***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

Final Decision and Order

CLOSED HEARING
ODR File Number: 19422 16 17

Child's Name: O.T. **Date of Birth:** [redacted]

Dates of Hearing:
8/11/2017, 9/14/2017, 10/5/2017 and 10/6/2017

Parent:
[Parents]

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Hearing Officer: William Culleton Esquire, Certified Hearing Officer

Date of Decision: 11/6/2017

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)[1] is an eligible resident of the District. Student attended Student's neighborhood schools within the District and attained high marks, advancing from grade to grade. However, in the beginning of [redacted] Student [was involved in an incident]. Subsequently, the District identified Student as a child with an emotional disturbance pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). [redacted].

Parent asserts that the District committed procedural violations of both the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), resulting it its failure to identify Student in a timely fashion [redacted]. Parent also asserts that the District committed procedural violations of both the IDEA and section 504, resulting in its failure to provide Student with an appropriate program and placement and denying Student a free appropriate public education (FAPE) [redacted]. Parent requests an order that the District provide Student with compensatory education on account of all or part of those periods of time. The District denies any procedural or substantive violations of either the IDEA or section 504.

The hearing took place in four sessions. I have considered and weighed all of the evidence of record. I conclude that the District failed to provide Student with a FAPE during the period [redacted]. I will order the District to provide Student with compensatory education accordingly.

ISSUES

1. Did the District fail to perform its Child Find obligations by failing to evaluate Student in a timely fashion during the relevant period [redacted]?

2. Did the District, due to failure to identify Student timely, fail to provide Student with a free appropriate public education during the relevant period [redacted]?

[1] Student, Parent and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality.

3. Did the District fail to provide Student with a free appropriate public education during the relevant period [redacted]?

4. Should the hearing officer order the District to provide Student with compensatory education on account of all or any part of the relevant periods [redacted]?

FINDINGS OF FACT

1. Student is an eligible resident of the District and was enrolled in a District neighborhood school prior to [redacted]. (J 3 para. 1; J 8, J 27.)[2]

2. Student has intellectual ability measured within the Extremely High range for Student's age. Student's school achievement is above average to superior both academically and in extracurricular and community activities. Student's behavior in the classroom is appropriate. (NT 35-37; J 4, J 16, J 27.)

3. [Redacted]. (NT 36-37.)

4. Student is diagnosed with Bipolar Affective Disorder. Student had no psychiatric history or treatment prior [redacted]. (J 31A, J 31E.)

5. [Redacted]. (NT 153-154; J 5, J 6, J 23, J 24 p. 4-5, J 31A, J 31E.)

6. [Redacted]. (NT 37-38; J 5, J 31A.)

7. [A redacted] incident [occurred]. School administrators were notified of this. (NT 191-192, 468-471, 474-480, 491-492.)

8. [Redacted]. (NT 495-510, 522, 525.)

9. [Redacted]. (NT 39-40, 93-94, 474-480; J 10 p. 3-5, J 16 p. 2, 9-10, J 31A, J 31D, J 34, J 45 pp. 3-4.)

10. District personnel at Student's neighborhood school became aware of the [redacted] event [from students]. (NT 493-494; J 5, J 6.)

11. [Redacted], Student was hospitalized [redacted]. (J 3 para. 7; J 31A, J 45 p. 4.)

12. [Redacted] school and District officials became aware that Student had been hospitalized for behavioral treatment. (J 28, J 45.)

[2] All of the exhibits in this matter are marked as Joint exhibits ("J [numeral]."). The parties entered into 20 stipulations of fact, marked as exhibit J 3. These will be cited to the joint exhibit and paragraph containing the stipulation ("J 3 para. [numeral].").

13. The District became aware of the Student's diagnosis of bipolar disorder sometime after Student's discharge from hospital [redacted]. (NT 190-191; J 31A.)

14. [Redacted], Student did not attend Student's neighborhood school; Student attended a partial hospitalization behavioral health program, which provided no more than two hours per day of instruction. (J 3 para. 8; J 31B.)

15. Student returned to school [redacted]. (J 10.)

16. The school counselor provided Student with weekly check-ins. (J 8, 10.)

17. Student's condition, including mood disturbances [redacted], interfered with Student's performance and achievement in school. (J 8, J 31E, J 33 p. 35, J 34.)

