

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: W.E.

Date of Birth: [redacted]

Dates of Hearing:

June 24, 2010

August 24, 2010

August 25, 2010

October 4, 2010

October 25, 2010

CLOSED HEARING

ODR No. 00881-0910-KE

Parties to the Hearing:

Representative:

Parent[s]

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Date Record Closed:

November 30, 2010

Date of Decision:

December 15, 2010

Hearing Officer:

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

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a late-teenaged resident of the Fannett-Metal School District (hereafter District) who is eligible for special education and related services on the basis of a traumatic brain injury. Student's Parents filed a due process complaint under both the Individuals with Disabilities Education Act (IDEA)² and Section 504 of the Rehabilitation Act of 1973 (Section 504),³ challenging the educational program offered to Student by the District, and sought compensatory education.

Five due process hearing sessions were conducted at which the parties presented evidence in support of their respective positions. At the beginning of the first session, the Parents sought to establish one of the exceptions to the statute of limitations to permit evidence going back to the 2000-01 school year. This hearing officer determined that the Parents had not established such an exception,⁴ and that the Parents would be permitted to present evidence on their claims for the time period beginning in March 2008 forward. The hearing then proceeded to receiving evidence on the substantive claims.⁵ For the reasons which follow, I find in favor of the Parents in part and in favor of the District in part.

ISSUES

1. Whether the District failed to appropriately and timely evaluate Student;
2. Whether the District failed to provide an appropriate program for Student from March 2008 through the end of the 2009-10 school year;
3. If the District did so fail, is Student entitled to compensatory education and, if so, in what amount?

FINDINGS OF FACT

1. Student is a late-teenaged resident of the District and is eligible for special education by reason of a traumatic brain injury (TBI). For the 2010-11 school year, Student is currently attending a program outside of the District and there is no issue in this case regarding this school year. (Notes of Testimony (N.T.) 24-26, 196-97, 245)

¹ Student's name and gender are not used in this decision to protect Student's privacy.

² 20 U.S.C. §§ 1401 *et seq.*

³ 29 U.S.C. § 754.

⁴ Notes of Testimony (N.T.) 118-22.

⁵ The Parents' motion to amend the complaint made just prior to the fourth hearing session, to which the District objected, was denied without prejudice. N.T. 574-75; Hearing Officer Exhibit (HO) 2.

2. Student entered the District in first grade and began receiving Title I services in Reading and Mathematics which continued through third grade. Student also had Title I services in fifth grade. (N.T. 28-31; Parent Exhibit (P) 1, P 2)
3. Student achieved passing grades, generally C or better, in all classes through the end of Student's seventh grade year. In eighth grade, Student passed all classes except Spanish, and in ninth grade Student failed Biology, Civics, and Mathematics. (P 6, P 8, P 9; School District Exhibit (S) 1)
4. Student was in tenth grade and passed all classes except U.S. History, achieving grades of C or D in most classes with significant variability across marking periods. However, Student did not have enough credits to be considered a junior for the [next] school year. Student's report card for the [tenth grade] school year included comments that Student "needs to be better prepared," "shows improvement in effort," and had "careless homework preparation" in the first marking period; was "not working to ability" in the third marking period; and "wastes time in class" in the fourth marking period. (N.T. 81-82, 261, 657-58; P 6, P 11; S 3)
5. Student's disciplinary records for the [tenth grade] year consisted of one detention for disruptive behavior/distracting other students in February, two detentions for inappropriate language in November, and detentions in September, February, and April for arriving late to class on multiple occasions. (P 7)
6. In May 2008, Student was injured in a fall and suffered a TBI. Student was hospitalized overnight, and subsequently experienced headaches, sensitivity to noise, distractibility, frustration, and emotional lability. Student was treated for mild TBI after the accident at the [redacted] Medical Center Concussion Program [hereinafter MCCP]). The Parents provided releases so that the District would be provided Student's medical records from MCCP, but the District did not receive those records until sometime during the summer of 2009, over one year later. (N.T. 223-25, 263, 410-11, 461-62; P 13)
7. Student had 7.5 days of excused absences in the fourth marking period of the 2007-08 school year, although the record does not establish what amount of time, if any, Student missed due to the accident. (S 3)
8. In August 2008, Student's MCCP physician made several recommendations for Student at school. In addition to no gym class, the physician recommended accommodations in the form of untimed tests, a reduced workload when possible, frequent breaks when experiencing symptoms, modified homework assignments, and extended time on homework and projects. He also suggested that Student attend half days of school until Student's next appointment at the end of September. (P 12)
9. At the beginning of the 2008-09 school year, the school psychologist from the local Intermediate Unit (IU), who has a contract with the District for services, contacted the Parents about Student's return to school. The Parents advised that they would be obtaining medical records in a follow-up appointment at MCCP at the end of September. (N.T. 133-34)

