

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.C.
Date of Birth: [redacted]

CLOSED HEARING
ODR File No. 18868-16-17AS

Parties to the Hearing:

Representative:

Parents
Parent(s)

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Dates of Hearing:

5/22/2017, 7/24/2017, 7/27/2017,
7/28/2017, 8/1/2017, 8/8/2017

Date of Decision:

August 21, 2017

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.
Certified Hearing Official

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a late-teenaged resident of the Hempfield Area School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the bases of Autism and Other Health Impairment. Student is now beyond twelfth grade, having previously participated in a local vocational-technical program (VTP) before returning to a full time District program, and then transferring to a different, Intermediate Unit (IU)-provided program at the start of the 2016-17 school year.

In March 2017, Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA),⁴ as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing convening over six sessions.⁵ The Parents sought to establish that the District failed to provide Student with FAPE throughout the time

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 to specific events are intentionally vague to guard Student's privacy and not to minimize Student's unique abilities, needs, and experiences. All identifying information appearing on the cover page of, and elsewhere in, this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2) without disclosing details that identify the child.

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ 42 U.S.C. §§ 12101-12213.

⁵ The number of hearing sessions was necessary due to witness availability, with many sessions lasting only a half day or less. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to duplicative exhibits may be to one or the other or both. References to Parents in the plural will be made where it appears that one was acting on behalf of both, and to the singular Parent to refer to Student's father who was more actively involved in the educational program during the time period in question.

period in question, particularly with respect to post-secondary transition services following a number of incidents involving peers at the VTP, which has resulted in an overly restrictive placement. The District maintained that its special education program, as offered and implemented, was appropriate for Student, and that neither it nor the VTP had knowledge of the peer incidents, but responded appropriately when informed; and, that Student has made appropriate progress in any event.⁶ The decision due date was extended on joint request and the record closed upon receipt of the parties' written arguments.

For the reasons set forth below, the Parents' claims will be granted in part and denied in part.

ISSUES

1. Whether the District complied with its obligations to Student to provide a free, appropriate public education from the start of the 2014-15 school year and continuing through the present?
2. If the District did not comply with its obligations to provide Student with a free, appropriate public education at any point during the relevant time period, should the Parents be reimbursed for expenditures incurred in providing Student with counseling and therapeutic support?
3. If the District did not comply with its obligations to provide Student with a free, appropriate public education at any point during the relevant time period, should Student be awarded compensatory education?
4. Whether the District acted with deliberate indifference to Student in light of Student's disability?

FINDINGS OF FACT

1. Student is a late-teenaged student who is a resident of the District. Student is eligible for special education under the IDEA based on Autism Spectrum Disorder (ASD) and Other

⁶ In a prehearing ruling, the District's Motion to Dismiss all claims against it that involve the VTP based on an asserted absence of an agency relationship between the District and the VTP was denied. (HO-1) This hearing officer observed that the District at no time relinquished its primary obligation to implement Student's special education program. *See R.B. v. Mastery Charter School*, 762 F. Supp. 2d 745, 760 (E.D. Pa. 2010). After the Parents rested, the District's Motion to Dismiss on the basis of an asserted failure of the Parents to meet their burden of proof was also denied. (N.T. 972-73)

Health Impairment (OHI), and is a protected handicapped student under Section 504. (N.T. 54; P-30 p. 11)

RELEVANT BACKGROUND

2. Student does not generally exhibit problematic behaviors in the educational environment. (N.T. 165-66, 169, 440, 442, 739-40, 796-97)
3. Student has difficulty with expressive language and communicating needs and feelings, and has social skill deficits. Student often tries to please others, and will answer questions based on what Student believes the questioner wishes to hear. (N.T. 88, 101, 677-78, 694, 737-38, 750-51, 797, 853-54, 888-89; P-1 p. 4)
4. Student often smiles or laughs when Student is experiencing fear or other negative emotions. (N.T. 679, 806, 824, 831-32, 910-11)
5. Student often stares at others for periods of time, sometimes when Student is not able to express self. (N.T. 850-51, 888-89)
6. Student has significant difficulty with transitions. (N.T. 697; P-27 p. 18)
7. Student has had mental health therapy since before the family's move into the District. (P-1 p. 3)
8. Student began therapy with a behavioral health service provider (BHS) in approximately December 2010 due to Student's anxiety, ASD, obsessive-compulsive disorder (OCD), intermittent explosive disorder, and depression. Behavioral therapy services continued through the dates of the due process hearing, and included medication management. (N.T. 300-01, 664, 666, 945; P-34; S-32)⁷
9. In January 2014, Student was diagnosed with Crohn's disease and underwent surgical procedures. Student reported feeling very concerned about that condition at that time, including not being able to eat certain foods that Student enjoyed. (N.T. 835, 853-54, 860-61, 924-25, 943, 949; S-32 p. 6)
10. Student undergoes regular infusion treatments for the Crohn's disease. (N.T. 805-07; P-20)
11. Student experiences an increase in Crohn's symptoms during periods of stress. (N.T. 808, 816, 890; P-27 p. 21)
12. Since the Crohn's diagnosis, Student has had a history of occasional suicidal ideation. Manifestations of Student's anxiety, depression, and other diagnoses have fluctuated over time. (P-39, P-47, P-48; S-32)

⁷ The District's objection to P-25 was taken under advisement (N.T. 1114-16). There being no indication in the record of the purpose of this letter, the District's objection is hereby sustained.

