

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:

File No.23343-19-20

Child's Name:

A.M.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

09/15/2020

INTRODUCTION AND PROCEDURAL HISTORY

The student, A.M., (hereafter Student)¹ is a mid-teenaged student in the Gateway School District (District) who currently is identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's disability also entitles Student to protections under Section 504 of the Rehabilitation Act of 1973.³

Student has attended school in the District since entering kindergarten, and was identified as IDEA-eligible in early grades. In early 2020, a dispute arose between the parties with respect to Student's educational program. Student's Parent ultimately filed a Due Process Complaint against the District, asserting claims that it denied a free, appropriate public education (FAPE) to Student under the IDEA and Section 504, and the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing which convened exclusively through virtual sessions, with the parties presenting evidence in support of their respective positions.⁴ The Parent sought to establish that the District failed to provide Student with FAPE throughout the time period in question and sought both compensatory education and an appropriate program going forward. The District maintained that its special education program, as implemented, was appropriate for Student.

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

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

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

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

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

ISSUES

1. Whether the District's educational program for Student from January 2018 through the present was inappropriate in any respect;
2. If the District's program was and/or is inappropriate for Student, whether Student is entitled to compensatory education; and
3. If the District's program was and/or is inappropriate for Student, whether the District should be directed to make any revisions to that program going forward?

FINDINGS OF FACT

1. Student is mid-teenaged and resides in the District. Student is currently eligible for special education based on classifications of Specific Learning Disability and Emotional Disturbance. (S-44.)
2. Student was evaluated by a private psychologist in the summer of 2017 to assess the need for behavioral health services. At that time, Student reportedly engaged in physically aggressive behavior at home that required crisis intervention. Diagnoses included Disruptive Mood Dysregulation Disorder and Attention-Deficit/Hyperactivity Disorder (ADHD). Intensive behavioral health services were recommended by that psychologist to include family therapy. (N.T. 40; P-29.⁵)

⁵ The private psychologist evidently was not provided with any of the District's RRs. (P-29 at 2.)

3. Student currently treats with a private psychiatrist and has for many years. (N.T. 36.)
4. Student has been provided with crisis intervention in the home when needed. District staff were also able to call for those services in the school but did not need to do so. (N.T. 41-43, 90-91.)

Previous Educational History

5. Student began attending school in the District in kindergarten and was identified as eligible for special education in the spring of 2010 on the basis of a Specific Learning Disability related to reading, writing, and mathematics. (N.T. 32; P-1.)
6. Student remained eligible for special education essentially based on the same Specific Learning Disability classifications with the addition of a Speech/Language Impairment and an Other Health Impairment throughout elementary school and into the start of middle school, except that the Speech/Language Impairment did not continue into seventh grade. (P-2; P-3; P-4; P-5.)
7. The District conducted an evaluation of Student with a Reevaluation Report (RR) issued in January 2017. That RR was completed at the request of the Parent for an FBA. (P-5.)
8. The January 2017 RR summarized results of prior evaluations, including results from December 2015. Student's scores in 2015 were variable on a measure of cognitive ability, with a Full Scale IQ score in the low average range (83). (P-5 at 2-7.)
9. On assessment of academic achievement also from December 2015, Student earned scores in the below average range on all subtests with the exception of reading comprehension and numerical operations (average range for both). A significant discrepancy between ability and achievement was noted in the areas of word reading, oral reading fluency, and mathematics problem solving. (P-5 at 3-5.)

