

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. P.
Date of Birth: [redacted]

CLOSED HEARING
ODR File No. 18152-16-17 AS

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
Upper Darby School District
601 N. Lansdowne Avenue
Drexel Hill, PA 19026

Dates of Hearing:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney
Vanita R. Kalra, Esquire
David J. Berney, Esquire
Law Offices of David J. Berney
1628 JFK Boulevard, Suite 1000
Philadelphia, PA 19103

LEA Attorney
Scott C. Gottel, Esquire
Holsten & Associates
One Olive Street
Media, PA 19063

November 22, 2016; December 22,
2016; January 11, 2017; January 13,
2017

February 20, 2017

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

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a late teenaged, regular education student in the Upper Darby School District (District) who is currently repeating ninth grade. Student previously was enrolled in the District in the fall of 2011 for seventh grade and was withdrawn at the end of that school year. Student returned to the District at the start of the 2014-15 school year having failed ninth grade in the other school district. Following an Independent Educational Evaluation, Student's Parent filed a Due Process Complaint against the District at the start of the 2016-17 school year as Student was set to begin ninth grade for the fourth time. The Parent raised claims under the Individuals with Disabilities Education Act (IDEA),² Section 504 of the Rehabilitation Act of 1973³ (Section 504), and the Americans with Disabilities Act (ADA),⁴ as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing convening over four sessions.⁵ The initial hearing session was delayed at the request of the Parent; importantly, at the time, the parties had reached an interim resolution for the 2016-17 school year program that included a District evaluation of Student.⁶ That agreement did not ultimately result in a resolution on any of the

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.

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

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

⁴ 42 U.S.C. §§ 12101-12213.

⁵ 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. It should be noted that this hearing officer recollects that her sentence at N.T.175 LL 9-10 is missing its final two words, "to Counsel," which is consistent with the statements made at N.T. 306-07.

⁶ HO-2. The Parent's subsequent objection to inclusion of the resulting Evaluation Report was overruled, as was the District's objection to additional Parent-procured evaluation reports. (N.T. 612-24; HO-6) There were also several Motions to Compel the production of Student's education records, with resulting rulings, before and after the hearing began. (N.T. 344-46; P-17; HO-3, HO-4, HO-5)

issues presented in the Complaint.⁷ At the hearing, the Parent asserted that the District failed in its obligations to evaluate and identify Student as a child with a disability who was eligible for special education, and that it further denied Student a free, appropriate public education (FAPE) from the beginning of 2014-15 school year and continuing through the present. She sought compensatory education and reimbursement for certain expenses, as well as directives to the District with respect to prospective programming. The District countered that Student is not eligible for special education and that Student's lack of success is attributable to a myriad of other factors, including Student's refusal to attend school and failure to complete course work. The District sought dismissal of all of the Parent's claims and denial of any relief.

For the reasons set forth below, the Parent's claims will be granted in part and remedies will be awarded.

ISSUES

1. Whether the District failed in its Child Find obligations to identify Student as a child with a disability and eligible for services under the IDEA and/or Section 504;
2. If the District did fail in those Child Find obligations, should the District be directed to develop and implement a special education program for Student;
3. If the District did fail in those Child Find obligations and thereby denied Student a free, appropriate public education, should Student be awarded compensatory education and, if so, in what form and amount;
4. Should the Parent be reimbursed for the Independent Educational Evaluation she obtained in the summer of 2016?⁸

⁷ The decision due date was extended on requests of the parties for good cause shown. The record closed upon receipt of the Parties' Closing Arguments on February 10, 2017, a date agreed to by both parties. (N.T. 1122-24)

⁸ In her Closing Argument, the Parent also sought reimbursement for two additional evaluations completed in late December 2016 and early January 2017. (Parent Closing at 13-20) That request is addressed in the Discussion section, *infra*.

FINDINGS OF FACT

GENERAL BACKGROUND

1. Student is a late-teenaged student who is a resident of the District. Student is in ninth grade in the District, repeating that grade three times so that this year is the fourth ninth grade school year. (N.T. 52-53, 229-30, 415, 500, 551-52, 629; S-22)
2. In the home where Student has grown up, domestic violence against the Parent occurred on a regular basis approximately between 2003 and 2010. The abuse was witnessed by Student; and, other family members including Student were also victims of the physical abuse. (N.T. 350, 634-35, 701-02, 721; P-3 p. 2, P-28 pp. 2-3)
3. Student, the Parent, and grandparent did not inform anyone at the District of the previous domestic violence in the household. (N.T. 307-08, 390-91, 464, 518, 648-49, 723, 862)
4. Student was evaluated by a neighboring school district in 2011 during sixth grade, but not for special education eligibility. At the time, Student's attendance over the course of Student's educational career was noted to be a concern with an average of thirty days absent each school year. That evaluation reflected Student's average to high average cognitive ability and average academic achievement. (N.T. 630-31; S-1)
5. Student previously attended school in the District during the 2011-12 school year, seventh grade, and was absent 59.5 days and tardy on 52 days with the majority of those unexcused. Student was promoted to eighth grade. Student then transferred out of the District for the 2012-13 and 2013-14 school years, successfully completing eighth grade but failing ninth grade. (N.T. 495, 630, 635-39; P-11 p. 1; S-2, S-5, S-6, S-8)
6. Student [experienced a significant incident] in the summer of 2014. (N.T. 353-55, 640)
7. Following the [incident], Student became withdrawn and would sleep all day. Student neglected Student's appearance, was frequently angry and upset, and isolated self from others. Student did not want to go to school and resisted the Parent's efforts to attend. (N.T. 355-57, 640-45, 650, 653-54)
8. Student did not receive privately obtained counseling or therapy services after the [incident]. (N.T. 724-25)
9. Beginning in June 2015, Student had several part-time jobs, working several days each week for up to six hours after the school day ended. Student's self-esteem improved as a result of Student's employment. By October 2016, Student was no longer employed. (N.T. 362-63, 374-75, 402-03, 428-29, 471, 473, 657-59, 662-63, 930-31, 971)
10. Student has told teachers and other professionals at the District that Student was working many hours during the week and could not complete coursework. (N.T. 428-30, 433, 446, 451, 453, 489, 835)

