This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name: H.S.

Date of Birth: [redacted]

ODR Nos. 14177-1314AS, 14208-1314AS (Consolidated)

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Dean M. Beer, Esq. 30 Cassatt Avenue Berwyn, PA 19312
Northampton Area School District 2014 Laubach Avenue Northampton, PA 18067	Joanne Sommer, Esq. 60 E. Court Street P.O. Box 1389 Doylestown, PA 18901-0137

Dates of Hearing: 09/24/2013, 11/20/2013, 12/05/2013, 12/06/2013

Record Closed: 01/06/2014

Date of Decision: 01/17/2014

Hearing Officer: Brian Jason Ford

Introduction and Procedural History

These consolidated matters arise under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4.

The District filed a due process complaint on August 6, 2013 (District's Complaint). The District's Complaint was assigned ODR Number 14177-1314AS. The District's Complaint was filed in response to the Parent's request for an independent educational evaluation (IEE) at public expense. Generally, the IDEA requires school districts to initiate a hearing when rejecting IEE requests.

The Parent filed a separate due process complaint on August 16, 2013 (Parent's Complaint). The Parent's Complaint was assigned ODR Number 14208-1314AS. The Parent's Complaint alleged various violations of the IDEA and Section 504. The Parent's Complaint included demands for an appropriate program and placement, compensatory education, and an IEE (including a neuropsychological evaluation, psychiatric evaluation, and functional behavioral assessment) at public expense.[1] The Parent withdrew the demand for an independent neuropsychological evaluation during the second session of this hearing. (N.T. 271).

Through preliminary correspondence and orders, these matters were consolidated and heard together. One record was generated for both files, and this Decision and Order resolves all issues presented in both complaints.

As this hearing commenced, an issue concerning the Student's pendent placement became evident. At the same time, the parties agreed that the Parent revoked consent for special education for a period of time, but disagreed about the legal consequences of the revocation. Evidence and testimony concerning pendency and the consent revocation was taken during the first hearing session. On November 1, 2013, I issued a Pre-Hearing Order determining that the Student's pendent placement was in regular education. In the same Pre-Hearing Order, I determined that the consent revocation was effective from September 11, 2012 through April 24, 2013. For reasons stated in the Pre-Hearing Order, I concluded that the Parent may pursue claims arising under Section 504, but not the IDEA, from September 11, 2012 through April 24, 2013. The Pre-Hearing Order is attached hereto as Appendix A.

[1] The Parent's Complaint also included a demand for attorneys' fees and costs, which I do not have authority to award.

Issues

1. Was the Student denied a free appropriate public education (FAPE) in violation of the IDEA and Section 504 from August 16, 2011 through September 11, 2012? If so, is the Student entitled to compensatory education as a remedy?

2. Was the Student denied a FAPE in violation of Section 504 from September 11, 2012 through April 24, 2013? If so, is the Student owed compensatory education as a remedy?

3. Was the Student denied a FAPE from April 24, 2013 through the present, ongoing, in violation of the IDEA and Section 504? If so, is the Student owed compensatory education as a remedy?

4. Is the Parent entitled to an IEE, including a psychiatric evaluation and a functional behavioral evaluation (FBA) at public expense?

Findings of Fact

All twenty six (26) findings of fact included in the Pre-Hearing Order of November 1, 2013[2] are incorporated herein by reference. For context and readability, I make some findings of fact in this Decision that repeat or summarize findings

1. The Student is currently a 7th grade student, and is currently receiving regular education only. (S-38).

2. The parties agree that the Student has specific learning disabilities (SLD) in math and written expression. (S-3; N.T. at 37, 39,40, 79, 238, 244, 245).

3. The 2008-09 school year was the Student's 2nd grade year.

4. The Student was first evaluated in May, 2008. The evaluation team determined that the Student was eligible for services as a student with a speech and language impairment. (S-1).

