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: C.D.
Date of Birth: [redacted]

Dates of Hearing: 7/7/2015, 7/8/2015, 9/21/2015, 9/22/2015

CLOSED HEARING

ODR File No. 15968-14-15 AS

Parties to the Hearing:	Representative:
Parents	Parent Attorney John P. Corcoran, Jr., Esquire Jones, Gregg, Creehan & Gerace LLP 411 Seventh Avenue, Suite 1200 Pittsburgh, PA 15219
Local Education Agency Mars Area School District 116 Browns HIll RoadValencia, PA 16059	LEA Attorney Thomas E. Breth, Esquire Dillon McCandless King Coulter & Graham, LLP 128 West Cunningham Street Butler, PA 16001
Date Record Closed:	October 19, 2015
Date of Decision:	October 31, 2015
Hearing Officer:	Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)[1] is beyond high school-aged and formerly attended the Mars Area School District (hereafter District). Student is alleged to be a Protected Handicapped Student under Section 504 and Pennsylvania's Chapter 15[2] for part of Student's tenure in the District. Student's Parents filed a due process complaint against the District under Section 504 and its implementing federal and state regulations, claiming the District violated Student's rights based on Student's disability.

After preliminary rulings limiting the scope of the evidence to be produced to the Parents, the case proceeded to a due process hearing convening over four sessions, at which the parties presented evidence in support of their respective positions. The Parents sought to establish that the District failed to identify Student as having a disability and provide Student with a free, appropriate public education (FAPE) during the 2013-14 school year, and sought relief in the form of tuition reimbursement and a finding that the District discriminated against Student on the basis of Student's disability. The District maintained that Student did not qualify under Section 504/Chapter 15, that the educational program that it implemented was appropriate for Student, and that no remedy is warranted.

For the reasons set forth below, I find in favor of the Parents, but will not order all of the specific relief requested.

[1] In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. References will be made to the record as follows: Notes of Testimony (N.T.); Parent Exhibits (P-); School District Exhibits (S-); and Hearing Officer Exhibits (HO-). References to exhibits that are duplicative will be to one or the other or occasionally both. Citations to the exhibits are not necessarily exhaustive; and it merits mention that the voluminous record contained roughly 1,000 pages of email messages, many of which included identical content.

[2] 29 U.S.C. § 794 and 22 Pa. Code §§ 15.1 – 15.11, respectively.

ISSUES

1. Whether the District failed to timely identify Student as a Protected Handicapped Student under Section 504 and Chapter 15?

2. Whether the District failed to provide appropriate accommodations to Student to address Student's disability?

3. If the District failed to timely identify Student and/or provide appropriate accommodations to Student on the basis of disability, are the Student and Parents entitled to compensatory education in the form of tuition reimbursement?

FINDINGS OF FACT

General Background

1. Student is a late teenaged student who was previously enrolled in the District. For a part of Student's tenure in the District, Student was considered to be a Protected Handicapped Child under Section 504 and Chapter 15. (Notes of Testimony (N.T.) 43-44)

2. The District is a recipient of federal funding for purposes of Section 504. (N.T. 44)

3. Student attended a private school for five years prior to enrolling in the District. Student was able to pursue a field of interest[3] at the private school until the end of ninth grade. (N.T. 48, 288)

4. In February 2012, when Student was in ninth grade and in the private school, Student suffered a traumatic brain injury with a resulting concussion. Student had restrictions on some physical activities until August of that year because of the injury, but was "cleared" at that time (N.T. 58). (N.T. 55-58, 290-91, 295)

5. Children who suffer a concussion need to rest and allow the brain and body to repair. Executive functioning, including initiating and ceasing behaviors and actions, self-monitoring, focusing and concentrating, and controlling emotions, may be impacted. A reduction in physical and cognitive tasks can help those children recover. (N.T. 1104-06, 1108-12; P-68 p. 2)

6. A child who suffers from a second concussion, particularly those who have not yet fully recovered from the first concussion, may have a more significant or prolonged experience, including potentially more serious cognitive difficulties, than would a child who has had a single concussion. Children who suffer more than one concussion also

[3] The field of interest is not identified in this decision in order to protect Student's privacy in this closed hearing, but among other evidence, Student's mother described that interest at N.T. 49-50.

have a higher risk of depression than those who never had such an injury. (N.T. 582-83, 602, 824-25, 893, 1090)

7. During the time period at issue, when Student was in tenth through twelfth grades, Student and the Parents resided in a different school district. The Parents and Student explored options for Student to continue taking classes in the field of interest, and learned that the District offered such courses. Student attended high school in the District beginning in tenth grade at the expense of the Parents, who paid tuition to the District. (N.T. 49-50, 288-90, 350; P-48)

8. Student's guidance counselor was made aware when Student first began attending tenth grade in the District that there had been a previous injury, but was unaware that Student had suffered a concussion in 2012. (N.T. 447, 449)

9. Student participated in activities related to the field of interest outside of school during tenth grade. (N.T. 52, 636-37, 679-80)

10. Student's grades for the 2012-13 school year (tenth grade) ranged from C (in a foreign language) to A+ (in classes related to the field of interest). Most grades were in the A to B range, and Student's then-current QPA was 3.3417 with a cumulative QPA of 3.0382. Student had one disciplinary infraction that school year for using a cell phone without permission, for which Student was assigned detention. (P-1 p. 1, P-50; S-15 p. 1)