13. By December 2016, Student was referred for evaluation of an eating disorder. Student at that time perseverated about Student's weight, and Student continued to struggle with the disorder at the time of the due process hearing. (N.T. 331-33, 335-36, 379, 681; P-33; S-32 p. 27)
14. Student's eating disorder is particularly concerning due to Student's Crohn's disease. (N.T. 693-94)
15. The eating disorder is related to Student's OCD and PTSD diagnoses. (N.T. 391-93; P-33; S-32 p. 23)
16. The Parents expressed concern over Student's safety at every Individualized Education Program (IEP) meeting during the high school years, noting a need for supervision and the likelihood of teasing by peers. (N.T. 82, 206-07; P-3 p. 9, P-5 p. 9, P-8 p. 9, P-11 p. 14, P-15 p. 16; S-5 p. 14, S-6 p. 15, S-16 p. 9 S-17 p. 9)

DISTRICT BULLYING POLICIES AND PRACTICES

17. The District has an anti-bullying policy that is included in student handbooks. (N.T. (N.T. 257, 259; P-43; S-1, S-2)
18. The District conducts an assembly each school year where the District's bullying policy is discussed. The high school special education teacher also provided instruction and activities on bullying and self-advocacy during the life strategies class, and other teachers reviewed the policy at the beginning of the school year. (N.T. 198-204, 259, 1071; S-4)
19. The administrative procedure for making a complaint about bullying in the District is available on the District website. That procedure includes information about the rights of parents and students and identifies the contact person for each school building. (N.T. 260, 265; P-44)

ENTRY INTO DISTRICT

20. The family moved into the District in June of 2009. (N.T. 848)
21. The District conducted an evaluation of Student in the fall of 2009 and issued a Reevaluation Report (RR). Student's diagnoses included Attention-Deficit/Hyperactivity Disorder (ADHD) and OCD. A history of speech services from which Student was dismissed was also noted. (P-1 pp. 1-6)
22. Assessments conducted for the RR were the Woodcock-Johnson Tests of Cognitive Ability – Third Edition and Woodcock-Johnson Tests of Achievement – Third Edition. Student scored in the low range cognitively with some variability among clusters and subtests. Student's achievement scores ranged from low to low average with noted weaknesses in the areas of reading, mathematics, and written expression. Student was determined to be eligible for special education on the basis of an OHI, to be addressed by a program of learning support at the supplemental level. (P-1 pp. 7-11, P-2)

23. The District's middle school is comprised of students in grades six, seven, and eight. Student's program remained one of learning support at the supplemental level through most of middle school until it was increased to full time learning support in the fall of 2012. (N.T. 58, 60-61; P-3, P-5, P-6; S-16, S-17, S-18)
24. In a new RR issued in May 2012, the Parents noted concerns that Student might be teased by other students and asked that Student be well supervised at the middle school. An Autism diagnosis was noted in this RR. Student remained eligible for special education on the bases of OHI and ASD. (P-4)

ENTRY INTO HIGH SCHOOL

25. Student entered the high school at the start of the 2013-14 school year for ninth grade. At the IEP meeting to plan for that transition, the Parent expressed concern for Student's safety in school and a need for close supervision in the high school. (N.T. 78-79, 92, 155, 857-58; P-8; S-17)
26. The ninth grade special education teacher spoke with Student's former teacher at the middle school to develop a new post-secondary transition goal for Student to complete career interest surveys. Student did complete a career interest survey. (N.T. 86-87; P-10 p. 7)
27. Student's May 2013 IEP for implementation in ninth grade included transition planning through exploration of technical school training based on an interest that Student had. Additional goals and objectives addressed needs in reading fluency and comprehension, mathematics application and problem solving, and written expression. Program modifications and items of specially designed instruction included monitoring work at the beginning of assignments, positive reinforcement of behavior, limited objectives, limited paper and pencil tasks, modified and adapted materials and assessments, repeated directions, prompts and cues, multisensory cues and manipulatives, and direct instruction in reading and mathematics. A classroom paraprofessional was specified for all academic classes. (P-8; S-17)
28. Student's May 2013 IEP provided for learning support at a supplemental level, a decrease from the prior school year. The Parents approved the Notice of Recommended Educational Placement (NOREP). (P-8 pp. 27-28, P-9; S-17 pp. 27-28)
29. Student's ninth grade program was one of full time special education with the exception of a separate learning support reading class that Student took outside of that classroom. The full time special education class was considered to be learning support with some activities designed for development and practice of life and daily living skills. (N.T. 99-100, 212)
30. Student's high school special education classroom typically had eight to ten students. Students were provided small group instruction in English and mathematics depending on ability levels. (N.T. 151)

31. Student had a life strategies class at the high school that worked on independent living skills including vocational skills. (N.T. 78-79, 144)
32. Student had access to a paraprofessional who provided support for the classroom in most classes at the high school. (N.T. 89-90, 1006-07, 1011-12, 1053)
33. Student's adaptive physical education and most elective and special classes did not include regular education students in the class. Student's special education class did have lunch in the cafeteria with other students. (N.T. 160-63)
34. In the high school, Student was a member of a group responsible for making deliveries of supplies throughout the high school several days each week in addition to similar tasks throughout the building. Student enjoyed those experiences and expressed an interest in working for a company that provided delivery services. (N.T. 95-96, 157-60, 808-09; P-8 p. 13)
35. Student was able to successfully transition throughout the high school and generally exhibited appropriate social skills with peers in that environment. (N.T. 163-65, 1009, 1015)
36. Student completed a career interest survey each year at the high school. Those surveys also explored the level of support a student would need in post-secondary living if not independent. (N.T. 87, 95, 103, 144)
37. Student asked the high school special education teacher for work missed when Student was absent. (N.T. 88, 102, 165)
38. The high school special education teacher did not observe Student to express frustration with challenging material. (N.T. 79-80, 137)
39. The high school special education teacher occasionally observed Student to make inappropriate comments and to stare at others at school during ninth grade. (N.T. 80-81, 195)

THE VOCATIONAL TECHNICAL PROGRAM - GENERAL

40. Students in ninth grade in the District go to an assembly to learn about the VTP. That program is available to students in grades ten through twelve in the District. (N.T. 84, 283) (S-17 p. 12 reference)
41. The VTP provides programming to prepare high school students for employment in a variety of areas. A number of school districts have students at the VTP and students attend for half days, either morning or afternoon. (N.T. 399, 401)
42. Student's VTP program provided instruction in the classroom and learning activities in a larger open area below the classroom. A portion of the day involved classroom instruction and a portion involved practicing skills in the larger open area. (N.T. 400-04)

43. Students at the VTP program review the student handbook at the start of the school year. The student handbook contains the bullying policy for the VTP. (N.T. 438-39, 474-76, 480, 524-25, 526; P-42; S-33)
44. A District transition coordinator was responsible for overseeing students at the VTP, which in turn provided quarterly progress reports to the District. Staff in both programs communicated regularly about students as needed, and District staff believed that the VTP would advise it of any concerns. (N.T. 98-99, 105-07, 116, 251-52, 258, 412-14, 415)

