

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: J. M.

Date of Birth: [redacted]

ODR File No. 18009-16-17 KE

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
Coatesville Area School District
3030 C G Zinn Road
Thorndale, PA 19372

Dates of Hearing:

Date of Decision:

Hearing Officer:

Representative:

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September 7, 2016; September 12,
2016; September 14, 2016; September
27, 2016; October 13, 2016

October 31, 2016

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

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a late teenaged high school student in the Coatesville Area School District (District). Student has been identified as a protected handicapped student under Section 504 of the Rehabilitation Act of 1973² following an incident in October 2015 after which Student was diagnosed with Post Traumatic Stress Disorder (PTSD). In July 2016, Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) during the 2015-16 school year under Section 504 and the Individuals with Disabilities Education Act (IDEA),³ as well as the federal and state regulations implementing those statutes.

Specifically, the Parents claimed that the District violated Student's rights as a child with a disability in failing to conduct appropriate evaluations of Student, including under Section 504 and in complying with its Child Find obligations under the IDEA; and in failing to develop and implement an educational program that met all of Student's needs related to Student's disability. The Parents sought compensatory education, reimbursement for certain expenses they incurred during the time period in question, and certain declaratory relief. The District maintained that its evaluation and educational programming were appropriate under the law and that no remedies were warranted.

The case was initially expedited because of an extended school year (ESY) issue;

¹ 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. The identifying information appearing on the cover page of and elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of 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 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).

³ 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth 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).

however, the parties elected to proceed under the ordinary statutory and regulatory timelines, with the due process hearing convening over five sessions.⁴ Following review of the entire record, and for the reasons set forth below, the Parents will prevail in part and the District will prevail in part.

ISSUES

1. Whether the District conducted appropriate evaluations of Student in all areas of suspected disability and reached an appropriate conclusion on eligibility;
2. Whether the District's programming as developed and implemented from October 2015 through the end of the 2015-16 school year was appropriate for Student;
3. If the District's evaluations and/or educational programming were not appropriate, should Student be awarded compensatory education;
4. If the District's evaluations and/or educational programming were not appropriate, should the District be ordered to reimburse the Parents for any expenses; and
5. Should the hearing officer order declaratory relief with respect to Student's earned credits and attendance records?

FINDINGS OF FACT

General Background

1. Student is a late-teenaged student who resides in the District. Student is an individual with a disability and a protected handicapped student within the meaning of Section 504

⁴ The parties were exceptionally cooperative in scheduling hearing sessions. However, many sessions were not full days in order to accommodate all schedules. The decision due date under the standard timelines was ultimately extended by joint requests for a period of 33 days to accommodate the agreed hearing dates; the granted extensions gave consideration to the fact that Student's educational program for the 2016-17 was not a substantive issue for the hearing. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations in the findings to duplicative exhibits will be made to one or sometimes more than one exhibit, but not necessarily all. References to Parents in the plural will be made where it appears that Student's mother, who was the more active participant in Student's education, was acting on behalf of both Parents. The hearing officer acknowledges with great appreciation the cooperation of counsel and the parties in participating in the electronic exhibit pilot program.

and Pennsylvania's Chapter 15; and the District is a recipient of federal funds. (N.T. 61-62)

2. The District has an intermediate high school and a senior high school building together on a single large campus that includes sports fields and parking lots. During the 2015-16 school year, some students transferred between those buildings for classes that were not offered in both buildings. (N.T. 171, 672, 691-92, 932; P-70A)
3. The guidance counselors at the intermediate high school complete a form referring a student to a school psychologist for a special education evaluation. (N.T. 73-74)
4. The guidance counselors at the intermediate high school are responsible for developing and revising Section 504 Plans. (N.T. 70)
5. An incident occurred on October 20, 2015 [redacted] at the District intermediate high school wherein Student was assaulted by two other students. (N.T. 46, 656, 658, 756-57, 758-59; HO-1 p. 1)
6. Student was examined by a pediatrician on October 21, 2015. Student's regular pediatrician wrote a letter dated November 6, 2015, recommending that Student be provided with cyber-school programming and tutoring at home. That physician had not seen Student since prior to the October 20, 2015 incident. (N.T. 473-74, 511-12, 759-60; P-17 p. 1)
7. Student attended school for a few days after October 20, 2015, and on November 6, 2015 left after taking a makeup test. On November 4 and 6, 2015, Student believed that other students, including one of the assailants, were following Student. (N.T. 144, 268, 759-62, 875-78)
8. Student began seeing a therapist, a licensed psychologist, on November 9, 2015. At that time, Student remained extremely upset about the October 20, 2015 incident and refused to return to school. In early December 2015, the therapist recommended that Student not return to school due to reported symptoms of PTSD. At the time of the due process hearing, Student continued to see the therapist. (N.T. 770, 772; P-18 p. 1; S-4 p. 2)
9. Student was provided tutoring at home between early December and January 29, 2016 by a foreign language teacher for that particular class; Student also began a cyber-school program on November 12, 2015. Student attained a midterm grade of 92 in the foreign language class. This teacher also assisted Student with elective courses and carried those assignments between home and school. (N.T. 98, 699-700, 704-05 707, 769, 775-78, 897)
10. Student was excused from attending school for most school days between November 5, 2015 and January 28, 2016. (S-6 pp. 3-4, S-11)