10. As Student started the 2008-09 school year, Student was experiencing headaches every day. Student was permitted to go to the nurse's office when needed and Student did take advantage of that opportunity, consequently missing class time throughout that school year. Student was also taking several medications due to the TBI. (N.T. 211-12, 282-84, 313-14, 321, 579)
11. In late September 2008, the MCCP physician modified his recommendations to include a "504 plan" as well as a new schedule: full days Monday through Wednesday and half days in the afternoon on Thursdays and Fridays. He also suggested that Student have tests taken in a private location, preprinted class notes, and tutoring. The previous recommendations for a reduced workload and modified homework were no longer suggested. (P 12)
12. In early October 2008, Student's Parents and several District representatives including the special education coordinator and guidance counselor, as well as a school psychologist from the Intermediate Unit (IU), met to develop a Section 504 Plan. The team agreed to provide for preferential seating, written outlines, frequent breaks from class, extra time for assignments and tests, reduced homework, tutoring, tests in a private location, an extra set of books at home, an assignment notebook and homework notebook, and Student was also permitted to leave textbooks in the classrooms. Strategies including visual cues and refocusing techniques were also indicated. Student's Parents provided Student with a lock for Student's locker which opened with a key rather than a combination since Student had difficulty remembering the combination. (N.T. 260, 264-65; 305-06, 408-09, 413-14, 420-21, 580-82, 662-67; P 14; S 5)
13. Student began the 2008-09 school year attending on various schedules which were modified in efforts to accommodate Student's needs. Student generally would attend half day sessions but occasionally stayed for the whole day in order to complete all required work. However, Student was often late to class, and Student's absences due to that schedule caused Student to miss coursework. Student's activities were restricted, such that Student was not permitted to attend after-school and evening activities or play videogames. (N.T. 265-68, 270, 282-85, 289-92, 307-08, 311-14, 340, 578-79; P 19, P 48 pp. 2, 4-5)
14. By mid-October 2008, Student was failing Algebra 2. Student was habitually late to that class, was frequently absent, and was not turning in assignments. Student's teacher recommended tutoring which was available to Student twice per week, but Student did not take advantage of that opportunity. (N.T. 582-87; P 48 p. 8; S 22)
15. Also in October 2008, Student was evaluated by a clinical neuropsychologist. At that time, Student reported continued headaches as well as fatigue, in addition to difficulty with memory, frustration, and concentration. The neuropsychologist conducted a number of assessments and issued a report recommending pain management for Student's headaches, medication, counseling/psychotherapy, and a number of accommodations within the school setting: testing in a quiet environment, an assignment log, preferential seating, notes provided by teachers, and an extra set of books at home. That report was provided to the District in November 2008. (N.T. 263-64; P 13)

16. Assessments by that clinical neuropsychologist included the Wechsler Adult Intelligence Scale – Third Edition (WAIS-III) and the Wide Range Achievement Test – Third Edition (WRAT-3). Student achieved a Full Scale IQ in the low average range on the WAIS-III, and on the WRAT-3, scored in the low average range in Reading and in the average range in Spelling and Arithmetic. (P 23)
17. At the end of October 2008, Student’s Parents requested a multidisciplinary evaluation of Student. The Parents signed permission to evaluate forms on November 10 and 13, 2008. (N.T. 273-75, 421-23, 508; P 15, P 16, P 17, P 48 p. 12; S 8)
18. In November 2008, the Parents and District put together a plan wherein Student would have three chosen District representatives from whom Student could obtain support whenever Student was feeling angry or agitated. This strategy was not always successful because the three support personnel had their own obligations and were not always immediately notified when Student needed their assistance. The Parents also agreed to provide releases for the District to obtain the medical records from MCCP and the clinical neuropsychologist. The team further determined that Student should start attending school all day, with the opportunity to go to the nurse when needed to rest. (N.T. 271-72, 312-17, 333-36, 338-40, 414-21, 514; P 48 p. 14; S 7)
19. Student’s Section 504 Plan was modified in December 2008. The team agreed to additional accommodations related to communication between the family and the District, chunking of information presented, paired work assignments as appropriate, simplified directions and verification that Student understood directions, peer support, one-to-one tutoring, shortened and chunked assignments, modified coursework, additional test taking accommodations, and Student’s access to the Section 504 plan at all times. Medically, Student was provided access to snacks, to an alternative environment, and to music for relaxation. (N.T. 273; P 14)
20. Student continued to perform poorly in Algebra 2 despite modifications to assignments and tests, and Student’s Algebra teacher contacted the Parents about Student’s failing grade and continued absences from class. Student frequently missed the Algebra 2 class, which was the first period of the day, because Student was in the nurse’s office. Student’s Algebra 2 teacher communicated with the Parents regularly about Student’s absences and performance in that class through the end of that school year. (N.T. 258-59, 276, 383-85, 587-94, 599-601, 603; S 22)
21. Also by December 2008, Student was experiencing depression, and the Parents conveyed concerns about Student’s self-esteem and depression to the District. Student’s Section 504 team conducted an informal Functional Behavior Assessment (FBA) due to Student’s chronic lateness to class. The team determined that this behavior occurred between classes when Student wished to spend time with a friend⁶ with whom Student had a romantic relationship. Other behaviors discussed at the meeting were Student’s failure to

⁶ The gender of the friend is also not used in the interest of protecting Student’s privacy, since doing so might reveal Student’s gender. *See* n.1 *supra*.

turn in assignments and to remain on task during instruction. (N.T. 179-81, 199-201, 276-78, 330-31, 440, 506-08, 513-14; P 20; S 11)