5. The 2009-10 school year was the Student's 3rd grade year.

6. The Student was evaluated a second time, resulting in a reevaluation report of August 3, 2009. (S-2). At that time, the evaluation team determined that further testing was required, and such testing was completed by a certified school psychologist. *Id.* The additional testing revealed that the Student was functioning in the average range by most measures, but exhibited a statistically meaningful

[2] The Pre-Hearing Order was originally titled "Preliminary Decision." It was issued on November 1, 2013. A corrected copy, fixing typographical errors, was issued on November 30, 2013.

discrepancy between ability and achievement in written expression. *Id*. The Student qualified as a student with a SLD on that basis.

7. Further testing conducted as part of the August 2, 2009 evaluation prompted the psychologist and the evaluation team to conclude that the Student had secondary disabilities of Emotional Disturbance and Speech or Language Impairment. (S-2).

8. In the August 2, 2009 report, the school psychologists made recommendations to the IEP team to address the Student's SLD, and also recommended an FBA followed by development of a behavior support plan. (S-2).

9. The Student received special education pursuant to an IEP during the 2009-10 school year.

10. The Student took the PSSAs in the spring of 2010. The Student scored in the Advanced range in Mathematics and Proficient in Reading. (SD-3).

11. The 2010-11 school year was the Student's 4th grade year.

12. The Student received special education pursuant to an IEP during the 2010-11 school year. During this year, the Student attended the neighborhood school and received academics in regular education classes. The Student also received some instruction from a learning support teacher as well as speech and language services.

13. The Student took the PSSAs in the spring of 2011. The Student scored in the Advanced range in Mathematics and in the Proficient range in Reading and Science.

14. During the 2010-11 school year, the Student exhibited several serious behavioral problems in school. Behaviors included pushing other children in unsafe environments, and becoming argumentative, defiant and disrespectful with teachers when asked to perform certain tasks. (*See* NT at 414, 419).

15. In addition to isolated but serious behavioral incidents, the Student's teachers uniformly reported that the Student required frequent redirection, and exhibited both noncompliance with teacher directions and disorganization. When asked by teachers to do non-preferred activities, the Student would grunt, sigh, huff, appear to ignore or simply refuse the request. The Student appeared unmotivated and became angry when asked to organize Student's work space. (S-50).

16. The teachers were all of the opinion that the forgoing behaviors adversely affected the Student's academic performance, and persisted despite implementation of a positive behavior support plan. (S-50).

17. On March 29, 2011, an IEP meeting was convened to discuss programming and placement for the Student's fifth grade year. At that meeting, the IEP team, including the Parent, agreed to remove speech and language services based on information suggesting that the Student no longer required those services. (S-50).

18. A new IEP was developed during the March 29, 2011 IEP meeting. (S-50). At the same time, as part of the IEP, the District conducted an FBA. The FBA was completed by the District's Director of Psychological Services, who is a certified school psychologist. In completing the FBA, the Director of Psychological Services did not observe the Student, but rather relied upon reports from teachers that indicate the behaviors detailed above. (S-50).

19. The FBA was reviewed during the March 29, 2011 IEP team meeting. The Director of Psychological Services was present at the meeting, as was the Parent and mental health professionals who worked with the family outside of school. (S-50).

20. Based on the FBA, the March 29, 2011 IEP included a positive behavior support plan (BPSP). (S-50).

21. The Parent approved the March 29, 2011 IEP, including the PBSP.

22. Despite the agreement to implement the March 29, 2011 IEP, the IEP team determined that the District should reevaluate the Student in response to the severity of the Student's behaviors. A reevaluation report (RR) was completed on May 15, 2011. (S-5).

23. The May 15, 2011 RR included information from the Parent and teachers. This input included written information regarding the Student's behaviors in home and school. The evaluator, a certified school psychologist, also had the Parent and teachers complete behavior rating scales. The evaluator reviewed the Student's educational records (including the March 29, 2011 FBA). (S-5).

