

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: T. L.

Date of Birth: [redacted]

### CLOSED HEARING

ODR File No. 16274-14-15 KE

Parties to the Hearing:

Representative:

Parents

Parent[s]

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Dates of Hearing:

12/4/2015, 1/21/2016, 3/15/2016,

3/17/2016, 3/22/2016

Date Record Closed:

April 25, 2016

Date of Decision:

May 7, 2016

Hearing Officer:

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

Certified Hearing Official

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is an early teenaged student who previously attended school in the Blackhawk School District (District). Student is a protected handicapped student under Section 504 of the Rehabilitation Act of 1973,<sup>2</sup> and is currently also identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>3</sup> Student's Parents filed a Due Process Complaint against the District, followed by an Amended Complaint, asserting that the District denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504, as well as the federal and state regulations implementing those statutes. Specifically, the Parents claimed that the District failed to comply with its Child Find Obligations, and that it provided inappropriate programming for Student between January 2011 and the fall of 2013 when Student withdrew from the District, including implementation of its Section 504/Chapter 15 Service Agreements that they assert were not adequate to meet Student's needs. The District contended that its programming for Student addressed all needs exhibited at school, and that no relief was due.

The case proceeded to a due process hearing that was bifurcated to address the scope of the hearing before presentation of evidence on the substantive claims.<sup>4</sup> Following an Interim

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<sup>1</sup> 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. The term "Parents" is used in the plural where it appears that Student's mother, who appeared to be the more active participant in Student's programming in the District, was acting on behalf of herself and the father.

<sup>2</sup> 29 U.S.C. § 794. Pennsylvania regulations provide for school district compliance with Section 504 and its implementing federal regulations in Chapter 15, 22 Pa. Code §§ 15.1 – 15.11.

<sup>3</sup> 20 U.S.C. §§ 1400-1482.

<sup>4</sup> The original Complaint was filed in May 2015. Due to successive scheduling conflicts, a request to amend the complaint in August 2015, and various motions, the first hearing session was delayed. Two hearing sessions addressed only the scope of claims/statute of limitations issue, which could not be completed in a single session because of the need for securing additional evidence requested by this hearing officer. Three sessions convened for evidence on the substantive issues following an Interim Ruling on the scope of the claims. Student was in a charter school placement selected by the Parents throughout the time period within which these proceedings were initiated and completed; thus there was no issue raised regarding Student's current program. References to the record will be

Ruling in favor of the Parents on the statute of limitations, wherein this hearing officer concluded that the Parents filed their Complaint within two years of the date they knew or had reason to know of the facts underlying their claims (S-R), the parties proceeded with evidence on the substantive issues from January 2011 forward.<sup>5</sup> Prior to submission of written closings but after the testimony had concluded, the District filed a Motion for Relief from the interim statute of limitations Ruling based on testimony presented in subsequent hearing sessions; because of the timing of the Motion, this hearing officer determined that issue would be most efficiently addressed as part of this final decision.

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

### **ISSUES**

1. Whether the District complied with its Child Find obligations in failing to identify Student as eligible for special education from January 2011 through Student's withdrawal from the District;
2. Whether the District provided appropriate programming to meet Student's needs from January 2011 through Student's withdrawal from the District;
3. If the District failed in its Child Find or FAPE obligations, is Student entitled to compensatory education and, if so, in what form and amount;
4. Did the District engage in disability-based discrimination on the basis of the asserted FAPE denials;
5. If the District did engage in discrimination, are the Parents entitled to expenses associated with transportation of Student between January 2011 and Student's withdrawal from the District?

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as follows: Notes of Testimony (N.T.); Parent Exhibits (P-) followed by exhibit number; School District Exhibits (S-) followed by exhibit letter or number; and Hearing Officer Exhibits (HO-) followed by exhibit number. The exhibits admitted into evidence, including all procedural documents (S-A through S-R and HO-1), are set forth at N.T. 855 and HO-2. References to duplicate exhibits in this decision may be to one or the other or both.

<sup>5</sup> The Parents' claim related to an Independent Educational Evaluation (S-A p. 8, S-J p. 7) was dismissed on the record at the conclusion of the hearing by agreement of the parties. (N.T. 852-53)

## **FINDINGS OF FACT**

1. Student is a late pre-teenaged child who resided within the geographical boundaries of the District throughout the time period at issue. (N.T. 32-33)
2. Student has historically presented at home with anxiety, signs of depression, withdrawal, lack of attention, and difficulty with social skills, peer interactions, and organizational skills. (N.T. 211-12, 772-75)

### **Entry Into District Through End of 2010-11 School Year**

3. Student began attending District schools at the age of five, attending regular education classes through the end of second grade. In second grade, Student did exhibit some difficulties with attention, following directions, using time wisely, and organizational skills, all of which were discussed between the teacher and Parents, but those signs were not atypical of Student's peers; however, Student's inattention became more noticeable at the end of the school year. The teacher worked with Student informally to address these areas as needed, and Student attained marks of meeting or exceeding standards on a majority of areas and classes. As the school year ended, Student's teacher suggested to the Parents that Student be evaluated due to the attention difficulties, but she did not have other concerns with Student's performance that school year. (N.T. 210-13, 310-11, 363-67, 372-74, 749-55; P-1; S-2)
4. At home and in the community during that year, Student exhibited difficulties with social skills and peer interactions, and those extended to riding the school bus. The Parents transported Student to and from school for the majority of the time Student attended school in the District because of Student's discomfort with riding the school bus. Homework was also frustrating for Student. (N.T. 754-57)
5. The District did not undertake an evaluation of Student prior to the end of the second grade year, and Student was not provided with a Section 504/Chapter 15 Service Agreement (Service Agreement) or Individualized Education Program (IEP). (N.T. 212, 362, 370-71, 753)
6. The Parents had Student evaluated in June and July following second grade by a private psychologist. At the time, the Parents understood Student to have difficulties at school with respect to social skills and social communication, peer relationships, following directions, completing assignments, and organizational skills. Student at that time exhibited other behaviors in the home, and was diagnosed with Anxiety Disorder following that evaluation. Other Axis I diagnoses were Asperger's Disorder, Attention Deficit Hyperactivity Disorder (ADHD), and Sensory Modulation Disorder. (N.T. 214-17, 222, 760; P-2)
7. The private psychologist reported results of a variety of rating scales and inventories, reflecting average cognitive ability; weaknesses in social/emotional and executive functioning with respect to attention, planning and organization, task initiation and

