

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 Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

24228-2021

Child's Name

S.S.

Date of Birth

[redacted]

Parents

[redacted]

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Hearing Officer

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Date of Decision

06/29/2021

Introduction

This special education due process hearing concerns the educational rights of S.S. ("student"), a student who resides in the Pittsburgh School District ("District").¹ The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")² as a student who requires special education to address the student's needs related to an emotional disturbance. The parties disagree over whether or not the student should have been identified at some earlier point as a student who qualified under IDEIA and, consequently, whether the District's programming was appropriate to meet the student's needs.

The student's parents claim that the District has denied the student a free appropriate public education ("FAPE") through various acts and omissions related to lack-of-attendance and school avoidance since the 2018-2019 school year. Analogously, the parent[s] assert these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").³

¹ The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162 ("Chapter 14").

³ It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 ("Chapter 15").

The District counters that at all times it met its obligations to the student under IDEIA and Section 504. Accordingly, the District argues that the parents are not entitled to any remedy.

For reasons set forth below, I find that, in part, the District met its obligations to the student and, in part, it did not.

Issues

1. Should the District have identified the student, at some point during or after the 2018-2019 school year and prior to January 2021, as a student who was eligible for special education under IDEIA?
2. If so, when?
3. To the extent the answer to question #1 is “no” in some regard over the time period in question, did the District provide appropriate programming under Section 504?
4. To the extent that either/both of the question(s) #1 and/or #3 is/are “no”, is remedy owed to the student?

Findings of Fact

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness’s testimony are not explicitly referenced below.

2018-2019 / 9th Grade

1. In the 2018-2019 school year, the student was in 9th grade.
2. The student is diagnosed with a chronic intestinal condition which sometimes requires immediate care or attention. [redacted] (Parents' Exhibit ["P"]-8; Notes of Testimony ["NT"] at 43-147).
3. At times, the condition would lead to the student missing school. (NT at 43-147, 152-243).
4. Through September and October 2018, the student's condition led to minimal absences. (School District Exhibit ["S"]-21).
5. In November 2018, the student was medically absent six times. By late November, the student was provided with a Section 504 plan which addressed the student's need to attend to the intestinal condition in the school environment, as well as providing time to allow the student to make up missed work due to absence. (P-1; S-1, S-21; NT at 43-147, 152-243).
6. Over the period December 2018 through February 2019, the student was absent six times in December, eight times in January, and seven times in February (including medical tardiness). (S-21).
7. The amount of school absences led to missed school work. The need to make up schoolwork led to anxiety for the student. Increased anxiety exacerbated the school-attendance issue, and a cycle of absence/missed-schoolwork/anxiety ensued. (P-23 at pages 1-2; S-21; NT at 43-147, 152-243).

8. By mid-March 2019, the student was medically absent ten times, and the parent submitted a request for homebound instruction. (P-2; S-21).
9. The homebound application mentioned both the student's intestinal condition and anxiety. (P-2).
10. The District's director of psychological services became involved in the student's programming at the time of homebound instruction. He testified that the focuses of the considerations was school-absence and work-completion and not anxiety. (NT at 225-356).
11. Homebound instruction began in April 2019. (P-23; NT at 505-569).
12. Medical professionals provided documentation of medical diagnoses of social anxiety disorder and panic disorder. (P-6).
13. The skill level of the homebound instructor did not allow him to deliver all of the student's instruction, especially in mathematics. (NT at 43-147).
14. The student experienced a heightened level of anxiety related to biology class due to missing schoolwork and the working dynamic with the teacher. (P-23; S-23a at pages 2-3; S-23a at pages 240-242, 245-247, 259-263; NT at 43-147, 152-243, 361-427).
15. In May 2019, the parents provided communications from the student's doctors regarding anxiety. The student's Section 504 plan was revised but did not address school-related anxiety. In response to parents' concerns, the District requested permission to evaluate the student. (P-3, P-7, P-8, P-23; S-2, S-4).

16. The District sought to consider therapeutic interventions or settings, but the family was resistant to these options. (NT at 43-147m 152-243).
17. The student received As and Bs, and received credit, in all courses in 9th grade. (S-22; NT at 361-427).