18. Upon Student's return, Student experienced anxiety and difficulty with social interactions and friendships in school that posed a significant stressor exacerbating Student's mental illness and behavioral symptoms. (J 8, J 10 pp. 4-6, J 12 p. 3, J 36 p. 1.)

19. Student's symptoms returned after one day in school, and Student had to return to partial hospitalization [redacted]. (J 33 p. 28.)

20. [Redacted]. Student's counselor wrote to Parent indicating that the school intended to offer an initial evaluation for special education under the IDEA. [Redacted], the counselor referred Student to District administrators for evaluation for the concern of emotional disorder due to Student's hospitalization. The District issued a Permission to Evaluate form to Parent [redacted], requesting parental consent to a proposed initial evaluation of Student for special education. (J 3 para. 9, J 7, J 9.)

21. The District reissued the permission form to Parent [redacted], having not received the original form with Parent's signature. (J 3 para. 10.)

22. [Redacted], Student was readmitted to the partial hospitalization program, and after fourteen consecutive days in that program, Student was hospitalized [redacted], from [redacted]. (J 3 para. 11, 12; J 31C, J 31D.)

23. On or before [redacted], Parent spoke with Student's school guidance counselor concerning possible evaluation for special education. During that conversation, Student's high grades and the effect on possible eligibility were discussed. (NT 53-56, 213-218, 436-441.)

24. On [redacted], Parent signed a NOREP declining the District's proposed evaluation, and the District received this information by [redacted]. (J 9 p. 2, J 33 p. 48.)

25. The District did not offer or provide a section 504 service agreement. (NT 56, 219-220.)

26. On or about [redacted], while still in hospital, Student was enrolled to take three academic classes per day through cyber-school service provided by the District. These classes were interrupted while Student was in hospital, so Student needed to restart access to the classes after discharge. (NT 56-57; J 13, J 14, J 33 p. 74.)

27. Student did not comply fully with Student's medication orders. Student's therapists made a number of changes during both the [redacted] school years to the medication regime in an effort to find the most appropriate medications and dosages to enable Student to remain in remission of Student's symptoms. Repeatedly, these medication changes had adverse effects on Student's behavior and school performance. (NT 92-94; J 31E.)

28. District personnel, including the educators at Student's school, were aware of [redacted]. (NT 69-72, 93-94, 123-124. 191-192, 197-200, 485-486, 495-510; J 4, J 5, J 10 p. 3-6, J 16, J 31 A through J 31E, J 34, J 36, J 37, J 45 pp. 3-4.)

29. [Redacted was] a significant stressor and contributed to the exacerbation of Student's mental illness, concomitant behavioral symptoms and admissions to partial and inpatient hospital programs. (NY 888-889; J 10 p. 3-5, 31A, J 31E.)

30. District and school personnel were given notice that [redacted] in the general education environment were a factor in Student's repeated hospitalizations and absences from school during the periods [redacted]. (J 4, J 8 p. 2, J 10 p. 3-6, J 16, J 31 A through J 31E, J 34, J 36, J 37, J 45 p. 3-4.)

31. School officials did not formally investigate whether or not there was an ongoing pattern of [redacted difficulties], and what if any effect such [difficulties] had on Student's ability to function in school. (NT 220-222, 590-594, 598-603, 727, 763-768, 772-773.)

32. After discharge [redacted], Student began coming into Student's neighborhood school for [some] classes and doing clerical work [where] an adult could watch over Student while Parent was at work. (J 13, J 33 p. 85.)

33. Upon discharge [redacted], the hospital referred Student for [redacted] and Student attended such programming [redacted]. The hospital also recommended that Student attend a private therapeutic school upon discharge. (J 31D, J 31E.)

34. On [redacted], Parent requested that the District reissue the Permission to Evaluate form so that Parent could give consent. The District reissued the form on [redacted]; Parent signed it on [redacted], and delivered it to the District on [redacted]. (J 3 para. 12, J 13, J 14, J 33 p. 65.)

35. The District provided an evaluation report to Parent on [redacted], identifying Student as a child with the disability of Emotional Disturbance and recommending an IEP. (J 3 para. 15, J 16.)

36. From [redacted] until Student was dis-enrolled from the District [redacted], the District conducted no re-evaluation of Student. (NT 74.)

37. The District provided an IEP to Parent [redacted]. The IEP placed Student in full time emotional support at a private therapeutic school. The IEP was anticipated to continue for approximately one year. (J 3 para. 16, J 17, J 18.)