District Discipline Policy

11. At the start of each school year, the District holds class meetings to highlight its discipline policies and procedures (N.T. 966)

12. Discipline for most offenses, pursuant to District policy, may consist of a warning, after-school detention (fifteen minutes), in-school suspension (ISS) (one day) typically two days after the incident; and out-of-school suspension (OSS). The policy provides guidelines for the discipline to be imposed for specific behavior. (N.T. 967, 968-69, 971-72, 982-83; P-49 pp. 1-8)

13. When students are assigned to ISS, they are required to notify their teachers with a form so that work may be assigned. Students are expected to complete all work for the period of ISS, and that work completion is the focus of ISS. (N.T. 177, 685-86, 693, 972, 984-87, 1217-18, 1273-74, 1309-10)

District Concussion Injury Policy in Fall 2013

14. The District had a policy in the fall of 2013 that addressed how to proceed when a student suffered from a concussion. Pursuant to that policy, notice of a student with such an injury was to follow this sequence:

    a. Request medical documentation, secure release authorization from parents, and contact school psychologist and school nurse with documents

b. Review of information by a team of counselor, school psychologist, and school nurse to determine how to implement recommendations made; and develop a plan for implementation with that team as well as an administrator and possibly teacher(s)

c. Notification of recommendations from guidance counselor to teachers, administrators, and parents

d. Guidance counselor to secure updated information and provide notice to school psychologist, school nurse, and administrator

Typically, the guidance counselors, and sometimes nursing office staff, were responsible for implementing these procedures, including notifying teachers of any necessary accommodations. The guidance counselor then periodically asked teachers how a particular student was progressing. (N.T. 455-56, 470-71, 476, 479-80, 710-12, 717, 851, 993; P-7)

15. District staff who might be involved when a student suffers a concussion could include the school nurse, a principal, the student's guidance counselor, teachers, the school psychologist, and the Director of Pupil Services (DPS). Those members are considered to be part of a team that also includes the parents and sometimes the student. The specific staff involved in a particular case depends on the severity of the injury and whether a medical doctor makes recommendations (compared to a psychologist); and the DPS is not always the administrator member of the team for every concussion injury from the outset. (N.T. 826-29, 831-32, 917-18, 926, 991, 1009-10)

16. The District's general practice is to follow any recommendations for accommodations sent by a medical doctor or psychologist for a student who suffers a concussion, particularly those provided by the UPMC Concussion Center (hereafter CC). (N.T. 541-42, 854, 855, 1058-59)

17. When a student in the District suffers a concussion and accommodations are necessary, the assigned guidance counselor asks those students to remind their teachers of those supports. These students are generally expected to ask for accommodations as they are necessary. (N.T. 461-62, 463-64, 484, 1066-67)

18. Typically, after a student would have a third evaluation for a concussion injury, District staff would consider whether a formal process, such as a Section 504 Plan, should be initiated. The DPS would also usually be involved at that point. (N.T. 514-15, 718-19, 725, 1010; S-2 p. 79)

Fall Semester 2013-14 School Year

19. Student began eleventh grade in the 2013-14 school year. Early in that year, Student was disciplined for behaviors such as using a cell phone and being disrespectful, but sometimes only a warning was imposed. (N.T. 795-96)

20. In approximately late September or early October 2013, Student suffered a second

traumatic brain injury during a recreational activity. Student reported the incident to Student's parents but claimed to be "fine" when asked how Student was feeling (N.T. 59-60). After discussions with the school nurse about changes to Student's demeanor at school, and noting differences in Student at home, the Parents took Student for evaluation and treatment at the CC on October 23, 2013. (N.T. 59-61, 221, 296-97, 299-301; P-5 p. 2; S-2 p. 42)

21. On October 16, 2013, Student's foreign language teacher referred Student to the Student Assistance Program (SAP) due to observed changes in Student's behavior (arriving late to or missing class, not feeling well, not completing work). This teacher had also had Student in her class the previous school year. (N.T. 128-29, 155, 161-62, 173-74, 191; P-4; S-2 p. 29)

22. The Parents declined SAP services for Student, believing that any concerns could be addressed by the therapist who treated Student following the 2012 injury. Student did see that therapist again beginning in October 2013. (N.T. 222-25; P-4; S-2 pp. 31, 38)

23. On October 23, 2013, after the CC appointment, the Parents informed Student's guidance counselor and all of Student's teachers of Student's most recent concussion, as well as the first injury in 2012. (N.T. 61, 62, 234, 443, 446, 448, 713; P-5 p. 2; S-2 p. 42, S-7 p. 13, S-9 p. 1)

24. The CC provided a form with accommodations for Student at school at the time of Student's evaluation in October 2013. The recommended accommodations were for testing (extra time test in quiet environment, and allowed across multiple settings); workload reduction (overall amount of make-up, class, and homework, recommended 50-75%); provision of class notes; opportunity for breaks; extra time for assignments; and avoidance of busy environments. That form was provided to the District. (N.T. 65, 104, 715-16; P-6 p. 6; S-1 p. 1)