11. Throughout the time period in question for this hearing, Student occasionally visited a grandparent in a nearby city. In May 2016, Student moved in with the grandparent. (N.T. 357, 371-72, 399, 653, 704-05)

2014-15 SCHOOL YEAR

12. Student re-enrolled in the District at the start of the 2014-15 school year. Shortly after the start of that school year, Student informed the guidance counselor assigned to Student of the [incident]. The guidance counselor made a referral for Student to the social worker so that an outside agency would be contacted to provide counseling or other services to support Student because of the [incident]. (N.T. 221, 228, 233-36, 255, 278-79, 281-83, 286, 639, 646, 702; S-7, S-11)
13. The guidance counselor and social worker met with the Parent in mid-September to discuss the outside agency services. The guidance counselor was hopeful that Student would follow up with the outside agency, although she did not perceive Student to be suffering from trauma. (N.T. 235-37, 239-40, 251-52, 254-55, 261, 286-87, 646-47, 702-03; S-19 p. 1)
14. The social worker did not perceive Student to exhibit signs of anxiety or struggles academically or emotionally, but recognized that Student needed mental health treatment. (N.T. 282, 291-94, 296-97, 310, 317, 329-30)
15. Student's teachers did not perceive Student to exhibit anxiety, trauma, or withdrawal. They did speak with Student about the significant number of absences and Student provided reasons and excuses for missing school, such as oversleeping or missing the bus. (N.T. 1008-09, 1012-15)
16. Student had poor attendance during the 2014-15 school year. When Student did go to school, Student often did not go to class. (N.T. 233, 240, 266; S-25 p. 7)
17. The guidance counselor and social worker attempted to contact the Parent on several occasions in the fall of 2014 to discuss Student's attendance and to set up meetings with representatives of the outside agency. The Parent also tried to contact the guidance counselor on several occasions. The guidance counselor and the Parent did have a telephone conversation in early 2015. (N.T. 241-43, 244, 289-91, 295, 299-301, 654)
18. Student was scheduled to meet with the representatives of the outside agency on a few occasions, but did not. (N.T. 290-91, 294, 325)
19. Student met with the guidance counselor three or four times during the 2014-15 school year. (N.T. 257)
20. Student met with the social worker approximately five times during the 2014-15 school year. (N.T. 286, 318)

21. On December 22, 2014, the District sent a second Notice of Truancy⁹ to the Parent, reporting three unexcused absences early that month. No truancy elimination plan was developed. (N.T. 242-43, 289-90, 300-01, 312-13, 326-27; S-12)
22. Sometime during the fall of the 2014-15 school year, a teacher overheard Student and a peer talking about the [incident]. She contacted the guidance counselor to ensure that someone was addressing the matter, and was assured that the District was doing so. Another teacher contacted the guidance counselor in January 2015 about Student's failing grade and referenced the [incident] as something Student had mentioned. (N.T. 1011-12, 1023-24; S-19 p. 4)
23. The guidance counselor scheduled two meetings for Student and the Parent to meet with her regarding Student's attendance, one in March 2015 and one in April 2015, but Student and the Parent were not able to attend those meetings. (N.T. 244-46, 294)
24. In June 2015, the Parent met with District representatives to discuss Student attending a District program that utilized online instruction. (N.T. 294-95, 363-66, 392-93, 666-68, 670-73)
25. Student ended the 2014-15 school year having earned no credits and passing no classes. All grades reported for each of the four marking periods were failing. Student was reportedly absent 51 days (7 excused and 44 unexcused) and tardy on 30 days. (P-6 p. 2; S-22)

2015-16 SCHOOL YEAR

26. Beginning in the fall of 2015, Student began the District online learning program that was home-based. Students are required to check in once each week at the online learning program center, and the expectation is that each student will log on for a minimum of one hour per school day for each course. During check-ins, students can get assistance with coursework and instruction if needed. (N.T. 409-10, 417, 431-32, 434, 456-57, 573, 582-83, 710)
27. The District's online learning program also provides services for students in its alternative education program who have been identified as disruptive and have engaged in behavior that could result in suspension or expulsion. Student was not in that particular program. (N.T. 574-78, 582)
28. Concerns were raised by October 2015 that Student was not logging on and attending the check-ins. Student continued to miss check-ins through the end of the school year. (P-12; S-14 pp. 1-4, S-15)
29. Student's teachers did not perceive Student to exhibit anxiety, trauma, or withdrawal. They did speak with Student about the significant number of absences and Student

⁹ There is no first such notice in the record.

provided reasons and excuses for missing school, such as having to work or oversleeping. (N.T. 429-30, 489-90)

30. Student's attendance at the online learning program has been discussed at its weekly meetings, but no plan was developed to address Student's attendance. (N.T. 422-23)
31. The director of the District online program met with Student four times over the course of the 2015-16 school year for a total of approximately fifteen minutes. She did not perceive Student to have a need to meet with a social worker or for similar supportive services. (N.T. 412-13, 430, 455)
32. The District issued a notice to the Parent in January 2016 advising that Student was failing three courses. (P-11 p. 2)
33. Student experienced difficulty accessing the online learning program during the 2015-16 school year when Student's computer was broken. In February 2016, the director of the online program suggested that Student use a local library or go to the center four days each week. Ultimately, the grandparent bought Student a computer. (N.T. 394-95, 426-28, 432-33, 444, 474-78, 675-78, 711; S-14 p. 3, S-15 pp. 10-11)
34. Student did not pass ninth grade during the 2015-16 school year, but earned a single credit toward graduation. (S-22)