24. Written information from teachers regarding the Student's behavior, collected for the May 15, 2011 RR, reported that "when frustrated, [Student] overacts by making inappropriate comments alluding to blowing things up or killing []self." (S-5, p. 5)

25. Based on the reported behaviors and the behavior rating scales, the evaluator completed what the District characterizes as another FBA. Like the FBA of March 29, 2011, the FBA that was part of the May 15, 2011 RR did not include a direct observation of the Student by the evaluator. (S-5).

26. As part of the May 15, 2011 RR, the evaluator administered a Test of Written Language, 3rd Edition (TOWL-3). (S-5). Based on the results of the TOWL-3, the

evaluator concluded that the Student continued to have a SLD in the area of written expression.

27. The May 15, 2011 RR notes that the Student ignored teachers and refused to complete tasks in school that required writing. (S-5).

28. In the May 15, 2011 RR, the evaluator concluded that the Student's primary disability was an Emotional Disturbance and the Student's secondary disability was a SLD. (S-5).

29. In the May 15, 2011 RR, the evaluator suggested revisions to the Student's PBSP and also urged the IEP team to consider a more restrictive setting. (S-5).

30. The May 15, 2011 RR was sent to the Parent on May 25, 2011. The IEP team then reconvened on June 14, 2011. (S-5, S-6).

31. An IEP was prepared for the June 14, 2011 meeting. That IEP changed the Student's eligibility classifications in conformity with the May 15, 2011 RR, and changed the Student's placement from the Student's neighborhood school to a different District elementary school that housed an Emotional Support program. (S-6).

32. The June 14, 2011 IEP called for the Student to receive a supplemental level of Emotional Support while receiving Math, Social Studies, Science, Specials, lunch, and recess in regular education. (S-6).

33. The 2011-12 school year was the Student's 5th grade year.

34. The June 14, 2011 IEP was implemented during the 2011-12 school year.

35. On March 27, 2012, the Student was hospitalized at a psychiatric hospital for children that contains a school. This hospitalization was prompted by the Student's behaviors at home. The Student was discharged from the hospital on April 3, 2012. (S-8)

36. The Student had 17.5 excused absences during the 2011-12 school year, all but 3.5 of which occurred during the fourth quarter. (S-12). Many, but not all of, the excused absences coincide with the Student's hospitalization. (c/f S-8, S-12).

37. Report cards for the 2011-12 school year generally show strong academic performance during the first three quarters, but a significant decline in the fourth quarter. There are some notable exceptions to this trend. (S-12). The Student's academic performance, as measured on report cards, is as follows:

Content Area	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
Reading	94	94	85	68
Writing	83	88	82	56
Mathematics	75	75	55	90
Science	99	86	74	22
Social Studies	93	90	89	68

38. Some of the Student's teachers noted behavioral problems on the Student's report card during all four quarters of the 2011-12 school year. More teachers noted poor behavior as the year progressed and, by the fourth quarter, all core academic teachers noted significant behavioral issues in class. (S-12).

39. The report card entered into evidence includes numeric grades on a per-quarter breakdown. That report card does not indicate the Student's final grades in content area classes. Special area classes were all either "satisfactory" or "outstanding" for the entirety of the school year. (S-12)

40. The Student was promoted to 6th grade at the end of the 2011-12 school year. (S-12).

41. Towards the end of the 2011-12 school year, and during the summer of 2012, the Parent and the District engaged in a series of meetings, telephone conversations and email exchanges concerning the Student's placement. Throughout this time, the Parent expressed her belief that the Student should not be identified as a student with an emotional disturbance and objected to any Emotional Support placement. (*See Pre-Hearing Order*, November 1, 2013).

42. The parties participated in mediation and at least two IEP team meetings during the summer of 2012.

43. On July 23, 2012, the District proposed an IEP that would continue the Student's Emotional Support program, but that would increase the amount of Emotional Support that the Student would receive. The Parent rejected this proposal. (S-19, S-20, *Pre-Hearing Order*).

