

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: B.S.

Date of Birth: [redacted]

Dates of Hearing:
September 28, 2011
September 29, 2011

CLOSED HEARING

ODR File No. 2057-1011AS

Parties to the Hearing:

Parent[s]

Lakeland School District
1593 Lakeland Drive
Jermyn, PA 18433

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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October 19, 2011

October 28, 2011

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

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ was previously a student in, and has graduated from, the Lakeland School District (District). During the time period at issue, Student was eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² by reason of a specific learning disability and other health impairment. Student's Parents filed a due process complaint in June 2011 in which they claimed that the District denied Student a free, appropriate public education during the 2006-07, 2007-08, and 2008-09 school years under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and applicable state and federal regulations. The District sought, among other things, a limitation on the scope of the Parents' claims.⁴

The matter proceeded to a due process hearing convening over two sessions at which the parties presented evidence in support of their respective positions. For the reasons which follow, I find in favor of the Parents.

ISSUES

1. Whether the District denied Student a free, appropriate public education; and
2. If it did not, is the Student entitled to compensatory education and, if so, for what time period, and in what form and amount?

FINDINGS OF FACT

1. Student is a graduate of the District, having received a diploma in 2009. For all times relevant to the issues in this case, Student was a resident of the District and was eligible for special education on the basis of a specific learning disability and, in later years, an other health impairment. (Notes of Testimony (N.T.) 25-27, 47, 135, 240)
2. Student enrolled in the District in kindergarten in 1996, and was initially evaluated for special education in the spring of 2004 during seventh grade following a referral from Student's guidance counselor. Student, who had demonstrated weak reading and mathematics skills since kindergarten, was struggling academically at that time and was in danger of not being promoted to eighth grade due to poor grades. (Parent Exhibit (P) 1)

¹ In the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

² 20 U.S.C. §§ 1401 *et seq.*

³ 29 U.S.C. § 794.

⁴ The record reveals that the Parents filed an initial complaint against the District in 2009, but for reasons not relevant to this decision, that complaint did not proceed to a decision at that time. The parties had an agreement to toll the filing date of the original complaint with respect to the claims for the 2007-08 and 2008-09 school years. (School District Exhibit (S) 36, S 37)

3. The initial evaluation reported Student's general cognitive ability in the average range on the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV). On the Wechsler Individual Achievement Test – Second Edition (WIAT-II), Student demonstrated relative weaknesses in Pseudoword Decoding, Word Reading, and Math Reasoning. (P 1)
4. The June 2004 Evaluation Report (ER) concluded that Student was eligible for special education by reason of a specific learning disability in reading decoding and math reasoning, and was in need of specially designed instruction. The Parents agreed with this eligibility determination. (P 1)
5. In February 2005, a behavior contract was developed to address problematic behaviors that Student was exhibiting: calling out and disrupting class, and eloping from class to spend time in the hallway. The District conducted a screening for Attention Deficit-Hyperactivity Disorder (ADHD) in the spring of 2005 but did not determine that Student was eligible for special education on that basis. (N.T. 124-27, 144, 153; P 4, P 5; School District Exhibit (S) 5 at 1-5)
6. An Individualized Education Program (IEP) developed in October 2005 noted that Student's behavior was "frequently interfering" with Student's education. (P 15 at 4) This IEP contained a goal for Algebra I, and a few program modifications and items of specially designed instruction addressing mathematics, reading decoding, and behavior, as well as test-taking accommodations. The Parents approved the Notice of Recommended Educational Placement (NOREP). (P 15; S 1, S 2)
7. Student began to receive medication therapy based upon several diagnoses including ADHD sometime prior to February 2006. (N.T. 54; S 4)
8. Student was re-evaluated in late 2005 - early 2006 due to new concerns about Student's behavior, and a Re-Evaluation Report (RR) issued in February 2006. At that time, Student was exhibiting problematic behaviors such as calling out, disrupting class and verbal aggression, and was withdrawn and having difficulty sitting still. Student's teachers reported that Student's behavior was interfering with regular education classes, particularly as compared to earlier in that school year. However, information in the RR was that Student was "handling the course load in the ninth grade regular education curriculum with specially designed instruction" but that behavior was the "biggest area" needing improvement. (School District Exhibit (S) 5) at 3) The RR stated that Student "has the academic ability to do all of the work in the regular education 9th grade curriculum [but Student's] behavior is hindering [] progress." (*Id.*) Additional information from an ADHD screening was also included in the RR. (N.T. 98, 120-21; S 3, S 5)
9. Student's Parents completed a Parent Report Form and Student completed a Behavioral Assessment Scale for Children – Second Edition (BASC-2) self-report. The Parents reported social/emotional concerns with excessive talking, and academic concerns with reading and writing. Student's BASC-2 Self-Report revealed no concerns. (S 4, S 5)