10. Social/behavioral/emotional functioning in December 2015 was assessed through rating scales that reflected clinically significant concerns with conduct problems (Parent); attention problems (Parent and teacher); and learning problems (teacher). One or both raters indicated at-risk concerns with hyperactivity, aggression, conduct problems, anxiety, depression, atypicality, and withdrawal. The Parent also endorsed clinically significant concerns with all domains of adaptive skills, with the teacher similarly endorsing clinically significant or at-risk concerns on those scales (adaptability, social skills, leadership, activities of daily living (strictly a parent scale), functional communication, and study skills (strictly a teacher scale)). (P-5 at 5-7.)
11. An FBA conducted for the January 2017 RR identified task refusal as the behavior of concern. The hypothesized function was determined to be task avoidance, particularly for non-preferred activities. (P-5 at 13-14.)
12. The January 2017 RR determined that Student remained eligible for special education based on classifications of Specific Learning Disability and Other Health Impairment. (P-5 at 15-16.)

2017-18 School Year

13. Student was in a special education English class of thirteen students during the 2017-18 school year. That class was two periods and involved both reading and writing. (N.T. 292-93, 310-11.)
14. Student would meet with the eighth grade English teacher when Student needed support and was in that academic support class. That included times when written tasks were involved. (N.T. 294-96, 312, 321-22.)
15. Student's Individualized Education Program (IEP) developed in December 2017 identified needs for reading fluency and

comprehension, writing fluency and spelling, development of problem-solving skills, ongoing repetition and review of content, checks for understanding, and strategies for maintaining focus and attention as well as completing assignments. Student's non-compliance with task demands was also noted. (P-8 at 10-12.)

16. Post-secondary transition planning in the December 2017 indicated goals for enrollment in the military after graduation, competitive employment, and independent living. (P-8 at 12-13.)
17. Annual goals in the December 2017 IEP addressed reading fluency and comprehension, written expression, and mathematics problem solving. A Positive Behavior Support Plan (PBSP) targeted on-task behavior. The IEP provided for small group instruction for reading, English, and mathematics and a number of test/assignment accommodations and adaptations. Student's program was one of supplemental learning support. (P-8 at 18-25, 28.)
18. The Parent approved the Notice of Recommended Educational Placement (NOREP) for implementation of the December 2017 IEP. (P-14.)
19. In the second half of the 2017-18 school year, Student's exhibited some off-task behavior centered on Student's use of a cellular phone and distractibility because of that device. Student also required some prompting and redirection and at times refused to complete tasks, but overall behavior was not problematic compared to typical peers. (N.T. 297, 302-03, 308, 498-99, 502, 506-07, 511-13, 520-21.)
20. Student received thirteen disciplinary referrals over the course of the 2017-18 school year for behavior mainly related to noncompliance with directions and failure to complete assignments. Student served a few detentions for those behaviors. (S-12 at 4-5.)

21. Student earned passing final grades in all classes during the 2017-18 school year, with A to C grades in mathematics, reading, science, health, fitness, multimedia production, and pre-engineering. Student attained a D in social studies and family and consumer sciences. (S-7.)
22. In the second half of the 2017-18 school year, Student nearly mastered the reading fluency and comprehension goals; did not complete assessments of progress on the written expression goal; did not make progress on the mathematics goals; and performed inconsistently on the goal for complying with directives. (P-24 at 2-8; S-49.)

2018-19 School Year (Ninth Grade)

23. Student's IEP team met early in the fall of 2018 and made revisions. Student's reading goal was removed; and a few additional program modifications/items of specially designed instruction were revised. (S-49.)
24. Student's IEP team agreed that Student no longer needed special education reading instruction because Student earned grade-level scores on assessments. Student also did not want to continue in that class. However, Student's English class was a resource class that encompassed all aspects of reading, including comprehension. (N.T. 150-52, 651-59, 704-05; S-49 at 1.)
25. Student had an academic support class, a structured study hall, with a special education teacher after the reading instruction was omitted from the IEP. (N.T. 715-16, 760, 790-91.)
26. Near the start of the 2018-19 school year, Student had a friendship that ended. Student experienced difficulty with that former friend and another peer, and verbal conflicts resulted. (N.T. 58-59, 136-37.)