2019-2020 / 10th Grade

18. The student returned to the District in 10th grade.
19. In August 2019, the District again sought permission to evaluate the student, in a revised form. Parents provided permission for the evaluation at the end of the month. (S-5).
20. In early September 2019, the student's Section 504 plan was modified, adding use of a manipulative for stress and access to professionals in the building for the student to utilize as a resource. (S-6).
21. In September 2019, the student attended regularly, being medically absent only one day. (S-21).
22. In late September 2019, the District issued its evaluation report ("ER"). (P-10).
23. The September 2019 ER indicated that the evaluation process was to determine the student's potential eligibility for special education on the basis of the student's intestinal condition and/or "social anxiety disorder and panic disorder". (P-10 at page 1).

24. The September 2019 ER contained teacher input. The teachers who provided input indicated that the student did not experience difficulty learning in their classes and did not require supports in their classes, although one teacher noted that absences impacted the teacher's view of the student. (P-10 at page 2).
25. The September 2019 ER contained observations by the District evaluator and a recitation of the Section 504 plan and homebound education history of the student. (P-10 at pages 4-5).
26. The September 2019 ER contained cognitive assessments which indicated that the student had a full-scale IQ of 120, with relative weakness in executive function and processing speed. Accounting for these relative weaknesses, the student's general ability index was 129. (P-10 at pages 4-9).
27. The September 2019 ER contained achievement assessment in reading, mathematics, and writing commensurate with the student's cognitive ability. (P-10 at pages 9-11).
28. The September 2019 ER contained social/emotional/behavioral assessments.
29. Behavior assessment in the September 2019 ER included results from four teachers (from both the 2018-2019 and 2019-2020 school year) and the student's mother. (P-10 at page 15).
30. One teacher reported an elevated score on the emotional distress index, two teachers reported very elevated scores on the upsetting thoughts/physical symptoms index, one teacher reported a very elevated score on the separation fears index, one teacher reported a very elevated score on the perfectionistic & compulsive

behaviors index, and three teachers reported very elevated scores on the physical symptoms index. (P-10 at pages 12-16).

31. The student's mother reported an elevated score on the emotional distress index, and a very elevated score on the physical symptoms index. (P-10 at pages 12-16).
32. Three teachers did not record any elevated or very-elevated scores in the symptoms scale. One teacher recorded an elevated score for oppositional defiant disorder, and very elevated scores for generalized anxiety disorder, separation anxiety disorder, obsessive-compulsive disorder, and autism spectrum disorder. (P-10 at page 16).
33. The student's mother reported an elevated score for major depressive episode, and a very elevated score for generalized anxiety disorder. (P-10 at page 16).
34. Although the District evaluator opined that the behavior index scores were an atypical profile for the student's age and gender, the behavior indices and symptom scales did not strongly support the psychological diagnostic criteria due to a divergence between the index scores and symptom scales. (P-10 at page 16-17).
35. Given the mother's symptom scales indicating a potential major depressive episode, the District evaluator administered a childhood depression inventory to the student. The student's mother scored the student as high-average for emotional problems, functional problems, and total scoring, with the instrument's interpretive guide noting "no problem indicated". (P-10 at pages 21-22).

36. The September 2019 ER also contained an assessment of anxiety scales from the student's mother and a self-report for the student. (P-10 at pages 17-21).
37. The student's mother reported elevated scores on the panic index. The student reported slightly elevated scores on the generalized anxiety disorder index, total physical symptoms index, and the panic index. The student reported elevated scores on the tense/restless index. (P-10 at pages 17-21).
38. The overall results of the anxiety assessment indicated that based on the parent's scores, the student has a low probability of anxiety disorder. The student's own scores indicate a borderline probability of anxiety disorder. (P-10 at pages 18, 20).
39. The September 2019 ER concluded that the student has disabilities (through the diagnoses of the intestinal condition, the generalized anxiety disorder, and the panic disorder) but does not require special education. The ER recommended that the student continue to be serviced under a Section 504 plan. The most significant recommendation was that the student receive mental-health/student-assistance support as part of that plan. (P-10 at pages 22-23).
40. Shortly after the issuance of the September 2019 ER, the student was medically excused for two days in early October. After that, the student's mother reported to the District that the student was experiencing heightened anxiety related to work completion and school attendance. The September 2019 ER was revised to include this content (approximately 10 days into October). (P-10 at page 22, P-25 at page 1; NT at 43-147, 152-243).