Evaluation

11. The Parents requested that the District conduct a special education evaluation of Student in November 2015, and the District agreed and issued a Permission to Evaluate form on December 9, 2015. The Parents provided consent on December 16, 2015. (N.T. 386; P-20, P-21; S-2 pp. 1-4)
12. The District arranged for a certified school psychologist from the local Intermediate Unit (IU) to conduct an evaluation of Student. That school psychologist met with Student in January 2016 and issued an evaluation report (ER) on February 4, 2016. (N.T. 298, 302, 387, 779-80)
13. The school psychologist obtained information from the Parents including pediatrician records and a letter from Student's therapist. She also spoke with the pediatrician, who documented a PTSD diagnosis. The therapist expressed Student's ongoing anxiety over the October 2015 incident and the therapist's concerns over Student's safety at school. In a conversation the school psychologist had with Student, Student described concerns with safety at school and Student's perception that one or more of the assailants may have been following Student. (N.T. 305, 308-11; P-25 pp. 1-2, 5-6; S-2 pp. 5-6, 9-10)
14. The school psychologist obtained input from teachers from the fall when Student was attending school prior to the October 20, 2015 incident. (N.T. 313-14, 326-27; P-25 pp. 2-5; S-2 pp. 6-9)
15. The school psychologist conducted assessments of Student's cognitive ability and academic achievement, and also determined that a broad assessment of behavior/social/emotional functioning was indicated in addition to her behavioral observations during test administration and interview. (N.T. 322-24; P-25 pp. 6-7; S-2 pp. 10-11)
16. Student reported to the school psychologist fear for Student's safety at school and anxiety over the incident on a daily basis. Student also expressed uncertainty over returning to school and limited contact with friends since the incident. (P-25 p. 7; S-2 p. 11)
17. The school psychologist conducted all assessments in accordance with the publisher's guidelines and has been trained in their administration. (N.T. 321-22)
18. Cognitively, Student achieved a Full Scale IQ (92) in the average range but a General Ability Index score (86) in the low average range (Wechsler Adult Intelligence Scale – Fourth Edition). Working memory was a relative strength. (P-25 pp. 8-9; S-2 pp. 12-13)
19. Academic performance (Wechsler Individual Achievement Test – Third Edition) scores were in the average range in most areas (mathematics, reading, and oral language) with high average scores in writing skills. (P-25 pp. 9-11; S-2 pp. 13-15)
20. The Parents, through Student's mother, provided rating scales (Behavior Assessment System for Children – Second Edition, BASC-2), reflecting clinically significant

concerns on the Internalizing Problems Composite and two of its scales (anxiety and depression); and in the at-risk range for several other scales (hyperactivity, aggression, somatization, atypicality, withdrawal, leadership, and activities of daily living). Student's BASC-2 self-report yielded scores in the at-risk range in only two areas, hyperactivity and self-reliance; and on the Beck's Youth Inventory, Student's rating scale reflected a mild elevation on the anxiety scale and a much lower than average score on the self-concept scale. No teacher BASC-2 ratings were obtained because Student had not been in school since early November. (P-25 pp. 11-13; S-2 pp. 15-17; *see also* N.T. 313, 326)

21. The school psychologist concluded that Student did not meet the criteria for a student with an emotional disturbance and was not eligible for special education, but that accommodations in regular education would meet Student's needs regarding safety. She provided recommendations in the ER (a plan for return to school full time, with counseling for coping skills and anxiety; and monitoring of anxiety and attendance). The school psychologist did not recommend a psychiatric evaluation and agreed with the PTSD diagnosis. (N.T. 315-17, 328, 332-34; P-25; S-2 pp. 5-23)
22. The District issued a Notice of Recommended Educational Placement (NOREP) on February 8, 2016, recommending that Student was not a student with a disability but should be provided with a Section 504 Plan for continued regular education programming. The Parents did not approve the NOREP. (P-26; S-2 pp. 24-28)
23. At request of the Parents, a meeting with the school psychologist, the Parents, their advocate and attorney, and several District representatives convened on April 6, 2016 to review the ER. The Parents asked that Student return to school full-time at that meeting. (N.T. 319, 390-91, 439-41, 728, 790; S-2 p. 28, S-7 p. 229)
24. The Parents contacted the school psychologist and asked for another evaluation around the time of the April 6, 2016 meeting. The school psychologist referred that request to the District, and it issued a NOREP on April 21, 2016 reflecting its refusal to conduct another evaluation. (N.T. 319-20, 395-96, 442; P-34-1; S-7 pp. 341-42)