completion, processing speed, working memory, social skills, sensory regulation, and coping with change; and significant anxiety, impulsivity, and distractibility. The teacher's rating scales (NICHQ Vanderbilt Assessment Scales) reflected difficulty with peer relationships, following directions, completing assignments, and organizational skills. (P-2)

8. The private psychologist concluded that Student exhibited the following areas of deficit: social interaction skills, nonverbal communication skills, social cognition (including perspective taking), cognitive rigidity, and sensory modulation, as well as impulsivity, planning and organizational skills, distractibility, task initiation and completion, short term and working memory, and dysregulation of attention, behavior, and emotions. (P-2 pp. 5-6)
9. The private psychologist provided a number of recommendations for Student in the home and educational settings, including behavioral health services (BHS) and a Chapter 15/Section 504 Service Agreement. The majority of the suggestions were general for children with Asperger's Disorder and included recommendations for addressing difficulty with change, teaching social skills, need for positive reinforcement, perseveration, attention and focus, gross and fine motor skills, managing emotions, and academic weaknesses. The private psychologist did identify signs of depression (increased disorganization, inattention, and isolation; fatigue; suicidal ideation) to which adults should be alert. (P-2 pp. 6-18)

#### 2011-12 School Year

10. Student entered third grade at the start of the 2011-12 school year. Students in third grade attend a different building than they did in first and second grade and the transition can be difficult for some children. (N.T. 396, 410, 428-29)
11. The Parents contacted someone in the District administration office before the school year began to explain Student's prior difficulties riding the school bus. The District representative with whom the Parents spoke agreed to contact the bus company. It is unknown what steps were taken to address this circumstance, but Student stopped taking the bus again by sometime in November 2011. (N.T. 756-57, 813)
12. The Parents shared the private psychological evaluation with the District at the start of the 2011-12 school year. They also requested that Student be provided with a Service Agreement under Section 504/Chapter 15. (N.T. 219-20)
13. A meeting convened in September 2011 to discuss the private evaluation and Student's need for accommodations, and to create a Service Agreement. The initial Service Agreement included as its first page a "Chapter 504 [sic] Evaluation" (P-3; S-5 p. 1) that set forth Student's diagnoses from the private psychological evaluation and identified three areas where Student experienced difficulty: maintaining attention, staying on task, and organization. A Service Agreement was recommended. (N.T. 282-83, 593-95, 631-32, 767-67; P-3; S-5 p. 1)

14. The initial Service Agreement provided for the following accommodations: small group counseling; chunking sections on longer tests; opportunity for verbal responses in mathematics; a signed agenda book; and a separate folder for incomplete assignments for homework. The Parents approved the Service Agreement. (P-4; S-5 pp. 2-3)
15. Student's third grade teacher implemented the September 2011 Service Agreement and January 2012 revised Service Agreement. Changes made in January 2012 were to add reverse inclusion to the small group counseling sessions; chunking of all assignments and tests; extra time for assignments; strategies for Student taking necessary materials home; and encouragement of homework completion at school. Student had breaks daily, and a peer buddy assisted Student with organizing materials to go home at the end of the school day. Student also had a card for requesting a break, but did not use that card frequently because Student did not want to appear different to classmates. (N.T. 397, 399, 411, 425-26, 429-30, 433-35, 597-98, 769, 779-80; P-8; S-6 pp. 2-3)
16. Student participated in a lunch group with the school counselor during third grade at the Parents' request to develop and practice social skills. Student also met with the counselor individually on a few occasions using social stories so that Student would be better prepared for new experiences such as transitioning to fourth grade. (N.T. 225-26, 305-06, 592-93, 598-600, 605, 607-08, 637-39; P-5 pp. 4-8; S-18, S-19)
17. Student at times exhibited difficulty following directions, using organizational skills, maintaining attention, and understanding perspectives of others, and sometimes became frustrated. Student specifically worried about what peers thought about Student, but the teacher did not believe this fear or any of Student's behaviors were more significant than other children of Student's age. (N.T. 408-09, 414, 429, 431, 432-33, 435-40, 443-45)
18. Student continued to exhibit difficulty with homework, forgetting to take home materials needed to complete assignments and becoming frustrated. Student engaged in behaviors at home several times a week that were described as shutting down. (N.T. 440-41, 780-81, 783-84)

#### Evaluation February 2012

19. Student was evaluated by the District in the middle of the 2011-12 school year, after the Parents requested an evaluation in early 2012 and gave their written permission. The District issued an Evaluation Report (ER) in February 2012. (N.T. 35-36, 41, 71-72, 83-84, 226-27, 284, 601-02, 768-69; P-6, P-9; S-9, S-12, S-26)
20. The ER provided parent input including a summary of previous evaluations and Student's developmental and educational history; a classroom observation; and input from Student's teachers who reported frustration when following directions or completing tasks, difficulty with peer relationships, and signs of struggling in science class. Curriculum-based and benchmark assessment results were also reported. (P-9 pp. 1-8; S-12 pp. 1-8)