25. On October 24, 2013, Student's guidance counselor sent email notification to all of Student's teachers, except the Social Studies teacher, that Student required accommodations due to the concussion, specifying the following "***when requested by*** [***Student***]" (emphasis in original): extra time on tests; option to test in a quiet environment; workload reduction "(at teacher discretion – when appropriate)"; and copy of guided notes. The guidance counselor also provided those teachers with a copy of the CC form. The omission of the Social Studies teacher was inadvertent; the Parents, school nurse, and principal were copied on this email message. (N.T. 138-39, 451-52, 457, 719, 721-23, 732-33, 1134-35, 1203, 1258-59, 1295-96; P-9 p. 1; S-2 pp. 44, 75, S-7 pp. 31-32, S-9 p. 2)

26. Student's guidance counselor expected Student to self-advocate for accommodations, and informed Student and the Parents of this responsibility on Student's part. He also told the Parents that proceeding "in a more 'formal' manner" would be considered after the November 2013 CC evaluation (P-9 p. 3). (N.T. 227; P-9 p. 3; S-2 p. 45)

27. Student's grades at the end of the first quarter marking period were in the C range in five

classes, in the B range in two classes, and one A grade. (P-1 p. 2)

28. Student was seen at the CC again on November 19, 2013. The CC provided a new form with slightly revised accommodations, which the Parents provided to the District. The recommended accommodations were for testing (extra time test in quiet environment, allowed across multiple settings, reduced length); workload reduction (overall amount of make-up, class, and homework, recommended 50-75%); provision of class notes; opportunity for breaks; extra time for assignments; and no physical education class or sports participation. (N.T. 69; P-13; S-1 p. 5; S-2 p. 73)

29. Student's Parents advised Student's guidance counsel and teachers about the November 19, 2013 appointment. The guidance counselor then notified all of Student's teachers by email about the accommodations recommended in October 2013, and specifically advised them to provide: extended time on tests; option to test in a quiet environment; workload reduction "(at teacher discretion, when appropriate – i.e., possibly lightning the 'non-essentials')"; copy of guided notes; and the option of breaking up time-intensive tests into two sessions. The previous bold and italicized reference to Student requesting accommodations was omitted from this email message. The school psychologist, school nurse, and principal were copied on this message from the guidance counselor, in addition to the Parents. (N.T. 483-84, 719, 734-35, 1265-66, 1296; P-14; S-2 pp. 73-74, 84, S-8 p. 33, S-9 p. 8)

30. In the fall of 2013, the District did not conduct a formal Pupil Service meeting, or any meeting, to discuss Student's need for accommodations, or whether Student needed a Section 504 Plan. District staff believed that the accommodations provided were meeting Student's needs, and were awaiting the next (third) evaluation by CC before scheduling a meeting. (N.T. 465-71, 491-93, 516, 738-40, 925)

31. Student's grades at the end of the second quarter marking period were failing in one class, in the D range in two classes, in the C range in three classes, and in the A range in two classes. (P-1 p. 2)

Spring Semester 2013-14 School Year

32. In February 2014, Student's guidance counselor notified the Parents that Student had failing grades in nearly all classes. At that time, District staff were concerned with Student's behaviors that resulted in discipline and Student's failure to make the effort to complete work. (N.T. 487, 489-90, 493, 518, 743; P-20)

33. In early March 2014, Student's guidance counselor reminded Student's teachers by email to continue providing the accommodations specified in the November 20, 2013 communication to them. The guidance counselor also asked the teachers to allow late completion of assignments from the third quarter. The school psychologist, school nurse, and principal were copied on this message as were the Parents. (N.T. 484-85; P-22; S-2 pp. 150, 162)

34. The Parents also communicated with Student's guidance counselor in early March, expressing their concerns with Student making up work and expressing frustration over

imposition of ISS for Student as discipline. (S-2 pp. 156-57)

35. A meeting was held with District staff and the Parents on March 11, 2014 to discuss Student's grades and needs, and an upcoming evaluation. The Parents brought a letter from Student's pediatrician suggesting that Student needed an academic plan to support Student, and that ISS was a punishment for Student that prevented Student from making up missed work. A particular high school administrator (hereafter HSA) used a raised voice during the meeting, flung the physician's letter back to the Parents, and stated that he would determine what discipline to impose. The participants did agree that Student would have two teachers available after school to help Student in any areas of difficulty, and that some work could be made up and some grades corrected. (N.T. 258, 260-61, 305, 310-12, 315, 317-19, 321, 322, 331, 400-01, 494-98, 516-17, 744, 813, 935-36; P-6 p. 5)

36. On March 13, 2014, Student's guidance counselor sent email notification to all of Student's teachers of the discussions at the March 11 meeting, and repeated the need to continue providing the accommodations from November 2013. A plan to allow Student to meet with teachers after school was also mentioned, as was the need to permit Student to make up missing work. (P-23 p. 1, S-2 p. 163)

37. After the March 11, 2014 meeting, two teachers were made available to Student after school to assist with two subjects in which Student was struggling, Physics and Trigonometry, in the spring of 2014. Student did not meet with those teachers after school, and the Parents did not believe having Student do so was appropriate. (N.T. 752, 769, 805, 942, 977, 984, 987, 1210-12, 1242; P-66; S-2 pp. 162, 245)