Safety Plans 2015-16 School Year

25. A Safety Plan to address Student's safety on the school campus was initially drafted on November 4, 2015 with input from the family, and revised on November 24, 2015. The District staff who participated were aware of who the assailants were during the drafting of the Plan. (N.T. 211, 246-47, 252-53, 286, 825, 943-44, 955, 961-62; S-3 p. 1)
26. The November Safety Plan included the following accommodations:
 - a. Change in schedules of the assailants to avoid interactions with Student
 - b. Teacher monitoring of all of the students involved

- c. Provisions for the assailants to transition to the next class a few minutes late, and pursuant to specific routes to avoid interaction with Student, and a “cease and desist” letter against the assailants
- d. Opportunity for Student to have lunch in a quiet location and teacher monitoring of the lunch line
- e. Opportunity for Student to speak with guidance counselor or administrator when feeling anxious
- f. Periodic check-ins with guidance counselor

(S-3 p. 1)

- 27. An assistant principal at the intermediate high school participated in the development of the Safety Plan and was responsible for ensuring that all who were required to implement it were aware of its content, including revisions as they were made. The Plan was revised on multiple occasions. The assistant principal held meetings so that all staff were aware of the Plan and the identity of the assailants, and checked in with the assigned escorts regularly. (N.T. 178, 180, 188-89, 196, 198, 209, 225, 227, 252-54, 255-58, 262, 286, 662-63, 948-49, 954, 956-57, 962)
- 28. By January 2016 three additional students were identified as associates of the assailants with whom Student should not have contact, and those students’ identities were shared with District staff. (N.T. 265-66, 272-74, 955-56)
- 29. Student’s guidance counselor was aware of the identity of the assailants and associates, and had the responsibility to ensure that none of those individuals was in any of Student’s classes upon Student’s return to school on January 29, 2016. (N.T. 102-03, 127-28)
- 30. Student’s guidance counselor scheduled Student for a homeroom/advisory class to which one of the assailants was assigned. Student attended that homeroom/advisory class one time before Student was changed to a different homeroom/advisory classroom. Student was upset over this circumstance. (N.T. 128-29, 153, 199-200, 841)
- 31. Changes were made to Student’s schedule to avoid the assailants and associates. (N.T. 97, 955)
- 32. The assistant principal met with Student in the guidance counselor’s office to check in with Student on January 29, 2016. The assistant principal and the guidance counselor told Student that they would meet with Student two or three times each week. (N.T. 878-79)
- 33. Student was assigned an escort for the return to school on January 29, 2016. The escort was to be with Student when Student was on the campus including upon return from the cyber-school program. At that time, at the suggestion of the District, the escort was not a paraprofessional aide but a security guard who had a primary role of promoting a safe school environment. (N.T. 196-98, 221, 269, 837, 862, 948-49)

34. Student was permitted to leave classes a few minutes early to transition to the next class, and avoid contact with the assailants and associates. However, Student did not choose to leave early from most classes, believing that doing so would draw attention to Student. (N.T. 944-45, 971; S-2 p. 11)
35. A revised Safety Plan was created on February 5, 2016. That Plan provided the following accommodations:
 - a. Change in schedules of the assailants and associates to avoid interactions with Student
 - b. Changes in Student's schedule to avoid contact with the assailants and associates
 - c. Teacher monitoring of Student on a "need to know" basis
 - d. Provisions for Student to transition to the next class with a peer buddy
 - e. Opportunity for Student to have lunch in a quiet location and teacher monitoring of the lunch line
 - f. Opportunity for Student to speak with guidance counselor or administrator when feeling anxious
 - g. Periodic check-ins with guidance counselor
 - h. Communication with Parents on any instances of anxiety
 - i. An escort for Student while on campus: on arrival, between classes, and before departing for the cyber-school program building and home

This Safety Plan was approved by the Parents on February 16, 2016. (S-3 pp. 9-11)

36. The District had a mental health specialist during the 2015-16 school year who had an office in the intermediate high school. (N.T. 185-86)
37. Student was never referred to the mental health specialist. (N.T. 186, 811-12)
38. After Student returned to school on January 29, 2016, Student attended classes for three elective courses on campus in the morning, and was at another building for cyber-school programming the remainder of the school day. The cyber-school program did not offer the electives that Student had been taking earlier in the school year, but did offer other electives. (N.T. 146-47, 149, 263, 564-67, 569-71, 776, 778, 792, 838)
39. Student rode a bus from the intermediate high school campus to the building where the cyber-school program was provided. After the cyber-school program ended for the day, Student took another bus back to the intermediate high school campus. With the escort, Student was able to move to and wait on the bus that would transport Student home. A school police officer also served in the role of escort for a short period of time. (N.T. 149, 270-71, 666-67, 669, 673-74, 883, 895-96, 949-50; P-24 pp. 4-6; S-7 p. 204)
40. The guidance counselor was responsible for checking in with Student periodically to gauge Student's anxiety and to serve as a resource for Student. She met with Student and

the assistant principal in the guidance counselor's office on a few occasions. (N.T. 116, 147, 151-52, 188-89, 194, 212-13, 879-80, 905; S-3 p. 9)