21. At the time of the District evaluation, the District school psychologist was aware of Student's diagnoses including Asperger's Syndrome, Anxiety Disorder, and ADHD. (N.T. 41, 54)
22. The ER included input from the Parents and District staff who worked with Student; cognitive and achievement testing were also conducted. Student scored in the average range on the Wechsler Intelligence Scales for Children – Fourth Edition on all scales, obtaining a Full Scale IQ of 96. Student's performance on the Wechsler Individual Achievement Test – Third Edition was in the average to high average range on the majority of subtests, with numerical operations the sole exception where Student scored in the superior range. (N.T. 232; P-9; S-12)
23. Rating scales from the Behavior Assessment System for Children – Second Edition (BASC-2) were completed by Student's mother and teacher. The ER reported that the scales completed by Student's mother yielded clinically significant concerns with respect to atypical behavior, anxiety, depression, attention problems, and withdrawal; and that the teacher's scales reflected at-risk concerns with attention and atypical behaviors including frustration and lack of awareness of others. The teacher also reported on communication, social, and stereotypic behaviors characteristic of children with Autism Spectrum Disorders (ASD) with results in the possible range; overall the index on this measure was consistent with Asperger's Disorder. (N.T. 38, 41-42, P-9 pp. 11-12; S-12 pp. 11-12 )
24. The teacher's BASC-2 rating scale protocols reflected at-risk concerns in the areas of anxiety, depression, atypicality, withdrawal, and adaptability. The T-score for anxiety was at the 95th percentile, that for depression was at the 92nd percentile, and that for atypicality was at the 92nd percentile. The internalizing problems composite and behavioral symptoms composite were also in the at-risk range. BASC-2 scores in the clinically significant range suggest a notable level of concern in that particular area or domain, while scores in the at-risk range suggest a need for monitoring. (N.T. 101; S-28)
25. An Occupational Therapy evaluation completed as part of the ER reflected no concerns. (P-9 p. 10; S-11, S-12 p. 10)
26. The ER report of the BASC-2 scales did not reflect that Student exhibited anxiety or depression in the educational environment, but did note that Student at times became frustrated with assignments. The District's school psychologist discussed Student's behavioral presentation with the teachers, considered his observations of Student, and concluded that Student was not exhibiting signs of depression or anxiety at school. Specifically, the teacher's rating scales were reported as indicating "some attentional, and atypical behaviors that are not considered to be clinically significant in nature, but do require some monitoring" (P-9 p. 11; S-12 p. 11) with Student exhibiting a short attention span, lack of awareness of others, and frustration when plans changed. That section of the ER concluded with, "In sum, as with the parent report, [Student's] teacher's report highlights some behaviors related to perspective taking and rigid thinking ... as well as some attentional difficulties" (*id.*) that were not as significant at school as in the home. (N.T. 43-44, 49-53, 58-60, 78, 146, 162-65; P-9; S-12)

27. The ER concluded that Student did not have a disability; however, the District school psychologist believed that Student did have a disability but was not in need of specially designed instruction. A Section 504 Service Agreement was recommended to monitor Student in unstructured activities, provide opportunities for breaks, monitor academic performance, and monitor behavior. (N.T. 66-67, 70; P-9 pp. 13-15; S-12 pp. 13-15)
28. The District school psychologist discussed the ER results with the Parents, verbally explaining Student's behavioral presentation at school, including signs of anxiety and depression, in more detail than was reflected in the ER. (N.T. 52, 57, 63, 67-68, 73, 79-81, 86-87, 149-51, 162, 167-68, 234-35, 239-40)
29. The Parents did not disagree with the results of the ER. A Notice of Recommended Educational Placement (NOREP) proposing regular education with Section 504/Chapter 15 Support was approved by the Parents. (N.T. 85-86, 237; S-13)
30. The Service Agreement was revised in March 2012 to add the nonverbal cue card when Student was frustrated; communication between District staff and outside service providers; the opportunity to type written responses to assessments; and a high interest afternoon activity as a transition. (P-10)
31. The District conducted a brief Functional Behavioral Assessment (FBA) in April 2012. Behaviors of concern in the school setting were identified as difficulty remaining on task (daily behavior throughout the day); difficulty finding and organizing materials (several times per week, usually at the end of the day); and frustration resulting in shutting down or self-stimulatory behavior (once or twice per week, particularly at the end of the day, during writing activities, or when the routine was not followed; those behaviors had decreased at school by the time of the FBA). (N.T. 431-32, 643-44; P-12 pp. 1-6; S-23 pp. 1-6)
32. A Behavior Intervention Plan (BIP) was developed following completion of the FBA. Interventions set forth in the BIP were verbal and nonverbal direction to task; access to a daily schedule with notice of changes; redirection; a signal for needing a break when frustrated; use of a keyboard for written work and assessments; provision of study guides as needed; and strategies to assist with transition to fourth grade and develop peer relationship skills. (N.T. 417; P-12 pp. 7-8; S-23 pp. 7-8)
33. The third grade teacher implemented the BIP by providing verbal and nonverbal redirection when needed and providing study guides; and allowing use of a keyboard for written assignments. Student also had a daily schedule. (N.T. 419-20, 422-26)
34. Student achieved final grades of A and B in all classes for third grade. (P-14; S-3)
35. In the spring of 2012, the private psychologist conducted a re-evaluation based on information obtained from the Parents and Behavior Specialist Consultant (BSC), and issued another report, with no changes to Student's diagnoses. By then, Student had begun to receive BHS: 4 hours per week by the BSC, 2 hours per week of Mobile Therapy (MT), and 6 hours per week of Therapeutic Staff Support (TSS). At that time, the private psychologist recommended TSS services at school (15 hours per week) to



address task initiation and completion, planning and organizational skills, transitions, social skills, and coping skills. The Parents shared this report with the District. (N.T. 240-42, 779, 781; P-11)