38. Student was prescribed medication in late March 2014 to address Student's lack of focus. The physician who prescribed the medication agreed with the CC recommendations to continue for at least another month. Student did take this medication at school. (N.T. 85-86, 111, 113-14; P-8 p. 11, P-27 p. 3, S-4 pp. 1, 11, S-17 pp. 20-21)

39. Student was seen at the CC again on March 25, 2014. The CC provided a new form with slightly revised accommodations, which the Parents provided to the District. The recommended accommodations were for testing (extra time test in quiet environment, allowed across multiple settings, reduced length); workload reduction (overall amount of make-up, class, and homework, recommended 50-75%, and shortened tests and projects); provision of class notes; and opportunity for breaks. (N.T. 84-85; P-27;[4] S-1 p. 6)

40. Student was also evaluated by a neuropsychologist in late March 2014 based on a recommendation by the treating physician at CC. This neuropsychologist is certified as a

[4] The Parents' version of the March 2014 CC recommendations form includes a page that appears to also be from March 25, 2014 and states, "Please extend previous accommodations." (P-27 p. 2) This page is in addition to the immediately preceding page (P-27 p. 1) described in Finding of Fact (FF) 36 and included in the District's version of this CC recommendations form. (*Cf.* P-27 p. 2 with P-27 p. 1 and S-1 p. 6) It is unclear to whom, if anyone, the additional page at P-27 p. 2 was sent, or why there are two versions of the same form from March 25, 2014, but the discrepancy is immaterial to the issues presented.

school psychologist. (N.T. 66-67, 117-18, 402-03, 577, 586, 588-89; P-8; S-4)

41. The neuropsychologist understood that Student had been experiencing irritability, impulsivity, and difficulty with attention and concentration. Student was also exhibiting problematic behaviors, and grades had declined. (N.T. 579-80)

42. The neuropsychologist issued a report (NR) about her assessment of Student. Cognitively, Student scored in the high average range on the Wechsler Adult Intelligence Scale – Fourth Edition, with verbal abilities a relative strength. In assessments of attention and executive functioning, Student demonstrated generally average or better abilities, but the neuropsychologist noted weaknesses in self-monitoring and emotional control reported in rating scales. The neuropsychologist also described symptoms of depression from rating scales, which were reportedly more significant since the September/October 2013 injury; however, none of the scales reflected clinically significant concerns. She further noted symptoms of post-concussive syndrome. The neuropsychologist believed that Student's concussions had exacerbated the depressive symptoms. (N.T. 581-83, 600-02; P-8; S-4)

43. In the NR, the neuropsychologist made a number of recommendations for Student's educational programming, including a Section 504 Plan, as well as therapy to address Student's mental health needs. The neuropsychologist discussed a Section 504 Plan with the Parents, and suggested to them that Student be provided with such a Plan. (N.T. 83, 402-03, 587-88; S-4 pp. 4-6)

44. The Parents contacted Student's guidance counselor again in late March 2014, asking that Student not be subject to in-school suspension (ISS). They also continued to contact Student's teachers and guidance counselor that month after notification that Student was failing all classes. (N.T. 77-81; P-24, P-25)

45. By late March 2014, District administrators expressed frustration among themselves about continuing to accommodate Student and the requests to eliminate ISS for Student. They also decided to hold a meeting to discuss the potential need for a Section 504 Plan, and contacted the Parents about scheduling a meeting to discuss such a plan. (N.T. 788-90; P-26)

46. A second meeting was held on April 15, 2014, following issuance of the March 25, 2014 report from the neuropsychologist. This was the school psychologist's first meeting regarding Student; the school nurse, Student's guidance counselor, and HSA attended along with the Parents. The participants discussed recent discipline imposed on Student as well as the neuropsychologist's report. The HSA again used a raised voice during the meeting and, as in the prior meeting, flung the neuropsychological report back at the Parents. The Parents also raised their voices at this meeting. (N.T. 258-59, 334-35, 338, 395, 504-05, 775-76, 814-15, 846-47, 849, 866-70, 958-59; P-8, P-28 pp. 1-4)

47. In the spring of 2014, the District did at times waive Student's ISS for certain class periods where Student would have missed important material or activities. Some instances of ISS were postponed. However, Student was required to serve all ISS

imposed. (N.T. 751-52, 764-65, 766-67, 939-40, 976-77, 988; P-25 p. 1, P-56; S-2 pp. 176, 178)

48. District staff believed that Student was not motivated to bring work to ISS and to make up work missed, and Student frequently did not complete work during ISS. (N.T. 752-53, 770, 805-06, 1177-79)

49. After the April 2014 meeting, the school psychologist sought information from Student's teachers. Student's foreign language teacher completed an input form, noting concerns with Student's attendance, inattention and lack of focus, and refusing to complete work; she had also noticed that Student was engaging in inappropriate peer interactions as well as using the restroom frequently and without a hall pass. Another teacher reported lack of participation, incomplete assignments, and distractibility. A third teacher noted difficulty focusing and with peer relations and organizational skills. A fourth teacher reported lack of focus and self-discipline, failure to complete assignments, difficulty with organization, and inappropriate language and interactions with peers. (N.T. 151-52, 169-70, 175, 192-95, 857-59, 877, 893, 895; P-12; S-5 p. 17, S-7 p. 3, S-8 p. 53, S-9 p. 41)