PLANNING FOR STUDENT'S ENTRY INTO AND ATTENDANCE AT THE VTP

45. At a meeting in April 2014, members of Student's IEP team including both Parents discussed Student's enrollment in a program at the VTP that was in line with Student's career interest. A representative of the VTP participated in that meeting by telephone. (N.T. 96-97, 101-02, 173-74, 802-03, 814, 837, 865-67; S-5)
46. At the April 2014 meeting, the Parents expressed concerns with Student's social skill deficits and safety, noting that Student smiled at inappropriate times and could be subject to teasing by peers. The Parents did agree with the other members of the IEP team that Student would attend the VTP. (N.T. 802-03, 862, 865-66)
47. A new IEP was developed in April 2014. Needs identified in that IEP were for reading fluency and comprehension, mathematics application and problem solving, and written expression skills; frequent checks for understanding and self-monitoring of behavior (staring at others, making inappropriate comments, and silly behavior) were also noted. (P-11; S-5)
48. Transition services in the April 2014 IEP included attendance at the VTP in an area of Student's interest for the morning and a return to the high school for the afternoon for classes in English, reading, mathematics, and special classes, and prevocational and independent living skills. (P-11; S-5)
49. Annual goals and short-term objectives in the April 2014 IEP remained the same as in the May 2013 IEP except that a reading comprehension goal for certain classes was removed (classes that Student would no longer take). The previous program modifications and items of specially designed instruction also remained, with the addition of test and assignment accommodations and graphic organizers, outlines, and written directions. (P-11)
50. In the April 2014 IEP, the classroom paraprofessional for academic classes would continue and a PCA during transportation to and from the VTP was added. Student's program remained supplemental learning support. (P-11; S-5)

2014-15 SCHOOL YEAR

51. Staff at the VTP were provided with IEPs for students who have one. The District expects VTP staff to implement a student's IEP. Student's IEP was provided to the VTP

teacher for Student and a special education teacher. (N.T. 98-99, 104-05, 113-14, 253-54, 405-06, 506-08)

52. During the 2014-15 school year, Student had a PCA on the bus to and from the VTP because it was an unstructured setting. The team did not believe that a PCA was needed while Student attended the VTP because there was sufficient support provided in the program itself. (N.T. 94-95, 103-04, 173, 863; S-5 p. 8)
53. Approximately fifteen to twenty students were typically in a class in the VPT program Student attended. The teacher sometimes had an aide in the classroom. (N.T. 401-02, 453-54)
54. Classroom instruction at the VTP was typically small group work but also included whole class and individual work. The teacher was able to frequently check on Student's understanding as occurred for all students in the program, as well as whether any student was having difficulty or was inattentive. (N.T. 404, 407-08, 423-24, 426, 454, 455)
55. Most activities in the open area were conducted in small groups. (N.T. 432, 454)
56. Students usually started with classroom work and then would move to the open area for practice activities when the classroom work was completed. At times, there were students in the classroom and also in the open area. The teacher tried to be within sight or sound distance of the classroom and open area at all times when students were in both places, but it was not possible to monitor every student at all times. (N.T. 426-27, 428, 430-31, 445, 447, 459-64, 485, 489-90, 613; S-34)
57. In Student's VTP program, students were responsible for receipt of materials and supplies for delivery throughout the building. Student participated in receipt and delivery of materials at the VTP, an activity that usually was done with a partner. (N.T. 399, 431-33, 443, 485-86, 609)
58. Student's VTP teacher used positive reinforcement with all students. (N.T. 410-11)
59. Students who needed additional assistance could go to the VTP resource room that is staffed by special education teachers. (N.T. 406, 416-17, 424, 497-99, 540)
60. Students in the VTP program Student attended had extra time for tests and assignments when needed. If a student needed a test or assignment modified, a special education teacher in the resource room would assist. (N.T. 422-23, 510)
61. Student was provided extended time for assignments as needed at the VTP. (N.T. 114, 416; S-10 p. 3)
62. Student's VTP program teacher did not observe any incidents involving Student that caused concern or was out of the ordinary for students of that age. No concerning incidents involving Student were reported to that teacher. (N.T. 433-34, 441-42, 447-49, 469-71, 474, 477, 481-84)

63. Student's VTP program teacher did observe Student to be teased by peers about a certain bodily function. (N.T. 482-83, 583)
64. Student's VTP program teacher was not aware when Student attended that Student would smile at inappropriate times. (N.T. 469)
65. The high school special education teacher spoke with the Parent in December 2014. At the time, Student was exhibiting signs of depression at home. The teacher did not observe similar signs at school. (N.T. 167-68)
66. Around the middle of the 2014-15 school year, Student mentioned to the Parents some troubling incidents with peers such as a peer throwing backpacks and Student's lunch. The Parents did not believe those incidents to be of major concern. Around the same time, Student stopped participating in some activities that Student previously enjoyed. (N.T. 812-13, 839-40, 867-68)
67. Student ingested a large quantity of pills in January or February 2015. (N.T. 347, 382, 839, 871)
68. Student's high school special education teacher spoke with a teacher at Student's VTP program in approximately February 2015. That conversation followed a report that Student had picked up food from the floor and was eating that food. Student's high school special education teacher called and spoke with the Parent about that incident. (N.T. 107-08, 113, 180-81, 214, 218-19, 420, 500, 814-16, 869-70, 1142; S-10 p. 3)
69. Student's IEP team determined in February 2015 that Student was not eligible for Extended School Year (ESY) services. (P-12)
70. Progress monitoring reports on the April 2014 IEP goals and objectives provided general anecdotal notes of maintaining progress. (P-13)
71. Progress monitoring from the VTP reflected that, except for the first quarter of the 2014-15 school year, Student did not consistently demonstrate an ability to work with peers or use appropriate social skills. Student completed that course with an 80% average over the 2014-15 school year. (S-28)
72. While Student attended the VTP, Student no longer participated in delivering supplies at the high school. Student did participate in other activities in the school building. (N.T. 175-76)