41. In October 2019, the District performed a functional behavior assessment ("FBA"). The FBA noted that the student did not exhibit problematic behaviors in the school environment, so observations of the student in the educational environment did not yield any behavioral recommendations. (P-11; S-8).
42. In November 2019, the student was medically absent four times, and experienced medically-related tardiness. (S-21).
43. In early December 2019 (approximately 10 days into the month), the student had been medically absent four times and once experienced medical tardiness. (S-21).
44. In mid-December 2019, the student's Section 504 plan was revised to allow for more structure access to individuals in the school environment. Additionally, where the family was having difficulty getting the student to school, the school counselor was established as a point of contact to meet the family to help the student to enter the building. (S-9).
45. At times, the school counselor at the student's school and the building principal assisted the student at arrival to have the student exit the family vehicle to enter the school building. (NT at 152-243, 361-427).
46. Overall, in December 2019, the student largely failed to attend school, being medically absent twelve days. (S-21; NT at 43-147).
47. In the first half of January 2020, the student failed to return to school after the winter break, being medically absent for nine days. (S-21).

48. The student was placed on homebound instruction in mid-January 2020. (P-12; NT at 43-147, 152-243).
49. Except for Spanish, the student received As and Bs, and received credit, in all courses for the first semester of 10th grade. The student's second quarter grade in Spanish was a C. (S-22).
50. In February 2020, the District authorized an independent educational evaluation ("IEE") at public expense to re-evaluate the student. (P-12; S-10).
51. In early March 2020, the student's homebound education program was extended. (P-12).
52. In early March 2020, the District was exploring, at the request of parents, distance learning where some of the student's education would be delivered using live teaching through online learning platforms. There were, however, issues related to this delivery model because of the collective bargaining agreement with District teachers; the school administration was exploring whether and how this might be accommodated. (NT at 43-147, 361-427).
53. In mid-March 2020, as a result of the COVID-19 pandemic, schools were closed by governmental order and did not re-open for in-person instruction for the remainder of the 2019-2020 school year.
54. Because in-person homebound instruction was no longer possible in the spring of 2020, the student received online instruction through the District's online learning platform for the remainder of the 2019-2020 school year. (NT at 43-147, 361-427).
55. The IEE process was also delayed due to societal circumstances related to the COVID-19 pandemic. (P-15; NT at 43-147, 437-494).

56. Except for Spanish and English, the student received As and Bs, and received credit, in all courses for the second semester of 10th grade. The student's third quarter grades in Spanish and English were Cs. (S-22).
57. The student's 10th grade Spanish teacher did not feel the student had the spoken-Spanish skills necessary to recommend Spanish in 11th grade. The student did not take Spanish in 11th grade. (NT at 43-147, 361-427).
58. In July 2020, the independent evaluator issued the IEE. (P-15).
59. The independent evaluator noted that the student refused to participate in the evaluation process in person or over the phone. "Therefore," the evaluator noted, "a full evaluation of (the student's) behaviors, academic skills and needs was not possible." (P-15 at page 2).
60. The July 2020 IEE contained extensive background information provided by the student's mother. (P-15 at pages 2-9).
61. The background in the IEE provided by the student's mother indicated that attendance-refusals (for example, to attend therapy sessions with private providers) and anxiety-related disengagement (for example, from family religious preparation, and a community-based theatrical production) are pattern in the student's life outside of schooling. (P-15 at pages 4-5).
62. The July 2020 IEE included behaviors (such as crying and curling up on the floor during refusals) that were not present in the school environment. (P-15 at pages 2-10).

63. These instances of significant behavioral manifestations were not known to the District (at least in any pertinent detail) prior to the issuance of the IEE. (P-10, P-11; S-8; NT at 152-243, 361-427, 505-569).
64. The July 2020 IEE contained a review of the student's educational background and history, including the student's Section 504 plans and the content of the September 2019 ER. (P-15 at pages 10-19).
65. The July 2020 IEE contained input from the homebound instructor who provided instruction to the student over January – March 2020. The student would not engage in person with the homebound instructor, either instructionally or through communications. (P-15 at pages 17-18).
66. The July 2020 IEE contained behavior rating scales completed multiple teachers and the student's mother. The results of these behavior ratings were largely consistent with the behavior assessment scores obtained by the District in its September 2019 ER. (P-15 at pages 18-22).
67. The July 2020 IEE contained the same anxiety assessment completed by the District in its September 2019 ER. The anxiety assessment was completed by both of the student's parents and by the student. (P-15 at pages 22-26).
68. On the anxiety assessment, the scores reported by the student's mother showed multiple slightly-elevated and elevated scores (more than she had reported in the September 2019 ER). The student's father reported elevated scores for total physical symptoms, panic, and tense/restless indices. The student's scores were very consistent

with the scores the student had reported in the September 2019 ER. (P-15 at pages 22-26).