50. The school psychologist asked to contact the neuropsychologist to discuss Student's depression symptomatology. In that conversation, the neuropsychologist suspected that Student had had some emotional difficulties even prior to the concussion injuries. (N.T. 868-71, 876-77, 879)

51. Student suffered injury to Student's back and leg in April 2014 during a recreational activity. Student was not able to bear weight on the leg, and pursuant to a medical note, Student was placed on homebound instruction (up to five hours per week) with accommodations and modifications to the curriculum. Student did not return to the high school through the end of that school year. (N.T. 87-89, 345-46, 877-78, 1039-41; P-29; S-2 p. 252, S-17 p. 4)

52. The District school psychologist considered, but did not pursue, a special education evaluation of Student because of the April 2014 injury that resulted in Student not returning to school. (N.T. 878-79, 889-91)

53. In late April 2014, the HSA instructed other staff not to include the DPS in communications regarding Student. Another administrator did advise the DPS about Student's April 2014 injury, and she then learned about Student's concussion injuries. The DPS was concerned that she was not involved sooner when she discovered that Student was exhibiting behavioral problems and the approaches used to that point seemed not to be working. (N.T. 783-86, 1014, 1016, 1022-23; P-30)

54. The HSA contacted the DPS and the District business office in early May 2014 about refusing Student's enrollment for the following school year. (N.T. 913-14; P-31 p. 1)

<u>2013-14 School Year Overall</u>

55. Student had a romantic relationship with a peer during the 2013-14 school year, and the two experienced difficulties with that relationship at times. There was at least one

meeting with the two students, their parents, and an administrator, and District staff attempted to enforce the request of the children's parents to keep the two separated at school. (N.T. 216-17, 218-20, 367-68, 745-49, 755, 799-801, 813, 978-80, 982; S-2 pp. 143-44, 231-32)

56. From late October 2013 to the end of the school year, Student's eleventh grade foreign language teacher provided Student with extra time to complete tests and assignments, testing in a quiet environment, and the opportunity to take tests over multiple sessions. Student was not required to take notes in that class, but was given opportunities to take breaks. Student was not required to ask that teacher for accommodations. Over the course of the school year, Student exhibited increased difficulty with focusing and paying attention and was frequently off task. (N.T. 164-67, 169-171, 173-74; S-2 pp. 67, 88)

57. From late October 2013 to the end of the school year, Student's Technology Education teacher provided Student with extra time on the single test given to the class, the ability to retake the test, the ability to take the test in any environment, and as much time as needed to take the test or to submit assignments. Student's workload was reduced to some extent by the teacher permitting Student to submit media related to the same content that was previously completed for full credit. All students were provided with guided notes and a study guide for tests. Student was not required to ask for accommodations in technology education class. (N.T. 1137-47, 1151-53, 1160-62, 1166-67, 1169-71)

58. From late October 2013 to the end of the school year, Student's Physics teacher provided all students with the opportunity to retake tests (not exams) but did not modify them for Student. She also provided testing in a quiet environment and permitted Student to only listen (not watch) video lectures without taking notes as a form of workload reduction, and offered a copy of notes but Student declined those. Student exhibited a lack of focus in Physics class. At the end of the school year while student was on homebound instruction, the Physics teacher did modify tests for Student and exempted Student from some assignments and gave credit for some that were turned in later. (N.T. 1200, 1203-08, 1216-17, 1228-29, 1230, 1231-32, 1234-35, 1248-49)

59. From late October 2013 to the end of the school year, Student's English teacher provided Student with extra time for tests and assignments and the ability to take tests in a quiet environment. There were no guided notes to provide but students in the class worked on study guides together. Student was provided extra time on assignments any time one was not turned in, without Student having to ask. Student did exhibit a lack of focus and motivation in English class as the school year went on, and was at times distracted by Student's cell phone. The English teacher exempted Student from a few assignments and the final project while Student was on homebound instruction, but did not believe the workload during the rest of the year was too intensive for Student. (N.T. 1259-64, 1266, 1273, 1277-78, 1282-84, 1288; S-2 pp. 90, 93)

60. From late November 2013 to the end of the school year, Student's Social Studies teacher provided extra time for tests for all students, and the classroom was a quiet environment for all tests. Student was provided the opportunity to take sections of tests at a time, but

typically elected to continue until completion. This teacher eliminated a portion of questions on homework and some tests for Student, and provided a copy of all teacher notes. There were occasions when Student was given some extra time to complete assignments and tests, but those opportunities were limited in duration. Student demonstrated varying levels of motivation in Social Studies during the school year. (N.T. 1297-1302, 1305, 1307, 1317-18, 1322-23, 1334; P-16 p. 1; S-7)

61. Throughout the 2013-14 school year, Student's Trigonometry teacher provided accommodations very similar to those of the Technology Education, Physics, English, and Social Studies teachers. (N.T. 1336-37; S-2 pp. 96-97, S-6)

62. Student's guidance counselor asked Student's teachers informally how Student was progressing in the fall and spring of the 2013-14 school year. (N.T. 518-19, 925)