PLANNING FOR 2015-16 SCHOOL YEAR

73. Student was reevaluated again in the spring of 2015 and a new RR issued. The Parents' concerns continued to be ensuring that Student was well supervised in the high school at the VTP. Student's VTP teacher reported having to talk to Student about picking food up from the floor and eating it. Teacher recommendations were for a continuation of the combination high school and VTP program. Student remained eligible for special education on the basis of ASD. Recommendations to the IEP team included small group

and individual instruction; frequent checks for understanding; testing accommodations; positive behavioral support; and inclusion with regular education peers during non-academic classes. (P-14)

74. A recommendation in the March 2015 ER that Student no longer needed a PCA on the bus to the VTP was made because there were no reported problems during transportation and Student needed the opportunity to become more independent. (N.T. 110-11; P-14 pp. 5, 13)
75. An IEP meeting in March 2015 included a representative of the VTP, a special education teacher, who was present for a portion of the meeting. The Parent reiterated concerns for Student's safety. (N.T. 117, 494-96, 500; S-25)
76. A new IEP was developed for Student in March 2015. Needs identified in that IEP were for reading fluency and comprehension, mathematics application and problem solving, and written expression skills; frequent checks for understanding; and self-monitoring of behavior (staring at others, making inappropriate comments, and silly behavior). (S-6)
77. Transition services in the March 2015 IEP included continued attendance at the VTP in an area of Student's interest for the morning and a return to the high school for the afternoon for classes in English, mathematics, adaptive physical education, and prevocational and independent living skills. (S-6)
78. Annual goals and short-term objectives in the March 2015 IEP remained the same as in the April 2014 IEP except that the reading fluency objective was removed. The previous program modifications and items of specially designed instruction also remained, except that the direct instruction in reading and mathematics was omitted and a reading program was added. The classroom paraprofessional for academic classes would continue and Student's program remained supplemental learning support. (S-6)

START OF 2015-16 SCHOOL YEAR

79. Before the 2015-16 school year began, Student exhibited significant anxiety and also developed flare-ups of the Crohn's disease. (N.T. 816, 841-42, 876-77)
80. Student started the school year continuing with the VTP. (N.T. 873-74)
81. At and after a District Open House in the fall of 2015, the Parent and high school special education teacher spoke about some of Student's experiences of concern involving peers at the VTP that Student had begun to report to the Parents. The teacher met with other District representatives to follow up. (N.T. 181-84, 263, 273-74, 877-78)
82. The District contacted the VTP to obtain information about the incidents that Student had reported to the Parent. (N.T. 185-86, 257, 263-64)
83. The high school special education teacher spoke with Student and the Parents about the experiences at the VTP after the meeting with other District professionals. (N.T. 186)

84. Student's IEP team reconvened at the end of September 2015 and a representative of the VTP was present. The Parents explained the reports that had been shared by Student about incidents at the VTP, including physical assault by peers, being locked in a room by peers, and peers pounding on the restroom door when Student was using the facility. Two other recent incidents where Student engaged in conduct meant to embarrass peers were also discussed. The team agreed that Student should no longer attend the VTP. (N.T. 118-20, 249-50, 543-51, 817-18, 878-80; P-15 pp. 1-2, 15-16, 18; S-13)
85. Student's IEP was revised to provide for Student returning to the high school full time. Student was to add elective classes and begin tutoring in mathematics. However, the transition section of the IEP was not revised. (P-15; S-7)
86. Also in September 2015, the Parent reported to a BHS professional that Student had been increasingly depressed with suicidal ideation. By December 2015, Student's suicidal ideation continued and Student attempted to cut Student's throat with a sharp object. Student was hospitalized and several medication changes were ordered. (N.T. 308, 311-13, 819, 868, 884-85; P-18, P-47 p. 1)
87. Student was diagnosed with Post-Traumatic Stress Disorder (PTSD) after the December 2015 suicide attempt and began trauma therapy. (N.T. 312-13, 315-16, 322, 334-35, 663, 886-87; P-23, P-47 pp. 2-4, P-48; S-32 p. 16)
88. Trauma therapy focused on identifying the triggers of traumatic memories that often result in difficulty functioning. Student described flashbacks Student had involving peers at the VTP: being unable to open a door because peers were holding it closed; physical assault in the groin area; pounding on the restroom door; and an incident of sexual assault with an object. (N.T. 322, 375, 387-88, 390, 666, 668-69, 698-99, 700-02; 711-12, 813, 887-88, 920; P-23, P-47 p. 4, P-48; S-32 p. 20)
89. The therapists also worked with Student to decrease Student's anxiety, especially with new situations and environments and being with peers. Safety in an educational setting was part of that therapy. (N.T. 667, 669-70, 673-76, 705)
90. Sometime in the fall of 2015, Student posted on social media expression of harm to self in connection with certain VTP peers. Student's high school special education teacher contacted the Parents to alert them. (N.T. 140-41, 1086-87; P-18 p. 1)

VTP INVESTIGATION

91. A VTP administrator conducted an investigation of the incidents reported by the Parent. That investigation included student interviews and review of available surveillance video in the building in addition to discussions with teachers. A portion of the video revealed Student and peers engaging in disruptive but not overtly harmful conduct, but there are gaps in the video. (N.T. 551-56, 558-59, 561-65, 573- 95, 597, 600-05, 607, 648; P-17; S-13, S-14, S-15)

92. One peer confirmed that another student had held a classroom door shut with Student inside for a period of approximately 60 seconds. That incident was not captured on the video surveillance. (N.T. 578-81, 606, 625-26; P-17 pp. 1, 4; S-14 pp. 1, 4)
93. Student's VTP teacher and several peers confirmed that the students would pound on the restroom door when another peer, including Student, was using the facility. (N.T. 518, 584-85; P-17 p. 2; S-14 p. 2)
94. Several students confirmed that they would occasionally, out of sight of the VTP teacher, "catch" other students by touching or poking them on a specific part of the body. That contact could be painful. (N.T. 585-87; P-17 p. 2; S-14 p. 2)
95. Two students confirmed that another student dared Student to pick up food from the floor and eat it. (P-17 p. 2; S-14 p. 2)
96. Video footage confirmed an incident where a peer held the restroom door in such a manner that Student, who was inside, was not able to close it. (N.T. 598-99; P-17 p. 3; S-14 p. 3)
97. Several students confirmed that other students would engage in disruptive activities such as throwing other students' backpacks down the stairs. (N.T. 588-89, 591-92, 595)
98. The surveillance video at the VTP holds approximately two or three weeks or less of footage before it is recorded over due to space limitations. (N.T. 562-63, 566, 570, 645)
99. The VTP administrator did not find any of the incidents that were described through the investigation to rise to the level of bullying according to its policy. (N.T. 630-33, 635)