38. Student attended a private therapeutic school on [redacted], and remained in that program until [redacted]. The school provided a small-group setting for some classes. (J 3 para. 17, J 31E, J 17 p. 6.)

39. On [redacted], without conducting a prior re-evaluation, the District proffered a Notice of Recommended Educational Placement/Prior Written Notice to Parent proposing to change Student's placement upon Student's return to the neighborhood school in August to itinerant emotional support. Parent signed this NOREP, approving the change in placement, on [redacted]. (NT 68; J 19.)

40. During this period of time and the summer, Student's newly appointed guidance counselor kept in touch with Student by email messages and telephone calls, as well as meetings. (J 15.)

41. Student returned to school on [redacted]. (J 3 para. 18.)

42. During the first few days of classes, Student did not evidence significant signs of anxiety or depression in classes. (J 20 p. 7.)

43. [Redacted]. (NT 69-73, 467-510.)

44. On [redacted], the District convened an IEP team meeting, attended by Parents and Student. Although Parent reported [a redacted] incident, the IEP team did not consider the appropriateness of reducing Student's placement level of support from full time to itinerant support, nor did it consider the effect of eliminating small group settings for any of Student's classes in view of Student's emotional disturbance. (NT 72-73; J 20 p. 20, J 21.)

45. [Redacted]. Student reacted to this incident with a great increase in anxiety and depressive thoughts. (J 15, J 33 pp. 140-143.)

46. Student's school timely moved to separate Student [redacted] (J 15, J 33 p. 140.)

47. [Redacted]. (J 23, J 24.)

48. Student was hospitalized [redacted] and remained in the hospital until [redacted]. (J 3 para. 19; J 26.)

49. During this time, Student was unable to attend substantially to school work. (J 15, J 33 p. 169.)

50. The school's vice principal conducted a thorough investigation of the [redacted] incident, [redacted] and researching school rules that Student might have violated. (NT 488-491; J 24, J 33 p. 165.)

51. On [redacted], school officials met with Student [redacted] inside of a locked psychiatric unit without Student's parents being present. These officials included the Superintendent of the District, the principal of Student's neighborhood school, and the director of student services for the school. A hospital therapist was present for part of the meeting. (NT 154-162; J 24.)

52. During that meeting, the principal indicated that discipline would be imposed and that Student was [redacted] and banned from school property. Topics discussed included a 45 day interim educational placement and out of school suspensions for greater than ten days. Participants followed a carefully organized script to question Student about [redacted]. (NT 141, 165-166; J 24.)

53. After the meeting, the participants allowed Parents to enter the ward, where the participants summarized the previous meeting. (NT 154-162; J 24.)

54. No manifestation meeting was held. (NT 90-92.)

55. On [redacted], while Student remained in the hospital, the District issued another NOREP changing Student's placement from itinerant emotional support to full time emotional support in a therapeutic school setting. Parent signed the NOREP after being advised that it was necessary in order to begin to place Student in a therapeutic setting. (NT 162; J 25.)

56. Parent dis-enrolled Student from the District on [redacted], and enrolled Student in a neighboring school district. (J 3 para. 20, J 32.)

CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[3] In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the

[3] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[4] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – that is, when the evidence on each side has equal weight. The Supreme Court in Schaffer called this "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. Parent must introduce preponderant evidence to prove all facts material to Parents' claims; otherwise the evidence will be either in "equipoise" or preponderant against Parent and Parent will not prevail.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I reach the following credibility determinations.

[4]A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

The District urges careful scrutiny of Parent's testimony, largely because Parent [redacted] necessarily had little opportunity to observe personally the events which she depicted in her testimony. Many of the events that she recounted were based upon what others told her, including hearsay statements of Student, teachers and other parents. In making my findings, I have adhered to the rule that, although hearsay is admissible in these administrative proceedings, the hearing officer cannot rely upon it unless it is corroborated by non-hearsay evidence. Thus, my findings are narrower than what otherwise might have been suggested by Parent, and I make no findings as to a number of incidents that Parent recounted and that were based purely upon hearsay.

I find no basis in the record to question Parent's testimony as to things within her personal knowledge. Her material testimony is corroborated in the documentary record, and by school District witnesses. I noted some non-material conflicts in the documentary record, but very few. Where Parent's recollections are contradicted by District witnesses, I conclude that the differences are based upon differing perspectives, rather than a red flag pertaining to credibility itself.