63. Student's disciplinary record for the 2013-14 contained the following infractions with resulting discipline:

Date	Infraction	Discipline
9/23/13	Technology/Using Cell Phone	Detention
10/2/13	Unacceptable Action/Meeting Peer in Restroom	ISS (3 days)
10/7/13	Unacceptable Action/Blocking Traffic in Parking Lot	Warning
10/15/13	Technology/Texting During Class	ISS (1 day)
10/15/13	Unacceptable Action/Late to Class	Warning
10/16/13	Unacceptable Action/Late to Class	Warning
10/30/13	Unacceptable Action/Using Cell Phone	Warning
1/24/14	Swearing/Obscene Gestures	ISS (1 day)
1/27/14	Unacceptable Action/Leaving Lunchroom	ISS (1 day)
2/6/14	Technology/Texting in Class	ISS (1 day)
3/5/14	Tardiness 3 days	Detention
3/7/14	Unacceptable Action/Disrespect	ISS (2 days)
3/13/14	Technology/Disrespect/Using Cell Phone	ISS (1 day)
3/17/14	Technology/Texting	ISS (1 day)
4/8/14	Disrespect to Teachers	ISS (1 day)
4/8/14	Unacceptable Action/Cell Phone	ISS (1 day)
4/11/14	Harassment/Communication with Peer (with whom Student was not to communicate)	OSS (3 days)

(P-69; S-3)

64. The DPS was in communication with the Parents about Student after the April 2014 injury. She also worked with the teachers to ensure that Student could make up work and be given credit for, or exempted from, some missed assignments. Student made up work through July 2014. (N.T. 1018, 1027-28, 1030, 1040-4; P-303)

65. In August 2014, the Parents communicated with the District regarding Student's grades for the 2013-14 school year. Some District staff did not believe it appropriate to change

Student's grades for much earlier in the school year. By the end of the year, the Acting Superintendent was involved and took steps to ensure that Student had grades for all classes. The DPS worked with the teachers to provide updated grades at the end of the summer that reflected all assignments, including those from the homebound instruction. (N.T. 510-11, 553, 556-57; P-35, P-36, P-37, P-39; S-2 pp. 315-17, S-10 pp. 64-65, 68)

66. Also in August 2014, the Acting Superintendent and DPS looked into the chronology of events following the October 2013 notification of injury, including accommodations provided to Student. (N.T. 529-30, 534-35, 551-54, 556-58, 1027-32, 1044-45; P-38, P-41, P-42)

67. On August 19, 2014, the Parents wrote a letter to the School Board detailing their concerns with the series of events over the course of the 2013-14 school year, beginning with the October 2013 notice of Student's injury through their not yet completed request for corrections to Student's grades. (N.T. 90-91; P-46 pp. 3-4)

68. Student's final grades for the 2013-14 school year ranged from C+ (Physics and World History) to A- (English and the field of interest). Student's final QPA was calculated to be 3.092. (S-15 pp. 5-6)

2014-15 School Year

69. The Parents had concerns about returning Student to school for Student's senior year (2014-15), but wanted Student to graduate from the District. After the Parents and District explored options, Student attended the District's cyber school program for that school year. (N.T. 346, 544-45, 59644-46, 648, 1038; P-2, P-48 p. 3)

70. In August 2014, the Acting Superintendent determined that the HSA should no longer communicate with Student and the Parents and that other administrators would address the concerns expressed in the Parents' letter to the school Board. The HSA was also told verbally not to interact with Student. (N.T. 541, 559-61, 563-64, 655-56, 952; P-46 p. 1)

71. Student attended Homecoming in September 2014. The administrator who was not to communicate with Student nonetheless greeted Student at the door. The Parents advised the Superintendent that the administrator who was not to communicate with the family had spoken to Student. (411-12, 420, 671-72; P-44)

72. Student graduated from the District in June 2015. (N.T. 44)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the

burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). The testimony of the various witnesses was consistent and credible in many respects. Many of the teachers and other District professionals understandably lacked specific recollection of events that occurred two years ago; it must, however, be noted that the testimony of the HSA was accorded reduced weight because it appeared that he attempted to minimize the tenor of the March and April meetings in contrast to many other witnesses who described his demeanor and actions. It should also be noted that, despite their conflicting positions at the hearing, the Parents presented as passionate and devoted advocates for Student; and, the District personnel, in general, presented as dedicated professionals.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' Closing Arguments. Nevertheless, it is important to recognize what this decision will not address; specifically, the alleged systemic flaws in the District's administration of its public school obligations (Parents'

Closing at 16-17 and *passim*) and the character of the HSA (Parents' Closing at 38-43). This hearing officer has jurisdiction only over the issues identified above involving the Student, a minor child with a possible disability during the time period in question, and has disregarded any evidence and arguments that are not related to those claims.

Section 504 Principles

Section 504 specifically 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).

> Since § 504's definition of disability is identical to the ADA's definition, it is appropriate to look to the ADA for guidance in interpreting this definition.
>
> * * *
>
> When considering an individual's disability under the ADA, a court should consider the nature, severity, duration, and permanent or long-term impact of the impairment in assessing whether it substantially limits plaintiff in a major life activity. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002). It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. The individual must also show that the impairment "substantially limits" a major life activity. The ADA does not define "substantially limits," but "substantially" suggests "considerable" or "specified to a large degree." While substantial limitations should be considerable, they also should not be equated with utter inabilities.

Centennial School District v. Phil L. ex rel. Matthew L., 799 F. Supp. 2d 473, 483 (E.D. Pa. 2011) (some citations and quotation marks omitted). "The question of whether an individual is substantially limited in a major life activity is a question of fact." *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751, 763 (3d Cir. 2004).