27. Student and the Parent met with a school social worker in the fall of 2018 to discuss Student's attendance and offer support in school. (S-8.)
28. A new IEP was developed in December 2018. Teacher input reflected increasingly problematic behavior in most classes, including using the cellular telephone; non-compliance with directives and demands; and a lack of participation, effort, and motivation. (S-10 at 8.)
29. Needs identified for reading fluency and comprehension, written expression, mathematics computation, behavior support, and an improved work ethic. (S-10 at 10.)
30. The PBSP that was part of the December 2018 IEP identified both avoidance of tasks and attention as the functions of the refusal behaviors. Antecedent strategies and consequences for the replacement behavior and the behavior of concern were also provided including identified adults to contact when needed. (S-10 at 11-13, 24-25.)
31. Post-secondary transition planning in the December 2018 IEP continued to identify enrollment in the military, competitive employment, and independent living as Student's' goals. (S-10 at 14-15.)
32. Annual goals in the December 2018 IEP addressed written expression, mathematics problem solving, and compliance with task demands. The IEP provided for small group instruction for English and mathematics in addition to a number of test/assignment accommodations and adaptations. Student's program was one of supplemental learning support. (S-10 at 20-23, 26-27, 30.)
33. The Parent approved the NOREP for implementation of the December 2018 IEP. (S-11.)

34. Student made unknown progress on the written expression goal by the end of the first semester of the 2018-19 school year but failed to complete assessments; did not make progress on the mathematics goal but was distracted by the cellular phone; and performed inconsistently on the compliance goal. (P-24 at 11-15.)
35. During the 2018-19 school year, Student received fifteen disciplinary referrals through mid-February 2019. The behaviors generally involved failure to comply with directives including use of the cellular phone and leaving or arriving late to class. Student served several detentions, a one-day in school suspension, and a one-day out of school suspension. (S-12 at 3-4.)
36. In mid-February 2019, Student served an out of school suspension for conduct that involved the school police officer. (S-12 at 3.)
37. Student was reluctant to return to school after the February 2019 incident, and the family decided to enroll Student in the cyber charter program after Student requested the change. (N.T. 64, 65, 100-01, 156-58; S-1 at 10; S-4 at 25-27.)
38. District professionals did not agree that cyber school programming was appropriate for Student and suggested other options, but accepted the family's request because the alternative was that Student would not attend school. (N.T. 72, 188, 194, 361-62, 365-66, 384-85, 387, 391-92.)
39. Student's IEP was revised in January and February 2019 to discuss Student's numerous disciplinary incidents and to reflect that Student would begin attending the District's cyber school program. Progress monitoring on the IEP goals would not continue while Student was in the cyber school program, and most program modifications and items of specially designed instruction were eliminated with the exception of a few test and assignment accommodations. New goals were added

for active engagement in online learning and timely assignment completion. Student's program was then one of itinerant learning support. (P-24 at 17-19; S-26.)

40. The Parent approved the NOREP for implementation of the IEP as revised in February 2019. (S-28.)
41. The Parent also agreed to waive a reevaluation at the time the decision to move to the cyber school program was made. (N.T. 379-81; S-27.)
42. The Parent did not advise the District that family was assisting Student with the cyber school program, but they did so. (N.T. 73, 104.)
43. Student finished the 2018-19 school year with passing grades in all classes except social studies and computer-aided drafting. Student's grades were variable across other subjects. (S-32.)
44. Student mastered or nearly mastered the goals for engaging in instruction and completing assignments in the cyber school classes. (P-24 at 18-19.)

Private Neuropsychological Evaluation

45. The Parent obtained a private neuropsychological evaluation in the spring of 2019 due to Student's history with emotional/behavioral functioning and academic difficulties. Student reportedly had also exhibited aggression in the home setting. (P-30.)
46. Cognitive assessment for the private neuropsychological evaluation yielded overall ability in the very low range with some variability in among indices. Assessment of verbal memory and learning indicated skills in the average range. (P-30.)
47. Brief assessment of academic achievement for the private neuropsychological evaluation reflected low average range word reading and mathematics computation skills. The evaluator concluded

that Student's academic skills were generally consistent with cognitive functioning. (P-30.)

