record does not establish the reasons that Student was placed on homebound instruction in the fall of 2012, but regardless of whether homebound instruction was indicated and agreeable to the parties, such is not a special education placement and, moreover, is intended to be a *temporary* measure. *See* Basic Education Circular, Instruction in the Home (revised June

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<sup>8</sup> Districts have 60 calendar days to complete a special education evaluation, and 30 days thereafter to develop an IEP. 22 Pa. Code § 14.123(c); 34 C.F.R. § 300.323(c).

30, 2005); 22 Pa. Code § 11.25. It should also go without saying that on the spectrum of a continuum of special education services, providing instruction at the home of a student is one of the most restrictive alternatives. Here, there was no carefully considered plan for Student to successfully transition back to school, or any less restrictive environment, at any point during the school years in question. Even the return in January 2013 for half days, while certainly planned, was not gradual, did not include emotional support and, ultimately, was not successful. Thus, the placement on homebound instruction for the entire 2013-14 school year was inappropriate, was not the least restrictive environment, and denied Student FAPE. And, because Student should have been provided with special education including emotional support for approximately the last quarter of the 2012-13 school year, Student was also denied FAPE for that time period.

There is no evidence as to what position Student would have been in if FAPE had been provided. The question, then, becomes what Student should have received for FAPE. The District's former school psychologist estimated that Student should have been provided with one period per day of emotional support. (N.T. 240-41) The Service Agreement, while a step in the right direction, did not provide this necessary emotional support. This hearing officer thus concludes that Student should be awarded one hour per day of compensatory education for the lack of appropriate emotional support services for the entire time period in question, regardless of where Student was receiving educational programming. Because the homebound instruction was not appropriate for Student, and further since it did not involve any sense of coordination between the homebound teachers, the District shall not be given credit for the emotional support services that were provided in the home following the November 2013 IEP.<sup>9</sup> Further, because Student's inability to attend school was a result of Student's disability, the compensatory

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<sup>9</sup> This is not to suggest that those emotional support services were not well-intentioned, or thoughtful, or beneficial to Student.

education award shall be for all school days and not reduced by days that Student did not attend at least a part of the school day.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent 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 social/emotional and/or transitional/vocational goals and 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).

There are financial limits on the parents' discretion in selecting the compensatory education; the costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District and other professionals who did and would have provided social/emotional and/or transitional/vocational services to Student during the period of the denial of FAPE.

The Parent also asserts in Parent's closing that Student was denied the procedural protections for discipline of students under the IDEA. Although discipline was mentioned in the Parent's opening statement (N.T. 14-15), the record does not provide preponderant evidence to establish that Student was improperly removed from school on the basis of Student's disability

such that a manifestation determination hearing was required. 34 C.F.R. §§ 300.530 – 300.536; 71 Fed. Reg. 46715; *see also Wise v. Pea Ridge School District*, 855 F.2d 560 (8<sup>th</sup> Cir 1988).

Lastly, the Parent requested an order for a prospective placement outside of the District. (N.T. 15, 23-24)<sup>10</sup> While such a remedy can be a form of equitable relief under the IDEA, the record in this case does not support such an award. Despite having determined that the District denied Student FAPE in several respects, as discussed above, there was no evidence that it is unable or unwilling to develop and implement appropriate IEPs for Student that address all needs such that a prospective private placement at public expense must be ordered. Moreover, Student exhibits emotional difficulties with respect to persons in the community in addition to Student's school peers, and the evidence is, thus, not preponderant that an order for an out-of-District placement is required. Student's IEP team will, however, be directed to convene and revise Student's IEP to include an appropriate plan to gradually transition back to attending full days of a school-based program, wherever that may be, to be determined by Student's IEP team.

#### Section 504 Claims

The Parent's complaint also raised a claim under Section 504. The above discussion reflects discrimination against Student on the basis of Student's disability under Section 504. However, because 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, and further because all of the Parent's claims have been addressed pursuant to the IDEA, there need be no further discussion of the claims under Section 504.

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<sup>10</sup> The Parent's Closing did not seek this specific remedy.

## **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District failed in its Child Find obligation, and failed to provide Student with FAPE in the least restrictive environment. 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 failed in its Child Find and FAPE obligations to Student.
2. The District shall provide Student with one (1) hour of compensatory education, to address Student's social/emotional and/or transitional/vocational service needs for every day school was in session during the fourth quarter of the 2012-13 school year, and the entire 2013-14 school year, subject to the conditions and limitations set forth above.
3. On or before August 25, 2014, the District shall convene a meeting of Student's IEP team to revise the IEP and develop a plan for Student's gradual transition to a school-based program.
4. Nothing in this Order precludes the parties from mutually agreeing to alter any of the directives regarding the IEP meeting and timelines, the IEP content, or the form of compensatory education, set forth in this decision and order.

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: August 10, 2014