In the context of education, Section 504 and its implementing regulations "require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). 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).

This FAPE obligation includes the duty of Child Find under Section 504. 34 C.F.R. § 104.32; *Ridgewood* at 253. The applicable regulations implementing Section 504 further require that an evaluation shall be conducted "before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 C.F.R. § 104.35. An initial evaluation under Section 504 must assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id*. Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995).

The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit". *Ridgewood* at 247.

> 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. "In addition, the plaintiff must demonstrate that defendants know or should be reasonably expected to know of his disability." *Id*. Significantly, "[t]here 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).

Similar to Section 504, Pennsylvania's Chapter 15 regulations require a substantial limitation with respect to education, defining a "protected handicapped student" as:

> A student who meets the following conditions:
>
> > (i) Is of an age at which public education is offered in that school district.
> >
> > (ii) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program.
> >
> > (iii) Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under § 15.10 (relating to discrimination claims).

22 Pa. Code § 15.2.

Intentional discrimination requires a showing of deliberate indifference, which may be met by establishing "both (1) knowledge that a federally protected right is substantially likely to be violated … and (2) failure to act despite that knowledge." *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013).

The Parents' Claims

The first issue is whether the District failed to timely identify Student as a Protected Handicapped Student. The Parents argue on the one hand that Student's declining grades "could only be caused by the concussion related symptoms" (Parents' Closing at 12-13), while the District contended and presented evidence that Student's rocky romantic relationship was a key

factor in Student's behaviors and declining performance.[5] This hearing officer is not persuaded that this potentially contributing influence on Student's behavior during the 2013-14 school year alone accounts for the marked changes from the prior year, but also does not accept the Parents' conclusory interpretation of the record.

Certainly not every child who suffers the same type of injury as did Student, or experiences a notable decline in grades, should automatically be evaluated by a school district. However, here, Student suffered a second such injury, and witnesses for both parties agreed that children who have multiple concussions commonly exhibit pronounced difficulties with cognitive functioning, including focus and concentration, and are at a greater risk for symptoms of depression. The record reflects that in the early part of the 2013-14 school year, Student was exhibiting behaviors of concern at school that contrasted sharply with the prior year, including difficulty focusing in class, and was incurring discipline on multiple occasions, failing to complete assigned work, missing classes, and earning noticeably lower grades. While the SAP referral appears to have been wholly appropriate in mid-October, the subsequent notification from the Parents on October 23, 2013 that Student had suffered a second head injury some weeks earlier, coupled with the obvious changes in Student's demeanor and behavior and the recommendations for numerous accommodations at school by the CC, presented clear indication that Student's academic functioning was considerably limited as a result of that event.

Viewed as a whole from the perspective of what was known in late October 2013, the facts in this case provided more than ample reasons for the District to suspect that Student may have had a disability within the meaning of Section 504 and Chapter 15, and taken steps to make

[5] The District also offered evidence that Student participated in various physical activities depicted in photographs and videos that Student posted on social media. As it conceded, however, it is unknown when those photographs and videos may have been created. (N.T. 1338-40; S-18) I found that evidence to be immaterial to the issues presented in this administrative hearing.

that determination. This hearing officer therefore concludes that, no later than the end of October 2013, the District was armed with enough information to convene a team to include the school psychologist to begin an evaluation to determine whether Student was a child with a disability, consistent with its policy. Had the District done so, completing an evaluation within a reasonable time would have provided sufficient information to assist the District in properly accommodating Student with individualized supports for the remainder of the school year. The failure to proceed with an evaluation amounted to a violation of the District's Child Find obligation.

Borrowing from the timeline for conducting special education evaluations under Chapter 14,[6] an evaluation should have been issued by the end of December 2013. Such an evaluation would then have provided guidance and recommendations for Student's educational programming from early January 2014. And, because the District already had the CC recommendations as a starting point, there is no reason to believe a significant amount of time was then required to develop a Section 504 Plan. Thus, early January is the beginning of the time period for which Student should have been identified and accommodated under Section 504/Chapter 15.

The conclusion that Student did qualify as a Protected Handicapped Student at that time does not end the inquiry on the first issue, however. Although it did not proceed with an evaluation, had the District nonetheless appropriately provided accommodations for Student beginning on October 24, 2013 and continuing through the end of the school year, one might reasonably conclude that no denial of FAPE occurred. The record as a whole, however, compels the conclusion that the District also failed in this regard.

[6] 22 Pa. Code § 14.123(b). Pennsylvania's Chapter 14 is set forth in 22 Pa. Code §§ 14.101 – 14.163 (implementing the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401 – 1482).