44. On August 27, 2012, the District significantly revised the IEP that it offered on July 23, 2012. The IEP still proposed an Emotional Support placement outside of the Student's neighborhood school. However, the IEP established a nine (9) week timeline under which the Student would return to the neighborhood school if the

Student's behaviors were manageable and behavioral expectations were met. The Parent approved this IEP. (S-24).

45. The 2012-13 school year was the Student's 6th grade year.

46. On September 11, 2012, the Parent revoked consent for special education services. (*See Pre-Hearing Order*). The Student returned to the neighborhood school at that time.

47. From September 11, 2012 through the present, the Student received no special education services pursuant to an IEP or Section 504 accommodations pursuant to a Section 504 plan.

48. On January 5, 2013, the Parent asked the District to reevaluate the Student. This request was made by submitting a Permission to Evaluate (PTE) - Evaluation Request Form. On that form, the Parent's concerns were that the Student was "failing most subjects … has attention [] and organization issues…" The District received the PTE on January 8, 2013. (S-27).

49. The District agreed to evaluate, and issued a PTE - Consent form, detailing the types of evaluations that it would conduct, on January 18, 2013. The Parent approved the form on January 21, 2013 and the District received the form on January 24, 2013. (S-28). The District also simultaneously sought and obtained parental consent for the evaluation through issuance of a NOREP. (S-29).

50. As part of the evaluation, the District sought and obtained a "Parent Questionnaire" on which the Parent responded to several questions from the District's evaluators. On that form, the Parent indicated that the Student had ADHD and was experiencing "significant behavioral problems" that were "induced by medication." (S-30). On the same form, the Parent indicated that the Student was not taking medication at that time. *Id*.

51. In response to questions about the Student's emotional wellbeing, the Parent wrote that the Student "belongs in a regular education classroom" and, in general, indicated that any behavioral issue was a result of the Student's difficultly "focusing." (S-30).

52. In response to the question "What are your child's interests outside of school?" the Parent wrote "IT DOESN'T MATTER." (S-30, capitalization original).

53. In addition to the Parent Questionnaire, the evaluation also included a review of records, teacher input, a "Systematic Classroom Observation" by a certified school psychologist, the Woodcock Johnson III NU Test of Cognitive Abilities, the Woodcock Johnson III NU Test of Achievement, the Behavior Assessment System for Children, Second Edition (BASC-2), the Behavior Rating Inventory of Executive Functioning (BRIEF), the Asperger Syndrome Diagnostic Scale, a "Projective Assessment: Draw a Person," and a FBA. (S-31).

54. The District prepared an Evaluation Report (ER), dated March 22, 2013, that includes detailed reports of the results of the foregoing assessments. Based on the assessments, the evaluator concluded that the Student was IDEA-eligible as a student with an emotional disturbance. (*See* S-31). Based on those assessments, the evaluator further determined that the Student's had a secondary disability category of SLD, resulting from a discrepancy between ability and achievement in the domains of math calculation and written expression. (*See* S-31).

55. As part of the discrepancy analysis yielding the SLD conclusion, the evaluator noted that the Student's profile, as assessed by standardized, normative tests indicate that the Student would have more trouble with tasks requiring automaticity, processing speed, and working memory. (S-31).

56. The March 22, 2013 ER includes numerous recommendations to the IEP team, including a recommendation to develop an IEP and BPSP designed to meet the Student's needs as described in the ER as a whole. The ER also includes many specific recommendations for specially designed instruction (SDI) and program modifications. (S-31).

57. After the March 22, 2013 ER was presented, the District scheduled an IEP team meeting. Prior to the meeting, the Parent wrote to the District saying that she would "not sign or agree to anything that has to do with emotional support." (S-32).

58. The Student's IEP team met on April 24, 2013. During that meeting, the District proposed an IEP, BPSP and NOREP calling for the Student to receive Emotional Support in a supplemental Emotional Support placement outside of the Student's neighborhood school. (S-34, S-35).