69. Based on the scores from the anxiety assessment, the scores of the student's mother supported a finding that there was a very high probability of an anxiety-related disorder. The student's scores supported a finding that there was a high probability of such a disorder. The scores of the student's father could not be used to perform a probability characterization due to a lack of completed items on the instrument. (P-15 at pages 25-26).
70. The July 2020 IEE concluded that the student should be found eligible under the IDEIA as a student requiring special education for an emotional disturbance. (P-15 at page 28).
71. The independent evaluator recommended online instruction for the student, regardless of the instructional posture of the District when school resumed in the 2020-2021 school year. (P-15 at page 28).
72. The independent evaluator made recommendations, most of which could be implemented in any educational environment, whether online or in-person. A handful of recommendations were made should the student return to in-person instruction. (P-15 at pages 28-29).

2020-2021 / 11th Grade

73. The District did not return to in-person instruction at the outset of the 2020-2021 school year. Instruction for all students, including the student in this matter, was delivered through online learning platforms. (NT at 43-147, 361-427).

74. In August 2020, the District re-evaluated the student, considering the content of the July 2020 IEE and incorporating it into its August 2020 re-evaluation report ("RR"). (S-12).
75. The August 2020 RR noted the difficulties acknowledged by the independent evaluator in not having the student directly available for observation, interview, or assessment. Furthermore, the RR noted that the July 2020 IEE recommended that the student be identified as a student with an emotional disturbance but did not document how the findings of the IEE supported the identification criteria for emotional disturbance in the IDEIA. (S-12 at page 28).
76. The August 2020 RR concluded that "(t)here is no dispute that (the student) is a...student requiring...Section 504 supports for equitable access to ...general education programming. However, the existing data does not support educational need for specialized goal development or remediation of educational programming over a marked period of time." The RR continued to recommend that the student be considered as a student with the previously-identified disabilities who did not require special education. (S-12 at pages 28; S-13).
77. The August 2020 RR made numerous recommendations for Section 504 accommodations. (S-12 at pages 28-30).
78. The student's Section 504 plan was revised to include the recommendations of the District evaluator. (P-18; S-14).
79. Online learning was at times unsuccessful because the student did not always engage in the learning environment and work-completion issues persisted. (P-18; S-14).

80. In October 2020, the student's parents requested an independent FBA, and the District requested permission to re-evaluate the student. (P-19).
81. On the same date that parents provided permission for the independent FBA, the parents filed the special education due process complaint which led to these proceedings.
82. In November 2020, the independent behaviorist issued the independent FBA. (P-20; S-15).
83. The November 2020 independent FBA included structured interviews with school personnel and the family, review of educational records, observations in the home environment, and the administration of assessments. (P-20; S-15).
84. A structured interview with the student did not yield meaningful substantive data, although the student's affect, flat and minimally engaged/responsive at the outset, ended with disengagement, tears, and a retreat to the side of the mother. (P-20; S-15).
85. Utilizing behavioral assessments and the additional information in the possession of the evaluator, the hypothesis for the independent FBA was that the student seeks to escape or delay non-preferred tasks, specifically academic work. This triggers the work-completion/school-attendance and anxiety cycle. (P-20; S-15).
86. The independent FBA evaluator provided numerous, detailed recommendations and interventions for each stage of the FBA analysis (addressing antecedents, the manifest behaviors, and consequences). (P-20; S-15).

87. In the recommendations, the evaluator spoke at times of how those recommendations and interventions were for a Section 504 plan, and at other times for an IEP, or in a special education context. (P-20; S-15).
88. In December 2020, in light of the independent FBA, the District issued a re-evaluation report. (P-21).
89. The December 2020 RR found that the student was eligible for special education as a student with an emotional disturbance. The District evaluator concluded:
- “Based on review of existing data, interviews and additional data collected through this multidisciplinary evaluation, (the student) currently demonstrates symptoms consistent with the Commonwealth guidelines such as: an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, inappropriate types of behaviors or feelings under normal conditions and a tendency to develop physical symptoms or fears associated with personal or school problems. Therefore, evaluative data meets the Commonwealth of Pennsylvania’s psychometric criteria for a student with an Emotional Disturbance. These behavioral difficulties have been reported over a long period of time, to a marked degree and have been determined to have a significant impact on (the student’s) educational attainment.” (P-21 at page 36).
90. In December 2020, parents requested permission to amend their complaint, a request which was granted.