22. The District, through the IU school psychologist, conducted its educational evaluation of Student and issued a report in January 2009. This evaluation assessed Student to be in the average range on the Composite Intelligence Index of the Reynolds Intellectual Assessment Scales. Using the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III ACH), Student’s scores were in the low average range in Broad Reading, in the average range in Broad Math, in the low average range in Broad Written Language, and in the low average range in Oral Language. Another result of significance was a weakness in visual motor integration, and an occupational therapy (OT) evaluation was recommended. (N.T. 134-35; P 23; S 6)
23. In behavioral assessment, the IU school psychologist concluded that Student exhibited behavioral, emotional, and executive functioning concerns based upon utilization of the Third Edition of the Conners Rating Scales (Conners), the Behavioral Rating Inventory of Executive Function (BRIEF), and the Self-Report Form of the Behavior Assessment System for Children – Second Edition (BASC-2). (P 22, P 23; S 6)
24. The IU school psychologist recommended that Student be considered for special education services on the basis of the TBI. Although he also found that Student demonstrated a significant discrepancy between ability and achievement in Oral and Written Language, suggesting a learning disability, he concluded that the discrepancy was due to the TBI. (N.T. 169-71; P 23) Other recommendations included both an OT and a psychiatric evaluation. It was further noted that Student was exhibiting behaviors symptomatic of ADHD but that the behaviors were not consistent across settings. When the team discussed a psychiatric evaluation, the Parents indicated that Student was already treating with a psychiatrist and declined a new psychiatric evaluation. (N.T. 173, 208; P 23; S 6)
25. The District issued an Evaluation Report (ER) at the end of January 2009. This report included the information from the IU school psychologist’s report, and also contained assessment results, including vocational interests, as well as input from teachers, Student, and the Parents. As of that date, records from MCCP had not yet been provided to the District. Student was determined to be eligible for special education with a primary disability category of TBI and a secondary disability category of Learning Disability.⁷ All participants including the Parents agreed with the learning disability determination. (N.T. 224-25, 425-26; P 23, P 24; S 8)
26. An Individualized Education Program (IEP) was developed on February 26, 2009. The team answered in the affirmative that Student exhibited behaviors that impeded his/her learning or that of others, but there was no positive behavior support plan. Academic

⁷ It should be noted that the IDEA and its implementing regulations, as well as Chapter 14 of the Pennsylvania Code, all refer to “specific learning disability” as a category of eligibility. 20 U.S.C. § 1401(3) and 34 C.F.R. § 300.8; 22 Pa. Code. § 14.125. The District did not stipulate to Student’s eligibility under the IDEA based on a specific learning disability. (N.T. 24-26)

needs were identified as extra time for work completion, opportunity to rest as needed, assistance with organization and writing/written expression, restricted physical activity, memory aids, and accommodations from the Section 504 Plan. Study skills were described as “likely to be useful.” (P 26 at p. 5; S 9 at p. 5) This IEP contained goals in the areas of work ethic, maintenance of a specific grade average, development of a portfolio for transition to post-secondary education, and functional writing and organizational skills. The IEP further included modifications and specially designed instruction (SDI), many of which were very similar to the accommodations in the previous Section 504 plans. Additionally, Student was to have a learning support class to reinforce general education concepts for one period each day. The Parents approved the Notice of Recommended Educational Placement (NOREP). (N.T. 428-39, 441-42; P 25, P 26, S 9)

27. Student had an English class in the second semester of the 2008-09 school year which was in the afternoon. Student was rarely absent from that class. Student’s English teacher implemented the Section 504 accommodations and then the SDI in the IEP and believed that Student made satisfactory progress throughout the term. Student completed the required junior paper but turned it in late, having changed the topic at the end of the school year and then losing the document. Student earned a 72% on the junior paper using the Pennsylvania Writing Assessment Domain Scoring Guide. (N.T. 620-29, 632-33, 638-39; S 20)
28. In April 2009, pursuant to a request or recommendation from Student’s MCCC physician, the District sought permission to evaluate Student’s speech and language needs. The Parents gave their consent. (N.T. 446-48; P 28)
29. Also in April 2009, the District obtained an OT evaluation which recommended OT as a related service. Student’s IEP was revised to include OT goals and short-term objectives with one thirty-minute session of OT per week. Student’s Parents approved the NOREP, and Student had a few sessions of OT by the end of that school year. (N.T. 443-45; P 30, P 32; S 9)
30. The District issued a revised ER in late May 2009 to include the results of the speech/language evaluation. That evaluation included the Clinical Evaluation of Language Fundamentals, revealing below average scores in the Core Language Score as well as the Expressive and Receptive Language Composite and the Language Content Index. (P 31; S 10) The Parents did not approve the NOREP to add speech/language services to Student’s IEP. (N.T. 446-452; P 31; S 10)
31. Student’s disciplinary records for the 2008-09 school year included detentions for cheating on two assignments, arriving late to class on numerous occasions, and using inappropriate language toward another student more than once, all during the fall of 2008. There was also an incident in the library in October 2008 when Student was asked by a teacher to leave the room, and Student kicked a chair and used inappropriate language toward the teacher; Student received a three-day out-of-school suspension for that incident. The District believed this library incident was an isolated occurrence. (N.T. 182-83, 268-71, 304; P 7, P 48 pp. 10-11)

32. There was a separate incident in the spring of 2009 when Student was involved in a verbal altercation with another student in the hallway. Several other students intervened to break up the confrontation before it became physical, but Student sustained a hand injury after hitting a wall or bookshelf. (N.T. 272-73, 325-26, 338, 597-99, 612, 628-29)
33. Student passed all classes in the 2008-09 school year (repeating tenth grade), achieving a C or better in all classes except English and Algebra 2 where Student received D grades. Comments on Student's report card for the first two marking periods included missed work due to absences (Algebra 2), incomplete assignments (Algebra 2 and World Cultures), lack of organization (Algebra 2), and cheating (Environmental Science). There were a few positive comments, particularly recognizing Student's efforts. The comments for the third and fourth marking periods revealed that Student was unprepared for English class. In World Cultures class, Student missed a number of assignments but did well overall. Student had 24 excused absences for the school year, 2 during the fourth marking period. (N.T. 595, 662-73, 683-89; P 11, P 33; S 3)
34. Student was privately evaluated by another clinical neuropsychologist in August 2009 in an independent educational evaluation (IEE) funded by the District. This evaluator reviewed Student's educational and medical records, interviewed the Parents and Student, and conducted several assessments. General cognitive abilities were assessed using the Differential Abilities Scale-Second Edition, revealing generally average range scores but with difficulties noted for sustained attention, mental effort, and retrieval speed, and a weakness in nonverbal reasoning. Student demonstrated age appropriate vocabulary and verbal skills with some variability; strengths and weaknesses in visuospatial functioning; some weaknesses in executive functioning (rote attention, working memory, sequencing, sustained attention and mental effort, inhibition, and divided attention), and with organization and problem solving; variability in processing speed tasks; and average memory function. In motor functioning, Student demonstrated a weakness in fine motor skills. Academically, Student's Reading and Mathematics skills were variable, and Student exhibited low-average to average Spelling and Written Language skills. (N.T. 453; P 34; S 15)
35. This August 2009 private evaluation also assessed Student's behavioral and emotional functioning utilizing the BRIEF and the BASC-2. Of significance to this case, these assessments revealed behavioral and emotional difficulties as well as executive dysfunction at school. This evaluator further characterized Student's head injury as moderate rather than mild. (P 34; S 15)
36. The private neuropsychologist made a number of school-based recommendations, including a low student-to-teacher ratio; reduced workload and extended time for assignments, tests, and processing of information; instruction in organizational and study skills; copies of teacher notes; chunking of assignments; a functional behavior analysis and behavior plan; occupational therapy; opportunities for mentoring and provision of coping strategies with someone at school such as a guidance counselor; and the availability of a quiet alternative environment when needed. She also made several suggestions for appropriate teaching strategies. The Parents provided a copy of the IEE report to the District. (N.T. 279-80; P 34; S 15)

37. The District issued a Reevaluation Report (RR) in September 2009 which included the results of the IEE as well as results of the 2008-09 4Sight Reading Assessment (Below Basic) and some updated teacher input. The RR also included information obtained over the summer from the initial hospitalization in May 2008 and from MCCP. The Parents were not able attend the meeting to discuss the RR or the District's newly drafted IEP which similarly included updated information. Goals added and carried over from the prior IEP addressed Students needs in the areas of transition, written expression, listening comprehension, problem solving, and OT (including visual perceptual and fine motor skills). New items of SDI addressed Student's organizational and memory needs as well as sound sensitivity, and counseling was provided as a related service. (N.T. 213, 411, 453-56, 458-62, 486-87; P 38; S 12, S 13, S 16)
38. Another informal FBA was conducted in September 2009 to address Student's frustration which was resulting in verbal and physical aggression. Student's Parents were not able to attend the meeting. The team determined, however, that by mid-September 2009, these behaviors were "nonexistent." (N.T. 216) Consequently, there was no behavior plan in the revised IEP to address the behaviors which were no longer a concern. (N.T. 216-20, 229-31, 466-67, 526; P 40)
39. Pursuant to a recommendation in the August 2009 IEE, the District provided training to Student's teachers on TBI. (N.T. 456-58)
40. Sometime during the fall of 2009, Student's Parents agreed to speech/language services for Student. (N.T. 452)
41. Student's attendance improved in the fall of 2009 over the prior school year. Notably, Student had a Geometry class in the first period and Student did not have excessive absences from that class, and Student's visits to the nurse during that class period were infrequent. Student did well in Geometry class, completing all assignments with extended time as specified in the IEP. (N.T. 647-54; S 3)
42. Student's IEP was revised again in December 2009. Student had been accepted to a vocational program to begin in January 2010 where Student would be in [a redacted] program at the local career center, and the meeting included Student's teachers at the career center. At that meeting, Student's IEP was revised to provide for counseling and learning support, and speech/language support and OT services would continue. The team determined that a quiet working environment would be available to Student, and the provision to going to the nurse's office when necessary was to continue. The attendance policy for the [career center] was also discussed. Student participated in this IEP meeting. (N.T. 468-78, 481, 530-31, 705, 757-59; S 16, S 18, S 27)
43. Student attended the vocational program in the second semester of the 2009-10 school year. Student had a learning support teacher who would check on Student's work and observe Student in the [career] class. The teacher did offer Student the opportunity to work on assignments in the resource room, which Student declined. This teacher also maintained communication with the Parents about Student's performance. Student did well in [career class], earning A and B grades until the early to middle part of May, when

Student's performance declined due to absences and failing to turn in assignments. (N.T. 705-12, 715, 730-35, 745-46, 792-93, 798-800, 804-10, 814-16; S 26, S 30)

44. A social worker was assigned to Student at the vocational program. She was responsible for monitoring Student for emotional concerns and communicate with Student's teachers and therapists. The social worker met with Student regularly, weekly or more often if necessary, sometimes at her initiation and sometimes at Student's initiation. (N.T. 756-57, 786-87; S 28)
45. None of Student's IEP goals were addressed in the vocational program, although some of the modifications and SDI were implemented. There was a learning support assistant in the [career] class who worked with all students including Student. (N.T. 707, 715, 727-28, 748, 811-12)
46. Student's disciplinary records for the 2009-10 school year include detentions for arriving late to class on one occasion and making a verbal threat to another student on another occasion, both of which occurred in the fall of 2009. Additionally, there was an incident in November 2009 when Student verbally threatened another student and received a one day out-of-school suspension. Student was also suspended twice in April 2010 for possessing smokeless tobacco on school property. (N.T. 249-50, 257, 296-98, 673-76, 680-81; P 7)
47. In late April 2010, Student was involved in a physical altercation with another student in the [career] class. Student received an in-school suspension and the other student received an out-of-school suspension. Out-of-school suspensions are considered to be a more serious form of discipline than in-school suspensions. Student's Parents believed that the suspensions for this incident and for the two April 2010 possession of tobacco violations were the result of retaliation against Student after the due process complaint was filed. (N.T. 246-49, 293-95, 297, 480, 482, 764-65, 769-70, 800-04, 830-32; S 33)
48. In the 2009-10 school year, Student achieved A and B grades in all classes except [career class], for which Student received a D grade. There were no negative comments on Student's report card, and Student was absent only 17.5 days for the entire school year. (S 3)
49. Student was disenrolled from the vocational program on June 7, 2010 because of Student's attendance. The policy at the career center where the vocational program was provided was to disenroll students who failed to attend for ten consecutive days. The disenrollment followed notice to the Parents by the vocational program on May 3, 2010 that Student had been absent five days without complying with the program's requirements when missing classes. A meeting had been convened by the career center to discuss Student's declining performance and attendance on May 24, 2010, but the Parents did not attend. At the May 24, 2010 meeting, the participants discussed conducting another FBA, and the speech/language and occupational therapists recommended that those services be discontinued. (N.T. 717-21, 737-40, 742-45, 816-18, 826, 835-37, 843-44, 857-58, 861-62; S 28 p. 7, S 32, S 34, S 35, S 37)

50. Student was not enrolled in the District for the 2010-11 school year. (N.T. 196-97, 245)

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);⁸ *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 are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible, and the testimony as a whole was essentially consistent.

The Parents contend that the District (1) improperly failed to evaluate Student for special education prior to the May 2008 accident; (2) developed a Section 504 Plan in October 2008 that failed to address Student’s needs; (3) failed to adequately assess Student’s behavior in December 2008 and in its subsequent special education evaluations; (4) issued an ER which failed to identify all of Student’s educational needs; (5) developed IEPs in the spring and fall of 2009 that failed to address Student’s educational needs; and (6) improperly exited Student from the career center without convening a meeting of the IEP team. These claims will be addressed *seriatim*.

Eligibility under IDEA in the Spring of 2008

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

⁸ The burden of production, “*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding,” *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

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. 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).

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. “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).

The first issue is whether the District should have evaluated Student for special education prior to the May 2008 accident which caused the TBI. In the 2007-08 school year, Student’s report card contained a few comments about Student’s efforts and preparation for class in the fall, but in the spring semester, the comments related solely to Student not working to Student’s ability and wasting time in class. (Finding of Fact (FF) 4) There are no standardized test results for Student during that school year in the record which would suggest that Student’s achievement did not meet expectations, although a report of the Pennsylvania System of School Assessment (PSSA) in the spring of 2006 (eighth grade) revealed Basic level scores in both Reading and Mathematics. (P 8) Student’s disciplinary record that school year was limited to a few instances of inappropriate language and one instance of disruptive behavior, in addition to a number of late arrivals to class which were concentrated in September, February, and April. (FF4, 5) The fact that Student obtained some low final grades on the 2007-08 report card (FF 4) does not, in and of itself, suggest that a special education evaluation was necessary, particularly given the comments on the report card relating to Student’s preparation for and use of time in class, as well as the notable improvement in Student’s grades over the prior school year. (S 23 at 32; FF 3, 4) As it is the burden of the Parents to establish that the District violated its obligations under the IDEA, *Schaffer, supra*, I cannot conclude that the record supports a conclusion that a special education evaluation should have been conducted by the spring of 2008 in this case.⁹

⁹ It merits mention that even if the District had initiated a special education evaluation in the spring of 2008, which is the time period at issue in this case, Student’s May 2008 injury would very likely have drastically changed that evaluation and any resulting IEP.

Eligibility and Programming Under Section 504 in the fall of 2008

The next issue is whether the District's Section 504 Plan developed in October 2008 and revised during the semester was based on an adequate evaluation and addressed Student's needs.

The obligation to provide a "free appropriate public education" 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). 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).

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.*

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.*

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 in its jurisdiction." *Id.* (citation and quotation marks omitted); *see also* 34 C.F.R. § 104.33(a). 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). "There 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).

Student suffered the TBI in the May 2008 and recommendations for educational programming were provided by the treating physician at MCCP to the District in August 2008.

(FF 6, 8) The IU school psychologist did contact the Parents at the beginning of the 2008-09 school year to discuss Student's return. (FF 9) Nevertheless, the meeting to develop a Section 504 Plan was not convened until early October 2008 (FF 12), and even then there was apparently no mention of an evaluation or other basis to develop that Plan other than the recommendations of the MCCP physician. The facts here plainly are contrary to the regulations implementing Section 504 with respect to conducting an evaluation to assess all areas of need, from a variety of sources, before developing a Section 504 Plan.

The Section 504 Plan which was developed in October 2008 and revised in December 2008 did include many of the recommendations of the MCCP physician. (FF 8, 11, 12) Nevertheless, the accommodations clearly were not adequate to address Student's significant needs, which is not surprising given the absence of any evaluation by the District to determine what those needs were. Student, for medical reasons, was missing large amounts of class time due to headaches and fatigue, and was not doing well in classes, including Algebra 2, despite the continuous efforts of that teacher to advise the family of Student's difficulties and make suggestions. (FF 10, 13, 14, 20, 27) While it is clear that the District did not have all of Student's medical records in the fall of 2008 (FF 6), there was nothing to prevent it from conducting a comprehensive evaluation for Section 504 services, as required by the regulations, in order to develop a plan which would meet Student's unique individual needs.

Given Student's significant behavioral deterioration in the fall of 2008 frequently resulting in disciplinary action, and the need to develop a plan for three chosen District employees to provide support to Student (FF 18), it is implausible that the District elected only to address Student's chronic lateness to class through an informal FBA. (FF 21) This is especially glaring given the concession of the IU school psychologist that changes in behavior is a "hallmark" characteristic of students who suffer from a TBI. (N.T. 233) The accommodation involving the District employees, while certainly a valuable idea, was not wholly successful in supporting Student's behavioral needs and, by the time of that December 2008 meeting, the District was aware of Student's diminishing self-esteem and signs of depression. (FF 21) The conclusion is inescapable that Student's educational program in the fall of 2008 was inappropriate and failed to address Student's needs under Section 504.

It should also be recognized that the Parents had requested a special education evaluation pursuant to the IDEA in October 2008. (FF 17) There is apparently no claim that the District should have undertaken such an evaluation in the fall of 2009 prior to that request or that it did not timely complete and issue the ER in January 2009.

The District's IDEA Evaluations

The next issue is whether the District's evaluations in January and September 2009 were flawed and inadequate. The Parents suggest that Student's evaluations lacked sufficient information about Student's behavior, present levels of academic achievement, and needs for OT, speech/language therapy, and reading. They also contend that the District's ER failed to evaluate Student in all areas of suspected disability, including Attention Deficit Hyperactivity Disorder (ADHD).

Local education agencies, including school districts, are required under the IDEA to conduct a “full and initial individual evaluation” of a student before it provides special education and related services to that child. 20 U.S.C. § 1414(a)(1)(A); *see also* 34 C.F.R. § 300.301(a). In conducting an evaluation, a local education agency must ensure that it uses procedures to determine whether the child has a disability and to determine the child’s educational needs. 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c)(2). Those procedures include adherence to time limitations which, in Pennsylvania, mandates that evaluations be completed within 60 calendar days following receipt of Parental consent. 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c); 22 Pa. Code § 14.123(b). The child must be assessed “in all areas of suspected disability.” 20 U.S.C. § 1414(b)(3)(B); *see also* 34 C.F.R. § 300.304(c)(4).

The IDEA regulations provide further guidance for conducting the evaluation.

(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. § 304(b); *see also* 20 U.S.C. § 1414(b)(2). 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). Further, the team must ensure that it considers existing information about the child through the following.

(a) *Review of existing evaluation data.*

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must—

- (1) Review existing evaluation data on the child, including—
 - (i) Evaluations and information provided by the Parents of the child;
 - (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
 - (iii) Observations by teachers and related services providers; and
- (2) On the basis of that review, and input from the child's Parents, identify what additional data, if any, are needed to determine—
 - (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or
 - (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
 - (ii) The present levels of academic achievement and related developmental needs of the child;
 - (iii)(A) Whether the child needs special education and related services; or
 - (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

34 C.F.R. § 305(a); *see also* 20 U.S.C. § 1414(c)(1).

The District's January 2009 ER included cognitive and achievement testing as well as assessment in the areas of behavioral, emotional, and executive functioning. (FF 22, 23, 25) It also considered input from the Parents, Student, and Student's teachers. (FF 25) The ER reported several classroom observations by three different individuals in a variety of settings. (P 24; S 8) Student's present levels of academic achievement were included. (*Id.*) An OT evaluation was recommended, as was a psychiatric evaluation which the Parents declined. (FF 24) Additionally, it merits repeating that the District did not yet have the medical records from MCCP. (FF 6, 37)

With the exception of one area, I find that the District utilized appropriate assessment tools and strategies to obtain relevant information about Student, and was sufficiently comprehensive to assess all areas of suspected disability and to identify Student's needs. 34 C.F.R. §§ 304(c)(4), (c)(6) and (c)(7). I cannot agree with the Parents that the ER should have

included additional assessment into whether Student had ADHD or a specific learning disability in reading. The information available to the District at the time of its ER did not reveal achievement in reading which was discrepant from Student's ability (FF 16, 22). With respect to an ADHD screening, the indications were that Student's symptoms were not demonstrated across settings and, at school, Student's teachers generally did not report issues with attention, impulsivity, or hyperactivity.¹⁰ (P 24; S 6) The one exception is Student's Algebra 2 teacher's rating using the Conners who indicated some scores of borderline significance on the Inattentive Domain, but who nonetheless was more concerned about Student's attendance and preparation than inattention. (*Id.*) As a whole, this hearing officer finds the District's ER properly considered the areas of ADHD and reading.

Nevertheless, the area in which I conclude the ER was deficient is behavior. As discussed above, the informal FBA conducted in December 2008 merely addressed Student's lateness to class without considering the significant behaviors Student was demonstrating in school that fall, which were markedly worse than the prior school year in both form and frequency. (FF 5, 21, 31) Notably, the ER merely summarized the results of that informal FBA. (P 24 at p. 10; S 8 at p. 12) The BASC-2 Self Report confirmed Student's depression and further reflected serious concerns with anxiety and a sense of inadequacy, yet the ER did not discuss these results in any detail. (P 24 at p. 10; S 8 at p. 12) This deficiency in the ER resulted, at least in part, in inadequate programming for Student's behavioral needs in the IEPs.

The basis for the claim regarding the September 2009 RR, however, is difficult to discern, beyond the fact that the meeting to discuss this report occurred without the participation of the family. (FF 37, 38) The RR contained information from the IEE conducted in the summer of 2009, as well as updated medical information and teacher input. (FF 37) This hearing officer cannot find the September 2009 RR to be deficient, particularly since it contained significant additional information not previously available such as Student's medical records from M CCP. (FF 37) Further, the District evidently accepted the IEE evaluator's recommendation to conduct an FBA since an informal FBA was conducted in response, reflecting no behavioral issues to address. (FF 38)

Student's IEPs

The appropriateness of the ER and RR tie in with the next issue, which is whether Student's February and September 2009 IEPs were appropriate. With respect to the February 2009 IEP, it contained goals which addressed work ethics, a 77% grade average (the lowest C in the District, *see, e.g.*, P 6 p.2), developing a portfolio, and development of writing and organizational skills. (FF 26) The modifications and SDI were very similar to the accommodations in the Section 504 plan which, as previously discussed, were only marginally successful for Student. (*Id.*) There was no behavior plan despite an indication that Student displayed behaviors which impeded his/her learning or that of others, (FF 26). The addition of a

¹⁰ See *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision (DSM-IV-TR) (2000), at 92 (including as criteria for ADHD diagnosis that "some impairment from the symptoms is present in two or more settings").

period of learning support for one period each day was clearly an appropriate and proper element of the February 2009 IEP, which undoubtedly provided Student with the reinforcement needed to attain passing grades of C or better in most classes. (FF 26, 33) The April 2009 revision to this IEP to include OT based upon an evaluation (FF 29) was similarly an appropriate change to Student's program to address that need.

As a whole, Student's February 2009 IEP addressed some of Student's needs, but clearly not all. Student continued to experience difficulty with Algebra 2 and English (FF 27, 33), and there were two significant behavioral incidents in the spring semester of the 2008-09 school year, but no positive behavior support plan was developed to address Student's behavior. (FF 31, 32) Again, this IEP noted that Student demonstrated behaviors that impeded his/her learning, which required consideration of a behavioral support plan. (FF; 34 C.F.R. § 300.324(a)(2)(i)) With respect to academics, this IEP did not address identified needs in organization, written expression, or study skills. (P 26; S 9) Despite continued attendance concerns, there is also no indication in the record that the District considered making any changes to Student's schedule so that Student would not consistently miss the same classes due to Student's daily morning headaches. While tutoring was a seemingly reasonable suggestion, it must be recalled that Student had difficulty managing an entire school day after the TBI, and adding more to Student's schedule through tutoring sessions would likely have been more detrimental than beneficial had Student taken advantage of such opportunities. For all of these reasons, this hearing officer concludes that Student was denied FAPE during the spring semester of the 2008-09 school year after the February 2009 IEP was implemented.

With respect to the fall of 2009 and the appropriateness of the September 2009 IEP, several goals had been added to address many of Student's identified needs. (FF 37) The record does not include a NOREP for this IEP and it is not clear when it was implemented in the fall of 2009. (N.T. 460) Nevertheless, the September 2009 IEP was directly responsive to the information and recommendations contained in the IEE,¹¹ adding goals and SDI to address written expression, listening comprehension, problem solving, organization and memory, and also added counseling as a related service. (FF 37) Student's attendance improved considerably from the prior school year, with fewer visits to the nurse particularly in the morning (FF 33, 48), and the number of disciplinary incidents decreased from the 2007-08 school year both in frequency and severity. (FF 31, 32, 45, 46) The lone exception that school year, the April 2010 physical incident, was attributed by the family to retaliation, and not to Student's disability or educational programming. (FF 46, 47) With the exception of [career class], Student's report card reflected all A and B grades and no negative comments. (FF 48) There is little evidence to support any argument that the fall 2009 programming based upon the September 2009 IEP was inappropriate, and, indeed, the Parents concede in their closing argument that "for most of the [2008-09] year [Student] did well[.]" (Parents' closing argument at 44) This hearing officer

¹¹ The District objected to the introduction of the IEE at the hearing without testimony from the neuropsychologist who conducted that evaluation and issued that report. (N.T. 280-81; District's closing at 22) The objection was overruled. (N.T. 281) This hearing officer notes that this ruling was consistent with the general prehearing directions which all Pennsylvania special education hearing officers were following as of the summer of 2009. Moreover, the District included a significant amount of information from that IEE in its RR and fall 2009 IEPs. (N.T. 453-59)

must agree that Student's September 2009 IEP, including its implementation, was appropriate in the fall of 2009.

Lastly, Student's educational program in the spring semester of the 2009-10 school year was largely successful at the vocational center, at least through the middle of May. (FF 43, 48) It should be noted, however, that while Student did receive learning support and related services in the vocational program, none of Student's special education goals set forth in the December 2009 IEP were implemented that semester. (FF 45; S 16) Review of that December 2009 IEP reveals that Student was therefore not provided with special education to address Student's needs in writing and written expression, developing a portfolio for post-secondary education or training, and listening comprehension. Consequently, Student was denied FAPE for a portion of the spring 2010 program.

In a related argument, the Parents assert that Student's exit from the career center program was improper since it constituted a change in placement without the protections afforded by the IDEA. To the extent that this issue was raised during the course of the due process hearing, this hearing officer cannot agree. Even assuming that the change in Student's placement required a meeting of Student's IEP team, there was a meeting held on May 24, 2010, to which the Parents were invited, at which Student's performance and attendance were discussed. (FF 49) Student and Student's Parents were aware of the career center attendance policy and the likely outcome of that May 2010 meeting. (FF 42) While the participants did discuss conducting another FBA (FF 49), Student's lack of attendance after the meeting clearly precluded completion of that assessment. (S 32) Moreover, the record establishes that Student's failure to attend classes in the vocational program beginning in late April or early May was not due to Student's disability, but rather to a perception by Student and the Parents that some person or persons were retaliating against them for filing a due process complaint. (N.T. 245-50) Furthermore, the decision on June 7, 2010 to disenroll Student, made at the very end of the school year,¹² cannot be considered a deprivation of meaningful educational benefit to Student. For these reasons, this hearing officer cannot find a denial of FAPE on this basis.

Compensatory Education

The final issue is what remedy is warranted to remedy the deprivation from the District's denial of FAPE to Student. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.*¹³ Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

¹² Student's 2009-10 final report card was issued on June 17, 2010, establishing that the school year was nearly over when Student was disenrolled from the career center on June 7, 2010. (S 3)

¹³ *Compare B.C. v. Penn Manor School District*, 906 A.2d 642 (Pa. Commw. 2006), which rejected the *M.C.* standard for compensatory education, holding that "where there is a finding that a student is denied

Having concluded above that the District failed to appropriately address Student's needs during the 2008-09 school year, the next question is the time period for which compensatory education is owed for that school year and a portion of the 2009-10 school year.

Student started the 2008-09 school year with a TBI which was known to the District. (FF 9, 10) The starting point for compensatory education for that school year must follow a reasonable rectification period. This hearing officer concludes that the District had reason to know that the Section 504 Plan developed in early October 2008, which was created without any evaluation of Student's needs, was not appropriate by the beginning of November when Student was failing Algebra 2 and the team recognized the need to put additional behavioral support in place. (FF 13, 14, 18) Giving the District until the end of that month to remedy the deficiencies in Student's program under the circumstances is, in this hearing officer's opinion, the appropriate start date for compensatory education. Moreover, had the District properly evaluated Student after the results of the September 25, 2008 MCCP appointment which the Parents advised the District about (N.T. 133-34), it would have been armed with sufficient information to develop an appropriate Section 504 Plan no later than the end of November.

As discussed above, once Student was determined to be eligible under the IDEA and an IEP was developed, that program was not sufficient to address all of Student's needs and contributed to a difficult and highly unsuccessful school year for Student. Thus, Student will be awarded compensatory education from December 1, 2008 through the end of the 2008-09 school year.

This hearing officer agrees with the Parents that the educational deprivation during the 2008-09 school year pervaded Student's entire day. While Student did manage to pass some classes, and had less difficulty in classes held in the afternoon, it would be next to impossible to calculate any hours during which Student derived meaningful educational benefit throughout this time period. *See Keystone Cent. School Dist. v. E.E. ex rel. H.E.* 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education). Therefore, I will award full days of compensatory education for the portion of the 2008-09 school year beginning December 1, 2008 (by which time Student had returned to full school days (FF 18), and continuing through the end of that school year, for each school day or partial school day that Student attended. In further equitable consideration, this calculation will exclude the hours which the District is able to document that Student was in the nurse's office pursuant to the medical doctor's recommendation and Student's Section 504 Plan and IEP, since under these circumstances, the District cannot be faulted for failing to provide an appropriate education during time periods that Student was medically unable to attend classes.

a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an 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." *Id.* at 650-51. *B.C.* was a case involving a gifted student, however, and is, thus, distinguishable. There was also little if any evidence at this hearing which would permit a determination of what position Student would have been in had the District provided FAPE. I therefore conclude that the *M.C.* standard is the appropriate method of determining the amount of compensation education owed to Student in this case.

The other time period for which compensatory education is owed is the spring semester of the 2009-10 school year when Student was in the vocational program. Student's IEP provided for special education in the areas of writing and written expression (weekly probes and monthly writing assignments), post-secondary planning (monthly meetings), listening comprehension (ongoing observation), and problem solving (ongoing observation) (S 16). This hearing officer estimates that the amount of special education which should have been provided to Student to address these areas as set forth in the IEP approximates one hour per week. Accordingly, Student will be awarded one hour per week of compensatory education for the second semester of the 2009-10 school year, or eighteen (18) hours (assuming 36 weeks in one school year of two semesters).

The compensatory education award is subject to the following conditions and limitations. Student's Parents 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 instruction, service, or device. The hours of compensatory education created by this provision may be used at any time from the present to beyond Student's 21st birthday, if necessary, and when convenient for Student and the family.

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 hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

CONCLUSION

For the foregoing reasons, I find that the District did not fail to identify Student as eligible under the IDEA; that it properly identified Student under Section 504; and that it denied Student FAPE during the 2008-09 school year from the time period December 1, 2008 through the end of the school year, for which compensatory education will be awarded. I also find that the District denied special education to Student during the second semester of the 2009-10 school year for which compensatory education will be awarded.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to:

1. Provide full days of compensatory education to Student for each day that Student attended full or partial days of school beginning on December 1, 2008 and ending on the last day of school for the 2008-09 school year, which calculation shall exclude the

number of hours which the District can document that Student was in the nurse's office pursuant to the recommendations of the medical doctor and Student's Section 504 Plan and IEPs.

2. Provide eighteen (18) hours of compensatory education for the second semester of the 2009-10 school year.
3. The compensatory education award is subject to the conditions and limitations set forth above.

Any claims not addressed in this decision and order are hereby denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

December 15, 2010
00881-0910KE