The District's practice is, apparently, to follow all recommended accommodations for students who suffer a concussion. Contrary to the Parents' arguments, though, an educational recommendation from a physician or other professional does not automatically demand absolute adherence as a matter of law. For example, the recommendation that Student be provided a reduced workload at a 50-75% level does not mean that any teacher's failure to calculate and provide that specific workload for Student was necessarily inappropriate. Similarly, it is not irreconcilable that the DPS only became involved in the spring of 2014, particularly since her testimony, in hindsight, was equivocal on when she should have been notified of Student's fall 2013 injury. (N.T. 1011-12, 1016-17, 1022-23, 1063) What is convincing is the evidence of what the District did and did not do, and how those actions affected Student's educational performance.[7]

The record does establish that many of Student's teachers implemented accommodations for Student, yet others did not do so on a consistent basis. The fact that Student's grades for the various marking periods in the 2013-14 school year were not finalized until sometime after the start of the next year, and only through efforts of a number of District administrators, speaks volumes about Student having an inadequate opportunity to fairly complete missed assignments and make up tests. Moreover, workload reduction did not appear to be a priority but was instead implemented only occasionally at teacher discretion. Fortunately, the directive of Student's guidance counselor to the teachers to require Student to ask for accommodations was largely ignored. However, Student exhibited a lack of focus and attention in many classes throughout the school year, despite some accommodations, and continued to engage in problematic

[7] I decline to draw an adverse inference because the teachers did not maintain written documentation of the regular education accommodations they provided to Student. The Parents cite no authority for this purported lapse on the part of the District. (Parents' Closing at 30-31)

behaviors and perform poorly. The reasonable reaction to those concerns, even without a Section 504 evaluation, would have been to consider and explore whether Student's educational needs were appropriately being met. It was not until April 2014, just before Student was placed on homebound instruction, that the District finally recognized its obligation to begin an evaluation. That decision was made much too late.

The ongoing decisions to impose discipline on Student in a rigorous and non-wavering manner is at least equally, and arguably more, problematic. This hearing officer must agree with the witnesses who opined that the continued imposition of ISS in the spring of 2014 at the direction of the HSA was not only counterproductive in terms of accommodating Student's brain injury, including through a reduced workload where possible, but served to let Student get farther and farther behind. Student was undoubtedly overwhelmed with an impaired ability to cope with the demands of high school classes, and the insistence on discipline without an examination into whether Student's disability was manifested in the various problematic behaviors further corroborates the denial of FAPE to Student. Asking Student to seek assistance from teachers after school, thereby prolonging the school day rather than decreasing the workload, was similarly inappropriate. The characterization of Student as a "discipline problem" (N.T. 938) simply does not ring true on this record and is unsupported by the other record evidence as a whole. These disciplinary actions in the spring of 2014, furthermore, were not only ineffective, but substantiate the Parents' claim of deliberate indifference, since the HSA and other District staff were aware of Student's two head injuries and consequent need for accommodations, were at least constructively aware that Student may have had a disability, and intentionally failed to consider those factors in its disciplinary actions.

Remedy

The last issue is whether the Parents and Student should be granted the relief that they seek. 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.* *Compare B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Cmwlth. 2006) (rejecting the *M.C.* standard for compensatory education, holding that "where there is a finding that a student is denied a FAPE and … an award of compensatory education is appropriate, the student is entitled to an 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."); *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Giving the District reasonable time to complete a Section 504 evaluation and develop appropriate accommodations to address Student's disability after the October 23, 2013 notice of Student's second head injury, this hearing officer finds that the first day of school in January 2014 is the appropriate date on which to begin an award of compensatory education. The term of compensatory education will end on the last day of school that Student attended before Student's April 2014 injury, at which time Student was placed on homebound instruction and provided appropriate accommodations.

The next question is the nature of the compensatory education. Although the Parents seek reimbursement for tuition that they paid to the District, this hearing officer cannot conclude that such a remedy is sufficiently related to the denial of FAPE to Student, and would do nothing to remedy that deprivation. Unlike a typical case of tuition reimbursement where parents receive recompense for their own costs in providing FAPE,[8] the relief sought here would serve no purpose other than punish the District financially since the Parents assert, and I have found, that the District's program was not appropriate. Thus, the requested remedy will be denied.

Student shall, however, be awarded compensatory education services. The amount of those services is equitably calculated to be one hour per school day, the estimated amount of time that Student would have needed during the school day to complete assignments and tests that focused on essential content, with individualized support as necessary, for the relevant time period.

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 social/emotional/behavioral and/or academic needs. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21), but may not be used for post-secondary tuition. 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

[8] Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *see also* 20 U.S.C. § 1412(a)(10)(C).

are the average of the hourly salaries and fringe benefits that would have been paid to the District teaching professionals who provided educational services to Student during the 2013-14 school year.

CONCLUSION

For the foregoing reasons, the District did fail to timely identify Student as a Protected Handicapped Student, and to provide appropriate accommodations between January and April 2014. Student shall be awarded 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 during the 2013-14 school year, failing to identify Student as a Protected Handicapped Student and provide appropriate educational programing to address disability-related needs.

2. The District acted with deliberate indifference toward Student in imposing discipline in the spring of 2014.

3. The District shall provide Student with compensatory education in the amount of one hour for every school day that the District was in session for students from the first day of school in January 2014 through the last day of school that Student physically attended in April 2014, subject to the following conditions:

    a. 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 social/emotional/behavioral and/or academic needs. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21), but may not be used for post-secondary tuition.

    b. 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 average of the hourly salaries and fringe benefits that would have

been paid to the District teaching professionals who provided educational services to Student during the 2013-14 school year.

4. Nothing in this Order precludes the parties from mutually agreeing to alter any of the directives regarding 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

_____

Cathy A. Skidmore
HEARING OFFICER

Dated: October 31, 2015