41. The assistant principal had the primary responsibility for monitoring the implementation of the Safety Plan. The assistant principal also checked in with Student periodically, asking how Student was feeling. These meetings occurred in the guidance counselor's office or elsewhere in the school building, but were not regularly scheduled. (N.T. 81, 116-17, 146-47, 151-52, 179, 198-99, 258-59, 879, 945-48, 952, 1023; P-29 p. 2)
42. Student typically told the assistant principal that Student was feeling fine and felt safe. Student was not comfortable explaining how Student felt especially in front of peers. On March 21, 2016, the Parents reported that Student felt intimidated by the assistant principal. (N.T. 259-60, 292-93, 296, 879-80; S-7 p. 210)
43. The Parents and Student asked in early March 2016 that the Safety Plan be revised to include a provision for an escort for Student to travel to a locker room in a certain building to prepare for participation on a team sport. A security guard was assigned to escort Student to that locker room. (N.T. 232-33, 288, 674, 884; P-24 pp. 11-12; S-7 pp. 192-96, 205-06)
44. Also in early March 2016, the Parents requested that all communications from an intermediate school assistant principal be made to their counsel. (P-24 p. 7)
45. On or about April 6, 2016, when Student arrived back to campus from the cyber-school program, the security guard was not present to escort Student. (N.T. 221, 224, 282-83)
46. On or about April 6, 2016, an assailant drove past the field of a sporting event in which Student was participating as a member of the team after school. The assailant drove to a parking lot. (N.T. 130, 794, 880-81)
47. On or about April 7, 2016, after Student arrived back to campus from the cyber-school program, Student missed the bus and obtained a ride from the aide who was in the parking lot. (N.T. 224, 795, 882, 893)
48. On or about April 8, 2016, the Safety Plan was revised to provide for Student to be escorted by a paraprofessional aide rather than the security guard. The Parents had been notified in late March of this specific change and expressed their disagreement, and Student told the assistant principal that Student was unhappy with the substitution of an aide. (N.T. 216-20, 285, 883; P-32 p. 8; S-7 pp. 210, 223)
49. Also on April 8, 2016, the District advised the Parents that the guidance counselor would meet with Student once a week. (P-30 p. 43; S-7 p. 272)
50. Prior to beginning the responsibilities as Student's escort, the aide was provided with the Safety Plan and a schedule, and was directed to wait outside of Student's classrooms. She was also informed of the identity of the assailants and their associates. After the incident when Student missed the bus and the aide was in the parking lot, the assistant

principal met with the aide to review her responsibilities. (N.T. 222-23, 226, 962-63, 965, 976-78, 980, 1020; S-3 pp. 12-15)

51. On or about April 11, 2016, Student was in a physical education class when one of the assailants appeared in the gymnasium. The assailant was scheduled to be in another class at the time. Student became upset and went home for the rest of the day. (N.T. 129, 226-28, 796, 884-85, 897-999)
52. Student refused to return to school after April 11, 2016. (N.T. 798)
53. On the morning of April 20, 2016, the Parents (by Student's mother) sent an email message to the assistant principal advising that, "[Student] will not be back to school and I do not know when or if [he/she] will return. [Student] will log onto cyber school and will go to [sports team] practice. However we must find a way to get [Student] all [his/her] credits due [him/her]." (S-14 p. 2) The District understood that Student would not return to school as of that date, and responded to Parents' counsel that Student had been withdrawn and would no longer participate on the sports team until the parties agreed to an acceptable safety plan. The District also advised that Student would be contacted about elective courses. (N.T. 941-43; P-28 pp. 1-4; S-7 pp. 313, 325, S-14)
54. Also on April 20, 2016, Student arrived for a sporting event after school, and was informed that Student was no longer on the team. (N.T. 800, 884)
55. After Student stopped attending classes, one of the Parents contacted Student's guidance counselor about getting work for Student's elective classes. Student continued taking the cyber-school program courses. (N.T. 132, 133-34, 865-66, 872)
56. Student's Safety Plan was not revised after Student stopped attending classes on campus in April 2016. (N.T. 135-36)
57. Student saw Student's pediatrician several times in April 2016, but had not seen that physician since prior to the October 20, 2015 incident. The pediatrician did agree with the PTSD diagnosis and prescribed medication for anxiety. (N.T. 473-74, 477, 495-96; P-17)
 - a. At an April 15, 2016 office visit, Student and Student's mother completed screening questionnaires that indicated generalized anxiety, school avoidance, and panic disorder. Those symptoms may be indicative of PTSD triggers such as contact with persons involved in the event or the environment; and Student related instances of seeing the assailants at school and the sporting event and not feeling safe in those environments. The pediatrician wrote a letter at the Parents' request recommending a safety plan with an aide or security guard of Student's gender, and that Student not return to school until a safety plan that was agreeable to Student and the Parents would be implemented. (N.T. 487, 489-91, 493-94, 498, 505, 516-17, 798-99, 887-88; P-17 pp. 8, 11-13)