The District urges that Parent's testimony lacked credibility because it was self-contradictory and rambling, but I did not find it to be thus flawed. Parent did advocate strenuously, sometimes adding accusatory comments, but none of this was incoherent or beyond what can be expected in a difficult controversy involving someone's child. I found only one or two instances of minor self-contradiction, and generally found that Parent corrected misstatements herself, thus demonstrating an attitude of frankness.

While I listened attentively to Student's testimony, I give it ordinary weight as a depiction of Student's true feelings and perspective about [redacted]. I chose to rely upon documentary evidence and Parent's corroborated testimony with regard to the events in the two relevant time periods.

Of the District's witnesses, I placed most weight upon that of [one adult] who had to grapple with the [redacted] incident. This witness, though obviously concerned about testifying before the District Superintendent and other administrators[5], nevertheless demonstrated both sincerity and a deep sense of responsibility toward both the District and [redacted] Student. Her emotion and remorse were palpable and unreserved. Her way of answering questions implied forthrightness. Her testimony was consistent with the credible testimony of others and the documentary record, in all material respects.

Similarly, I found no basis to conclude that most of the other District witnesses were not credible, even when their recollections differed from each other or from those of Parent. On the other hand, I gave less weight to the testimony of an administrator who willingly produced "notes" of events from the times in question that were prepared deliberately for purposes of litigation and which the witness had offered to alter as desired by the witness' superiors.

THE DISTRICT DID NOT FAIL TO PERFORM ITS CHILD FIND OBLIGATIONS

Parent argues that the District failed to perform its child find obligations during the period between [redacted], because it failed to timely provide an evaluation of Student once it knew that Student was suffering from emotional disorder [redacted]. I conclude that Parents have failed to prove that the Student's counselor "talked Parent out of" seeking an initial evaluation. Moreover, I conclude that the District made reasonable and timely efforts to evaluate Student, which were delayed by Parent's decision not to give consent, which is legally required, for several weeks after being requested to do so.

Under the IDEA Child Find requirement, 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a),

[5] I do not suggest that these leaders expressed anything but support to this witness and others as they endeavored to testify truthfully.

(c), a local education agency has a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability." Ridley Sch. Dist. v. M.R., 680 F.3d 260, 271 (3d Cir. 2012)(citing P.P. v. West Chester Area School District, 585 F.3d 727, 738 (3d Cir. 2009)); Perrin v. Warrior Run Sch. Dist., 2015 U.S. Dist. LEXIS 149623 (M.D. Pa. 2015).

Local educational agencies are required to fulfill their child find obligation within a reasonable time after notice of behavior that is likely to indicate a disability. Ridley Sch. Dist. v. M.R., 680 F.3d above at 271-272. The courts will assess the reasonableness of an agency's response to such information on a case-by-case basis, in light of the information and resources possessed by the agency at a given point of time. Ibid. Even if parents do not cooperate fully with district efforts to identify a student (or do not request an evaluation), it is still the responsibility of the school to identify those children who are in need of the IDEA's protections. Taylor v. Altoona Area Sch. Dist., 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010).

Failure to conduct a sufficiently comprehensive evaluation is a violation of the District's "child find" obligations. D.K. v. Abington Sch. Dist., 696 F.3d above at 250 (a poorly designed and ineffective evaluation does not satisfy "child find" obligations). An evaluation must be sufficiently comprehensive to address all of the child's suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6).

In this matter, Student reported the [redacted] incident to school staff almost one week later. This was the District's first notice of a potential problem. At that point, there was no reason to suspect a disability, as Student did not have a known history of behavior indicating disability, and as Student had been an exemplary student in academic achievement, extracurricular performance and appropriate behavior in school. Thus, at this time, there was no suspected disability or reason to seek an evaluation.

The first time that school or District officials had notice that Student might be experiencing a disability was when they received notice that Student had been hospitalized for the first time [redacted]. On that date, the District received a doctor's note indicating that Student was in hospital, but the note did not indicate the nature of the hospitalization. By [redacted], the school nurse was aware that the hospitalization was behavioral in nature. By [redacted] or shortly thereafter, the District received the hospital discharge summary indicating a diagnosis of bipolar disorder. On [redacted], Student's counselor sent paperwork to District officials requesting an evaluation for special education and notified Parent that a permission form would be sent. The District issued a permission form on [redacted], and when this was not returned, it reissued the form on [redacted].