59. The same day, the Parent rejected the NOREP, writing "[The Student] will not [be] going to your Emotional Support program! It's a hazard for [the Student] and made [the Student] worse in 5th grade!" (S-35).

60. As per findings and discussion in the Pre-Hearing Order, on April 24, 2013, the Parent took actions that terminated the revocation of consent for Special Education. (*See Pre-Hearing Order*).

61. The Student's report card for the 2012-13 school year indicates as follows:

Content Area	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
Reading	80	84	74	43
Writing	73	57	85	61
Mathematics	54	60	54	63
Science	NA	NA	86	38
Social Studies	66	71	NA	NA

62. Throughout the 2012-13 school year, teachers reported that the Student was not engaged, unenthusiastic, and off-task during class. Homework completion problems were also noted throughout the year. The report card does not indicate behavior problems warranting discipline. (S-36)

63. On August 6, 2013, the District requested a hearing upon denying the Parent's request for an IEE at the District's expense.

64. On August 16, 2013, the Parent requested a hearing, as detailed above.

65. The 2013-14 school year is the Student's 7th grade year.

66. The Student moved from the neighborhood elementary school to the District's middle school as a regular education student at the start of the 2013-14 school year. (*See* P-14)

67. The first marking period of the 2013-14 school year ended on November 11, 2013. At that time, the Students grades were as follows:

- English - 66, D
- Geography - 42, F
- Life Sciences - 22, F
- Math - 76, C
- Reading - 36, F

68. The Student's Life Science teacher noted low test and quiz scores, and that the Student does not do homework. The Student's Reading teacher noted that the Student does not bring materials to class and does not hand in the required work.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion except for the IEE issue. As discussed below, the District must prove the appropriateness of its last evaluation.

Free Appropriate Public Education (FAPE)

IDEA-eligible students are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

Compensatory Education

It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he

or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id*. In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education "should aim to place disabled children in the same position that the would have occupied but for the school district's violations of the IDEA.")) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990)

IEE at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency…" 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

Section 504 / Chapter 15

Broadly, Section 504 prevents school districts from discriminating against children with disabilities by denying them participation in, or the benefit of, regular education. *See* 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to

provide accommodations so that students with disabilities can access and benefit from *regular* education.

Pennsylvania regulations describe how school districts must comply with Section 504. Those regulations are found at Title 22, Chapter 15 of the Pennsylvania Code (Chapter 15). 22 Pa Code § 15 *et seq*. Chapter 15 defines a "protected handicapped student" as a student who:

1. Is of an age at which public education is offered in that school district; and
2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and
3. Is not IDEA eligible.[3]

See 22 Pa. Code § 15.2.

Chapter 15 also defines a service agreement as a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student."

After providing these definitions, Chapter 15 explains what schools must do for protected handicapped students at 22 Pa Code § 15.3:

> a "school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities."

From this point, Chapter 15 goes on to list a number of rules describing what must happen when schools or parents initiate evaluations to determine if students are protected handicapped students.

[3] All IDEA-eligible students are also protected by Section 504. However, for IDEA-eligible students, school districts satisfy their obligations under both laws by compliance with the IDEA and its regulations. For example, IDEA-eligible students receive an IEP, not an IEP and a Section 504 plan. The particular requirements of Chapter 15 apply when a student is a protected handicapped student, but is not IDEA-eligible.

After evaluations, Chapter 15 goes into more detail about service agreements. In doing so, Chapter 15 first sets out rules for what must happen when parents and schools are in agreement at 22 Pa Code § 15.7(a):

> If the parents and the school district agree as to what related aids, services or accommodations should or should no longer be provided to the protected handicapped student, the district and parents shall enter into or modify a service agreement. The service agreement shall be written and executed by a representative of the school district and one or both parents. Oral agreements may not be relied upon. The agreement shall set forth the specific related aids, services or accommodations the student shall receive, or if an agreement is being modified, the modified services the student shall receive. The agreement shall also specify the date the services shall begin, the date the services shall be discontinued, and, when appropriate, the procedures to be followed in the event of a medical emergency.