10. The District did not conduct a functional behavioral assessment (FBA). However, the District's school psychologist concluded at that time that Student's problematic behavior was not a product of Student experiencing difficulty and frustration with the academic work expected, but rather that Student was not performing well in school primarily because of the problematic behavior. Student was identified with a specific learning disability in basic reading skills and mathematics reasoning. (N.T. 97-103; S 5)
11. Student entered the 2006-07 school year in 10th grade. Student was suspended for a total of ten days in the fall of 2006 for fighting. Progress reports from October 2006 reflected some missed assignments as well as lack of participation and motivation. (P 8; S 7)
12. An IEP developed in October 2006 noted needs for appropriate behavior and completion of homework and assignments, as well as in reading and mathematics. The IEP stated that Student would receive specially designed instruction with full inclusion in the regular education curriculum.⁵ The Parents approved the NOREP. (S 7, S 8)
13. Also included in the October 2006 IEP was a Behavior Intervention Plan (BIP), which was developed to address physical and verbal aggression toward a peer and failure to follow school rules. The perceived function of the aggressive behavior was to avoid work and stressful situations. The perceived function of the failure to follow rules was to avoid work and stressful situations as well as to gain power and attention, avoid directives, and engage in confrontations. (N.T. 103; S 7, S 9)
14. The BIP contained a few strategies to address the behaviors, including support for and reduction in assignments and an opportunity to cool down or meet with an adult at school. The plan also specified the consequences of the two identified behaviors, which were discipline referral/suspension, phone calls to the home, and the Manifestation Determination process. This BIP was revised in November and December 2006. (N.T. 106-09; S 7, S 9)
15. Student was re-evaluated again in early 2007 due to increased concerns over Student's problematic behavior. (N.T. 111-15; S 11)
16. Parental input into this evaluation reflected Student's difficulties with homework completion, distractibility, attention, and disorganization. They also noted academic needs in reading, mathematics, and writing. (S 12)
17. Student's teachers reported that, as of February 2007, Student's behavior had improved, but that Student continued to require redirection due to distractibility, was not completing assignments, and was frequently inattentive. Teacher Rating Scales from the BASC-2 revealed scores in the at-risk range for Externalizing Problems, Attention Problems, and Hyperactivity, and many Adaptive Skills. Student was identified as eligible for special education on the basis of an other health impairment due to Student's ADHD, as well as a specific learning disability in basic reading skills and mathematics reasoning. (S 13)

⁵ The IEP in the record does not appear to be a complete document. (S 7)