48. Assessment of Student's executive functioning skills for the private neuropsychological evaluation reflected variability in skills but numerous deficits. (P-30.)
49. Assessment of social/emotional/behavioral functioning for the private neuropsychological evaluation revealed a number of areas of concern by both the Parent and teachers, with the Parent's results indicating more substantial needs. Student's mental health diagnoses were ADHD, Disruptive Mood Dysregulation Disorder, Unspecified Bipolar and Related Disorder, and Oppositional Defiant Disorder. Those were considered to be significant factors in Student's behavior and learning, and ongoing psychiatric consultation was recommended. (P-30.)
50. Other recommendations in the private neuropsychological evaluation included clear and concise directions, instruction at a slower pace with pre-teaching, and use of context in presentation of new content. (P-30.)

2019-20 School Year (Tenth Grade)

51. In the fall of 2019, Student was referred for multifaceted home and community-based intervention services to address mental health and behavior. The family tried to arrange for those services but have encountered delays for various reasons. (N.T. 35-36; S-1 at 22.)
52. Student was evaluated again with a new RR issued in September 2019. (S-30.)
53. The September 2019 RR included input from teachers, reflecting that Student was frequently distracted by peers and the cellular phone, and early in the school year already had missing assignments. (S-34 at 4-5.)

54. The September 2019 RR summarized the private neuropsychological evaluation including the social/emotional/behavioral functioning. (S-34 at 7-9, 14.)
55. Assessment of cognitive ability for the September 2019 RR yielded a Full Scale IQ score in the below average range, and was consistent with the private neuropsychological evaluation results. (S-34 at 10-11.)
56. On assessment of academic achievement for the September 2019 RR, Student earned scores in the low to average range on reading subtests with reading comprehension in the average range; in the low to below average range on written expression subtests; and in the below average range on the mathematics subtests. A significant discrepancy between ability and achievement was noted to continue either by assessment or history in the areas of basic reading skill, reading fluency, written expression, and mathematics calculation and problem solving. (S-34 at 11-14, 17-19.)
57. The September 2019 RR determined that Student remained eligible for special education based on classifications of Specific Learning Disability and an Emotional Disturbance. (S-34 at 15.)
58. A new IEP was developed in October 2019. Teacher input reflected lack of preparation, participation, and assignment completion in most classes; non-compliance with directives and demands; use of the cellular telephone; failure to self-advocate; and a need for frequent redirection to maintain focus and attention to task. (S-39 at 8-9.)
59. Needs in the October 2019 IEP were identified for reading comprehension, written expression, mathematics computation, behavioral support, focus, acceptance of help and support, better developed reasoning skills, self-regulation, and an improved work ethic. (S-39 at 11.)

60. The PBSP that was part of the October 2019 IEP identified both avoidance of tasks and attention as the functions of the refusal behaviors (ignoring teacher demands, responding inappropriately, and distracting peers during instruction). Antecedent strategies and consequences for the replacement behavior and the behavior of concern were also provided including identified adults to contact when needed. (S-39 at 12-13, 26-27.)
61. Post-secondary transition planning in the October 2019 IEP to identified attending a community college, competitive employment, and independent living as Student's' goals. (S-39 at 9-10, 15-16.)
62. Annual goals in the October 2019 IEP addressed written expression, mathematics computation, and compliance with task demands. The IEP provided for small group instruction for English and mathematics, access to a trusted adult when needed, daily check-ins, and a number of test/assignment accommodations and adaptations. Student's program was one of supplemental emotional and learning support. (S-39 at 22-25, 32-34.)
63. The Parent approved the NOREP for implementation of the October 2019 IEP. (S-38.)
64. The District issued another RR in February 2020. That evaluation summarized previous evaluations including that obtained by the Parent in March 2019. (S-44 at 2-6.)
65. The February 2020 RR included input from teachers, reflecting that Student frequently did not attend classes and was distracted the cellular phone, in addition to regularly failing to complete assignments. (S-44 at 7-8.)
66. Behavior rating scales completed for the February 2020 RR reflected clinically significant scores in the areas of depression, attention problems, adaptability, social skills, leadership, activities of daily living

(strictly a Parent scale), and functional communication (Parent); and for withdrawal, adaptability, and study skills (strictly a teacher scale)(teacher). One or both raters identified a number of at-risk concerns on both the clinical and adaptive skills composites. (S-44 at 12-13.)

67. Another FBA was conducted for the February 2020 RR. At the time, Student's attendance was very poor and hampered observations. Nonetheless, the FBA revealed that Student spent a significant amount of class time non-engaged and distracted by the cellular phone; Student also failed to comply with teacher directives and task demands. (S-44 at 13-16.)
68. The February 2020 RR determined that Student remained eligible for special education based on classifications of Specific Learning Disability (basic reading skill, reading fluency, written expression, mathematics problem solving, and mathematics calculation) and an Emotional Disturbance. (S-44 at 16, 18-20.)
69. Student had an online science (biology) class during the second half of the 2019-20 school year. Student participated in that class to a much greater extent than Student had in the building. (N.T. 76; S-16 at 5-6, 8.)
70. In the fall of 2019, Student received twenty-eight disciplinary referrals. The incidents related to non-compliance with directives, including use of the cellular phone, missing class (especially biology), and two instances of verbal aggression with threats of physical aggression. Student served a number of detentions and a one-day out of school suspension, and was given multiple warnings. In December 2019, an IEP meeting was recommended. (S-14; S-20; S-33; S-35; S-40.)

71. In the spring of 2020, Student received eighteen disciplinary referrals through mid-March, nearly all for missing or leaving class. Student served a number of detentions and three one-day in school suspensions, and four one- or partial-day out of school suspensions. (S-20 at 1-3; S-21; S-23.)
72. Student made little to no progress on IEP goals over the 2019-20 school year with the exception of the online science class. Student's refusal to comply with task demands and participate in or attend classes was a major factor. (S-16; P-24 at 20-29.)
73. Student participated in a vocational education program during the 2019-20 school year that focused on an area of interest for Student. (N.T. 33, 333-34, 401, 645-46.)
74. In the vocational education program, Student was sometimes distracted by the cellular phone and at times did not complete assignments, some that involved writing and some that involved practical skills. Student did have access to a resource room if needed. (N.T. 334-35, 337, 339, 341-43, 347, 352-53.)
75. Student's IEP was revised in April 2020 following the school closures resulting from the COVID-19 pandemic. A reading comprehension goal was added, but Student had not completed any assessments to determine baseline performance or progress; other new goals addressed participation in remote learning. Additional program modifications included use of text-to-speech and some were omitted due to students not being present in the building. Student's program remained one of supplemental emotional and learning support. (S-45.)
76. Student passed all but one class during the 2019-20 school year, with grades mainly in the D range. (S-46.)

Emotional Support at the High School

77. Student's case manager for the 2018-19 and 2019-20 school years was an emotional support teacher. That teacher met with Student regularly for check-ins, and also when Student needed support, often discussing coping skill strategies that Student could use. However, Student frequently did not arrive for the check-ins. (N.T. 131-34, 141-42, 162-64, 176-77, 178-79, 215-16.)
78. Student was able to meet with the case manager or other adult as needed. During the 2019-20 school year, Student did so frequently, at least several times each week, and often was not attending classes as a result. (N.T. 164-67, 257-58, 401-04, 411-12, 435-36, 439-40, 585-88, 597-600, 603-04.)
79. For both high school years, Student's problematic behavior centered on Student's use of a cellular phone and distractibility because of that device. (N.T. 135-36, 138-39, 190, 207-08, 253, 271, 276, 585-86, 612-13.)
80. Student was permitted to listen to music using an earphone with the cellular phone in the high school years. (N.T. 135-36, 210.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. It should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parent who filed the Complaint that resulted in this administrative proceeding. Application of this principle, however, determines which party prevails only in those rare cases where the evidence is evenly balanced or in " equipoise." *Schaffer, supra*, 546 U.S. at

58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). With some exceptions discussed below, this hearing officer found each of the witnesses who testified to be generally credible as to the facts. Lapses in recollections or differing perspectives also resulted in some discrepancies.

The testimony of those with first-hand knowledge of what occurred in the school environment was credited over those witnesses who did not observe what they were describing. The testimony of the Parent with respect to the incident involving the school police officer, the reasons for asking Student to attend the cyber school program, and the decision to waive a reevaluation in the spring of 2019 (*e.g.*, N.T. 62-63, 65-67, 84) were deemed to be not credible because those assertions were contradicted by the documentary evidence; in addition, the witness' demeanor and offered explanations lacked persuasive value about those events.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were considered, as were the parties' closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related

services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Many years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

The state, through its local educational agencies (LEAs), meets the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). Fairly recently, the U.S. Supreme Court observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). “A focus on the particular child is at the core of the IDEA.” *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted).

Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; *see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also*

Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family has “a significant role in the IEP process.” *Schaffer, supra*, 546 U.S. at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

General Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Thus, in this case, the coextensive Section 504 claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

The Parent’s Claims

The first issue is whether the District’s program over the two year time period preceding the date of the Complaint was inappropriate for Student under the above legal principles. The record establishes preponderantly that, for a portion of that time period, it was not sufficient to confer FAPE.

For the portion of the 2017-18 school year that is at issue, Student's special education programming responded to Student's identified needs. In the spring of 2018, Student exhibited more distractibility by the cellular phone, but Student did not engage in problematic behavior that was different from or disproportional to that of typical peers. Student's final grades were average or better in all but one class. Although Student did not demonstrate progress on all IEP goals, the reasons were more behavior-related than specific to the identified weaknesses the goals were intended to address. By sometime during the fourth quarter, it would have been reasonable to consider potential revisions to the IEP for the start of the 2018-19 school year, but overall there was not evidence of a denial of FAPE during the spring of 2018.

The 2018-19 school year began, unfortunately, with a marked increase in Student's problematic behavior particularly with respect to distraction by the cellular phone as well as non-compliance. Multiple disciplinary referrals were necessary that resulted in consequences. Student's IEP was revised in December to reflect Student's then-current needs, and Student had supportive services available that were responsive to Student's academic weaknesses. However, progress on IEP goals is unknown in light of Student's failure to engage in assessments, as well as the District's perplexing decision to cease all special education support including monitoring of IEP goals after Student entered the cyber school program. The record is unclear whether, or to what extent, the PBSP was implemented following entry into the cyber school program, but it clearly was not effective prior to that time in ninth grade.

That Student did relatively well while attending the cyber school program is certainly a testament to Student and the family. Yet, Student's needs in written expression and mathematics problem solving were essentially set aside, although Student's ongoing noncompliance in the school environment was no longer a factor.

Student began the 2019-20 school year with the same pattern of problematic behavior, including noncompliance, task refusal, and distraction by the cellular phone in the school building. Student's attendance of classes was of significant concern, yet the evidence establishes that Student was permitted to avoid demands by spending more and more time outside of the classroom. The record is devoid of evidence that the emotional support that was provided focused on Student's individualized needs or was beneficial to Student. Certainly as that school year began, the District should have been monitoring Student's functioning and performance and standing ready to initiate revisions to the program when it became obvious that Student was not being successful.

It is, however, readily apparent that Student presents with significant mental health needs that the District could not reasonably be expected to address solely in the school setting. Those diagnoses were a predominant factor in Student's presentation in the school environment and elsewhere. Even so, taking the stance of deferring to Student's wishes rather than taking proactive steps to address Student's emotional and behavioral functioning left Student floundering, and clearly was not appropriately responsive during the 2019-20 school year when building attendance was permitted.

Remedies

Compensatory Education

Compensatory education may be an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The

Third Circuit has also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

An award of compensatory education must reflect consideration of all circumstances, and on this record it is not possible to calculate a qualitative make whole remedy. Thus, the quantitative approach must be used. The Parent suggests that full days of compensatory education are warranted, which is appropriate in some cases. *See Keystone Central School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). However, the remedy must be equitable under the circumstances and, here, must also consider that Student presented with significant mental health needs that impacted learning and behavior and could not be adequately addressed solely through school-based support.

For the 2018-19 school year, no period of reasonable rectification applies since the District was aware within a few days that Student’s behaviors were not effectively managed by the existing IEP and PBSP. When Student began the cyber school program, behavior was evidently no longer a concern but other special education support was removed. The 2019-20 school year followed a similar path as the first half of the prior year, and was a time when the District should have been monitoring Student’s performance and responding accordingly. Balancing Student’s behavior and significant mental health needs with Student’s limited academic success, as well as the

lack of special education services during the cyber school program, this hearing officer concludes that one hour per day of compensatory education is appropriate for the 2018-19 and 2019-20 school years through the date of the mandatory school closures in March 2020 pursuant to the Governor's order⁶ to remedy the deprivation.

The award of compensatory education is subject to the following conditions and limitations. Student's Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student's educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age twenty one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

Prospective Relief

The Parent further seeks an order for the IEP team to reconvene and revise Student's IEP. The District shall be directed to reconvene the IEP

⁶ No claim for relief resulting from the COVID-19 restrictions was explicitly raised. The parties must, however, be afforded the opportunity to comply with PDE guidance to IEP teams for such questions as the 2020-21 school year gets underway.

team to incorporate appropriate revisions to Student's program to include, at a minimum, scheduled weekly school-based counseling; emotional support that includes explicit instruction and practice in coping skills, self-advocacy, and self-regulation;⁷ access to a school counselor, emotional support teacher, or other trusted adult as needed; a revised PBSP that specifically addresses Student's specific behaviors including attendance; pre-teaching and regular review of content area materials; and all of the annual goals and program modifications/specially designed instruction and related services in the April 2020 IEP. The services in the revised IEP shall be provided to the extent possible whether or not Student is attending school in the building or through some other format.

ORDER

AND NOW, this 15th day of September 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did deny Student FAPE during the 2018-19 school year from the first day of the school year through the end of the school year, and from the start of the 2019-20 school year through the date of the COVID-19 school closures.
2. Student is awarded one (1) hour of compensatory education for each day that school was in session as identified in ¶ 1 hereof in order to remedy the denial of FAPE. All of the conditions and

⁷ Student clearly does also need more intensive mental health services that the Parent reportedly is actively seeking to arrange if she has not done so already. Once those services are in effect, the parties are encouraged to promote ongoing communication between private and District professionals with an aim for consistency and coordination.

limitations on that award set forth above are expressly made a part hereof as though set forth at length.

3. The District shall convene a meeting of Student's IEP team to include the Parent within ten calendar days of the date of this order to develop a new IEP for Student that includes, at a minimum, all of the following: scheduled weekly school-based counseling; emotional support that includes explicit instruction and practice in coping skills, self-advocacy, and self-regulation; access to a school counselor, emotional support teacher, or other trusted adult as needed; a revised PBSP that specifically addresses Student's specific behavior including attendance; pre-teaching and regular review of content area materials; and all of the annual goals and program modifications/specially designed instruction and related services in the April 2020 IEP.
4. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 23343-19-20