2016-17 SCHOOL YEAR

35. The Parent contacted the District on September 22, 2016, when Student had not yet been provided with a laptop for the online program, nor had training on changes from the prior year. (P-13)
36. The District agreed to provide tutoring to Student beginning in November 2016 with an aim toward Student attending a vocational program in the District. Because of the District's delay in following up on these services and difficulties with scheduling, by the end of December, Student had only had one tutoring session. (N.T. 529-31, 534-36, 547; S-23)
37. As of the end of December 2016, Student was not logging on to coursework at the suggested minimum of four hours per day. Student also frequently failed to attend the weekly check-ins. However, Student did attend the check-ins more regularly than during the prior school year after a delay in taking the steps necessary to access the program for the 2016-17 school year, so the director of the online program saw Student more frequently than in the 2015-16 school year. (N.T. 413-14, 416-17, 423, 441, 446-47, 450-52, 458-59, 485, 678-79)

EVALUATIONS

PRIVATELY OBTAINED EVALUATIONS

38. The Parent arranged for an Independent Educational Evaluation (IEE) during the summer of 2016. The private psychologist who conducted the IEE (first private psychologist) prepared a report dated September 12, 2016. (N.T. 62-63, 707-08; P-3, P-4)
39. The first private psychologist conducted the assessments for the IEE at Student's home away from other members of the household. (N.T. 162-63, 165; P-3 pp. 19-20)
40. Student's cognitive ability was assessed using the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV), with Student scoring in the average range (FSIQ 100) and solidly average scores on all subtests and composite scores with a relative strength in working memory and relative weakness in processing speed. Assessment of visual-motor skills revealed no concerns. (N.T. 67; P-3 pp. 5-7, 9)
41. The Wechsler Individual Achievement Test – Third Edition (WIAT-III) yielded scores in the average range on all subtests and composites, with some scores at the lower end of the average range on several subtests (Word Reading, Math Fluency (Addition and Multiplication)) and the Math Fluency Composite. The lower Math Fluency scores may have been impacted by Student's processing speed as well as insufficient exposure to the curriculum over a period of time. (N.T. 67-71, 157-59; P-3 pp. 7-8)
42. The first private psychologist did not contact anyone from the District for input during the course of the IEE. Because Student had not attended school for some period of time prior to the summer of 2016, he did not believe he would receive useful information had such input been requested. (N.T. 135-37)
43. Student's social/emotional/behavioral functioning was assessed using several measures: Vineland Adaptive Behavior Scales – Third Edition (Vineland-3); Behavior Assessment System for Children-Third Edition (BASC-3); Social Skills Improvement System (SISS); Beck Youth Inventories (Beck); and Trauma Symptom Checklist for Children (TSCC). (N.T. 72-75, 77-86, 88; P-3)
44. The Vineland-3 reflected well below average overall adaptive behavior functioning, with communication a relative strength and socialization a relative weakness. Maladaptive behavior was also a concern. (P-3 pp. 10-11)
45. On the BASC-3, the Parent endorsed clinically significant concerns with conduct problems, depression, attention problems, anger control, emotional self control, negative emotionality, and social skills; and at-risk concerns with anxiety, aggression, atypicality, bullying, adaptability, leadership, activities of daily living, and executive functioning, as well as on the Externalizing Problems, Internalizing Problems, and Behavioral Symptoms Index Composites. Results of the Parent's rating scales were to be viewed with caution due to indices measuring the results for consistency and overly negative responses. Student's Self-Report scales yielded clinically significant concerns with atypicality, depression, anger control, and emotional self-control, and at-risk concerns with attitude

toward school, social stress, anxiety, sense of inadequacy, hyperactivity, relations with parents, self-esteem, anger control, mania, and ego strength, as well as on the Internalizing Problems, Inattention/Hyperactivity, and Emotional Symptoms Index Composites. (P-3 pp. 13-15, 25-27)

46. The SSIS completed by the Parent reflected very low social skills and well above average problematic behaviors. Student's own SSIS form indicated average to above average social skills and above average problem behaviors. Student's Beck form revealed concerns with the anxiety and anger scales. The TSCC reflected near or beyond clinically significant scores on many of the areas assessed including post-traumatic stress associated with the [incident]. (P-3 pp. 27-28)
47. Vocational assessments completed by Student did not reveal any specific vocational aspirations but did provide information on occupations that Student might be interested in pursuing. (P-3 pp. 18-19)
48. The first private psychologist concluded that Student met the criteria for eligibility under the IDEA on the bases of an Emotional Disturbance and a Specific Learning Disability in the area of mathematics calculation based on fluency weaknesses that was considered mild. Recommendations included a focus on prevocational and post-secondary training and education, behavioral and emotional support including at home and in the community, and positive reinforcement for academic and prevocational/vocational progress determined by preference assessment. (N.T. 63, 67-71, 89-90, 208-09; P-3 pp. 9, 21-23)
49. A meeting convened on November 18, 2016 to review the IEE. The District requested the BASC-3 rating scale protocols completed by the Parent in order to better compare it to Student's rating scale so as to use the same norm-reference group for both scales; and also questioned the reasons for the administration of the TSCC. (N.T. 501, 527-28, 822-25, 885, 956)
50. The private psychologist issued an addendum to the IEE on November 21, 2016 to correct the TSCC results and to revise the BASC-3 results consistent with the District's inquiry. He also provided the BASC-3 protocol that was requested. (N.T. 76, 870-71)
51. Student was diagnosed with Posttraumatic Stress Disorder (PTSD) in late December 2016 through a new private psychological evaluation specifically conducted for the purpose of confirming or ruling out that diagnosis. The diagnosing evaluator (second private psychologist) also identified symptoms of related but secondary disorders including Anxiety and Depression. (N.T. 1047-48, 1051, 1057-61; P-28)
52. A third private psychologist conducted an assessment for Student's needs in transitioning to post-secondary life and issued a report detailing those findings in early January 2017. Rating scales and questionnaires completed by Student indicated Student's lack of preparedness for the transition to post-secondary life including employment, similar to results obtained for the original IEE. This third private psychologist made a number of recommendations for Student's educational programming that included attaining a