18. By the end of the third quarter in the 2006-07 school year, Student was failing several classes and had missed a number of assignments and quizzes/tests, particularly in English class. (P 9; S 10)
19. An IEP meeting convened at the end of April 2007. This IEP for the first time specified that Student exhibited behaviors that impeded learning. Goals addressed maintaining passing grades in all regular education classes and compliance with school rules and directives. Program modifications and items of specially designed instruction related to test and assignment adaptations, prompts and redirection, and self-monitoring. Student was to receive itinerant learning support. The Parents approved the NOREP accompanying this IEP. (S 14, S 15)
20. Student was in 11th grade for the 2007-08 school year, receiving itinerant learning support, and was included in all regular education classes. Student's learning support teacher was available when Student had a study hall, if Student asked for help. Student's grades in the first quarter ranged from an A in physical education and health to a low D in English, Geometry, and Chemistry. In the second and third quarters, Student's grades were similar to the first quarter. Fourth quarter grades ranged from failing grades in Health (46%) and Chemistry, a D in English, a B in Geometry and American History, and an A in physical education. (N.T. 193-95, 244-46; S 32)
21. The District initiated truancy proceedings against Student during the 2007-08 school year because Student was not attending school. Student was ordered by a magisterial district judge to attend school every day. (N.T. 165-66, 177-78; S 16, S 31, S 39)
22. An IEP was developed in April 2008 which was remarkably similar to the April 2007 IEP including the previously developed BIP. The Parents approved the NOREP. (S 18 (*compare with* S 14), S 19)
23. Student's final grades for the 2007-08 school year were as follows: A-B in Physical Education; B in American History; C in Geometry; D in English and Health; and an F in Chemistry. (S 32)
24. Student was absent 55.5 days during the 2007-08 school year, 37.5 days of which were unexcused. (S 39)
25. Student began 12th grade at the start of the 2008-09 school year. As in the prior year, Student was in regular education classes with itinerant learning support when Student had a study hall, receiving help when Student asked for it. Student received adapted tests in some classes, and the learning support teacher was advised about Student's attendance, behavior, and missed assignments or homework. (N.T. 193-95, 244-46, 260, 264, 275, 280-82; S 18)
26. Student continued to miss school throughout the 2008-09 school year, failing to attend when Student did not want to go and ultimately missing 54 days, 49 of which were unexcused. Student's absences adversely affected Student's grades and performance in

classes. Due to Student's age, Student was no longer required by law to attend school during that school year.⁶ (N.T. 225-31, 257-58, 261, 264, 278; P 11, P 16; S 31, S 39)

27. A "Quarterly Report" on Student's IEP goal(s) midway through the 2008-09 school year reflected that Student was "not making meaningful progress," was not completing homework and assignments, was distracted or distractive to others, and needed to improve attendance. (S 27)
28. A meeting convened in January 2009 to discuss Student's attendance and academics, including missed assignments and homework. Student was to meet with the guidance counselor each week, and the learning support teacher was to communicate regularly with the other teachers and the Parents. (S 20)
29. In the March or April of 2009, Student was placed into an alternative education program for a period of approximately two or three weeks. This decision was made without a meeting of the IEP team or the knowledge of the District's Coordinator of Special Education Services. When she offered to return Student to the District, the Parents decided to have Student remain at the alternative placement for a short period of time to see if Student would attend and be successful there. (N.T. 179, 184-91, 201-02)
30. The IEP team developed a new IEP for Student at the alternative program on April 21, 2009. This IEP stated that Student did not demonstrate behaviors that impeded Student's learning or that of others. The only need identified was to improve mathematics skills. Two goals addressed Algebra II and written expression, and a few program modifications/items of specially designed instruction provided for small group instruction, positive reinforcement for appropriate behavior, and adaptations to tests and assignments with itinerant learning support. The Parents did not approve or disapprove the accompanying NOREP. (N.T. 189-91; S 21, S 22)
31. A meeting convened on May 5, 2009 to discuss Student's return to the District high school. A plan was developed to require Student's attendance. (N.T. 191-92; S 23)
32. Student's grades at the end of the 2008-09 school year, as reported in September 2011, reflected failing grades in almost all subjects with the exception of Science (70%, the lowest D) and Problems in Democracy (also 70%), and Incomplete in American History and Criminology. Teacher comments throughout the school year related to absences/attendance, missed assignments, lack of participation and preparation, and Student not working to Student's abilities. (P 11; S 32)
33. Student had a goal of entering the military upon graduation from high school. Student took the Armed Services Vocational Aptitude Battery (ASVAB) on one occasion but did not pass. (N.T. 220-21, 224; S 18)