- b. On April 18, 2016, the pediatrician wrote another letter describing Student's worsening PTSD symptoms, and need for a safety plan that was agreeable to Student and the Parents to include an escort or security guard. (N.T. 501, 527-28; P-17 p. 22; S-4 p. 1)
 - c. On April 21, 2016 visit, the pediatrician wrote another letter recommending that Student return to the cyber-school program with an escort while on campus and at sporting events. Student saw the pediatrician again on April 22, 2016. (N.T. 502, 537-38; P-17 p. 15-17)
 - d. On May 6, 2016, the pediatrician wrote another letter asking that Student be excused from school from April 12-18 and 20, 2016, and recommending a return to the cyber-school program and the sports team. (N.T. 533; P-17 p. 18 S-4 p. 3)
 - e. The pediatrician did not review any of the Safety Plans. (N.T. 531, 544)
58. Student's therapist also wrote a letter on April 18, 2016, similarly reflecting worsening PTSD symptoms and recommendations that Student not return to school full time and that a safety plan be reviewed. He also suggested a reevaluation by the school psychologist. (P-18 p. 3; S-4 p. 3)
59. Sometime after Student stopped attending the intermediate high school for elective courses, Student chose electives that were offered by the cyber-school program to complete the required credits. (N.T. 575; P-33 pp. 6, 10-19)
60. Student was marked with a number of unexcused absence between April 12 and 20, 2016. (S-6 pp. 5-6)
61. A meeting convened on April 26, 2016 to discuss electives. Student and Student's mother attended that meeting. The team did not reach the question of accommodations for Student to continue with the sports team. (N.T. 802-04, 888)
62. There was a delay in Student's ability to access the foreign language class through the cyber-school program for various technical reasons. (N.T. 565, 577, 579)
63. Students are required to earn twenty four credits in order to graduate from the District. (N.T. 155)

2016-17 School Year

64. The District conducted a Section 504 Evaluation during the summer of 2016. The resulting Section 504 ER reflected PTSD as the disability and a need for a plan of accommodations based on the February 2016 ER. (N.T. 641-42; P-35)
65. A Section 504 Service Agreement was developed over the summer of 2016 with input from the Parents and consideration of the ER, with a team meeting in August to discuss its content. Representatives from both the intermediate and senior high schools

participated. The Parents signed the final 504 Service Agreement on September 10, 2016. (N.T. 621, 626, 632-33, 637-38, 807, 1028-29; P-34-2; S-5, S-10)

66. The signed Section 504 Service Agreement included the following provisions:
 - a. Guided notes, second set of textbooks at home, English class accommodations, study guides, and test accommodations
 - b. Counseling with the guidance counselor or mental health therapist
 - c. Encouragement of self-regulation and self-advocacy skills
 - d. Permission to leave classes a few minutes early to meet the escort
 - e. Classroom seating location

(S-10)
67. Student's teachers for the 2016-17 school year reviewed and signed the Section 504 Service Agreement. (S-10 p. 5)
68. Student's schedule was reviewed with Student prior to the start of the school year. (N.T. 1031-32, 1059-60; P-67)
69. Student began treating with a psychiatrist at the end of August 2016. (N.T. 774-75)
70. Student had weekly sessions with the District mental health counselor beginning in the fall of 2016. (N.T. 1037-38)
71. Student returned to school in the fall of the 2016-17 school year, participating for a half day in the cyber school program and the other half of the day at the senior high school building. Student did wish to return to the school building full time. (N.T. 644-45, 814-15, 889, 1032-33, 1043, 1047, 1077)
72. Student's guidance counselor provided all of Student's teachers at the high school with a copy of the Section 504 Service Agreement, and photographs and names of the assailants and associates. (N.T. 1033-34, 1075; S-151`)
73. Schedules for students at the high school are generated initially by computer. Before releasing the schedules to the students just prior to the start of the school year, Student's high school guidance counselor reviewed Student's schedule to ensure that none of the assailants or associates were in a class with Student. However, students are able to make changes to their schedules at the beginning of the school year, and one of the assailants made a change resulting in that student being scheduled for the same lunch period as Student, every other day. The District offered a number of options for Student so that the two would not be in the same place during that lunch period. Because Student was not at the high school building full time, Student did not have lunch in that building. (N.T. 645-47, 688-90, 814, 1043-51, 1061-62, 1082-84; S-13 p. 4)