### 2012-13 School Year

36. Student entered fourth grade at the start of the 2012-13 school year. The class was an inclusion classroom with a learning support teacher. (N.T. 454, 502)
37. Student's TSS services began at school on a daily basis in the fall of 2012. The BSC and MT also worked with Student; the BSC was in the classroom approximately once per week. (N.T. 242, 244-45, 480-81, 657, 660, 670-71)
38. Student began the school year riding the bus. Student and a friend had a disagreement about an incident on the school bus in the fall of 2012. The school counselor spoke with both children and the situation was resolved; however, Student again stopped taking the school bus for the rest of the school year. (N.T. 288-89, 609-11, 759-60; P-5 pp. 9-10)
39. At Student's request, Student participated in two lunch social skills groups during fourth grade with the school counselor (N.T. 286, 305, 592, 600-01, 637-39)
40. The BHS team created a treatment plan for Student that set forth goals and objectives for various domains, including family and educational, and a crisis plan for emergencies. The TSS worker collected data at school each day. The treatment plan was reviewed each month to assess progress on the goals and objectives. (N.T. 664-65, 668-69)
41. Student's BHS team determined that Student had needs at school with respect to maintaining attention to and completing tasks; expressing, managing, and regulating emotions; and organizing materials. (N.T. 677-82; P-25)
42. Student's Service Agreement was reviewed at a meeting held in September 2012. No changes to that Service Agreement were made from the prior version. The BIP was not part of that September 2012 Service Agreement. (N.T. 455-57, 785-86; P-10; S-7 pp. 2-3)
43. Student's fourth grade teacher implemented the then-current Service Agreement (without a BIP) as needed. Student was able to use a card to request a break but did not so do frequently; instead, Student tended to keep the card hidden from view. Student was given extra time for completing assignments, and had a signed agenda book. Student did not use a keyboard for written assessments and did not have a positive behavior support plan; nor was there a classroom behavior plan. (N.T. 455-56, 461, 468-69, 474-77, 494-96; P-25 pp. 47-48)
44. In or about February 2013, the Parents noted that Student's anxiety had worsened, and BHS and District staff reported similar observations at school. Student became resistant to attending school. Student also expressed to the Parents difficulties Student was

experiencing at school socially and academically, and the teacher observed Student's frustration. (N.T. 790-91; P-5 p. 11; P-25 pp. 4-10, 50)

45. In the spring of 2013, the private psychologist conducted another evaluation and issued another report. The previous diagnoses remained with the addition of Provisional Sleep Terror Disorder. At the time, Student was receiving four hours per week of BSC services, 1.5 hours per week of MT, and 10 hours per week of TSS services (a decrease of 5 hours per week). Although no school information was provided for that report, the BHS providers noted that Student had had an increase in negative peer relationships. The private psychologist recommended that TSS services be discontinued at the end of the 2012-13 school year. The Parents shared this report with the District. (N.T. 792-93; P-16)
46. Student exhibited inattention, frustration, and difficulty with peers at times during that school year; frequently required redirection and prompting to complete tasks; spoke out inappropriately; and fell asleep in class. Student also experienced difficulty and frustration with writing assignments, requiring the regular education teacher to provide assistance when that occurred. Student resisted assistance from the learning support teacher, TSS worker, and BSC, because Student did not want to appear different from other students. (N.T. 462-63, 477-80, 482-84, 494-96, 500-02; P-5 pp. 11, 16; P-25)
47. Student earned all A and B grades in fourth grade over the course of the school year and as final grades. (P-17; S-4)
48. During the summer of 2013, the BSC conducted another FBA that included information from the teacher for the end of the 2012-13 school year. Identified areas of concern were self-regulation and coping skills, social skills, attention to task, organization, and self-esteem. The BSC developed a hypothesis that Student engaged in problematic behaviors at school in order to gain attention or avoid/escape tasks and peer interactions. A new treatment plan was developed prior to the start of the next school year. (N.T. 685-87, 695; P-25 pp. 21-28)
49. Student was again evaluated by the private psychologist in August 2013. BHS input into this evaluation reflected some progress and some regression toward treatment goals, with significant difficulties with peers at the end of the 2012-13 school year and several instances of Student lying over the summer. Student's teacher provided information about Student's continuing frustration, difficulties with peers, attention, organizational skills, managing behavior, impulsivity, anger, and aggression. The previous diagnoses were unchanged, and the private psychologist recommended a gradual fading of TSS support and a new multidisciplinary evaluation at the start of the school year. The Parents shared that report with the District. (N.T. 798-800; P-18)

#### 2013-14 School Year

50. In early September 2013, the BSC met with the Parents, Student's teacher, the building principal, and District School Psychologist to discuss the recent FBA. The Parents also

reported that Student had had a difficult summer with respect to Student's emotions. (N.T. 696-97, 798-99)