special education diploma or General Education Development (GED) certification; development of coping, social, and emotional skills; and an individualized, high-interest program with positive behavior support and daily counseling. Additional recommendations for the home were also provided. (P-25)

DISTRICT EVALUATION

53. Student was never referred for a special education evaluation by anyone in the District until it issued a Permission to Evaluate (PTE) form in early September 2016. The evaluation was sought at that time because District representatives learned that the IEE was being conducted. The Parent consented to the District evaluation on September 16, 2016. (N.T. 230, 271, 282-83, 327, 414, 419, 584-85, 523, 1033-34; P-9; S-17)
54. A meeting convened occurred in October 2016 with the Parent and several District representatives, and the participants reviewed the PTE form. However, when the District school psychologist explained that need to obtain information for its evaluation, the Parent was unable to stay because she had been prepared only to pick up rating scale forms. The Parent also expressed concern about the District representatives making inquiry about Student and the [incident]. The District was later permitted to submit questions to the Parent to approve, but because they would be asked in the school environment without the presence of the Parent or a trusted individual, no questions could be asked about the [incident]. There were no questions about the [incident]. (N.T. 527-28, 549-50, 682, 727-28, 733-34, 828-30, 837, 921, 924, 988-89; P-19 pp. 5-11, P-21 pp. 14-17)
55. The District issued its Evaluation Report (ER) to the Parent on November 29, 2016. The District school psychologist conducted an observation of Student for the ER as well as an interview; however, she did not administer cognitive or achievement assessments to Student and instead agreed to rely on those reported in the IEE. (N.T. 762, 826-27, 833-34, 837-39; P-21 pp. 1-4; S-25 pp. 5-7)
56. The ER summarized input from the Parent as well as the IEE and 2011 evaluation, and included information on available attendance records and assessment results. Limited teacher input was provided because of Student's infrequent attendance; the District had to rely on information from personnel who had interacted with Student only a few times. (N.T. 855-56; S-25)
57. The District school psychologist intended to but did not report on all of the clinically significant and at-risk scores from the BASC-3 clinical and content scales, and in some instances reported the scores inaccurately. (N.T. 767, 772-778; S-25 pp. 3-5 (*compare with P-3*))
58. One of Student's previous teachers completed another BASC-3 rating scale form. That teacher indicated that he had not seen Student enough to know of any strengths; he also noted Student's consistent truancy, lack of work completion, untrue statements, and focus on employment rather than school work. That teacher's rating scales reflected clinically significant concerns with learning problems and study skills, and at-risk concerns with

attention problems, social skills, leadership, and executive functioning, as well as on the School Problems Composite. (P-21 pp. 5-13, 18, P-33)

59. The District school psychologist interviewed Student, and did not perceive Student to present with anxiety or depression during the interview; and District professionals who had met Student similarly did not report seeing anxiety or depression. Student mentioned the [incident] and stated that Student wanted to leave that event in the past and focus on the future. (N.T. 837-40, 848, 853-56, 860; S-25)
60. The ER concluded that Student was not eligible for special education. Specifically, the ER was not able to exclude lack of appropriate instruction as a determining factor and found no discrepancy between cognitive ability (WAIS-IV) and academic achievement (WIAT-III). The ER stated that there was insufficient evidence from which to conclude that Student had an Emotional Disturbance and that Student's academic difficulties could not be linked to a disability. (S-25)
61. The ER noted needs for coping and anger management skills. (S-25 p. 16)
62. The District did not consider whether Student was a protected handicapped student or evaluate Student under Section 504. (N.T. 861)
63. After the District sent the ER to the Parent, she asked if additional testing might be conducted. The District school psychologist responded that Student did not exhibit any cognitive or academic achievement concerns, and "therefore does not demonstrate a need for special education and related services at [that] time" (P-20 p. 2); thus, no additional testing was necessary. (P-20)
64. The District did not schedule a meeting with the Parent to discuss the ER. (N.T. 683-84)

STUDENT'S CURRENT PRESENTATION

65. Student presents with a lack of maturity and self-awareness, a tendency toward self-isolation, and distrust of teachers and other District professionals. As a result of that distrust, Student is not open and honest and claims to be fine. Student also uses escape and avoidance as coping measures, including failing to attend school, and exhibits anxiety and depression. (N.T. 898-900, 972; P-25)
66. Student's exposure to ongoing domestic abuse, coupled with the [incident], have combined into a complex profile that is consistent with PTSD diagnosed by the second private psychologist. Student continues to withdraw because of the two traumatic events and Student's condition is degrading. (N.T. 86-88, 125, 156-57, 195-97, 1048, 1053-54, 1062; P-28)
67. Student's trauma has manifested in, among other things, school avoidance, which is a symptom of PTSD. (N.T. 97-98, 105-06, 113, 196-98, 927, 935, 1073)

68. Students who have Anxiety and Depression, as well as PTSD, are able to function at times without exhibiting outward signs. (N.T. 934-35, 949, 1076-77)
69. Student has told privately retained professionals that Student is no longer affected by the [incident] and does not want to talk about it. Student has repressed the [incident]. (N.T. 974, 1051-53, 1066)

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 Parent 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 his or her ability and recollection with respect to facts necessary to resolving the issues presented.

Nevertheless, the testimony of the District school psychologist was accorded less weight than that of the Parent’s three psychologist witnesses, due to her lack of familiarity with, among other things, Section 504 evaluations (N.T. 861-62), as well as her clear focus on Student’s

academic (as opposed to social/emotional/behavioral) presentation, discussed more fully below. She also conceded that, while she found Student to have some understanding of Student's needs, she was not able to interact with Student for a lengthy period of time or on multiple occasions to truly make such an assessment (N.T. 868); and the ER tellingly is based on a lack of evidence of emotional disturbance (S-25) rather than a considered deliberation of its definition and application to Student. The three Parent psychologist witnesses, on the other hand, who all bear impressive credentials, provided testimony and reports that were grounded in comprehensive formal and informal assessments. Although it does appear that the private psychologists had better access to Student and information from the family than did the District school psychologist, that fact does not diminish the persuasive nature of their collective and individual testimony. The weight of the evidence is discussed further below as necessary.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' Closing Arguments.

GENERAL IDEA PRINCIPLES

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to students who qualify for special education. 20 U.S.C. § 1412. "The IDEA protects the rights of disabled children by mandating that public educational institutions identify and effectively educate those children, or pay for their education elsewhere if they require specialized services that the public institution cannot provide." *D. K. v. Abington School District*, 696 F.3d 233, 244 (3d Cir. 2012) (citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 735 (3d Cir. 2009)). Of course, these obligations only attach to students who are eligible for special education.

Parents who believe that a local education agency (LEA) has failed to comply with its

obligations under the IDEA may file a Due Process Complaint wherein they may “present a complaint [] with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to [a] child.” 20 U.S.C. § 1415(b)(6)(A). An administrative hearing will be held on the issues presented. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.511, 300.512, 300.515; 22 Pa. Code § 14.162.

GENERAL SECTION 504 AND ADA PRINCIPLES

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). In Pennsylvania, Parents may request an administrative hearing under Section 504 and Chapter 15 to challenge an LEA’s identification, evaluation, or programming for a protected handicapped student. 22 Pa. Code § 15.8.

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d

282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

CHILD FIND

The first issue is whether the District erred in failing to identify Student as eligible under the IDEA.¹⁰ That statute and its implementing state and federal regulations obligate LEAs 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). This obligation is commonly referred to as “Child Find.” LEAs 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, an LEA is required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K.*, *supra*, 696 F.3d at 249. LEAs are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted). A delay in complying with the Child Find obligations may constitute a procedural violation under the IDEA. *Id.* at 249-50.

The Parent’s claims are based on her belief that Student is a child with a disability under the IDEA, a position that is in direct contrast with the District’s conclusion that Student is not. As discussed more fully below, the evidence is preponderant that Student is eligible and should have been so identified during the second half of the 2014-15 school year.

Student experienced a significant trauma in the summer of 2014 in an [incident] which Student brought to the attention of the District at the very beginning of the 2014-15 school year.

¹⁰ The Parent contends in the alternative that Student qualifies for services under Section 504. There is a similar Child Find duty under Section 504. 34 C.F.R. § 104.32; *Ridgewood*, *supra*, 172 F.3d at 253.

The District immediately held a meeting with Student and the Parent and made a referral to an outside agency for support services. Although several Parent witnesses testified that the [incident] itself should have led to an immediate special education evaluation, the law does not impose an obligation to do so “at the earliest possible moment.” *D.K., supra*, 696 F.3d at 249.

The [incident] in this case led to the District’s prompt and reasonable response early in the 2014-15 school year, while at the same time alerting the guidance counselor and social worker to the need to monitor Student. The failing grades in the first marking period did not necessarily point to the need to evaluate. *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Moreover, it would be reasonable to conclude that Student was receiving counseling or other mental health services through an outside provider that would assist Student in coping with the effects of the [incident]. Nevertheless, the pattern of poor attendance and failing grades continued unabated, across all four marking periods, without any investigation into whether Student was merely truant or the known [incident] was adversely impacting Student’s ability to access the educational environment. The guidance counselor and social worker had only minimal contact with Student over the course of the school year, despite their concern for Student’s mental health, and they were aware that Student still had not met with the outside agency representatives as of March 2015. In light of all of the circumstances, this hearing officer concludes that, by the end of the second marking period when Student’s failing grades and attendance did not improve, the District had sufficient knowledge to take steps to try to discern the reasons therefor, including the basis for suspecting a possible disability. Its failure to do so constitutes a procedural violation of the IDEA.

ELIGIBILITY FOR SPECIAL EDUCATION

The next, related issue is whether Student is eligible for special education. The Parent

provided evidence that Student is eligible, while the District presented contrary evidence based on its ER completed in November 2016.

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. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a).

With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). Further,

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

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

34 C.F.R. § 300.39(b)(3).

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).

The testimony of the three private psychologists, individually and collectively, was quite compelling and convincing on Student's disability, including the PTSD diagnosis and Student's demonstration of its symptoms that are progressively worsening, including Anxiety and Depression. All of those conditions are manifested in the school environment. Viewing the record in its entirety, and even in the absence of the opinions of the second and third private psychologists, Student has exhibited an inability to learn that cannot be explained by intellectual, sensory, or health factors; inappropriate behaviors and feelings under normal circumstances; a general and pervasive mood of depression; and several physical symptoms and fears that may be associated with personal and school problems. All of these characteristics have been evident over a lengthy period of time (approximately 2½ years as of the date of this decision), and to a marked degree. The evidence further established the adverse impact on Student's educational performance; and, furthermore, clearly demonstrates that Student requires special education and related services by reason of the disability in order to access and make progress in the curriculum. The record as a whole supports a conclusion that Student is eligible under the IDEA as a child with an emotional disturbance. Though not necessary to this eligibility determination, the most persuasive and objectively thorough description of Student's emotional disability and how it impacts Student both in and outside the school setting was provided by the third private psychologist who spent considerable time interacting with Student on multiple occasions, and

has acquired a unique and comprehensive understanding of Student. (N.T. 894-97) There is nothing in the record to discount her astute observations and well-informed psychological conclusions.

The District correctly observes that it cannot be expected to delve into a student's complex psychological profile when he or she does not exhibit signs at school that suggest unhappiness, anxiety, or other concerning symptoms. (District's Closing at 7) However, while Student's actual diagnoses and significant mental health needs may go beyond school-based services and District expertise, District staff certainly were qualified to identify Student under the IDEA. The District also contends that it did not possess crucial knowledge about Student prior to the fall of 2016 and, thus, cannot be charged with recognizing a need for a special education evaluation. It is true that the Parent and Student did not disclose the domestic violence to school personnel through the beginning of the 2016-17 school year, as the Parent conceded. Nonetheless, many school professionals were aware of the summer 2014 [incident] shortly after it occurred, and recognized that the event likely would affect Student on a long-term basis. Furthermore, although Student did have a history of absences from school, the 2014-15 school year was the first for Student after two years in other schools; and, the District professionals who were monitoring Student's attendance were also aware of the [incident] and Student's failure to take advantage of services through the outside agency. Certainly by the start of the third marking period of the 2014-15 school year, the District had sufficient knowledge to begin an investigation into Student's emotional status and potential impact on Student's educational performance, raising a suspicion of a disability with a concomitant obligation to act within a reasonable time to begin an evaluation. It is, thus, reasonable to conclude on this record that an evaluation in the second half of the 2014-15 school year, under the IDEA or Section 504, would

have revealed changes to Student's emotional presentation and behavioral functioning following the [incident]. Recognizing the difficulties the District experienced in communicating with the Parent and arranging meetings, an evaluation should have been completed no later than mid-April 2015¹¹ and an IEP developed for implementation no later than the start of the 2015-16 school year.¹²

By contrast, however, the evidence does not support a conclusion that Student also has a Specific Learning Disability in mathematics. First, as the District observes (N.T. 815; District Closing at 9-10), the weakness noted in the IEE was for math fluency, which is not a category of eligibility under the IDEA and its implementing regulations. 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a). Second, the private psychologist who conducted the original IEE described Student's mathematics weakness as mild and, moreover, did not establish that Student was in need of specially designed instruction by reason of that specific weakness (rather than as a result of inadequate exposure to the curriculum and instruction). While it would be appropriate to monitor Student's performance in the area of mathematics as well as all subjects, this category of eligibility has not been demonstrated on this record and the District's conclusion with respect to a mathematics disability must be accepted.

It is prudent at this point to discuss the District's ER and the opinion of its school psychologist who conducted that evaluation. At the outset, it is significant that the ER specifically stated that there was insufficient evidence from which to determine whether Student had an emotional disturbance. (S-25 p. 16) It is evident that the District's evaluation process was hampered to some extent by its inability to obtain information from school personnel

¹¹ LEAs have sixty calendar days to complete a special education evaluation. 22 Pa. Code § 14.123(b).

¹² See 34 C.F.R. § 300.323(c) (requiring an IEP meeting within thirty days of an eligibility determination); 22 Pa. Code § 14.131(a)(6) (providing for IEP implementation within ten school days of completion).

familiar with Student; those who did provide input had very limited interaction with Student. Nonetheless, the ER reached the conclusion it did apparently because Student did not exhibit concerns with cognitive functioning or academic achievement and thereby implicitly disregarding any potential disability that would manifest socially or emotionally or otherwise impair educational performance. That position contradicts the U.S. Supreme Court's recognition over thirty years ago that a child with a disability who is "advancing from grade to grade" is not necessarily a child who has been provided with an appropriate education. *Board of Education v. Rowley*, 458 U.S. 176, 203 n. 25 (1982); *see also* 34 C.F.R. § 300.101(c)(1) ("Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade."). Education thus encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (citing *M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir. 1996)). Moreover, here, Student's educational performance did not include grade promotion for several school years in a row.

Finally, the District argues that the Parent never requested a special education evaluation. (District Closing at 8) While that does appear to be true, longstanding case law recognizes that "a child's entitlement to special education should not depend upon the vigilance of the parents [.]” *M.C., supra*, at 397. Thus, the Parent's action or inaction cannot defeat the claims.

SPECIAL EDUCATION PROGRAMMING

The next issue is whether the District should be ordered to develop a special education program for Student. As noted above, children who are eligible for special education are entitled

to FAPE through provision of special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Rowley, supra*, the U.S. Supreme Court held that the FAPE 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.

LEAs, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Most critically, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

The IEP team that will be directed to convene will be charged with the responsibility of identifying Student’s educational needs and addressing them in the IEP. Nevertheless, the District has requested specific guidance on what should be included if the determination were made that Student is eligible. (District Closing at 14) The following is offered to assist the IEP team in developing a program for Student and to promote final resolution of the issues presented in the Complaint.¹³

The record supports a determination that Student’s IEP must address: a carefully considered plan for Student to successfully transition from home-based online programming to a school-based location for the educational services to be provided as determined by the IEP team; a plan for improving attendance that includes reinforcement consistent with a preference

¹³ As the Court noted in *I.W. v. School District of Philadelphia*, 2015 U.S. Dist. LEXIS 157493 * 23 (E.D. Pa. 2015), an attempt to “permanently resolve the issues” may not operate to subvert the IEP process. The suggestions offered here are made to try to avoid a future dispute, particularly in light of Student’s age.

assessment; regularly scheduled counseling with ongoing access to that counselor as needed for emotional support; post-secondary transition planning based on vocational, post-secondary educational, and independent living interests and needs; and training and instruction in the areas of social skills, coping skills, anger management skills, and self-advocacy. Student's educational program and placement through online, distance learning should not be continued, as Student has demonstrated an inability to manage Student's own learning and to succeed in that type of environment independently. Regardless of the placement and program provided, Student should be given the opportunity for daily check-ins with trusted and identified District professionals; and, curriculum-based assessments should be conducted to identify areas of academic weaknesses. Student's IEP must also reflect a recognition of what programming is required for Student to complete in order to move on to post-secondary education, training, and/or employment. Student must be invited to participate in the IEP meeting which should not be delayed so that special education services may be implemented as soon as possible. The attached Order contemplates that the parties will meet promptly to finalize an IEP.

It is also quite evident that Student requires mental health therapy and counseling across all domains, and well beyond that which can be provided by a school district. (See, e.g., N.T. 902-03, 1059-60, 1062-63, 1110) The parties are encouraged to permit open communication and ongoing information-sharing among all professionals who work with Student, which can only benefit Student.

COMPENSATORY EDUCATION

As a remedy, the Parent seeks compensatory education, which is an appropriate form of relief where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to

remedy the problem. *M.C., supra*. Such an award 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).

This hearing officer observes that the record does not include evidence on an appropriate equitable remedy that would place Student in the position where Student would be had FAPE been provided. Thus, the hour-for-hour approach is appropriate. With regard to the scope of the remedy, this hearing officer has concluded that a special education program should have been implemented by the start of the 2015-16 school year. Despite the move to the online educational program that school year, the evidence establishes that that Student was entirely unsuccessful, and that Student was required to repeat ninth grade once again rather than being promoted. The same is true of the 2016-17 school year to date.

With respect to calculating compensatory education for the relevant time period, Student’s emotional disability and related educational needs clearly impeded Student throughout the day; in addition, they were or should have been known to the District prior to the start of the school 2015-16 school year, and, thus, no reasonable rectification period is warranted. Nevertheless, despite the Parent’s request for full days (six hours) of compensatory education

(Parent Closing at unnumbered p. 24), the record demonstrates that Student is, and has been for some time, emotionally fragile and lacking stamina for full-time school attendance. (*See, e.g.,* N.T. 911-12; P-28 p. 7) Student's symptoms have progressed over time, suggesting that Student currently is less able to attend school and complete coursework than in the past; yet, the trauma clearly impeded Student's functioning from the time of its occurrence. It is impossible to identify with any certainty whether, with appropriate educational and home- and community-based emotional support, Student may have been better equipped at any given point in time to attend full days of school. Thus, this hearing officer equitably estimates that three hours of compensatory education per day from the start of the 2015-16 school year and continuing until an appropriate IEP is developed is an appropriate award, balancing those periods of time when Student was better able to function (*e.g.,* by attending a full day of school) with those periods when Student was not (*e.g.,* sleeping all day and unavailable for any instruction).

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product, or device that furthers Student's academic or social/emotional/behavioral needs and skills, including academic tutoring services. 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 may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent, and may be used at any time from the present until Student turns age twenty one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent.

REIMBURSEMENT FOR IEEs

The next issue is whether the Parent should be reimbursed for one or more of the IEEs she obtained. When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Following a parental request for an IEE, the LEA must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). Here, the Parents did not make any such request of the District, but rather obtained the IEE and sought reimbursement after the fact. In this circumstance, the analysis of the appropriateness of the evaluation is the same. However, one element in considering whether a parent is entitled to an IEE at public expense is his or her disagreement with a school evaluation.

In this case, the Parent was not presented with a District evaluation with which she could disagree, because the District did not undertake the obligation to conduct such an evaluation. For all of the reasons discussed above, the record supports a conclusion that the District's failure to evaluate through the fall of 2016 was the functional equivalent of conducting an evaluation with which the Parent did not agree and, moreover, the original IEE report was immediately shared with the District for careful consideration in drafting a program for the 2016-17 school year. *Cf. L.M. ex rel. M.M. v. Downingtown Area School District*, 2015 U.S. Dist. LEXIS 49336 *75, 2015 WL 1725091 (E.D. Pa. 2015) (denying reimbursement of an IEE that was not pursued as part of the collaborative IEP process). For these reasons, the fact that the District did not conduct its own evaluation prior to the IEE is not fatal to the claim.

Here, the District did conduct an evaluation, and, thus, the relevant question in deciding

this issue is whether the District ER was appropriate.¹⁴ In conducting the evaluation, the law imposes certain requirements on LEAs 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

¹⁴ The Parent did not challenge this analysis as unnecessary. (Parent Closing at 13-20)

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).

As discussed above, this hearing officer has concluded that the District’s ER was flawed in failing to identify Student as eligible for special education. The District relied on the assessment results provided by the initial IEE, supplemented by a BASC-3 rating scale and an observation that provided little useful information. Some discussion regarding the District’s concerns with the IEE is warranted. First, while the District criticized the use of the TSCC, nothing in the ER contradicts its findings; and, moreover, the explanation for the addendum regarding the TSCC was both logical and cogent and allowed for a clear understanding of the information obtained from that measure. (N.T. 83-86, 181-92) Second, while the reasons that the private evaluator used different norm-reference groups for the Parent’s and Student’s BASC-3 rating scales were not clearly explained (N.T. 75, 77-78, 173-78), his opinion was not accorded any less weight because those results were not materially changed when the same norm-reference groups were used (N.T. 78, 886-87). In addition, the first and third private psychologist provided persuasive testimony regarding the significance of the cautionary flags raised by the Parent’s BASC-3 rating scales in terms of consistency and negativity (N.T. 171-74, 176, 209-10, 887-88, 958) that was much more in-depth and convincing than that of the District school psychologist on the same topic (N.T. 841-43).

The District’s evaluation purported to accept the original IEE assessment results, but not its conclusions. However, that evaluation simply was not adequate for identifying all of Student’s educational and related service needs. The ER itself documented a lack of sufficient information on whether Student had an emotional disturbance, yet incongruously rejected that

conclusion on the basis of Student's cognitive ability and academic achievement rather than on how Student's emotional functioning was manifested in the school environment. The eligibility determination was also not based on a meeting that included the Parent, but was already part of the ER at the time it was sent to her. For all of these reasons, the District's ER was not appropriate under the applicable standards. Accordingly, the Parent is entitled to reimbursement for the IEE completed in September 2016 by the first private psychologist.¹⁵ That reimbursement does not extend, however, to any services in connection with the November 2016 addendum which served only to correct inaccuracies in the original IEE report (and for which the Parent may not have been billed).

Next, the Parent also seeks reimbursement for the evaluations conducted by the second and third private psychologists. While the second and third evaluations provided additional assessments of Student's functioning with resulting recommendations, those professionals relied on their specific expertise to elaborate on Student's needs that were already identified in the original IEE. This hearing officer interprets the applicable regulation to provide for a single IEE at public expense in connection with the District's evaluation in this case, not for a series of evaluations, no matter how useful those subsequent evaluations may prove to be. 34 C.F.R. § 300.502(b)(5). This conclusion is also consistent with the commentary of the Department of Education when promulgating that provision in its implementing regulations. 71 Fed. Reg. 156 at 46690 (August 14, 2006). Accordingly, while the IEP team will be required to consider the second and third evaluation reports,¹⁶ 34 C.F.R. § 300.502(c), the District will not be ordered to

¹⁵ There is no suggestion in the record that the IEE did not meet agency criteria. 34 C.F.R. § 300.502(e). And, as a matter of equity, it merits repeating that the District incorporated the results of the IEE assessments into the ER.

¹⁶ Furthermore, it should be noted again that the second and third private psychologists' reports and testimony provide important information to the IEP team going forward, but were not necessary to the conclusions reached with respect to Student's eligibility under the IDEA and the FAPE determinations that were based on the information the District had at the time.

fund them.

Finally, having reached the above conclusions under the IDEA, there is no need to separately discuss the Parent's coextensive Section 504 and ADA claims, beyond noting that the same determinations are reached with respect to denial of FAPE and consequent disability-related discrimination under those two statutes.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District failed in its Child Find obligations to Student; that Student was denied FAPE; that Student is entitled to compensatory education; and that the Parent is entitled to reimbursement for the first IEE. The District will also be directed to convene an IEP team meeting to develop an initial IEP.

ORDER

NOW, this 20th day of February, 2017, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District failed in its Child Find obligations, and further erred in its determination that Student is not eligible for special education under the IDEA.
2. Within ten school days of the date of this decision and Order, the District shall convene an initial meeting of an IEP team for Student, to which Student is invited.
 - a. The team shall confirm Student's eligibility for special education.
 - b. The team shall identify Student's educational needs and develop an IEP to address them guided by the foregoing discussion.

- c. At the Parent's election, a private psychologist or educational consultant may attend and participate in the initial IEP meeting and in any subsequent meetings. The cost of that professional's attendance at the IEP meetings for up to three hours shall be at public expense.
 - d. The IEP team shall also consider and determine whether any additional assessments, including an FBA, are necessary to identify and program for Student's educational needs.
 - e. A Notice of Recommended Educational Placement (NOREP) shall issue upon completion of an IEP for Student but in no event shall the IEP be finalized after March 22, 2017.
 3. The District failed in its FAPE obligations to Student under the IDEA.
 4. The District shall provide Student with three hours of compensatory education for each day that the District high school was in session for the 2015-16 and 2016-17 school years through the date a completed IEP developed as described in ¶ 2 is approved by the Parent through a NOREP or March 22, 2017, whichever is sooner, subject to all of the following conditions and limitations:
 - a. Student's Parent may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student's academic or social/emotional/behavioral needs, including academic tutoring services. 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.
 - b. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent, and may be used at any time from the present until Student turns age twenty one (21).
 - c. The compensatory services shall be provided by appropriately qualified professionals selected by the Parent.
 - d. The costs to the District of providing the awarded hours of compensatory education may be limited to the average market rate for private providers of those services in [the county].
 5. The Parent is entitled to reimbursement for the cost of the IEE that culminated in a report on September 2016 and admitted into the record as P-3 and invoiced at P-4.
 6. Nothing in this decision and order should be read to prevent the parties from mutually agreeing to alter any of the terms of this decision and Order, including the content of Student's IEP.

7. The claims presented under ADA and Section 504 are DISMISSED as having been fully addressed under the IDEA.

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
ODR File No. 18152-1617AS