⁶ Pursuant to 24 P.S. §§ 13-1326 and 13-1327, Student was no longer subject to compulsory attendance upon reaching the age of 17 on March 23, 2008. (N.T. 238)

34. Student graduated from the District high school in 2009. Student had to complete some make-up work and tests in order to receive a diploma. (N.T. 135, 159-62, 192-93, 198-99, 215-17, 233-35, 240, 243, 262, 280, 283; P 12, P 13; S 25, S 26, S 34, S 35)
35. Student was employed after graduation and has worked continuously since then in various occupations. At the time of the due process hearing, Student was working in a factory and residing with the Parents. (N.T. 171, 215, 217-18, 240)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Broadly stated, 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);⁷ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in “equipose.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole was essentially consistent.

IDEA Principles

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

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized

⁷ The burden of production, “i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding,” *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

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

Motion to Limit Claims

As noted, the District filed a motion to limit the scope of the Parents’ claims, and evidence was presented at the beginning of the first hearing session on whether the Parents should be permitted to present their claim relating to the 2006-07 school year. This hearing officer made a ruling on the record, after a short recess, and concluded that the Parents would be permitted to present evidence with respect to that school year. In its closing argument, the District requested reconsideration of that ruling. While this hearing officer finds no basis to make any change to that determination, a brief explanation to clarify that oral determination appears to be appropriate.

The IDEA expressly provides that parties must be afforded the opportunity to file a due process complaint alleging “a violation that occurred not more than two years before the date the parent or public agency knew or should have known of the alleged action which forms the basis of the complaint.” 20 U.S.C. §1415(b)(6)(B); *see also* 34 C.F.R. § 300.507(a)(2). In other words, a party “must request an impartial due process hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint.” 20 U.S.C. § 1415(f)(3)(c); *see also* 34 C.F.R. § 300.511(e). The District bears the burden of establishing the knew or should have known date. *J.L. v. Ambridge Area School District*, 2008 WL 2798306 (W.D. Pa. July 18, 2008) at *10. Ordinarily, the knew or should have known date may be established through proof of

the date on which the District acted or refused to act with respect to the “identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education,” 20 U.S.C. s 1415(b)(6), and conveyed notice of that action or inaction to the Parents.

The IDEA also provides for two specific exceptions to the two-year limitation period, permitting claims beyond that timeframe to a parent who was prevented from requesting the hearing as a result of:

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local education agency’s withholding of information from the parent that was required under this subchapter to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D); *see also* 34 C.F.R. § 300.511(f). The burden is on the Parents to establish that one of the exceptions applies, which requires a “highly factual inquiry to determine if application of either exception is warranted.” *J.L. v. Ambridge Area School District*, 2009 WL 1119608 (W.D. Pa. April 27, 2009) at *4. Additionally, “the IDEA’s two-year statute of limitations applies to claims made for education under § 504 of the Rehabilitation Act.” *P.P. ex rel. Michael P. v. West Chester Area School Dist.*, 585 F.3d 727, 737 (3d Cir. 2009).