51. TSS services were to be discontinued during Student's fifth grade school year, with a gradual fading of that support ending in January 2014. (N.T. 251, 795-96, 801-02; P-5 pp. 13-14)
52. Student had the same teacher in fifth grade as Student had had in second grade. From the start of that school year, Student began to exhibit resistance to attending school. The Parents asked for a designated support person at school to assist Student when having those difficulties, but the District offered to have several staff available for that purpose. (N.T. 255-57, 312, 802-03, 805)
53. Also at the beginning of the school year, the Parents and school team met to discuss the Section 504 Agreement. The Parents expressed concerns about Student's frustration about school. The team agreed to make a staff person available to Student any time Student was frustrated or upset, designating several individuals to take that role depending on availability. (N.T. 292-94, 314-16, 613-14, 800-02, 824)
54. The September 2013 Service Agreement provided the following accommodations: reverse inclusion to the small group counseling sessions; chunking of assignments with extra time for completion as needed; encouragement of time management skills, monitoring of agenda book, and use of an organizational binder; private discussion with teacher when problematic behavior occurred; 'theraputty'; communication between District staff and outside service providers; parental notification to staff when Student was experiencing emotional difficulty; availability of the sensory room for de-escalation. The Parents approved this Service Agreement. (P-20; S-8 pp. 2-3)
55. The District has a practice of retaining the Section 504 Evaluation for attachment to all Service Agreements for that student. The only changes to that document for Student's Service Agreements was to the date and grade level, with new team member signatures. (N.T. 282-84; P-7, P-15; S-6 p. 1, S-7 p. 1; S-8 p. 1)
56. Student's fifth grade teacher implemented the Service Agreement in place for that school year for the one month period Student attended. However, Student did not ask to go to the sensory room, and the teacher was never advised that Student was experiencing emotional difficulty before arriving at school. Student did express to the teacher on one occasion that Student was concerned about the amount of homework in the fifth grade classroom. (N.T. 375-80)
57. Student and a peer had a few disagreements in the fall of 2013. The school counselor spoke with Student and Parents, and discussed the situations with the teacher and principal. Student at that time also expressed concerns that Student was causing consequences to the entire class by Student's actions, and shared a belief that a classmate "was telling on" Student (N.T. 616 L 10). (N.T. 290-92, 318-19, 615-17)
58. In mid-September 2013, Student, a peer, and the MT were at the family's home when Student became very upset. Student expressed [redacted] ideation at the time. (N.T. 698)

59. Student continued to have difficulty attending school and emotional outbursts at home at the end of the school day through September 2013, and that month the Parents decided to enroll Student in the District cyber school program. Initially Student would attend school for a half day and the cyber program for a half day. Student experienced significant difficulty making the transition to that program, exhibiting tantrum behavior and expressing negative feelings about Student' self and ideas of harming Student's self. The Parents reported these expressions by Student to the District. (N.T. 257-59, 262-64, 806-08, 824-25, 827, 835-37, 839-40; P-5 pp. 17-20)
60. The Parents decided to withdraw Student from the District in early October 2013 after the lack of success with the cyber school program. (N.T. 265, 809; P-5 pp. 21-23)

#### Out of District Evaluation and Programming After Withdrawal from District

61. Student began attending a cyber charter school for the 2014-15 school year and the beginning of the 2015-16 school year before that school closed. Student attended the program at a learning center five days per week receiving small group instruction. This cyber charter school evaluated Student in May 2015 and found Student eligible for special education on the bases of ASD and Other Health Impairment. An IEP was developed and implemented beginning in May 2015. (N.T. 511-12, 537-39, 542; P-27 p. 19; P-28)
62. Student was privately evaluated by a certified school psychologist who issued a report in March 2015. She summarized Student's developmental, medical, and educational history in that report, as well as behavioral observations during assessments and at the charter school program. (N.T. 552-53; P-26)
63. Student's cognitive functioning was assessed using the Woodcock Johnson Tests of Cognitive Abilities – Third Edition. Student earned a Global Intellectual Ability score of 95 (average) but with variability among subtests and a noted weakness in cognitive efficiency, including processing speed, and cognitive fluency. On the Woodcock Johnson Tests of Academic Achievement – Third Edition, Student attained average scores in reading, low average to average in mathematics, low average to average in written expression, and low average to superior in oral language. Reading and mathematics were determined to be relative strengths, with written expression a relative weakness. Assessment of memory and executive functioning revealed low average memory skills with nonverbal memory better developed than verbal memory. (N.T. 559-63; P-24)
64. BASC-2 rating scales were obtained from the Parents, Student, and a teacher at the charter school. Results from the father and Student were questionable based on the validity index. Student's mother's BASC-2 scales reflected clinically significant concerns in the following areas: hyperactivity, internalizing problems, anxiety, depression, somatization, behavioral symptoms, atypicality, withdrawal, adaptability, functional communication, anger control, developmental social disorders, emotional self-control, executive functioning, negative emotionality, and resiliency. At-risk areas of concern were externalizing problems, aggression, conduct problems, attention problems,

leadership, and activities of daily living. Student's teacher reported at risk concerns in the areas of attention problems, withdrawal, adaptability, and resiliency. (N.T. 568-69; P-26)

65. The private school psychologist concluded that some evidence supported a diagnosis of Asperger's Disorder. She also determined that student was eligible for special education as a child with a disability under the IDEA under the ASD category, and possibly under a second category of Emotional Disturbance due to Student's behavioral concerns. This school psychologist did not discuss whether Student had a need for specially designed instruction by reason of those disabilities. She did make a number of recommendations for educational and therapeutic interventions to address Student's needs. (N.T. 568-69, 587, 588; P-26)
66. Student began attending a different cyber charter school program in November 2015. Student accessed that program online from a location that was not affiliated with the cyber school but was outside of the family home through an arrangement with several families whose children attend the cyber school. Student had an IEP through that cyber charter school. (N.T. 711, 713, 733-34; P-31)
67. The BSC continued to work with Student as of the time of the due process hearing. (N.T. 657, 702)

## **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). This hearing officer found each of the witnesses to be credible, testifying to the best of their recollection; discrepancies in the testimony are more likely the product of variance in memory than any lack of candor. It should also be noted that the Parents presented as very concerned and loving parents who advocated strongly for Student; and all of the District personnel presented as qualified professionals dedicated to their fields and to Student's educational needs.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision. The parties' thorough Closing Arguments were also accorded attention and deliberation.

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

education agencies (LEAs) 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).

An LEA “need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a ‘basic floor of opportunity.’” *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 533-534 (3d Cir. 1995) (quoting *Rowley*, *supra*, at 201); *see also Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Nevertheless, the U.S. Supreme Court over thirty years ago 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 passing grades, such as by an inability to engage in appropriate social relationships with peers or enter the school building ready and able to learn.