When parents and schools cannot reach an agreement, a number of dispute resolution options are available, including formal due process hearings. 22 Pa Code §§ 15.7(b), 15.8(d).

Discussion

FAPE and Compensatory Education
August 16, 2011 through September 11, 2012

The first period of time in question in this matter is August 16, 2011 through September 11, 2012. Functionally, this period covers the entirety of the 2011-12 school year and the start of the 2012-13 school year. During this time, the Student received special education in a supplemental Emotional Support placement pursuant to the June 14, 2011 IEP.

As explained above, it is the Parent's burden to establish a denial of FAPE during this period of time. In support of this claim, the Parent points to alleged deficiencies in both the FBA developed in May of 2011, and the resulting PBSP. Specifically, the Parent argues that the FBA failed to meet guidelines established by the Pennsylvania Department of Education (PDE).

The Parent is correct that PDE has established FBA guidelines and has promulgated model FBAs for Pennsylvania LEAs. The Parent argues that these guidelines require a direct observation of a student by the individual completing the FBA. In support of this argument, the Parent cites to a web page that is no longer operative.[4] At the time of this

[4] http://www.pattan.net/files/Behavior/FBA070808.pdf

decision, guidance from PDE indicates that FBAs can be conducted with varying levels of formality, and that brief or structured observations of the Student are not required at all levels. *See* http://www.pattan.net/category/Resources/PaTTAN%20Publications/Browse/Single/?id=4dc09560cd69f9ac7f130000. The District's failure to conduct a direct observation of the Student when the May 2011 FBA was completed, therefore, is not inconsistent with PDE guidelines *per se*.

More importantly, however, PDE guidelines are neither laws nor regulations. Even assuming that conformity with PDE guidelines assures best practices, my inquiry is not whether the District implemented best practices. My inquiry concerns whether any law or regulation was violated. The IDEA's implementing regulations require observation of students in certain circumstances. *See* 34 CFR § 300.310. Direct observation by a member of the evaluation team is required when the team is determining whether a student has an SLD. *See* 34 CFR § 300.310(b). Otherwise, "The public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty." 34 CFR § 300.310(a).

The May 2011 FBA conforms with 34 CFR § 300.310(a) in that it includes information collected by teachers who observed the Student's behaviors in the classroom setting. In the experience of this Hearing Officer, FBAs that include a direct, structured observation of a student by the evaluator are uniformly superior to those that do not. Even so, it is possible for an LEA to fall below best practices without violating the IDEA.

Beyond the FBA's failure to include a direct observation, the Parent argues that both the IEP and PBSP in place during the 2011-12 school year were not appropriate. As evidence of this claim, the Parent argues that the Student failed to make meaningful educational progress during the 2011-12 school year, and that the PBSP does not target the violent behaviors that the Student exhibited the prior year. There is no evidence, however, that the Student exhibited violent behaviors that needed to be addressed through a PBSP at any time during the 2011-12 school year. At the same time, up until the fourth quarter of the 2011-12 school year, the Student was quite successful academically. There is a difference between report card grades and progress towards IEP goals. In this case, however, no evidence suggests that the Student's report card grades are anything but an accurate reflection of the Student's academic progress. For the first three quarters of the 2011-12 school year, that progress was substantial.

Things clearly took a turn for the worse at the end of the 2011-12 school year, but the Parent did not establish that the sudden, dramatic turn in the Student's performance

was attributable to any deficiency in the Student's IEP or PBSP. Rather, the evidence points to significant behavioral problems, exhibited outside of school, resulting in a psychiatric hospitalization. Evidence demonstrates that the District responded appropriately to this out-of-school crisis at the end of the 2011-12 school year and through the summer of 2012 by communicating frequently with the Parent and reconvening the Student's IEP team to revise the Student's IEP.