74. The Parents raised no claims regarding the Section 504 Service Agreement signed on September 10, 2016. (N.T. 641)
75. Student expressed having difficulty with the foreign language class at the start of the school year. The District offered to provide extra time with the foreign language teacher before or after school. At the time of the due process hearing, Student was struggling in that class but was only able to take advantage of meeting with that teacher on two occasions. (N.T. 650-51, 686-87, 810-11, 814-15, 896-97, 1035-36, 1053-54; S-13)
76. The guidance counselor suggested in mid-September that, if Student would not return full-time to campus soon, that she meet with Student and the Parents to explore options regarding Student's elective courses. (S-13)
77. Student has met with the high school guidance counselor on approximately a weekly basis to discuss any concerns. The guidance counselor also meets with teachers and the mental health therapist as needed. (N.T 1036-38, 142)

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 from his or her own perspective. With respect to the contradictory evidence on whether District personnel were apprised of the identity of the assailants and associates, the testimony of the District witnesses was credited as more persuasive than the hearsay evidence to the contrary. With respect to the nature of the meetings with the guidance counselor and assistant principal, Student's testimony was given greater weight in light of the inconsistency in the accounts of other witnesses and Student's overall candid and straightforward demeanor. In any event, in reviewing the record, the testimony of every witness,⁵ and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' closing arguments.

GENERAL SECTION 504 PRINCIPLES

Section 504 specifically 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 question of whether an individual is substantially limited in a major life activity is a question of fact.” *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751, 763 (3d Cir. 2004).

In the context of education, Section 504 and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person

⁵ It should be noted that there are several instances in the transcript where remarks made by counsel were attributed to the hearing officer. *See, e.g.*, N.T. 657 LL 5-23; N.T. 835 LL 7-9. There were also several statements by the hearing officer that were attributed to counsel for one of the parties. Counsel for both parties were vigorous advocates for their respective clients, which is not at all a criticism; nonetheless, there were several reminders throughout the hearing that only one person speak at a time to ensure an accurate hearing record.

in its jurisdiction.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit”. *Ridgewood* at 247.

EVALUATION/ELIGIBILITY FOR SPECIAL EDUCATION

The first issue is whether the District erred in failing to identify Student as eligible under the IDEA. That statute and its implementing 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. 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). The regulations further define emotional disturbance as follows.

(4)(i) *Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i).

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).

A related issue is whether the District conducted an appropriate evaluation of Student. In conducting the evaluation, the law imposes certain requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1). In interpreting evaluation data and making these determinations on eligibility and educational needs, the team must:

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

34 CFR 300.306(c). School districts are responsible for conducting the required assessments, and also must provide a copy of the evaluation report and documentation of the eligibility determination to parents at no cost. 34 C.F.R. §§ 300.305(c) and 300.306(a)(2). In Pennsylvania, the evaluation must be completed within sixty calendar days of receipt of parental consent, excluding the summer. 20 U.S.C. § 1414(a)(1)C); 34 C.F.R. § 300.301(c); 22 Pa. Code § 14.123(b). Following completion of the evaluation, an initial IEP must be developed within thirty days for a child who is determined to be eligible under the IDEA, with implementation as soon as possible thereafter. 34 C.F.R. § 300.323(c).

Following careful consideration of the evidence as a whole, this hearing officer finds that the District's evaluation met all of the above standards. She further concludes that the determination with respect to Student's eligibility under Section 504 and not the IDEA was appropriate.

The school psychologist was qualified to conduct the evaluation and the assessments administered, and did so pursuant to publishers' guidelines. The evaluation was conducted well within the applicable timelines, and included historical and current information from the Parents and Student's private pediatrician and therapist, in addition to input from teachers who had worked with Student. Although the Parents correctly observe that the school psychologist did not seek information from the foreign language teacher providing tutoring in the fall of 2015 and early 2016 or any of the cyber-school program teachers, the foreign language teacher testified at

the hearing and reported no concerns with Student's academic or emotional functioning during the time that she provided services to Student at home (N.T. 702-04); and, it is unclear what helpful information the cyber-school program teachers might have provided that was not already available to the school psychologist throughout that evaluation process.

The ER further reflects assessment of Student's cognitive ability and academic achievement, and includes a comprehensive summary of the school psychologist's observations of Student during testing. Student's social/emotional/behavioral functioning was assessed through rating scales from both the Parents and Student. Simply put, the record does not support a conclusion that further assessment of Student, including a psychiatric evaluation, was necessary for educational programming. While it is somewhat concerning that no meeting to discuss the ER occurred until April 2016, approximately two months after its completion, this hearing officer concludes that the evaluation met the requisite criteria in the law. As such, the District's decision not to evaluate Student again after the April 2016 request was not inappropriate.

With respect to eligibility, the school psychologist found no need for Student to be provided with specially designed instruction. As noted above, the test for IDEA eligibility is two-pronged. Although this hearing officer does conclude that Student had a need for services not provided in the spring of 2016, discussed *infra*, there was nothing in the ER, or other information available, that suggested that Student required specially designed instruction in order to benefit from Student's education. As such, there is no basis on which to disturb the eligibility determination. Since Student was not IDEA-eligible, there is also no reason to address the ESY claims.