#### 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).

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, supra*, at 253 (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).

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *Lower Merion, supra*, at 931.

#### District Motion Under Fed. R. Civ. P. 60(b)(2)

A preliminary issue to be addressed is whether the District’s Motion for Relief from the Interim Ruling on the statute of limitations should be granted based on testimony in a subsequent hearing session by Student’s mother. Without resort to reliance on the Federal Rules of Civil Procedure, an administrative hearing officer surely has authority to revisit rulings and



determinations other than a final decision made during the course of the hearing<sup>6</sup> should grounds therefor exist. The District posits that certain statements the mother made in a March 2016 session contradict her earlier testimony that formed the basis for the conclusion of the hearing officer that the Parents did not know, and had no reason to know, of the critical facts underlying their claims until the fall of 2013.

This hearing officer does not read the mother's testimony so expansively as to constitute a contradiction of her earlier accounts with respect to the statute of limitations and her knowledge prior to September 2013. Rather, the testimony cited by the District, particularly when viewed in the context of the record as a whole, established the mother's understanding as of the spring of 2016, and not the degree of knowledge she held during the 2011-12 and 2012-13 school years. Accordingly, absent any evidentiary basis to reconsider or further review the Interim Ruling, the District's Motion for Relief therefrom will be denied.

One other preliminary matter is the District's objection to several witnesses who were involved with Student after the withdrawal, which this hearing officer kept under advisement. (N.T. 504-05, 549-50, 706-10) The testimony of those particular witnesses was considered only to the extent helpful to provide context and understanding of Student's current programming, and the objections are sustained to the extent the evidence was proffered as proof that Student had special education needs in the fall of 2013 and previously. Children's needs change over time, as clearly occurred in this case during the relevant time period; and, educational programs must be assessed based on the information known at the time they are developed. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993) (explaining that, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not

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<sup>6</sup> The decision issued following completion of the hearing is final, subject to either party's right to file an appeal. 20 U.S.C. § 1415(i)(1)(A); 34 C.F.R. § 300.514(a).

at some later date.”).

### Child Find

The first substantive issue is whether the District complied with its Child Find obligations in failing to identify Student as eligible for special education as early as January 2011. As noted above, school districts are required to locate, evaluate, and identify children who are in need of special education. These obligations must occur 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 required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted). Nevertheless, when a school district has reasonable suspicion of a disability, the obligation is triggered. *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009). Child Find is an ongoing requirement. *Id.*

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). Further,

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

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

34 C.F.R. § 300.39(b)(3). “There is no precise standard for determining whether a student is in need of special education, and well-settled precedent counsels against invoking any bright-line rules for making such a determination.” *Chelsea D. v. Avon Grove School District*, 2013 U.S.

Dist. LEXIS 98125 \*24 (E.D. Pa. July 15, 2013) (quoting *West Chester Area School District v. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002)).

The FAPE obligation under Section 504 includes the duty of Child Find. 34 C.F.R. § 104.32; *Ridgewood* at 253. As explained in an analogous context, local education agencies are required to fulfill those Child Find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995).

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.* Pennsylvania’s Chapter 15 provides further guidance to school districts in compiling necessary information in order to develop an appropriate plan for related aids, services, or accommodations under Section 504/Chapter 15, including the regulations implementing Section 504, 34 C.F.R. §§ 104.1 – 104.61. 22 Pa. Code §§ 15.1, 15.5, 15.6.

The Parents contend that the District should have suspected that Student had a disability by January of 2011 when Student was in second grade. The evidence, however, does not support such a conclusion under either the IDEA or Section 504. While it is true that Student did not master all skills expected of second grade students by the end of that school year and exhibited some difficulties with attention and following directions, it is important to remember that children of Student’s age at the time typically experience similar difficulties, as was the case here. The teacher discussed those matters with the Parents and worked informally with Student as needed, but did not consider Student’s difficulties atypical of Student’s classmates until the

end of the school year when Student's lack of attention and focus became more concerning. Student's final report card showed success across the majority of skills that second graders are expected to master. While it is somewhat troubling that the suggestion was made to the Parents to arrange for an evaluation, even if the District had initiated that process at the end of the school year, it is reasonable to conclude that any evaluation would not have been completed until sometime after the beginning of the next school year.<sup>7</sup>

The Parents obtained and shared with the District the private evaluation they obtained over the summer of 2011 at the start of Student's third grade year. Assuming without deciding that the District then had sufficient information to develop a Service Agreement without conducting its own evaluation, a plan was developed to address Student's needs that were exhibited in the classroom based on the second grade teacher's completion of a rating scale to gauge symptoms of ADHD.<sup>8</sup> Each of those needs (difficulty with peer relationships, following directions, completing assignments, and organizational skills) were addressed through accommodations in the initial and modified Service Agreements in September 2011 and 2012 as well as Student's participation in social skills groups. Although the Parents contend that the District failed to incorporate all of the recommendations of the private psychologist, it is important to recognize that the majority of his suggestions were general rather than specific to Student. For example, the initial report recommended that academic difficulties and fine and gross motor needs be addressed, but neither of those were identified as weaknesses for Student in the educational environment during second or third grade. It is also evident that Student's

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<sup>7</sup> Pennsylvania's Chapter 14 provides for special education initial evaluations to be completed within 60 calendar days, but that timeline is suspended when school is not in session over the summer. 22 Pa. Code § 14.123(b). This timeline is permitted by the IDEA and its federal regulations. 2 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c).

<sup>8</sup> The NICHQ Vanderbilt Assessment Scale is a broadband measure useful for evaluating behaviors including those indicative of ADHD. JEROME M. SATTler, FOUNDATIONS OF BEHAVIORAL, SOCIAL, AND CLINICAL ASSESSMENT OF CHILDREN 462-63 (6<sup>th</sup> ed. 2014).

behavior presentation at home was much different than that at school during those school years. Overall, the District's approach to identifying Student's educational needs was appropriately responsive in the fall of 2011.

Similarly, the District's special education evaluation in the second half of that school year was sufficiently comprehensive to assess Student in all areas of suspected disability. In conducting such evaluations, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained. The LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining" the child's eligibility for special education and the content of an IEP. 34 C.F.R. §§ 300.304(b); *see also* 20 U.S.C. § 1414(a)(1)(C). The evaluation must assess the child "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]" 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified," and utilize "[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]" 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Upon completion of all appropriate assessments, "[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]" 34 C.F.R. § 300.306(a)(1); *see also* 20 U.S.C. § 1414(b)(4)(A).

The District's ER included input from the Parents and teachers, and provided results of

assessment of Student's cognitive ability, academic achievement, fine motor skills, and social/emotional/behavioral functioning. While the ER could have provided more detail about the extent to which Student exhibited signs of anxiety and depression at school, the purpose of having a certified school psychologist administer the assessments is to allow for his or her expertise in interpreting the results based on a review of all available information, as the District's school psychologist persuasively explained. (N.T. 58-63) Simply put, Student was not demonstrating the level of difficulty in these areas at school that Student was experiencing at home, and this hearing officer finds the District school psychologist's testimony on how and why he reported the BASC-2 results as he did to be well within his educational background and experience. The ER appropriately concluded that while Student did present with a disability, Student did not at that time require specially designed instruction as a result of that disability. The assessment results did suggest that careful monitoring of Student at school with respect to several areas, including anxiety, depression, and atypicality, was necessary going forward. In addition, an FBA in March 2012 revealed that Student was exhibiting behaviors of concern: difficulty remaining on task and finding and organizing materials, and exhibiting frustration; and, the Service Agreement was revised and a BIP developed to add interventions (access to a daily schedule, redirection, a cue card signaling frustration, availability of a keyboard, a transition activity, study guides, and transition to fourth grade). Thus, throughout the school year, as Student's needs became more pronounced, the District continually made revisions to its accommodations and approaches that appropriately responded to Student's changing presentation.<sup>9</sup> Moreover, "[w]hen a school district has conducted a comprehensive evaluation

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<sup>9</sup> The Parents did object to testimony about teaching practices and interventions that went beyond the four corners of the Service Agreements. (N.T. 381-83) The objection was noted for the record; however, this hearing officer does not conclude that evidence of standard teaching practices, regular education interventions, or informal accommodations and strategies that went beyond the terms of the Agreements is inadmissible, or should be

and concluded that a student does not qualify as disabled under the IDEA, the school district must be afforded a reasonable time to monitor the student's progress before exploring whether further evaluation is required.” *Ridley School District v. M.R.*, 680 F.3d 260, 273 (3d Cir. 2012). For all of these reasons, this hearing officer does not conclude that the District failed in refusing to find Student eligible for special education under the IDEA in the spring of 2012.

To the extent that the Parents raised Child Find claims for the 2012-13 and 2013-14 school years, they will be addressed below with the FAPE issue for ease of discussion.

### FAPE

As noted above, FAPE under the IDEA requires the provision of “significant learning” and “meaningful benefit” under the IDEA, *Ridgewood, supra*, at 247, through an IEP that is reasonably calculated to provide those elements at a level that provides appropriate educational opportunity without seeking to maximize the child’s potential. All domains of education, including academic, behavioral, social, and emotional weaknesses, are encompassed within FAPE.

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, supra* 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

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disregarded, when considering how the plan was implemented. *A.K. v. Alexandria City School District*, 474 F.3d 672, 672 (4<sup>th</sup> Cir. 2007) (refusing to consider evidence of proposed placement that did not appear in IEP when evaluating the appropriateness of the offer). In addition, the cases on which the Parents relied are all outside of this jurisdiction, factually distinguishable, and not binding. *Id.*; *Systema v. Academy School District*, 538 F.3d 1306, 1315 (10<sup>th</sup> Cir 2008) (concluding that evidence of offers to amend portions of the IEP was not admissible in consideration of whether the offer was a proposal of FAPE; analysis was confined to the content of that written document); *Union School District v. Smith*, 15 F.3d 1519, 1525-26 (9<sup>th</sup> Cir. 1994) (concluding that school district was required to make a formal offer of placement so that parents could adequately consider the proposal).

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).

Having found that the District did not violate its Child Find obligations and appropriately responded to Student’s needs through the end of the 2011-12 school year, there can be no finding of a denial of FAPE. As Student began the 2012-13 school year, the District continued the Service Agreement provisions that had been successful in third grade, and the addition of TSS services served to assist Student with behavioral and emotional manifestations in the classroom. What is troubling, however, is that the BIP was discontinued and nothing was put in place to replace its provisions; and, quite significantly, there was no plan in place for monitoring Student’s emotional needs as was clearly recommended as necessary at the time the ER was developed, or for evaluating whether Student was exhibiting the signs of anxiety and depression that the private psychologist had identified.<sup>10</sup> Perhaps not surprisingly, Student was demonstrating many of those very signs during the 2012-13 school year, specifically increased inattention and disorganization, and falling asleep in class; Student also was experiencing more difficulty with peers both in and out of school, had “meltdowns” (P-25 pp. 24-25), and was becoming resistant to attend school. It is difficult to pinpoint when this trend became noticeable; certainly by February 2013, it was very apparent that Student’s needs were not being adequately addressed at school; yet the District did not seek to conduct a new evaluation, reconsider special education eligibility, or revise the Service Agreement.

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<sup>10</sup> While there was testimony that District professionals did not observe signs of anxiety and depression in Student (N.T. 296-97, 319, 635-36), there was no indication that staff were specifically looking for the indications that the private psychologist identified as suggestive of those disorders.



In addition, some of the accommodations were either not made readily available during the 2012-13 school year, or were clearly not working: Student refused to use the cue card or seek assistance out of concern that Student would appear different from peers; Student was not able to access a keyboard but became frustrated with writing assignments; and, despite increased negative peer relationships, the social skills groups were provided only after Student requested to participate. Had the District taken steps to address the significant increase in Student's academic, social, emotional, and behavioral needs as they arose in January and February 2013, it is highly likely that Student would have been identified as eligible under the IDEA before the 2012-13 school year ended.

In September of 2013, the pattern continued and worsened. By then, everyone was aware that TSS services were to be gradually faded toward discontinuance. Despite Student's familiarity with the fifth grade teacher, Student became increasingly more resistant to going to school. While the new provisions in the revised Service Agreement were certainly a step in the right direction, Student's teacher was not aware when Student was experiencing emotional difficulty and there did not appear to be a plan in place for her to make an inquiry rather than rely on receiving advance notice through a report from the Parents. Finally, while the school counselor and principal did not recall having been advised that Student expressed [redacted] ideation in the fall of 2013 (N.T. 207, 319, 385-86, 617, 824-25, 829-30), the mother's testimony was convincing that she did share that information before Student was withdrawn from the District. By that point in time, Student was no longer able to attend school in an environment that was not adequately addressing, or perhaps even fully acknowledging, the severity of Student's needs.

For the forgoing reasons, the record provides more than sufficient evidence from which to conclude that Student was denied FAPE for the second half of the 2012-13 school year and the beginning of the 2013-14 school year until Student was withdrawn.

#### Section 504 Discrimination

The next issue is whether the District discriminated against Student on the basis of Student's disability. This argument as it relates to FAPE has already been adequately addressed above, as claims and standards are essentially the same. However, the Parents further contend that the District's failure to take steps to accommodate Student's difficulties in riding the school bus amount to disability-based discrimination for which they are entitled to reimbursement for expenses.

The only evidence of record on this issue suggests that Student had difficulty with riding the school bus and the Parents voluntarily transported Student to and from school. Student attempted to resume riding the bus on several occasions, unsuccessfully, but there is little indication that the District was made aware of the circumstances except for two occasions. In the first, the limited evidence of that one conversation does not establish what the District did or did not do, including whether it failed to recognize the situation as based on Student's disability or failed to take appropriate steps to accommodate Student. In the second, there is no indication that the District was made aware that its efforts to resolve the matter were unsuccessful. This hearing officer cannot conclude that these two isolated instances are sufficient to establish a Section 504 discrimination claim. Absent such a separate finding of discrimination, there is no foundation for reimbursement of transportation expenses.

## Remedy

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.* Other courts have accepted a more qualitative approach to this remedy. *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Cmwlth. 2006) (rejecting the *M.C.* standard for compensatory education, and 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.”); *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015) (concluding compensatory education may be awarded “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE); *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Having found that the District denied FAPE to Student in the second half of the 2012-13 school year and beginning of the 2013-14 school year, compensatory education is warranted. There was no evidence presented from which one could arrive at an award that would place Student in the same position Student would be in absent a denial of FAPE; thus, an hour for hour

award will be ordered. The District will not be credited with a period of reasonable rectification, however, because Student's needs were well known to it prior to the time period for which FAPE has been denied, and a careful plan of monitoring Student should have been in place in the fall of 2012.

The task of determining the award is difficult in this case,<sup>11</sup> as Student engaged in problematic behavior and exhibited signs of anxiety at various points throughout the school day, but did succeed in making some academic progress; thus, Student was provided with some educational benefit during the second semester of the 2012-13 school year. Based on the state-mandated length of the school day,<sup>12</sup> and considering that the denial of FAPE was for only part of the school day, this hearing officer equitably estimates that Student was denied FAPE for half of that time, or 2.5 hours per day for 90 school days. *See Keystone Central School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). School days that Student shall not attend shall not be deducted from this calculation since it is clear that Student had developed resistance to attending school directly related to Student's disabilities. For the beginning of the 2013-14 school year, when Student was very resistant to attending school at all and was experiencing ongoing and pervasive emotional difficulty, Student's benefit from the educational program may be considered to be minimal at best. Accordingly, Student shall be provided full days of compensatory education, or 5 hours for each day, that Student was enrolled during the 2013-14 school year prior to withdrawal. *Id.*

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<sup>11</sup> The Parents did not make any suggestion or proposal on the amount of compensatory education to be awarded.

<sup>12</sup> Elementary school students are required to be provided with 900 hours of instruction for the school term of a minimum of 180 school days. 22 Pa. Code §§ 11.1, 11.3.

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 needs and skills. Should Student return to the District, 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 sixteen (16).

### **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did fail in its educational obligations to Student under the IDEA and Section 504 for a portion of the relevant time period, and compensatory education is necessary to remedy that denial.

### **ORDER**

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

1. The District's Motion for Relief from the Interim Ruling of February 26, 2016 is **DENIED**.
2. The District failed in its Child Find and FAPE obligations to Student for the second half of the 2012-13 school year and the beginning of the 2013-14 school year.

3. The District shall provide Student with 2.5 hours of compensatory education to address Student's social/emotional needs for every day school was in session during the second semester of the 2012-13 school year.
4. The District shall provide Student with 5 hours of compensatory education to address Student's social/emotional needs for every day Student was enrolled in the District and school was in session during the fall of the 2013-14 school year.
5. 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 needs and skills. Should Student return to the District, 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 sixteen (16).
6. The District did not otherwise discriminate against Student on the basis of Student's disability.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: May 7, 2016