Those conversations and meetings resulted in revisions to the Student's IEP, and an increased level of support. No evidence suggests that the resulting IEP, complete with a plan to move the Student back to the neighborhood school, was not calculated to provide a meaningful educational benefit at the time it was drafted. No evidence was presented whatsoever regarding the implementation of that IEP during the first few days of the 2012-13 school year.

The Parent has not established a denial of FAPE from August 16, 2011 through September 11, 2012. No compensatory education will be awarded for this period of time.

Section 504
September 11, 2012 through April 24, 2013

On the NOREP exiting the Student from special education upon revocation of parental consent, the District notes its position that the Student was IDEA eligible at that time. Taken as a whole, the District has consistently maintained that the Student is IDEA eligible and has been at all times pertinent to this matter. I agree with the District's position, and therefore determine that the Student is and was a protected handicapped student at all times.

The Student was entitled to the protections and safeguards of Section 504 even while the Parent had revoked consent for IDEA services. *See also, Pre-Hearing Order*. There is no dispute that the Student did not receive a Section 504 plan, formalizing the provision of Section 504 accommodations, at any time. The District's failure to provide a written Section 504 plan, therefore violates Chapter 15.

The record does not, however, establish what regular education benefit the student was deprived of as a result of the District's failure to provide a Section 504 plan. In order to substantiate an award of compensatory education, the Parent must link the lack of a Section 504 plan to some denial of regular education benefits. To this end, the Parent points to the Student's remarkably poor academic performance during the 2012-13 school year. In doing so, the Parent highlights the symptom of an allegedly denied

benefit without saying what benefit was denied.[5] The record is silent as to what an appropriate Section 504 plan should have contained (particularly in light of the Parent's blanket rejection of Emotional Support), and the Parent makes no argument in this regard.

For the forging reasons, the Parent has proven that the District violated Section 504, as implemented through Chapter 15, by failing to provide a Section 504 plan from September 11, 2012 through April 24, 2013. The Parent, however, has not established that any regular educational benefit was denied as a result. Consequently, the Student is not entitled to compensatory education for this period of time.

FAPE and Compensatory Education
April 24, 2013 through the present

Although the Student finished the 2012-13 school year and started the 2013-14 school year as a regular education student, the District had evaluated the Student in March of 2013 and had proposed an IEP in April of 2013. The Parent, as part of a blanket rejection of all Emotional Support, rejected the District's proposal.

It is important to make a fine distinction between the end of the Parent's consent revocation and any agreement to start IDEA services. As discussed in the Pre-Hearing Order, parental revocation of consent for special education constitutes a legal defense for LEAs. For periods of time when parents revoke consent, the District has no obligation to provide a FAPE. In the Pre-Hearing Order in this case, I determined that the revocation was operative from September 11, 2012 through April 24, 2013. As a result, the District had no obligation to provide a FAPE pursuant to the IDEA during that time. The end of this legal defense, however, does not suggest that the Parent consented to the resumption of special education services on the same date.

The District properly characterizes the March 2013 ER as an *initial* evaluation. The Student had been exited from special education and, at that time, was a regular education student. The resulting IEP of April 2013 is also properly considered an offer of initial services as it would move the Student from regular education into special education. The IDEA prohibits LEAs from implementing an initial IEP without parental consent, and further prohibits LEAs from requesting a due process hearing to override

[5] The record, taken as a whole, indicates that *both* parties believe that the Student was IDEA-eligible at all times, consent revocation notwithstanding. It is not at all surprising that the Student's grades plunged when all special education was removed. The record, as a whole, strongly suggests that the removal of special education, as opposed to the lack of regular education accommodations, is the primary cause of the Student's poor performance. I, however, base my decision on the lack of evidence concerning what benefit was denied - not the likely cause of the Student's declining performance.

the parental consent requirement for the provision of initial services. *See* 20 U.S.C. § 1414(a)(1)(D).