91. In January 2021, the student's IEP team met to design the student's IEP. (S-17).
92. The January 2021 IEP contained three goals (including verbal or email communication with educators, engagement in class, and attendance) [redacted]. (S-17).
93. The January 2021 IEP included the school-relevant content from the independent FBA, including most of the recommendations of the FBA as modifications and specially designed instruction in the student's IEP. (S-17).
94. The January 2021 IEP indicated that the student had the option to remain in online instruction for the remainder of the 2020-2021 school year. (S-17).
95. Parents approved January 2021 IEP for implementation. (S-18).
96. At the hearing, parents seek quantitative compensatory education for alleged denial-of-FAPE from October 2018 through January 2021, when the District proposed the January 2021 IEP. (NT at 1-29).

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. Where particular emphasis was accorded to a witness's testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

Discussion

IDEIA/Denial-of-FAPE

FAPE. The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Child-Find. A critical aspect for the provision of FAPE is a school district's "child find" obligation, requiring states, through local education agencies like school districts, to ensure that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated." (34 C.F.R. §300.111(a)(i)). This provision places upon school districts the "continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009). The evaluation of children who are suspected to have a disability must take place within a reasonable period of time after the school is on

notice of behavior that is likely to reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999).

Evaluation. Finally, where a school district conducts an evaluation under its child-find obligation, that evaluation must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the student is a child with a disability and, if so, what must be provided through the student’s IEP in order for that student to receive FAPE. (34 C.F.R. §300.304(b)). The evaluation must assess “all areas related to the suspected disability”, must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”, and must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and (34 C.F.R. §300.304, generally, and specifically at §§300.304(b)(2-3),(c)(4)).

The District met its child-find obligation. It did not formally identify the student until December 2020. But from the fall of 2018, the District has been diligent in working with the student within the construct of the student’s needs as the District perceived those needs and as it was informed of those needs by the family.

This is a record where the student’s needs changed over time. The behaviors being presented to the District in the fall of 2018 were similar in kind to the student’s behavior in the winter of 2020, but the intensity of that behavior—and consequently the student’s needs in that regard—were very different. In the fall of 2018 and through to the start of the second semester that school year in the winter of 2019, the student’s absences were consistent but not entirely overwhelming. When brought to the attention of the District, it was in terms of the student’s intestinal condition that the

initial Section 504 plan was authored, and for most of the 2018-2019 school year, the District was responding appropriately, and effectively, to the student's medical diagnosis. Only in the spring of 2019, when the student's absences increased, did the notion of anxiety begin to be part of the conversation about the student's educational needs.

At that point, the student had been approved for homebound instruction and the Section 504 plan was revised. Homebound instruction was delivered through the end of the school year and issues related to the student's absences (work completion, grading) were being addressed. By the end of the school year, the District had even sought permission to evaluate the student (permission which did not come until the summer that year). On balance, however, the record does not support a conclusion that the student should have been identified as a student requiring special education in the 2018-2019 school year.

The 2019-2020 school year began with non-attendance, as in the prior school year, not significantly impacting the student's learning. When the September 2019 ER was issued in late September, the student's attendance had been nearly perfect, and all indications were that the student's Section 504 plan was appropriate to meet the student's needs. Granted, the September 2019 ER had indications that there may have been issues related to the student's behavior and affect that somewhat atypical, but the conclusion of the District evaluator that the student should continue to receive regular education accommodations through a Section 504 plan were fully supported, or at least not contradicted, by the evaluation process and results.

In October and November of 2019, non-attendance became slightly more elevated, but, again, the District cannot be faulted for not identifying, or not seeking to re-evaluate the student over this period. In December 2019, however, the student's non-attendance took on a more significant

aspect. First, the number of absences markedly increased. While not a decisive factor in and of itself, what had been relatively consistent episodes of non-attendance became much more frequent and consecutive. Second, the Section 504 plan was definitively revised to include addressing issues of attendance and facilitating the student's entry into the school building. This, too, is a marked departure from the accommodations which had been in place for the student.