I find no unreasonable delay in this sequence of events, and therefore no breach of the District's Child Find obligation. However, in early January, Parent and Student's guidance counselor at the time had a brief conversation, which both witnesses remembered differently. Parent asserted that she had signed the form as consenting, and then the counselor talked her out of consenting, indicating that Student probably would not qualify under the IDEA due to Student's excellent grades and academic achievement. The counselor testified that Parent changed her mind when told that eligibility would mean an IEP, which Parent seemed not to want; thereupon, Parent changed the form and handed it to the counselor. I found both of these witnesses to be credible; thus, the evidence on this point is in "equipoise", Schaffer, 546 U.S., above.

The document was introduced, showing that Parent indeed checked the box for consent, and then crossed that off, initialing the change, and marked the box as non-consenting. A District administrative assistant testified about what Parent had said concerning the form, but that witness had no information on what the counselor had said or not said to Parent. Given this record, the

evidence is in equipoise, and Parent has failed to prove by a preponderance of the evidence that the counselor "talked Parent out of" seeking an initial evaluation for special education.

Parent changed her mind and requested an initial evaluation when she became aware that Student would need placement at a therapeutic school, and that this placement would need to be made through special education. Therefore, Parent signed the consent form and provided it to the District by [redacted]. The District issued its initial evaluation on an expedited basis by [redacted]. One month and one day later, the District convened an IEP team meeting and offered an IEP with placement in full time emotional support.

Thus, the IEP was offered about one day later than the IDEA requires. 34 C.F.R. §300.323(c)(requiring the IEP team meeting within 30 days). Nevertheless, this procedural violation did not cause a deprivation of FAPE, since Student was in the IEP-recommended placement even before the IEP was finalized. See 34 C.F.R. §300.513(a)(2)(hearing officer ruling on procedural violation must be based upon a substantive denial of FAPE – either impeding child's right to FAPE; impeding Parent's participation in educational planning; or deprivation of educational benefit).

Parent argues that, because of the delays in providing an evaluation, the District failed to comply with its Child Find obligation under section 504. Specifically, Parent argues that section 504 does not provide a 60 day time frame for conducting an evaluation for section 504 purposes. Since Student's counselor asserts that Parent requested an evaluation for section 504 purposes on [redacted] when she decided against an initial evaluation under the IDEA, Parent argues that the failure to conduct a section 504 evaluation violated the requirements of that act. I do not accept this argument in the circumstances of this matter.

The section 504 regulations indeed do not specify a time frame for evaluation. 34 C.F.R. §104.35. However, the regulation delegates this function to the states. 34 C.F.R. §104.35(b). The Pennsylvania Code sets a time frame for section 504 evaluations at 25 school days from request. 22 Pa. Code §15.6(d). In this case, assuming that Parent's oral request to the counselor on [redacted] triggered the 25 school day time frame, and not considering any school holidays in [redacted], 25 school days would have ended on [redacted]. Before this deadline passed, Parent changed her mind and requested an initial evaluation for IDEA services. School officials reasonably thought that Parent was no longer requesting section 504 services at that point. Under these circumstnaces, I cannot conclude that there was a procedural violation of the District's duties under section 504 and the sstate implenting regulations.

Moreover, any such violation did not result in a denial of a FAPE under section 504, based upon this record. Student was in hospital until [redacted], with a discharge recommendation for a small therapeutic school setting. Threafter, Student received educational services through the District's on-line program. In addition, Student returned to participate in [certain] classes every day, and was supervised at the District administration building, rather than being left home alone, which was considered unsafe. Parent is not satisfied with these arrangements, but the record shows that Parent was involved in planning for Student's post-release programming. Student fell behind in school work due to hospitalization, but this bright child was afforded an appropriate opportunity to "catch up" on academics while the District was completing an initial evaluation for IDEA purposes requested by Parent on Student's day of discharge from hospital. Given the circumstances, I do not find that the District's attempts to educate this child were inappropriate.

In sum, I find no failure to seek an evaluation in a timely fashion. Therefore, I find no basis to conclude that Student was denied special education during the period [redacted]. Parent's claim for compensatory education on account of this period of time is denied.