There is also a duty of Child Find under Section 504. 34 C.F.R. § 104.32; *Ridgewood* at 253. The applicable regulations implementing Section 504 require 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.* By analogy, a Section 504 Service Agreement would reasonably follow timelines similar to those in the IDEA and implementing regulations. Having concluded that the District’s ER was appropriate and timely, the same determination is made under Section 504.

DISCRIMINATION UNDER SECTION 504

As explained above, the evidence does not establish eligibility under the IDEA. The next issue is whether the District denied Student FAPE and/or otherwise discriminated against Student on the basis of Student’s disability. Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood, supra*, at 253.

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood at 253. “In addition, the plaintiff must demonstrate that defendants know or should be reasonably expected to know of his disability.” *Id.* Significantly, “[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002).

The parties’ major disagreement is whether the District provided sufficient accommodations for Student’s safety. There was substantial evidence presented about the relatively few occasions when Student was in physical proximity to one of the assailants or associates, or that some aspect of the Safety Plan was temporarily unavailable. Each circumstance was easily and rationally explained with a reasonable and very prompt District response to the Parents and Student. The record also demonstrates, rather significantly, that Student was never in any danger as a result of any of the District’s actions or inactions during the time period in question. This conclusion applies equally to the substitution of the aide for the security guard as the escort, a role for which the aide was provided ample training, and is an accommodation that was part of the parties’ original discussions. Moreover, even considering Student’s perceptions (discussed below), it is impossible to expect that the District would be able to guarantee that Student would never so much as catch a glimpse of any of the identified individuals who attended school on the very same campus and had access to the grounds before, during, and after school, for anything but the briefest period of time.

On the other hand, it is curious indeed that the District created a Safety Plan rather than a Section 504 Service Agreement. Perhaps the caption provides some explanation for the absence of any provision for counseling services, but it is perplexing that the District did not agree with that specific recommendation of the school psychologist, particularly in light of the lack of any

regular meetings with a trusted District professional in whom Student would be comfortable confiding. The wholly understandable, and clearly overly optimistic, recurring assurances by Student to the assistant principal that Student was not anxious and was “fine” should have raised some flags, especially upon consideration of Student’s reactions on the occasions when one of the assailants or associates was observed by Student. Student’s perceptions, whether accurate or not, clearly required mental health counseling in the school environment to assist Student in attending to and benefitting from an education through acquisition of appropriate coping skills. This need is particularly evident and compelling given that Student undoubtedly would, and did, observe the assailants and associates from time to time on school grounds, and can be expected to do so at least until Student or all of the others graduate.

Similarly, with the District clearly aware of Student’s total inability to attend school for a significant period of time, some provision for monitoring Student’s attendance once Student did return was a critical omission from the Safety Plan. In addition, the provisions regarding check-ins (another recommendation of the school psychologist) were not adequate in terms of frequency and regularity, as written and implemented, to monitor Student’s anxiety. All of these omissions, taken together with the absence of appropriate counseling, operated to deny Student FAPE.

The Parents pointed out, both to the District in the spring of 2016 and at the hearing, that the Safety Plan did not incorporate all of the suggestions of Student’s pediatrician. However, much like the recommendations in the ER, a plan for accommodations at school need not include all suggestions, even those made by a physician. The Safety Plan was a form of Section 504 Service Agreement, with provisions to be decided by school district representatives and parents. 22 Pa. Code § 15.7. And, a Section 504 Service Agreement must follow and be based on an

evaluation to be considered by a team. 34 C.F.R. § 104.35. This hearing officer has found that certain needs went unmet in the spring of 2016 based on all available information in the record, and will accordingly award a remedy.

The Parents and District also disagree over who made the decision in April 2016 that Student would no longer attend the intermediate high school. The record supports a conclusion that the decision was a mutual one, but made for different reasons. In any event, the denial of FAPE continued through the end of the 2015-16 school year, and remedies will be addressed below.

Finally with respect to Section 504, there appears to be no reason to address any other claims of discrimination beyond those above related to FAPE.

REMEDIES

The Parents first seek compensatory education, which is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award may compensate the child for the period of time of deprivation of educational services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has recently endorsed a different approach, sometimes described as a “make whole” remedy, where the award of compensatory education is designed “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) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE). Compensatory education is an equitable remedy.

Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In this case, it is also important to keep in mind that Student was able to complete a number of classes through the cyber-school program during the time period in question, which provided, among other things, important socialization opportunities.⁶

The starting point for the remedy is February 5, 2016, the date of the first agreed upon Safety Plan following completion of the evaluation process, as the District must be provided a reasonable opportunity to identify Student's needs to be addressed in an educational program and respond appropriately.⁷ *M.C., supra*, 81 F.3d at 397. This hearing officer has concluded that Student required, but was not provided, mental health counseling. It is reasonable to conclude that one thirty-minute session each week of this type of counseling, which is the same frequency of the counseling sessions this school year as well as the check-ins as of April 2016, would have been appropriate. This metric will be used as the amount needed to compensate Student for this unmet need. Had Student been provided with this level of counseling support, it is also reasonable to conclude that Student would have learned appropriate coping skills to manage anxiety, allowing Student to remain at the intermediate high school for some classes through the end of the school year. According to the District calendar (S-11), there were approximately eighteen weeks of school from February 5, 2016 through the end of that school year. Rounding up to avoid an uneven number, Student shall be awarded ten hours of mental health counseling services as compensatory education.

In addition, had those counseling services been provided, it is similarly reasonable to

⁶ Student stated that, as of April 2016, Student "wanted to be [on campus] but knew [Student] couldn't be there" and was more comfortable in the cyber-school program building. (N.T. 890)

⁷ There is nothing in the record to suggest that the District should have suspected Student to be a child with a disability prior to the incident on October 20, 2015. As noted, the District could have taken 60 calendar days to complete the ER, and then develop a program based on needs identified through the evaluation process.

conclude that Student would have completed the 2015-16 school year with appropriate credits and the background course knowledge needed to succeed in the classes Student currently is taking. As of the end of September, Student was struggling in the foreign language class, and was also preparing for the Scholastic Aptitude Test (SAT) and was concerned about mathematics. (N.T. 1035-36, 1069-73) Student shall, therefore, be equitably awarded additional compensatory education in the form of academic tutoring services. Absent any indication in the record of the amount of compensatory academic services Student requires to be in the position Student would be in absent the denial of FAPE, Student shall be awarded the same number of hours of compensatory education for academic tutoring services as is ordered for counseling services. This award shall apply to any class in which Student has an average of 70% or below at the end of the first marking period, as well as in any academic subject area in which Student identifies a need for a refresher for the SAT, and which the guidance counselor agrees is a subject area for that test.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how and by whom the hours of compensatory education are provided. 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. Compensatory services must be provided when convenient for Student and the Parents, but the academic tutoring services must be provided within a reasonable period of time so that Student may benefit during the current school year. The hours of mental health counseling services may be used at any time from the present until Student turns age twenty (20).

The Parents may elect to have the compensatory education services provided by the District. Should the Parents decide that these services will be provided by the District, the

scheduling needs of both the Student and District provider(s) must be considered. Should the Parents decide that these services will be provided by persons not employed by the District, there are financial limits on their 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 professionals who did or would have provided those services to Student during the relevant time period.

The Parents also seek correction of Student's records with respect to attendance and credit hours earned. This hearing officer does not find that she has jurisdiction over these matters that are left to the authority of the School Board of the District. *See* 24 P.S. §§ 1-101 *et seq.*; Chapters 4 and 11, 22 Pa. Code. Thus, those claims will be denied. Similarly, as previously explained, the additional requests for fees, expenses, and other monetary relief must be denied as also beyond this hearing officer's authority.

Finally, this hearing officer makes the following observations. The special education and disability issues presented in this case are relatively straightforward. The Parents' claims were, however, colored by their understandable but palpable frustration and anger over the October 20, 2015 incident. Quite fortunately, there are new District personnel involved with Student this school year, and Student is in a new school building. It is very encouraging that the parties have been able to work together to agree on services to be provided for the 2016-17 school year, particularly since there are remaining challenges in returning Student to school on a full-time basis. Whether or not the parties' disagreements will continue into the future in other forums, this hearing officer respectfully suggests that the parties make every effort to look toward Student's future with a focus on helping Student achieve success going forward.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that there were some flaws in the District's Section 504 accommodations for Student during the 2015-16 school year, and that some amount of compensatory education is warranted to remedy the deprivation of FAPE. There shall be no other remedy awarded.

ORDER

AND NOW, this 31st day of October, 2016, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not err in its determination that Student is not eligible for special education under the IDEA.
2. The District failed in its FAPE obligations to Student under Section 504.
3. The District shall provide Student with compensatory education, subject to all of the conditions and limitations set forth above, as follows:
 - a. Ten hours of mental health counseling services;
 - b. Ten hours of academic tutoring services for each class in which Student has a 70% average or below at the end of the first marking period of the 2016-17 school year; and
 - c. Ten hours of academic tutoring services for any academic course which Student identifies as a need for a refresher as SAT preparation, provided that such identification is made by November 30, 2016 and the guidance counselor agrees the academic subject is one for the SAT.
 - d. The academic course areas in (b) and (c) are not exclusive and may overlap.

4. The District did not otherwise discriminate against Student.
5. The parties may mutually agree to alter the terms of the compensatory education provisions in this Order.
6. All other requests for relief are **DENIED** and **DISMISSED**.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER