

*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: C. M.  
Date of Birth: redacted

Dates of Hearing: 1/22/2015, 3/12/2015, 3/13/2015, 3/18/2015,  
3/23/2015, 3/24/2015

CLOSED HEARING  
ODR File No. 15465-14-15 KE

Parties to the Hearing:

Parents  
Parent[s]

Local Education Agency  
Lakeland School District  
1355 Lakeland Drive  
Scott Township, PA 18433-9801

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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May 4, 2015

May 30, 2015

Cathy A. Skidmore, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a late elementary school-aged student in the Lakeland School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA),<sup>2</sup> having previously received services under a Section 504<sup>3</sup> Service Agreement. Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504, as well as the federal and state regulations implementing those statutes.<sup>4</sup> Specifically, the Parents claimed that the District failed to timely identify Student as eligible under the IDEA, and further failed to provide appropriate programming to meet Student's needs.

The case proceeded to a due process hearing convening over six sessions<sup>5</sup> at which the parties presented evidence in support of their respective positions. The Parents sought to establish that the District failed to provide Student with FAPE throughout the time period in question, and that Student should be awarded compensatory education to remedy the deprivation. The District maintained that its educational program, as offered and implemented, was appropriate for Student.

For the reasons set forth below, I find in favor of the Parents and will award compensatory education for a portion of the time period in question.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

<sup>2</sup> 20 U.S.C. §§ 1400-1482.

<sup>3</sup> Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

<sup>4</sup> 22 Pa. Code §§ 14.101 – 14.163; 15.1 – 15.11.

<sup>5</sup> Several of the sessions were not full days. (N.T. 598-99, 733-34, 1076) I would also note that there is an error in the transcript at the very end of the hearing during my concluding remarks (N.T. 1076 L-1): the word "remind" should be "rely on."

## **ISSUES**

1. Whether the District failed to timely and appropriately identify Student as eligible for special education;
2. Whether the District provided an appropriate educational program to Student beginning in September 2011 through October 9, 2013 and from October 9, 2014 continuing through to the present;<sup>6</sup>
3. If the District did fail to identify Student as eligible for special education and/or fail to provide an appropriate educational program, is the Student entitled to compensatory education and in what form and amount?

## **FINDINGS OF FACT**

### **Background**

1. Student is a late elementary school-aged fourth grade student who is a resident of the District. Student is eligible for special education on the basis of an Emotional Disturbance and an Other Health Impairment. (Notes of Testimony (N.T.) 27-29, 140; School District Exhibit (S-) 24 p. 13)
2. Student has had behavioral difficulties throughout Student's life and exhibited developmental delays since birth. Student was provided early intervention services. When Student was in preschool, Student had Therapeutic Staff Support (TSS) services due to problematic behaviors (physical aggression, inattention, non-compliance). (N.T. 475-76)
3. Student began attending school in the District in kindergarten during the 2010-11 school year. At the time the Parents registered Student in the spring of 2010, they informed the District that Student had been diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD), that Student was taking medication, and that Student was receiving counseling through a behavioral health services agency. (N.T. 472-74, 489, 945-47; S-1)
4. Student completed the kindergarten year with all satisfactory and outstanding marks, with the exception of a need for improvement in obeying rules and displaying self-control during the fourth quarter. Student engaged in problematic behavior reported to the

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<sup>6</sup> The Parents originally filed a Due Process Complaint against the District in September 2013, and the parties indicated that they had a tolling agreement as they arranged for Independent Educational Evaluations (IEEs). (N.T. 24-25; S-34 pp. 4A-4F, S-39 pp. 1-2, 5-6)

Parents on two occasions that year, once in September (biting a peer's thumb) and once in June (scratching a peer's wrist). (S-30 pp. 4-5)

5. In late May and early June 2011, Student was hospitalized for mental health reasons and educational services were provided by that facility. (Parent Exhibit (P-) 31)
6. Student has gone to the school nurse to take medication during the school day throughout the time period in question. (N.T. 428-430, 489-90, 560, 832)
7. The District has a Child Study Team in each building. The team meets regularly and discusses students who are referred to it by a teacher, parent, or administrator; the guidance counselor is also involved at times. This team develops strategies and interventions to address concerns for individual students. Student was never referred to the Child Study Team at the elementary school Student attended. (N.T. 180, 311-13, 492)

#### 2011-12 School Year

8. Beginning in September 2011, Student's first grade teacher sent home notes advising the Parents of Student's problematic behaviors (calling out and not cooperating; yelling in the lavatory; kicking a child's lunch bag; not paying attention, not following directions, excessive talking; pushing another student) on six occasions, with one incident of hitting another student at school in February. The first five incidents were in September and December. (N.T. 480-83, 673-76, 678; P-3)
9. In October 2011, Student's treating mental health therapist made a recommendation to the District that Student be provided with a Section 504 Plan or an IEP to address behavioral needs (impulsivity, agitation, and a mood disorder). Student was taking medication prescribed by the psychiatrist. (N.T. 34-35, 485-86, 950; S-2)
10. A few days after the psychologist's recommendation, the District issued a Consent form to conduct an evaluation to include behavior rating scales. The Parents gave written consent within a few days of that request. (N.T. 38, 186; S-3)
11. The District gathered information about Student pursuant to the consent to evaluate, including the recommendation of the private therapist and input from the family and Student's teachers. Student's teacher noted that Student demonstrated "very serious and very disruptive" behaviors (S-4 p. 1) that may have inhibited Student's performance in the classroom, such as not listening when spoken to, being inattentive and easily distracted, and exhibiting disruptive, argumentative, aggressive and non-cooperative behaviors, particularly when not medicated. She also reported that Student was "consistently unhappy" (S-4 p. 4) but that Student's grades ranged from 85 to 99 with average reading, mathematics, and writing skills. The Parents reported that Student exhibited problematic behavior at home similar to that at school and was taking medication for ADHD and ODD. (N.T. 49-53, 71, 165-66, 174-75, 671; S-4; P-4)
12. The District did not obtain behavior rating scales, or assess Student's unhappiness, and did not perceived a need for, or request permission to conduct, a functional behavioral

assessment (FBA) at the time of the Section 504 evaluation. The District also did not consider whether Student might be eligible for special education as a child with an emotional disturbance at that time. (N.T. 53-56, 58-63, 68, 170-72; S-4)

13. A meeting convened in November 2011 at which Student was determined to be eligible for a Section 504 Plan. The Plan developed for Student provided for the following accommodations: breaks during the school day; preferential seating; positive reinforcement for appropriate behavior; use of non-confrontational approaches with Student; planned ignoring of non-disruptive behavior; and verbal redirection and prompting. (N.T. 49, 72, 74, 187; S-4, S-5)
14. Student at times continued to demonstrate problematic behavior after implementation of the Section 504 Plan resulting in calls to the Parents from the Principal's office. The Parents also expressed continued concerns with Student's social skills at school, although those concerns were not expressed by the teacher. (N.T. 481-83)
15. Student completed the first grade year with all grades of A or A+, outstanding, or satisfactory, with negative comments each quarter on failing to follow directions by the physical education and music teachers and one comment in the fourth quarter on need for class participation by the regular classroom teacher. (S-30 pp. 6, 12A-12D)
16. The District's school psychologist reviewed Student's accommodations and grades at the end of the 2011-12 school year and spoke with the teacher, but there was no meeting held. At the end of July 2012, the District sent a new Section 504 Plan to the Parents that included the same accommodations as in the prior Plan, and added one new provision for monitoring Student's progress with notice to be given to the guidance counselor if teachers had any concerns. The Parents approved this Section 504 Plan. (N.T. 76, 82-84, 85-88, 132, 187; S-6)

#### 2012-13 School Year

17. Student's school-based behavioral services case manager observed Student's behaviors at school in the fall during the 2012-13 school year (second grade), approximately monthly, and consulted with Student's teacher. (N.T. 493-94, 500-01, 695-96; S-7)
18. Beginning in November and December 2012 and continuing through the end of the school year, Student engaged in several significant behavioral incidents that the teacher reported to the Parents. In one incident, Student became upset and threw a desk and chair then tore up papers. In two other incidents, Student made annoying gestures to peers; and on one of those occasions, Student was physically aggressive toward a peer. In other instances, Student became upset and defiant with a teacher. Student's therapist was called to help calm Student for one of these incidents, and Student was not able to rejoin the class for a period of 20 minutes. (N.T. 699-700, 710, 712-17, 727-30; P-17)
19. In January 2013, Student's behavioral service therapists confirmed Student's need for Section 504 accommodations based on diagnoses of Bipolar Disorder and ADHD. (S-8)

20. Student's second grade teacher implemented the Section 504 Plan. She did not have concerns about Student's progress to convey to the guidance counselor, but she described Student as "explosive" when upset at the end of the school year (S-31 p. 1); and she found the accommodation of avoiding confrontation was significant and successful with Student when used, but there were times a teacher needed to be authoritative with Student. (N.T. 697, 700-05, 707-08, 719, 721-22; S-31)
21. Student completed the second grade year with all grades of A or B, outstanding, or satisfactory. One negative teacher comment in the second quarter suggested that Student needed to take time to complete assignments neatly. Student's scores on the TerraNova assessment in the spring of 2013 were all in the average range. (S-9, S-30 pp. 7-8)
22. In July 2013, the Parents requested an evaluation for special education. Around this time, the private therapist confirmed Student's mental health diagnoses of Bipolar Disorder NOS and ADHD (P-7, P-10)
23. The District's school psychologist reviewed Student's accommodations at the end of the 2012-13 school year and again no meeting was held. In late August 2013, the District sent a new Section 504 Plan to the Parents that was identical to the previous Plan. The Parents approved the Plan but noted their belief that additional educational services were needed for Student. (N.T. 97, 99, 101, 115-16, 187; S-10)