DISTRICT FAILED TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION [redacted]

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE is "special education and related services", at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school Districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be "reasonably calculated" to enable the child to receive appropriate services in light of the child's individual circumstances. Endrew F. v. Douglas County Sch. Dist., RE-1, __ U.S. __, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017). The Court of Appeals for the Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School Charter of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009). In appropriate circumstances, a District that meets this Third Circuit standard also can satisfy the Endrew F. "appropriate in light of the child's individual circumstances" standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

In order to provide a FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S. Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Endrew F., 137 S. Ct. above at 999 (requiring what is reasonable, not what is ideal); Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid.

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Endrew F., 137 S. Ct. above at 999; Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) The program's appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Applying these standards to the above findings and the record as a whole, I conclude that the District failed to offer or provide Student with an educational program that was appropriate in view of Student's circumstances during the relevant period from [redacted]. Despite its knowledge or at least reasonable notice that Student was struggling with a serious emotional disability that was being exacerbated by [redacted], and despite its knowledge that Student had done well at the

therapeutic placement during the preceding winter and spring months, the District reduced the support available to Student dramatically, and returned Student to a regular education environment, and to [redacted] [that] was likely to exacerbate Student's symptoms. It did this without any effort to evaluate Student's current emotional needs after the summer, and without convening an IEP team meeting to discuss alternate options.

The District argues that it was not required to conduct an evaluation, as it had just completed one 3 months earlier. While this may be a true statement of procedural requirements under the IDEA, it begs the question of what the District did to make sure that it understood Student's needs before drastically reducing the support level of Student's placement from full time to itinerant support. Moreover, an evaluation is required before any such placement change under section 504 regulations. 34 C.F.R. §104.35(a). Moving Student back to regular education and exposure to possibly injurious [redacted] was a change in placement that warranted at least a careful review of records.

Moroever, there was no IEP team meeting. This is contrary to the spirit if not the letter of the IDEA. 20 U.S.C. §1414(e)(parents must be part of group that changes placement); 34 C.F.R. §300.324(b)(revisions necessary when necessary to address anticipateed needs); 300.324(b)(2)(IEP team reviews IEP). At the least, it was a procedural step that should have been taken in view of Student's serious diagnosis, known dangerous behavior, susceptibility to [redacted] stressors, and previous apparent success in a smaller, more supportive educational environment at the therapeutic school. I conclude that changing Student's placement without even discussing such a move with the IEP team was not an action reasonably calculated to provide Student with the opportunity for progress that would be either meaningful or appropriate in view of Student's circumstances.

As the placement proved a failure immediately, and Student ended up back in the hospital after exhibiting dangerous behavior, I conclude that the District's change of placement was inappropriate. That Parent desired this change of placement is irrelevant. The District has a duty to offer an appropriate placement regardless of parents' desires. M.C. v. Central Reg. Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996)(child's right to FAPE not dependent on vigilance of parents).

Parent argues that the District denied Student a FAPE because it failed to investigate or respond properly to the Student [redacted] for the relevant periods. I make no finding and reach no conclusion about these allegations. Due process is not an appropriate forum in which to challenge a district's handling of [redacted]. Such allegations are relevant only insofar as they raise an inference that FAPE was denied. I have focussed on the latter question, the only one within my jurisdiction.

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the District to make up such services on an hour-by-hour basis; however, there is support also for a "make whole" approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010).

Here, there is insufficient evidence to indicate what services would be necessary to bring Student to the position that Student would have enjoyed if placed appropriately in [redacted]. Therefore, I conclude that an equitable remedy will be an hour for hour order to provide educational services that Student lost because of the inappropriate placement provided to Student by the District from [redacted]. Since Student on this record received no educational benefit, I will

order the District to provide full days of compensatory education for every school day on which the Student's neighborhood high school was open for students during that period of time.

CONCLUSION

I conclude that the District did not fail in its Child Find duties under either the IDEA or section 504 during the period from [redacted]. However, its placement of Student in regular education starting in [redacted] was inappropriate. Accordingly I order the District to provide Student with full days of compensatory education to remedy Student's resultant loss of educational services.

ORDER

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

1. The District shall provide compensatory education to Student in an amount equal to a full day of educational services for every day of school on which Student's neighborhood high school was open for students from [redacted].

2. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parent, and may be provided at any time, including after school hours, on weekends, or during summer months when convenient for Student or Parent. Such services may be provided to Student until Student reaches twenty-one years of age.

3. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.

4. The cost of any compensatory educational service may be limited to the current average market rate for privately retained professionals qualified to provide such service within a radius of fifty miles from the District administration building.

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

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

DATED: November 6, 2017