In this case, only the 2006-07 school year is the subject of the motion to limit the scope of the Parents’ claims. There was no contention that the Parents did not know of the actions or inactions of the District which formed the basis of their complaint at the time of each those actions during the 2006-07 school year. (N.T. 17, 76; *see also, e.g.*, N.T. 59-62) Thus, the determination of whether their claims should be limited turned solely on whether the Parents established a specific misrepresentation or withholding of required information which prevented them from filing a due process complaint. (N.T. 75-80) As set forth in the ruling made on the record, the Parents’ uncontradicted testimony and the exhibits referenced during that portion of the hearing (*see, e.g.*, S 10) established at least negligent misrepresentations that Student was making appropriate progress and was accessing the regular education curriculum without a need for accommodations or specially designed instruction, and that Student had met IEP goals. *See J.L. v. Ambridge*, 2009 WL 1119608 at *12 (finding negligent misrepresentation can satisfy the exception to the IDEA statute of limitations). The Parents also presented evidence that they understood from the information provided that the District was addressing Student’s academic and behavioral difficulties successfully. (N.T. 39, 56) This hearing officer concluded that the Parents did establish specific misrepresentation which prevented them from pursuing any action with respect to Student’s education during the 2006-07 school year and, thus, they would be permitted to present evidence for the entire time period claimed in the complaint. (N.T. 86-87)

Free, Appropriate Public Education

The central issue is whether Student was denied FAPE by the District for the school years in question. With respect to the 2006-07 school year (10th grade), the record evidence is sparse. Soon after Student began that school year, an IEP was developed which included a BIP. (Finding of Fact (FF) 12, 13, 14) The BIP was revised twice in the fall of 2006, and Student was re-evaluated in early 2007 due to Student’s problematic behavior. (FF 14, 15, 16, 17) However, Student’s behavior did not remain consistently inappropriate or problematic throughout that

school year. (FF 15, 17) At the end of the third quarter when Student was failing several classes and had not turned in many assignments, the IEP team reconvened. (FF 18, 19) For the first time, the team determined that Student was exhibiting behavior that impeded Student's learning. (FF 19) While the IEP itself cannot be considered a model document, the decision of the IEP team to reconvene and attempt to address Student's needs suggests that the District did not ignore its obligations to provide an appropriate education for Student which was responsive to Student's needs. Viewed in its entirety, there is simply insufficient evidence in the record to make any conclusions with respect to whether and how Student's educational program, including the BIP, was or was not appropriately addressed during the 2006-07. As the burden lay with the Parents to demonstrate a denial of FAPE, this hearing officer is compelled to conclude that the claim relating to the 2006-07 school year must be denied.

The evidence for the 2007-08 and 2008-09 school years is much more persuasive. In the spring of 2007, well before the start of the 2007-08 school year, the District was unquestionably aware of Student's problematic behavior and its impact on Student's learning. (FF 13, 17, 19, 23, 24) The recurring theme of the District evidence was that Student did well when Student tried, but that Student's poor academic performance was due to excessive absences and a conscious refusal to complete work. (N.T. 195-96, 279; S 14, S 18, S 20, S 23, S 25, S 27, S 32) Despite information in several evaluation reports prior to the 2007-08 school year that Student was inattentive and distractible, ongoing information that Student was not succeeding in many classes even with the provision of special education services, and an astonishing record of unexcused absences, nothing was done to attempt to determine whether Student had additional unmet educational needs. The clearly ineffective BIP from 2006 was not revised as the behaviors and absences worsened during the 2007-08 and 2008-09 school years, nor was there an attempt to develop a *positive* behavior support plan or to make a comprehensive inquiry into why Student was not attending school.

Student's IEPs in effect for the 2007-08 and 2008-09 school year did not contain objective present levels of educational performance, measurable annual goals designed to address specific needs, or statements of how Student's progress toward goals would be measured. (S 14, S 18). The goals in those IEPs contemplated that Student would pass all regular education classes and comply with school rules, and nothing more. (*Id.*) These IEPs included no information suggesting how, if at all, Student's specific learning disabilities or ADHD would be addressed. The limited progress monitoring of Student's IEP goals lacked any meaningful information from which one could assess whether Student was, indeed, making progress in any aspect of the educational program. (FF 27) Moreover, Student's problematic behavior was largely ignored, perhaps because Student so frequently missed school entirely, but that omission is glaring. Further, although the IEP developed in late April 2009 was marginally better than the prior IEPs, finally providing goals related to some of Student's needs, there was little time to introduce any new educational programming at the end of Student's senior year in high school to make a significant difference if it had been approved. Moreover, aside from brief testimony that Student's tests and assignments were adapted or modified and the regular education teachers had communication with the learning support teacher (FF 19, 25), the record supports the conclusion that Student was actually provided very minimal, if any, special education during the school day which was reasonably calculated to provide meaningful educational benefit given Student's potential and identified disabilities. Student's inconsistent