#### 2013-14 School Year

24. The District began to implement a School-Wide Effective Behavior Support (SWEBS) program at the beginning of the 2013-14 school year. In the SWEBS program, general school rules apply to all students, and there is a hierarchy of consequences for failure to comply with those rules depending on the nature of the violation. The program provides consequences consistently based on the type of behavior exhibited. There are three tiers in the SWEBS program, with higher tiers providing successively more intensive behavior supports. Students who are not successful at the third tier level are referred to the Child Study Team. (N.T. 177-79, 220-21, 223, 225-27, 230, 238; P-15)
25. Students also earn rewards through the SWEBS program, such as participating in fun activities once each month or entering a drawing for a prize, if students do not engage in targeted problematic behaviors and/or demonstrate positive behavior. (N.T. 222, 226, 237-38)
26. In the fall of 2013, the Parents asked that Student and Student's siblings not participate in a particular sport at recess because Student and others became aggressive during the activity. (N.T. 248-49, 534, 879-80; S-11, S-36; P-11 pp. 2, 4, P-13 p. 5, P-14)
27. Student's third grade teacher implemented the accommodations in the Section 504 Plan, and found the use of non-confrontational approaches was important for Student. She did not have concerns with Student's progress but did notify the guidance counselor of behavioral difficulties for Student. (N.T. 886-90, 958)

28. Student's behavioral difficulties became more pronounced during the third grade year. Student received consequences for behavior in school in the SWEBS program. Student was often angry or upset on arriving at school, and frequently returned home from school very upset. (N.T. 506-07, 511, 514, 526, 530-31, 548-49, 871-72)
29. Throughout the third grade school year, Student became upset with peers and/or staff, sometimes crying. Student at times thought that other students were laughing at or talking about Student. In February 2014, the Parents reported to the school principal that Student was being bullied at school. The principal investigated and spoke with the children involved, but was not able to determine what happened. (N.T. 240, 884-86; P-19, P-22)
30. Student violated the SWEBS program rules numerous times in the fall of 2013. Several incidents resulted in detention (for physical aggression/fighting on the playground), refocusing (refusal to follow directions, talking instead of listening, disruptive behavior) or parent contact, meeting with the principal, or a reflection on the incident (disruptive behavior, talking out in class, talking/shouting or running in the hallway). On two occasions that fall, Student's conduct was a Tier 2 violation (fighting/assault). The guidance counselor spoke with Student after one of those Tier 2 incidents and talked with Student. (N.T. 242, 249-50, 265-68, 959; S-13, S-33; P-11, P-12, P-13, P-15, P-16, P-27)
31. An incident occurred in school in February 2014 on a day when a substitute teacher was in Student's classroom. Student became very upset and was calling out to other students and kicking objects. Student then upset a desk and chair, striking Student's behavioral health services consultant who attempted to calm Student. Student's mother picked Student up from school. A one-day out of school suspension was imposed on Student for this incident. (N.T. 244-45, 542-44; S-12, S-13; P-19 p. 16)
32. Student was placed on homebound following that February 2014 incident and did not return to school for the remainder of the 2013-14 school year. The homebound teacher worked one-on-one with Student during this instruction, providing work supplied by the third grade teacher, and Student did not exhibit problematic behavior. The homebound teacher provided Student with breaks as needed, reinforced positive behaviors, used non-confrontational approaches, and redirected Student when necessary. (N.T. 245-46, 250-51, 353, 541, 548, 559-60, 802-03, 804-06, 894-97; S-14, S-17)
33. Student was hospitalized in March 2014 for approximately one week due to Student's mental health and emotional needs. Student was provided with some educational services through the hospitalization program. (N.T. 551-52, 748-49; S-15)
34. Student's grades at the end of the 2013-14 school year, third grade, ranged from A to C+ with outstanding and satisfactory marks in non-graded subjects. Negative teacher comments during the first quarter reflected difficulty interacting with peers and a need for redirection and reminders to follow school rules. Student did not participate in the Pennsylvania System of School Assessment (PSSA). (S-30 pp. 9-10, S-38)

#### Independent Evaluations

35. Two Independent Educational Evaluations (IEEs) of Student were conducted in the spring of 2014, one by a certified audiologist for speech/language, and one by a licensed and certified school psychologist. Both issued reports. (S-18, S-20)
36. The Speech/Language IEE, issued in June 2014, reflected some parental concerns with expressive and receptive language. Student's hearing was generally normal other than a possible high frequency hearing loss, and Student demonstrated age-appropriate speech and language skills. One exception was on an assessment of auditory processing which suggested some delayed development with possible weakness in processing spoken language when other noise is present, but that result was interpreted with caution because it is characteristic of students with ADHD. Recommendations from this evaluator were preferential seating with a good view of the teacher; use of inflection, intonation, and good articulation; chunking of instructions; frequent checks for understanding; structure and routine throughout the school day; minimal distractions around Student; prompts and redirection; and further hearing examination. (S-18)
37. The psychoeducational IEE was conducted in March 2014 with a report issued in August 2014. The IEE included parental and teacher input in addition to assessments of cognitive ability, achievement, executive functioning, social skills, and behavior. (S-20)
38. Student's performance on the Woodcock Johnson Tests of Cognitive Abilities, Third Edition reflected average scores on all subtests with a General Intellectual Ability score of 98. On the Woodcock Johnson Tests of Achievement, Third Edition, Student scored in the average range on all subtests and clusters, with no discrepancy between Student's ability and achievement in any assessed area. Student did demonstrate a weakness in visual-motor integration skills suggesting difficulties with handwriting and penmanship. (S-20 pp. 8-11, 15-19)
39. Assessment of Student's executive functioning using the Behavior Rating Inventory of Executive Functioning for the IEE reflected parental concerns with behavioral regulation (inhibit and emotional control scales) and metacognition (ability to initiate, plan/organize, and monitor). Teacher concerns were similar for behavioral regulation (inhibit and emotional control scales) and the ability to monitor on the metacognition index. Both parent and teacher ratings reflected significant difficulty with executive functioning. (S-20 pp. 11-13)
40. The Behavior Assessment System for Children, Second Edition yielded information from Student and one of the Parents. Results provided clinically significant scores on Student's self-report for attitude toward teachers with at-risk concerns for interpersonal relations and self-reliance. The Parent report reflected clinically significant concerns for the externalizing problems index (hyperactivity, aggression, and conduct problems), the behavioral symptoms index, and adaptive skills index, with at-risk concerns for depression, withdrawal, attention problems, and functional communication. (S-20 pp. 20-22)
41. Student's teacher and one of the Parents completed the Conners Comprehensive Behavior Rating Scales and the Conners Third Edition Rating Scale Long Form. Results indicated

significant emotional and behavioral difficulties. The Parent reported significant concerns with emotional distress, social problems, defiant/aggressive behaviors, academic difficulties, language, math, and violence potential as well as ADHD, Conduct Disorder, ODD, Manic Episode, Generalized Anxiety Disorder, Autistic Disorder, and Asperger's Disorder, with some concerns in other areas. The teacher's ratings reflected no clinically significant areas but some concern with defiant/aggressive behaviors, social problems, and violence potential, and with Conduct Disorder and ODD. Both the Parent and teacher ratings were consistent with ADHD and associated conditions. (S-20 pp. 23-28)

42. Other social/emotional measures from Student, one of the Parents, and the teacher were variable but suggested weakness in social skills, some depressive symptoms, and generalized anxiety. The evaluator's interview of Student similarly reflected sadness and some anger in school; however, the IEE did note that at the time of the evaluation, Student was not attending school, so assessment of Student's recent ability to function in that environment was not possible. (S-20 pp. 28-37, 42)
43. The IEE provided a number of recommendations for Student's educational program to include emotional support. The recommendations were: an FBA on return to school; programming to address executive functioning deficits; behavioral intervention to include teaching of self-monitoring skills and continuous and immediate feedback on behavior; prompting for focus and attention; school-based counseling with coping and anger management skill training; social skills training; alternate site for assessments; and home-school collaboration and communication. The evaluator also suggested specific elements for a structured program for Student: explicit rules and expectations; limitation on distractions; preferential seating in close proximity to the teacher and selected peers who can serve as role models; low student-teacher ratio; reduced homework; strategies to address social/emotional/behavioral needs including attention and impulsivity; frequent breaks and time-outs; emphasis on accuracy; a behavior plan provided consistently at home and school; social skill interventions; monitoring of emotional control; and opportunities for appropriate emotional expression with teaching of skills and strategies to monitor Student's emotions; counseling and therapy; and performance monitoring, review, and feedback. (S-20 pp. 43-49)

#### 2014-15 School Year

44. Student's physician provided a note in August 2014 indicating that Student was able to return to school for the start of the 2014-15 school year, fourth grade. (S-19)
45. From the start of the 2014-15 school year, Student became upset, frustrated, and physically aggressive toward objects; was inattentive, off task, and lacking focus; moved about the classroom; called out during class; and was non-compliant. (N.T. 854-858-59; P-33)
46. Student had a TSS worker at school for a period of time that year. Student also went to the nurse when Student was upset. (N.T. 430-31, 455, 564, 568, 797, 833; P-33, P-37)

47. The District conducted a special education evaluation of Student in the fall of 2014 in order to review records and the IEEs, and issued an Evaluation Report (ER) in late September. The Parents gave permission for this evaluation. The District considered the two IEEs as part of its own evaluation and did not conduct any assessments prior to completion of the ER. (N.T. 126-27, 134-39, 189-90, 355-58; S-21, S-22, S-23, S-24, S-25)
48. The District's ER summarized Student's educational history and included parent and teacher input, and incorporated information from both IEE reports. Needs identified were to minimize problematic behavior, hyperactivity, and impulsivity; development of coping skills; improvement of social skills; promotion of attention to task; and promotion of development of skills for emotional and behavioral control and self-management. The ER concluded that Student was eligible for special education on the basis of an Emotional Disturbance and an Other Health Impairment. (S-24)
49. A multidisciplinary team meeting convened to review the ER on September 29, 2014. The team, including the Parents and one of the independent evaluators, discussed the IEE recommendations. The team was in agreement with the IEEs and with the ER. (N.T. 190-91, 340, 356-76; S-24, S-25, S-37)
50. The District developed a draft Individualized Education Program (IEP) for Student based on its ER, summarizing its contents. There were two goals, one for staying on task, and one for using coping skills taught in social skills class; neither goal included a baseline. Numerous items of program modifications and items of specially designed instruction addressed small group/individual instruction, verbal prompts, social skills training, a crisis plan, testing and assignment accommodations, explicit rules, preferential seating, frequent breaks, sensory opportunities, a daily communication between home and school, social opportunities, and a classroom behavior plan with positive reinforcement. The draft IEP proposed supplemental time emotional support with all academic classes in that setting. (N.T. 149-50, 163, 183-85, 191, 341-44, 419-21, 423, 570-71, 995-96, 1021-22, 1062-63; S-27 pp. 1-41)
51. The Parents responded to the draft IEP with suggestions that were a verbatim recitation of the psychologist's IEE recommendations. (S-26)
52. The IEP was revised during a meeting held in October 2014. The section on Present Levels of Academic Achievement was revised and focused on Student's problematic behavior, noted to be the primary concern. The goals remained the same as in the draft IEP. The team reviewed the recommendations from the IEEs, and decided to eliminate items of specially designed instruction that were part of a behavior support plan implemented in the emotional support classroom, and also removed an item for reduced homework expectations. An organizational strategy and use of a hierarchy of prompts with planned ignoring were added, as were a daily morning check-in and weekly self-monitoring. The revised IEP proposed itinerant emotional support. (N.T. 153-55, 157-58, 185, 163, 346-48, 423-25, 571-72, 576-77, 1021-22; S-27 pp. 42-78, S-37)

53. The Notice of Recommended Educational Placement (NOREP) provided for itinerant emotional support. The Parents did not return the NOREP or otherwise approve implementation of the IEP until after this hearing began. (N.T. 164, 198, 347-48, 376, 581-82; S-27 pp. 75-78)
54. In an incident in October 2014, Student changed the price tag on a book at a book fair so that Student could buy it for much less than it actually cost. This was a Tier 2 violation. Student's fourth grade teacher discovered what happened and notified the Parents. (N.T. 562-64, 800, 836; P-26, P-33 p. 16)
55. The District conducted an FBA in November 2014 after the ER meeting with consent of the Parents, followed by recommendations for a Positive Behavior Support Plan (PBSP). The behaviors observed during the course of the FBA were impulsivity (negative vocalizations), hyperactivity (out of seat), and inattention (off task). Other behaviors identified by District staff were physical aggression toward objects, noncompliance, and stealing. The hypotheses from the FBA were that Student engaged in off-task behavior, negative vocalizations, and noncompliance, and was out of seat, to escape or postpone tasks; and that Student engaged in physical/verbal aggression when a given a consequence for an action in order to gain control. Recommendations from the FBA included positive reinforcement for appropriate behavior; modified assignments and choice in ordering tasks; clearly defined rules and consequences; instruction in social skills and self-calming strategies; preferential seating; and a crisis plan. (N.T. 160-61, 191-98, 208-09, 745-46, 749-53; S-25, S-28)
56. Student's IEP was revised in February 2015 in a meeting attended by the Parents. This IEP included updated information on the Present Levels of Academic Achievement and the FBA, added a PBSP based on the FBA, and again provided for itinerant emotional support. The IEP goals remained the same, although the PBSP repeated both goals; antecedent/prevention strategies, replacement behaviors, and consequences (positive reinforcement through verbal praise and bonus points for appropriate behavior, and negative consequences through the classroom behavior plan for inappropriate behavior) were contained in the PBSP. Small group instruction was eliminated as a program modification. The Parents' request for Student to be in regular education for the majority of the school day was also noted, as were all of the needs from the ER. The Parents approved the NOREP accompanying this IEP, but indicated that they believed additional revisions based on the IEE recommendations were needed. (N.T. 379-87, 405-06, 589-91, 761; P-34)
57. After the Parents approved the NOREP, Student was in regular education classes except during daily check-in with the emotional support teacher or social worker and weekly social skills group in the emotional support classroom. The social skills teacher worked with the group of students on recognizing feelings. The fourth grade teacher completed a checklist (tally marks) for Student that provided data to the emotional support teacher on Student's IEP goals; however, the tally marks actually reported when Student was not on task or experienced feelings, rather than on when Student was on task or used coping skills; anecdotal notes indicated Student's problematic behaviors. (N.T. 350-51, 407,

409-10, 590, 796, 810, 817, 842-44, 845, 847-49, 982-83, 985-87, 989-90, 1015-18, 1031-32, 1034, 1042-47; S-42)

58. Student completed a self-monitoring checklist on Fridays after the IEP was implemented, and the emotional support teacher kept a log of the morning check-ins. (N.T. 1000-15, 1019-20, 1035-38; S-42)
59. In the fourth grade classroom, the teacher provided the Section 504 accommodations for Student. After the NOREP was signed, she implemented items of specially designed instruction in the IEP, but she stopped using the communication log in October 2014 and instead wrote in Student's daily planner. (N.T. 806, 810-17, 842, 846)
60. The fourth grade teacher used the SWEBS program for the classroom. During the 2014-15 school year, Student reached the warning (first tier) level but only went beyond for the book incident, a level two violation. Student was able to participate in class reward activities. (N.T. 811-12, 835-36)
61. Student went to the nurse more frequently at the beginning of the 2014-15 school year than toward the middle and end of the year. (N.T. 831-32)
62. Student's grades at the end of the first quarter of the 2014-15 school year ranged from A+ (mathematics and spelling) to C+ (science). (S-30 p. 11)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making

credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible, testifying to the best of their recollection; the inconsistencies in the testimony were relatively minor and were more likely than not due to understandable memory lapses. It should also be noted that the Parents, as well as the District personnel, all presented as dedicated individuals who care about Student and Student's education, despite their conflicting positions at the hearing.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

### IDEA Principles

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. Section 504 has a similar requirement. 34 C.F.R. § 104.32; *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). This obligation is commonly referred to as "Child Find." Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, school districts are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability "at the earliest possible moment." *Id.* (citation

omitted).

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. Those classifications or categories are “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a).

With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction which is designed to meet the child’s individual learning needs.

34 C.F.R. § 300.39(a). Further,

*Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

Once identified as eligible, the IDEA further requires the states to provide a “free appropriate public education” (FAPE) to a student who qualifies 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, supra* at 247.

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

In addition to the IDEA principles set forth above, it is important to recognize that education is much more than academics. Nearly thirty years ago, the U.S. Supreme Court recognized that a child with a disability who is “advancing from grade to grade” is not necessarily a child who has been provided with an appropriate education. *Rowley, supra*, at 203 n.25; *see also* 34 C.F.R. § 300.101(c)(1) (“Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.”) An appropriate education, thus, encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (citing *M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir. 1996)). Moreover, a child’s educational performance can be affected in ways other than achieving (or not achieving) passing grades, such as by an inability to engage in appropriate social relationships with peers or refusing to attend school.

## 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). Relevant to this matter, the obligation to provide FAPE to a child with a disability is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm. 2005).

## The Parent’s Claims

The first issue is whether the District failed to timely identify Student as eligible for special education as part of its child find responsibilities. At the time of Student’s entry into the District, it was aware that Student was receiving mental health services including medication. While this information, standing alone, would not necessarily trigger an inquiry into whether Student should be evaluated for special education, it is clear that from the very beginning of the 2011-12 school year, Student began to engage in problematic and concerning behaviors at school. Even if the District’s initiation of Section 504 Plan eligibility was based in part on the recommendation of the behavioral service agency, though, the District did begin an evaluation process very early in the school year that sought information on Student’s performance and behavior in order to address them.

The evaluation itself and subsequent determination of Section 504 eligibility based on what the District knew at the time is, in this hearing officer’s estimation, of some concern. Section 104.35 of the applicable regulations implementing Section 504 requires that an

evaluation “shall” be conducted “before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.”

34 C.F.R. § 104.35. An initial evaluation under Section 504 must assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id.*

Here, no behavior rating scales were obtained, and the information about Student’s significant problematic behavior was all anecdotal and subjective, yielding a less than comprehensive picture of Student. It is also unclear how Student’s concerning behaviors could be essentially attributed to little more than a lack of medication (S-4 p. 1), despite Student’s history of continuous medication management.

Nevertheless, it is important to also keep in mind that Student had only been in first grade for two months at the time of the Section 504 Plan development. The accommodations, on their face, addressed Student’s behavior through positive reinforcement, redirection and prompting, planned ignoring, and use of non-confrontational approaches. Student’s concerning behaviors at school did appear to diminish after implementation of the Section 504 Plan and, overall, Student attained successful grades with few negative comments by teachers on the report cards. While Student’s Parents continued to have concerns, and additional accommodations may have been helpful, Student’s performance at school in first grade simply did not then indicate a need for special education or amount to a denial of FAPE under Section 504.

At the beginning of the 2012-13 school year, no meeting convened to consider how and whether the Section 504 Plan should be revised. There is little evidence to suggest that Student experienced academic or behavioral difficulties as that second grade year began, suggesting that Student did not require additional support beyond that provided in first grade. However, by November and December 2012, Student again began to exhibit increasingly aggressive behavior

that posed a danger to other students and to staff. Further, while the strategy of avoiding confrontation with Student appeared to be successful at times, there understandably were occasions that teacher direction and authority were necessary so that this approach could not be used. That Student excelled academically over the course of the school year is truly remarkable, but that success must be largely attributed to Student's own motivation and strengths rather than to the provided accommodations. Certainly by the end of the first semester of the 2012-13 school year, the District was or should have been aware that Student required more support than was currently provided through the Section 504 Plan, triggering an obligation to commence a special education evaluation while at the same time offering increased support. A timely evaluation would have provided the information necessary to develop an educational program that addressed Student's social, emotional, and behavioral needs including the teaching of skills that Student lacked. Thus, this hearing officer concludes that the District did violate its Child Find responsibility in failing to conduct such an evaluation in late 2012 or early 2013, and Student was thereby denied FAPE as a result of Student's unmet needs.

The following school year, 2013-14, reflects further behavioral deterioration with even more significant aggression. The SWEBS program provided to all children lacked any individualization and was clearly not appropriate for Student. Indeed, the emphasis on negative consequences directly contradicts the accommodation for avoiding confrontation with Student, the one element of the Section 504 Plan that was beneficial. Student was unable to control Student's emotions, regularly engaged in threatening and aggressive behavior, and was defiant and disruptive across all school environments. Additionally, Student was experiencing significant conflict with peers, and exhibited poorly developed social skills. Despite some academic success, all of these events further support the conclusion that Student should have

been evaluated no later than early 2013 so that an appropriate educational program could have been implemented to support Student and teach the skills Student needed to be successful in all domains. Accordingly, Student was again denied FAPE over the 2013-14 school year.

The start of the 2014-15 school year continued the same pattern of problematic and aggressive behavior, and the October incident involving what amounted to theft is particularly troubling. By then identified as eligible for special education, the IEEs and the District's ER identified numerous needs for Student, including development of social skills and coping skills, as well as skills for monitoring, controlling, and managing emotions and behaviors. Yet, the IEPs which followed those evaluations contained only two goals without baselines, and the program lacked any indication of how and when Student would be taught the specific skills that everyone agreed Student needed to develop, particularly self-monitoring, coping, and anger management skills. And, once again, the general classroom/school-wide behavior plans remained in place without any individualization to Student's needs.

Implementation of the IEP revealed additional flaws in responding to Student's unique profile. Although "[p]rovide instruction in social skills and/or self-calming strategies" was included in the PBSP, and appears to be appropriate, the actual teaching of these skills to Student is not part of the IEP, and its implementation had a limited focus on recognizing feelings on a weekly basis. The self-monitoring, again occurring weekly, required only that Student reflect back on Student's coping skills, with no indication of how Student was to develop the ability to manage emotions and behaviors. Importantly, the method of collecting data on Student's progress toward IEP goals did not actually provide information on how Student was performing in relation to those goals. In addition, the daily communication log that was part of the specially designed instruction was no longer used. In sum, the IEP as proposed and implemented falls

short of appropriately responding to Student's needs in a manner that was reasonably calculated to provide meaningful educational benefit and, thus, denied Student FAPE over the 2014-15 school year.

The Parents seek incorporation of all of the recommendations of the IEEs into Student's IEP, while the District contends that it has included as many as possible into an itinerant program of emotional support. Review of those documents reflects that many of those IEE recommendations are contained in the IEP; however, conspicuously absent are the recommendations for addressing Student's rather significant executive functioning needs and the explicit teaching of social, coping, self-monitoring, and anger management skills.<sup>7</sup> The IEP team will be directed to reconvene to add those elements of the IEE recommendations into Student's program. The team should also consider whether Student requires a higher level of emotional support than is provided in the currently implemented IEP; the team members are reminded of the reference in that evaluation, with which everyone agrees, to "an itinerant to supplemental level of emotional support" that must be determined *by the IEP team*. (S-20 p. 42 (emphasis added)) What is important is not what box may be checked on the document, or what percentage may be reported to the Department of Education, but what level is appropriate to address all of Student's needs at the present time.

The Parents also seek to have the District address the auditory processing needs that were mentioned in the speech/language IEE. The evidence, however, does not support a conclusion that this is a need that cannot be otherwise addressed. Although Student did not do well on a subtest measuring auditory processing ability, and the independent speech/language evaluator indicated a cautious suggestion of an Auditory Processing Disorder, she also conceded that this

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<sup>7</sup> There is overlap in these needs, which are explained in detail in the psychoeducational IEE report.

score may be attributed to Student's ADHD rather than an auditory processing disorder, and appropriately accommodated in the classroom. (N.T. 616-21, 624-25, 638-39; S-18, S-24, S-29) The District cannot therefore be faulted for its conclusion that any weakness in this area did not require additional programming.

### Remedies

The above determinations lead to the next issue, the Parents' request for compensatory education. 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. supra*. 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).

The Parents assert that full days of compensatory education are warranted in this matter. Although there was no evidence from which to determine the amount of compensatory education

that would place Student in the position Student would have occupied without the denial of FAPE, it is also clear that Student did well academically and did derive some meaningful educational benefit throughout the time period in question. In addition, there was no discernable pattern to Student's inability to function appropriately at school throughout the time period in question such that one might conclude Student's needs pervaded the entire school day for the full time period for which compensatory education is owed. After careful review of the record as a whole, this hearing officer equitably estimates that, had Student's executive functioning, social, emotional, and behavioral needs been properly met, 1½ hours per day of special education and related services throughout the school day (for actual instruction and opportunities to apply skills learned) would have been appropriately provided, and this is the amount that shall be awarded. The time period for the compensatory education award shall begin on the first day of the second semester (third quarter) of the 2012-13 school year, and continue through to the end of the 2014-15 school year, less the time period the parties agreed would be excepted from any remedy (October 10, 2013 through October 8, 2014).

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's executive functioning and social/emotional/behavioral needs and skills. 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 IEP 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 Parents. The hours of compensatory education may

be used at any time from the present until Student turns age fourteen (14).

There are financial limits on the parents' discretion in selecting the compensatory education; the costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the average of the hourly salaries and fringe benefits that would have been paid to the District and other professionals who did and would have provided social/emotional/behavioral services to Student during the period of the denial of FAPE.

Finally,<sup>8</sup> as discussed above, Student's IEP team will be directed to reconvene and to revise Student's IEP.<sup>9</sup>

#### Section 504 Claims

The Parents' complaint also raised a claim under Section 504. The above discussion reflects discrimination against Student on the basis of Student's disability under Section 504. However, because the obligation of a local education agency to provide a "free appropriate public education" is substantively the same under Section 504 and under the IDEA, and further because all of the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of the claims under Section 504.

### **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District failed in its Child Find obligation, and failed to provide Student with FAPE for a portion of the time period in question. Student is entitled to

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<sup>8</sup> This hearing officer lacks the authority to award payment of the Parents' attorney fees and costs.

<sup>9</sup> The team may wish to consider including an IEP facilitator at this meeting.

compensatory education.

**ORDER**

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

1. The District failed in its Child Find and FAPE obligations to Student.
2. The District shall provide Student with 1.5 hours of compensatory education, to address Student's executive functioning and social/emotional/behavioral needs, for every day school was in session for the second semester of the 2012-13 school year, and the entire 2013-14 and 2014-15 school years, except for the period of October 10, 2013 to October 8, 2014, subject to the conditions and limitations set forth above.
3. Within fourteen days of the date of this Order, the District shall convene a meeting of Student's IEP team to revise the IEP to address Student's needs for explicit instruction in social skills, coping skills, anger management skills, and self-monitoring skills, as well as Student's overlapping executive functioning needs, consistent with the foregoing discussion. The team shall also consider the level of support that is necessary to address all of these needs at the present time.
4. Nothing in this Order precludes the parties from mutually agreeing to alter any of the directives regarding the IEP meeting and timelines, the IEP content, or the form of compensatory education, set forth in this decision and order.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: May 30, 2015