RETURN TO DISTRICT FALL 2015 THROUGH END OF THE 2015-16 SCHOOL YEAR

100. After Student returned to the District full time in the fall of 2015, Student had access to the guidance counselor at the high school. Student did not speak with the guidance counselor after that option became available. (N.T. 114-15)
101. After Student returned to the District full time in the fall of 2015, Student had classes in life strategies, physical education, English, reading, mathematics, and several elective courses. During the second semester, Student began working in a specific area of the school building as an aide for one period each day. (N.T. 120-22, 880-81; P-15; S-7)
102. Progress monitoring reports on goals and objectives in the March 2015 IEP provided more general anecdotal notes of maintaining progress with little objective measurement. (P-16)
103. Student's IEP was revised in March 2016. The Parents provided substantial input including Student's needs for breaks due to anxiety, difficulty with social communications and interactions, need for supervision, tendency to smile at inappropriate times, need for structure and routine, and dislike of large groups and crowds. They also included information related to Student's medical needs. (S-8)

104. The high school special education teacher recalled first learning that Student would sometimes smile inappropriately at the March 2016 IEP meeting. (N.T. 166-67, 176, 188)
105. Needs identified in the March 2016 IEP were for reading fluency and comprehension, mathematics application and problem solving, and written expression skills; frequent checks for understanding; and self-monitoring of behavior (staring at others, making inappropriate comments, and silly behavior). (S-8)
106. Transition services in the March 2016 IEP included a transition planning course with career exploration in areas of Student's interest and classes in English, mathematics, adaptive physical education, electives, and prevocational and independent living skills, as well as acting as an assistant in a certain part of the school. (S-8)
107. Annual goals and short-term objectives in the March 2016 IEP remained the same as in the March 2015 IEP. The previous program modifications and items of specially designed instruction also remained, with the addition of preferential seating, frequent restroom breaks, prompting to report that something or someone bothered Student, and jobs within the school. The classroom paraprofessional for academic classes would continue and Student's program remained supplemental learning support. (S-8)
108. In the spring of 2016, the Parent reported to the District additional incidents of concern involving peers at the VTP that had occurred when Student attended there. (N.T. 196-97)
109. Student exhibited increased anxiety in the spring of 2016 both at home and at school when medical symptoms became more significant, and in April it was determined that Student would be provided homebound instruction. (N.T. 123-24, 139, 139-40, 187, 189-90, 196, 808, 835, 889-90; P-20, P-21)
110. The homebound instructor met with Student regularly and Student worked on reading, mathematics, independent living skills, and prevocational skills. Student was able to successfully complete more assignments independently as the homebound instruction continued. (P-27 p. 8)
111. Student was not referred to the Student Assistance Program in the spring of 2016. (N.T. 124)
112. By the end of the 2015-16 school year, Student had participated in several transition activities, including classroom and building jobs and tasks. Student also participated in a mock job interview and completed mock applications for jobs and a state identification card. (N.T. 144-45)
113. In May 2016, Student reported experiencing increased anxiety over homework and having to leave the house. (N.T. 323, 360; S-32 p. 17)
114. In June 2016, Student was arrested for making terroristic threats to a peer on social media. Student reported having nightmares and flashbacks at that time. (N.T. 324-25, 376, 881-82; P-47 pp. 5-6)

115. Also in June 2016, the high school special education teacher provided information about Student in connection with application for certain benefits available to Student on the basis of Student's disabilities. (N.T. 126-27, 191-93, 217, 892-93; P-24; S-11, S-12)

PLANNING FOR 2016-17 SCHOOL YEAR

116. In July 2016, Student's IEP team convened and determined that Student should transfer to a new placement for the 2016-17 school year in the IU program. Student was to be provided with transition programming in addition to life skills support. (N.T. 131-32, 232-33, 235, 240, 895, 899-901)
117. An IEP was developed for Student at the IU Program. This IEP contained significant historical information about Student's medical diagnoses, educational experiences, and input from teachers and the Parents. Student's private social worker attended and provided a number of recommendations to help Student at school, and noted that Student had significant difficulty with new situations, people, and places. (N.T. 671, 673-74; P-27 p. 18)
118. Needs identified in the July 2016 IEP were for reading fluency and comprehension, mathematics application and problem solving, and written expression skills; frequent checks for understanding; self-monitoring of behavior (staring at others, making inappropriate comments, and silly behavior); and social and self-advocacy skills. (P-27)
119. Transition services in the July 2016 IEP included a transition planning course with career exploration in areas of Student's interest and a classes in English, mathematics, reading, adaptive physical education, electives, and prevocational and independent living skills. (P-27)
120. Annual goals and short-term objectives in the July 2016 IEP remained the same as in the March 2016 IEP except that a new goal and short-term objectives were added to address social and self-advocacy skills. The previous program modifications and items of specially designed instruction also remained with a minor change to the restroom breaks to be in a private location; newly added were a PCA, seating on the bus near the driver, nurse monitoring of restroom use, breaks available when experiencing anxiety, and use of open-ended questions. The classroom paraprofessional for academic classes would continue. (P-27)
121. The Parents approved the NOREP for full-time life skills support at the IU Program. (P-28)

2016-17 SCHOOL YEAR AT IU PROGRAM

122. There were work experience programs available at the IU Program, both in the building and in the community. Student was only willing to engage in work experiences at the IU Program building, but not other environments due to anxiety and a concern for Student's own safety. (N.T. 144-45, 225, 240, 682-84, 696, 720-21, 763, 898-99)

123. The IU Program conducted a transition assessment of Student to identify areas of interest. (N.T. 743-44)
124. The IEP team suggested that Student sit near the front of the bus during transportation to the IU program. (N.T. 135)
125. The IEP team suggested that Student sit near an open door in the classroom due to anxiety, and be asked open-ended questions so that Student would not simply provide yes-no answers. These suggestions were in response to the newly-provided information about Student's experiences at the VTP. (N.T. 145-48)
126. The IEP team understood that Student's IEP at the IU program would be revised within approximately thirty days by that program. (N.T. 136, 234)
127. Student's program focused on functional life skills. Student was in the life skills classroom for most periods of the day with approximately nine other students, but went to a different classroom for science and social studies and some special classes. Student also participated in transition programming outside of the life skills classroom that involved prevocational and vocational skills in the school building. (N.T. 54, 282, 731-32, 746, 755-56, 761-62, 792-93)
128. Academic instruction at the IU Program was individualized for the students. (N.T. 788-89)
129. Student had a PCA at the IU Program, and that paraprofessional support gradually decreased over the 2016-17 school year as Student became more comfortable in the environment. (N.T. 746-47, 752-57, 760, 764-65)
130. An IEP meeting convened September 2016 at the IU Program after an August visit to that placement by the Parents and a District representative. (N.T. 235-39, 241)
131. A reevaluation was completed with consent of the Parents and a new RR issued in October 2016. (N.T. 734-35; P-30; S-35)
132. Parental input into the RR reflected Student's strengths at school and at home in addition to medical and educational needs. As before, the Parents emphasized Student's need for close supervision, and development of vocational skills and transition planning in addition to recreation and leisure activities. Academically, the Parents noted that mathematics was a strength while reading and writing were difficult for Student. (P-30)
133. A speech/language assessment was included in the RR. Student exhibited some speech dysfluency and the RR noted concerns with misarticulation and weak personal interaction skills. The Speech/Language Pathologist recommended that Student be provided services to address expressive and pragmatic language needs. (P-30 pp. 5-6)
134. Assessment conducted for the RR included cognitive and achievement testing. The full scale IQ (Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV)) was 70, but was considered to be a low estimate of cognitive ability. Achievement scores (Wechsler

Individual Achievement Test – Third Edition) were consistent with the WAIS-IV in some areas (listening comprehension, reading comprehension, mathematics problem solving, word reading, and sentence composition) but higher than expected in other areas (essay composition, pseudoword decoding, and numerical operations). (P-30 pp. 8-9)

135. Student's District high school special education teacher completed teacher rating scales for the Behavior Assessment System for Children – Third Edition (BASC-3). Her scales endorsed clinically significant concerns with anxiety, depression, somatization, atypicality, and withdrawal, with at-risk concerns with aggression and conduct problems. A teacher at the IU Program also completed BASC-3 rating scales, yielding all average range scores. However, the District teacher completed the BASC according to reports from the Parents, not based on her own experience with Student.⁸ The Parent completed the parent version of the BASC-3 rating scales, endorsing clinically significant concerns with anxiety, depression, atypicality, withdrawal, leadership skills, and functional communication; and at-risk concerns with somatization. (N.T. 1145; P-30 pp. 9-10)
136. An IU teacher also completed rating scales for executive functioning, with results considered to be within the average range despite relative weaknesses with receptive and written language. (P-30 p. 10)
137. Teacher input into the RR revealed that Student was working on a variety of skills related to academic, social, and transitional needs with the assistance of the PCA. A transition survey completed in the fall of 2016 reflected that Student remained interested in the area that was the focus of Student's VTP. (P-30 pp. 11-13)
138. The October 2016 RR reached a conclusion that Student was eligible for special education on the bases of ASD and OHI. Needs identified in this RR were reading fluency and comprehension, mathematics application and problem solving, written expression skills, self-monitoring of behaviors, and social and self-advocacy skills. Recommendations were for speech/language therapy and transportation as related services, as well as positive reinforcement, repeated directions, test accommodations, preferential seating near an open door, frequent restroom breaks in a private area, and self-initiated breaks for anxiety. (P-30 p. 11)
139. Another IEP meeting convened at the IU Program in October 2016 and Student's IEP was revised. This IEP summarized and incorporated the RR, with the same needs identified. (N.T. 269, 734-35, 739, 745-46, 777; P-46)
140. Transition services in the October 2016 IEP included on the job experiences and classes in reading/language arts, mathematics, social studies/science, electives, and prevocational and independent living skills. (P-46)

⁸ The teacher had never before completed BASC-3 rating sales. (N.T. 1146) That instrument was designed to acquire information from multiple informants (parents, teachers, and sometimes the student). See Jerome M. Sattler, *Foundations of Behavioral, Social, and Clinical Assessment of Children* 347 (6th ed. 2014); Robert A. Spies, Janet F, Carlson & Kurt F. Geisinger, ed., *The Eighteenth Mental Measurements Yearbook* 36-38 (18th ed. 2010).

141. Annual goals and short-term objectives in the October 2016 IEP addressed reading comprehension, spelling and written expression, functional mathematics skills, and expressive and pragmatic language. Program modifications and items of specially designed instruction were positive reinforcement, repeated directions, test accommodations, preferential seating near an open door, frequent restroom breaks in a private area, and self-initiated breaks for anxiety. (P-46)
142. A PCA, special transportation, and speech/language therapy were specified as related services in the IU Program IEP. Student's program was one of full time life skills support. (P-46)
143. A District Supervisor of Special Education communicated with the IU Program about students who attended there and to address any concerns that arise. This Supervisor also visited the IU Program regularly. (N.T. 237, 243)
144. In January 2017, Student harmed self with a sharp instrument and had written a suicide note. Student was hospitalized following that incident. (N.T. 332, 336-37, 825-28, 843-44, 905-08; P-37, P-49)
145. Student did not master any of the IEP goals during the 2016-17 school year and essentially maintained baseline levels over the course of that school year. (S-36)
146. During the 2016-17 school year and through the time of the due process hearing, Student was seeing a social worker for the trauma therapy on a weekly basis. (N.T. 666, 669, 708-09)

FUTURE TRANSITION PROGRAMMING

147. Student has been interested in a transition program at a nearby college that provides job skills and possibilities for auditing classes. Student's IEP team agreed that the program would be beneficial for Student, but it required that Student be accepted through an application process by the Parents and Student. (N.T. 123, 134-35, 232, 270, 1096, 1097, 1099)
148. Students who attend the college transition program attend full time and are not able to simultaneously attend another program. Students typically attend that college transition program for two or three years, and have to complete twelfth grade before attending that program. (N.T. 231-32, 276-78, 285, 1096-97)
149. Student has expressed to the Parents and social worker that Student felt safe at the IU program and enjoyed attending there. However, Student remained fearful in environments other than the school building and the family's home, and became very anxious when separated from the Parent. That anxiety continued into the summer of 2017. (N.T. 680, 696-97, 707-08, 713, 720-21, 810-11, 822, 828-29, 905, 958-59, 964-65)
150. The Parents obtained permanent guardianship of Student in March 2017. (N.T. 910-11; P-38)

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 the due process hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipose.” The outcome is much more frequently determined by the preponderance of the evidence presented.

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 his or her recollection based on his or her perspective. The forthright testimony of both Parents that they expressed ongoing concerns to both District and VTP professionals about Student’s safety, susceptibility to teasing by peers, social awkwardness, and tendency to smile at inappropriate times was accorded significant weight, and considered to be very reliable particularly in the context of the record as a

whole. In other respects, the testimony overall was rather consistent for disposition of the issues presented.⁹

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.

IDEA PRINCIPLES

The IDEA and state and federal regulations obligate local educational agencies (LEAs) to provide a "free appropriate public education" (FAPE) to children who are eligible for special education. 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 that are reasonably calculated 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). LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP that 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 "appropriate" education, is not limited to academics, but encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474,

⁹ There was some inconsistency in witness recollection over which VTP representative participated by telephone in a meeting with the Parents in the spring of 2014. It is not necessary to resolve that contradiction, which this hearing officer attributes to imprecise memory of the meeting participants rather than any attempt at deception, because it is clear that someone in authority at the VTP was made aware of the Parents' concerns with Student being provided adequate supervision.

483 (M.D. Pa. 2010) (citing *M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir. 1996)). A child’s educational experience can thus be affected in many ways, such as by an impaired ability to engage in appropriate social relationships with peers.

Recently, the U.S. Supreme Court considered anew the application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA[.] * * * A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child’s circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. * * * As we observed in *Rowley*, the IDEA “requires participating States to educate a wide spectrum of handicapped children,” and “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”

Endrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017) (italics in original)(citing *Rowley* at 206-09)(other citations omitted). The Court explained that, “an educational program must be appropriately ambitious in light of [the child’s] circumstances... [and] every child should have the chance to meet challenging objectives.” 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not “fully integrated into the

regular classroom.” *Id.* The Court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit.¹⁰

As *Rowley*, *Endrew*, and the IDEA make clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Critically, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); see also *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same).

Another essential consideration in this matter is the IDEA obligation for eligible students to be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); 22 Pa. Code § 14.145; *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). All local education agencies are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa Code § 14.145(5).

¹⁰ At least two federal District Courts in Pennsylvania have recently opined that the *Endrew* decision did not change Third Circuit jurisprudence regarding the standards for judging whether a special education program is appropriate. *E.D. v. Colonial School District*, No. 09-4837, 2017 U.S. Dist. LEXIS 50173, at *36 (E.D. Pa. Mar. 31, 2017); *Brandywine Heights Area School District v. B.M.*, 2017 U.S. Dist. LEXIS 47550, at *29 n. 25 (E.D. Pa. Mar. 28, 2017).

GENERAL SECTION 504 AND ADA PRINCIPLES

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005).

Intentional discrimination, however, 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).

With respect to the ADA issues, the substantive standards for evaluating claims under Section 504 and the ADA are essentially the same. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those statutes. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, the discussion below serves as a final determination of all Section 504 and ADA claims which will be considered together in this matter, although Section 504 will be the primary reference.

FIRST ISSUE: WHETHER THE DISTRICT DENIED STUDENT FAPE

The first issue is whether the District complied with its obligations to Student to provide a free, appropriate public education from the start of the 2014-15 school year through the

present. The Parents raised challenges to several aspects of Student's program that, they claim, establish a denial of FAPE throughout that time period.

The first consideration is the transition programming provided from the fall of 2014 through Student's removal from the VTP, and then upon return to the District. The record is clear that those two experiences were entirely different for Student.

The VTP provided Student with hands-on experience in addition to classroom instruction in preparation for employment in a field of interest to Student. The evidence also establishes that Student was generally provided with the specially designed instruction in Student's IEP while at the VTP. However, despite earning an 80% average, Student continued to demonstrate difficulty working with peers and using appropriate social skills, which is especially concerning in a program that emphasized small group activities. Furthermore, and critically, the record evidence is also plain that there was inadequate supervision of Student and peers at the VTP, such that Student was the victim of a number of instances of bullying¹¹ that were directly related to Student's disabilities, despite school-wide policies to prevent such occurrences. Moreover, staff at both the VTP and District were aware, or should have been aware, that Student tended to smile at inappropriate times, a characteristic that was compounded by Student's communication deficits.

As the U.S. Department of Education has long recognized, “[d]isability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA; [and h]arassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE.”¹² “Bullying fosters

¹¹ This conclusion is the same under both the District and VTP bullying policies and their definitions of bullying.

¹² U.S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Prohibited Disability Harassment (OCR July 25, 2000). *See also* Dear Colleague Letter (OCR October 21, 2014); U.S. Department of Education,

a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.”¹³

Our own Third Circuit has recognized that a student who is the victim of bullying and whose special education program is adversely impacted as a result can be denied FAPE. *Shore Regional High School v. Board of Education*, 381 F.3d 194 (3d Cir. 2004). A New York District Court more fully addressed a claim that a school district deprived a student of an appropriate special education program in failing to prevent bullying of the student by other students, thereby negatively affecting the student’s opportunity for an appropriate education in *T.K. v. New York City Department of Education*, 779 F.Supp.2d 289 (E.D.N.Y. 2011). The Court explained that, “[w]here bullying reaches a level where a student is substantially restricted in learning opportunities [he or she] has been deprived a FAPE.” *Id.* at 318.

Here, as a result of a number of bullying incidents, Student reached the point of withdrawal from the VTP in the fall of 2015 and then total removal from the educational environment by April 2016 before a move to a different program and placement for the 2016-17 school year and beyond. Additionally, there were no changes to the transition section of Student’s IEP upon return to the high school full time in the fall of 2015; and those services were minimal at best for the remainder of the 2015-16 school year and not individualized for Student. There can be no doubt on this record that the bullying to which Student was subject resulted in

Office of Special Education and Rehabilitative Services, Dear Colleague Letter: Bullying of Students with Disabilities (OSERS August 20, 2013);

¹³ U. S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Bullying and Harassment, at 1 (October 26, 2010).

substantial restriction of Student's opportunities for learning as described by the *T.K.* Court, and, thus, amounted to a denial of FAPE for which compensatory education will be awarded.¹⁴

It is true that Student had a variety of medical and other diagnoses that likely have had substantial impact on Student's current emotional health. However, even assuming that one cannot point to the bullying experiences at the VTP as the sole cause of Student's mental health decline beginning in the fall of 2015 when trauma therapy was introduced, there can be no doubt that those incidents were at least contributing factors to Student's PTSD and withdrawal behaviors that have reached the point where Student does not feel safe outside of the home and IU Program school building. The District's lack of knowledge notwithstanding, Student has clearly been denied FAPE with respect to post-secondary transition services over the 2014-15 and 2015-16 school years.

The Parents also challenge the transition programming and special education support in the IU Program. It is fortunate that the parties have identified a new educational environment where Student is comfortable attending. One must balance Student's significant mental health needs in evaluating the program that Student attended during the 2016-17 school year, to which Student will return this fall. This hearing officer cannot conclude on this record that the IU Program is more restrictive¹⁵ or otherwise inappropriate simply because Student is now participating in more functional life skills programming at this stage of Student's educational career, particularly since the instruction provided to Student is individualized according to Student's needs. And, although application to the transition program at the local college must be

¹⁴ This hearing officer also suggests that the District revise the citation in its IEPs to the Pennsylvania regulations regarding age range restrictions, consistent with 22 Pa. Code § 14.146 as revised in 2008.

¹⁵ The Parents do not dispute that Student requires a program in a segregated environment outside of the District high school. (Parents' Closing at 8)

delayed until the spring of 2018, the upcoming school year will provide Student with the opportunity to continue with the trauma therapy and potential resumption of being comfortable going out into the community without the Parent, including in vocational experiences. This hearing officer finds no denial of FAPE for the 2016-17 school year at the IU Program.

Finally on this issue, the denial of FAPE under the IDEA also constitutes discrimination against Student under Section 504, with a complete remedy to be provided under the IDEA.

SECOND ISSUE: REIMBURSEMENT FOR THERAPY AND COUNSELING

The Parents next challenge the District's failure to provide counseling and emotional support services upon Student's return to the high school full time in the fall of 2015, and seek reimbursement for those privately secured through August 2016. The record establishes that a guidance counselor was available to Student beginning in the fall of 2015, but Student did not speak with that individual. Whether or not Student was aware of the guidance counselor's availability, however, it must be recalled that Student had difficulty with new people, and it is unclear how Student may have benefitted from school-based counseling under all attendant circumstances. While some of the private services likely were necessary due to the bullying at the VTP, Student presents with very complex emotional needs that have required varying levels of counseling since at least 2009. The District shall not be ordered to reimburse the Parents for privately obtained mental health therapy.

THIRD ISSUE: COMPENSATORY EDUCATION

As another remedy, the Parents seek compensatory education, which is an appropriate form of relief where an LEA 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 LEA fails to remedy the problem. *M.C., supra*. Such an award may compensate the child for the period of time of deprivation of educational services, excluding the time reasonably required for a school

district to correct the deficiency. *Id.* The Third Circuit has recently endorsed a different approach, sometimes described as a “make whole” remedy, where the award of compensatory education is designed “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also 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).

This hearing officer finds that the record does not include evidence on an appropriate equitable remedy that would place Student in the position where Student would be absent the FAPE denials described above. Thus, the hour-for-hour method must provide the basis for the award.

Student was on track to participate in the VTP in the area of interest for the 2014-15 and 2015-16 school years, gaining valuable vocational skills that would have significantly assisted Student in post-secondary life. Since it is impossible to ascertain whether Student received some benefit from any portion of that transition programming, Student shall be awarded 2.25 hours¹⁶ of compensatory education for each day that Student attended any portion of the school day during those school years as a remedy for the FAPE deprivation. *See Keystone Cent. 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).

¹⁶ In their closing, the Parents provided this figure as the amount of time that Student attended the VTP in a single day, and therefore an appropriate basis for a compensatory education remedy. (Parents’ Closing at 9-10)

The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product, or device that furthers Student's academic or social/emotional needs and skills, including post-secondary transition. 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. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents, and may be used at any time from the present until Student turns age twenty four (24). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents and may be limited to the average market rate for private providers of those services in the county where the District is located.

FOURTH ISSUE: DELIBERATE INDIFFERENCE

Finally, the Parents contend that the evidence establishes deliberate indifference by the District toward Student. This hearing officer cannot agree. Despite the conclusions *infra* that the District did deny Student FAPE under the IDEA and Section 504, the evidence is preponderant that the District professionals lacked any knowledge of the serious incidents that occurred at the VTP. The District's actions and inactions were therefore not a "deliberate choice" and, as such, this claim must also fail. *S.H., supra*, 729 F.3d at 263.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did deny FAPE to Student during the 2014-15 and 2015-16 school years. Student will be awarded an equitable amount of compensatory education, but reimbursement for counseling services must be denied. The District did not act with deliberate indifference.

ORDER

AND NOW, this 21st day of August, 2017, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District failed in its FAPE obligations to Student during the 2014-15 and 2015-16 school years.
2. The District shall provide Student with compensatory education as follows.
 - a. Student shall be provided with 2.25 hours of compensatory education per day for each day that Student attended any portion of the school day during the 2014-15 and 2015-16 school years.
 - b. The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product, or device that furthers Student's academic or social/emotional needs and skills, including post-secondary transition. 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. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents, and may be used at any time from the present until Student turns age twenty four (24). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents and may be limited to the average market rate for private providers of those services in the county where the District is located.

3. The District did not otherwise discriminate against Student or act with deliberate indifference toward Student.
4. The District is not obligated to reimburse the Parent for privately obtained counseling and mental health therapy services.
5. Nothing in this Order precludes the parties from mutually agreeing to alter any of the directives including 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
18868-1617AS