grades in regular education classes further signify that the support provided for those classes was insufficient to meet Student's educational needs. For all of these reasons, this hearing officer concludes that Student was denied FAPE for the 2007-08 and 2008-09 school years.

One other aspect of Student's program in the 2008-09 school year merits mention. The decision to place Student into the alternative education placement in the spring of 2009 appeared to be a wholly inappropriate action, a fact which the District conceded. (N.T. 22, 319-20) That placement decision was not made by the IEP team, nor did it follow a manifestation determination meeting. Additionally, this placement clearly was not based on consideration of the factors for determining the least restrictive environment appropriate.⁸ The short time period Student spent in the alternative setting was part of the inappropriate programming for the 2008-09 school year and, thus, will not result in any addition to or deduction from the relief awarded below.

With respect to the Section 504 claims, this hearing officer observes that the obligation to provide FAPE is substantively the same under that statute as under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). The Parents made no separate substantive arguments under Section 504. Because all of the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

Remedy

The next question is what relief is warranted. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed a scheme that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

In this case, the District asserts that Student would be in essentially the same position post-graduation had Student's educational programming been different. (N.T. 319, 323)

⁸ The Parents can hardly be faulted for agreeing to let Student remain in that setting for a short time period to see if Student would be successful there, given the lack Student's academic success and the absence of appropriate programming in the District high school.

However, this hearing officer concludes that there was little if any evidence which would permit a determination of what position Student would have been in had Student been provided with appropriate educational programming throughout the time period in question. Thus, this hearing officer concludes that the *M.C.* standard is the appropriate method of determining the amount of compensatory education owed to Student in this case. Because the District was already quite familiar with Student and Student's needs as they presented at the start of the 2007-08 school year, there will be no reasonable rectification period included in the award.

This hearing officer agrees with the Parents that the educational deprivation during the school years in question pervaded Student's entire day. While Student did manage to pass some classes and obtained a diploma, it would be next to impossible to calculate any hours during which Student derived meaningful educational benefit throughout this time period. *See Keystone Central School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education). Therefore, full days of compensatory education will be awarded. There will be a deduction for the days that Student did not attend school due to an excused absence during those school years. There will not, however, be a deduction for unexcused absences because the District failed to take any steps to conduct additional evaluation or make any inquiry to determine whether Student was missing school for reasons related to a known or uninvestigated disability, or to deficiencies in the program provided.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how the hours of/fund for compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product or device. There are financial limits on the compensatory education award. The monetary value of the compensatory education shall be measured by the proportional cost to the District to provide educational services to Student based upon the salary, including the value of fringe benefits for the special education and regular education teachers, who provided services to Student during the 2007-08 and 2008-09 school years.⁹

CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that the denied FAPE to Student for the 2007-08 and 2008-09 school years. Consequently, Student is entitled to compensatory education. Because the denial pervaded Student's entire school day, compensatory education shall be for full school days subject to the limitations set forth in this decision and order.

⁹ The Parents' claims for attorney fees and costs are noted, but denied as outside of this hearing officer's authority.

ORDER

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

1. The District did not provide FAPE to Student during the 2007-08 and 2008-09 school years, and Student is accordingly entitled to, and the District is ordered to provide, full days of compensatory education for each school day that Student did not have an excused absence during those school years.
2. The compensatory education award is subject to the conditions and limitations set forth above.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: October 28, 2011