These consecutive and marked absences continued in January 2020, such that by mid-January 2020 (January 15, 2020 to be precise) the student was again receiving homebound instruction. This is the point at which the District knew, or more accurately should have known, that the student's behaviors had settled into this new pattern, were dramatically different from even a few months ago, and should warrant a re-evaluation process. Therefore as of January 18, 2020 (given a few days for the exchange of permission-paperwork to allow for a re-evaluation), the District should have undertaken a re-evaluation process which ultimately should have identified the student as eligible for special education.

At this point in the chronology, however, the COVID-19 pandemic throws off one's understanding of how the District did or did not provide FAPE to the student. With permission in hand on January 18, 2020, the District's re-evaluation report would be due by March 18, 2020—at which point the schools of Commonwealth had been closed (at first temporarily but ultimately for the remainder of the school year). It is the considered opinion of this hearing officer that the District would not have been in a position to provide an IEP or programming for the student in late March 2020.

This is not to say that the District was relieved of its obligations. As a matter of law, the District should have identified the student as eligible for special education on or before March 18, 2020. But the actual provision of FAPE to the student would have been entirely short-circuited as the IEP

team grappled not only with assessing the student's needs (new to them all in the educational environment) but how those needs could be met in an online learning environment. Thus, as a matter of equity, this hearing officer feels he cannot fault the District to the point of remedy for, on the surface, a denial-of-FAPE in the period of March and April of 2020.

By mid-May 2020, approximately eight weeks after the closure of Commonwealth schools, most school districts had gained an understanding of how to re-configure learning environments, including special education learning environments, to begin to meet students' needs. In sum, then, the District denied the student FAPE, as matter of remedy, beginning in mid-May 2020.

Accordingly, by not having identified the student's needs and not having an IEP in place at the outset of the 2020-2021 school year, the District denied the student FAPE as of mid-May 2020.

Section 504/Denial-of-FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).⁴ The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section

⁴ Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks.

504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (See *generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

As outlined above, the District provided FAPE under the Section 504 plans through the winter of 2020. It is therefore an explicit finding that the District did not deny the student FAPE under the terms of those plans through January 2020, when the District's focus should have shifted to re-evaluating the student (a re-evaluation which, when issued, should have qualified the student for special education). Therefore, the student is not entitled to remedy under any assertion of denial-of-FAPE for Section 504 programming.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (*Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Big Beaver Falls Area Sch. Dist. v. Jackson*, 615 A.2d 910 (Pa. Commonw. 1992)).

In this case, the District is liable for remedy for not having in place an IEP by mid-May 2020. The January 2021 IEP shows that appropriate programming could have been crafted for online learning environments, or in-person learning environments, or hybrid learning environments, such that regardless of the course of events after mid-May 2020, the student was not provided with appropriate special education programming.

Having said that, there are also mitigating elements to an award of compensatory education. First, the student made progress in the spring of

2020. Indeed, one of the options requested by parents and pursued by the District prior to the COVID-19 pandemic was online learning. This was employed, albeit without special education supports, and the student's academic performance—always strong—shows that the student was able to compete curriculum requirements and earn high school credit with, for the most part, strong grades. Second, and more importantly in the mind of this hearing officer, the record as a whole supports the assertion that the student's needs are founded in mental health. While the District is tasked with meeting those needs as they surface in the educational environment, the District in good faith, throughout this record, did not see many of the behaviors exhibited at home and did not have a comprehensive sense of the depth of the student's mental health needs until independent reports provided those insights from observation and in-depth sharing by parents as part of those processes. Again, as seen in the next paragraph, this does not excuse the District from providing remedy, but it does expand one's understanding that the student's needs range well beyond "not attending school".

Therefore, as a matter of equity in light of these factors, it is the considered opinion of this hearing officer that the student should be awarded 1 hour of compensatory education per school day for the approximately one month from mid-May through mid-June 2020 (20 hours), and 2 hours of compensatory education per school day for the approximately five school months from late August 2020 through late January 2021 (200 hours). In total, the student will be awarded 220 hours of compensatory education.

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's current or future IEPs, or identified educational needs. These hours must be

in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree in writing mutually and otherwise as to the use of the compensatory education hours.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Pittsburgh School District denied the student a free appropriate public education by not having in place as of May 2020 an IEP to structure the special education programming of the student. The student is awarded 220 hours of compensatory education.

Any claim not specifically addressed in this decision and order is denied and dismissed.

s/ *Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire
Special Education Hearing Officer

06/29/2021