The Parent has not provided consent for initial services since the consent revocation on September 11, 2012. The IDEA, therefore, prohibited the District from providing special education and also prohibited the District from requesting a hearing. At the same time, it is clear that the Parent refused to provide consent because the Parent believed that the offered IEP was not only inappropriate, but would harm the Student.

The Student's need for Emotional Support is exceedingly well-documented. In 4th grade, the Student exhibited serious behavioral problems. As a result, the District evaluated the Student and determined that the Student qualified as a student with an emotional disturbance in addition to SLD. The District then provided an IEP to address the Student's emotional needs and moved the Student to a placement in which Emotional Support could be provided. The move to an emotional support placement, albeit at the supplemental level, was followed by a 5th grade year without serious behavioral incidents in school. I am persuaded that the elimination of dangerous behaviors is attributable to the addition of emotional support.

Even disregarding the Student's historic need for emotional support, the March 2013 ER comprehensively examined the Student's emotional needs. By formally and informally obtaining behavioral information from the Student, Parent and teachers, and by conducting a formal observation, the District's evaluator determined that the Student qualified as a student with an emotional disturbance and required emotional support. This conclusion is overwhelmingly supported by both the ER itself and by the record as a whole. That ER was then used to develop an IEP in April of 2013. Given the findings in the ER, it was not only appropriate, but necessary for the District to propose an Emotional Support placement. Failure to offer such support on the heels of the March 2013 ER would have been plainly inappropriate.

The record of this matter also very clearly indicates that the *only* reason why the Parent rejected the April 2013 IEP was because that IEP would have moved the Student into a supplemental emotional support program.[6] Moreover, the Parent concedes that the supports and services contained in the April 2013 IEP are necessary and appropriate. (*See Parent's Closing Brief* at 16). Said differently, the Parent accepts everything in the April 2013 IEP, but rejects the Emotional Support. Offering Emotional Support, however, was appropriate.

[6] In her closing brief, the Parent avers that she wrote that the Student required support in Math and Written Expression on the NOREP rejecting the April 2013 IEP. This is not supported by the evidence. The NOREP is S-35. The only comments from the Parent on the NOREP concern the rejection of any Emotional Support placement.

The Parent argues that she is permitted to accept some portions of an IEP and reject others. In support of this argument, the Parent references 34 CFR § 300.518(c). The plain language of that regulation makes the regulation applicable only during the pendency of due process proceedings, and only when a student is transitioning from Part C to Part B services, and only after a parent provides consent for the initial provision of special education services. None of those conditions apply in this case. Moreover, apart from the NOREP that the District did *not* generate (discussed in the Pre-Hearing Order), there is no evidence that the Parent ever provided consent to portions of the April 2013 IEP.

The Parent also points to 34 CFR § 300.300(d)(3). According to that regulation, "a public agency may not use a parent's refusal to consent to one service or activity under paragraphs (a), (b), (c) or (d)(2) of this section to deny the parent or child any other service, benefit, or activity of the public agency …" Paragraph (b) is the regulation concerning parental consent. As such, the District cannot deny agreed-to services because the Parent rejected a portion of the IEP. However, the Parent did not reject a portion of the IEP. The Parent rejected the IEP in its entirety because it proposed Emotional Support. Again, there is no clear, compelling or preponderant evidence that the Parent agreed to any part of the April 2013 IEP - discounting a NOREP that the District did not generate.

Even if I were to accept the Parent's contention, in the absence of evidence, that portions of the April 2013 IEP were accepted, it is not clear how the District could have implemented only portions of that document. The provision of emotional support in a supplemental Emotional Support placement is inextricably intertwined with the IEP as a whole. While the IEP calls for the Student to spend 6 hours of a 6.5 hour day in regular education, it is not clear how any portion of the April 2013 IEP could be implemented without emotional support. It is not clear that the IDEA regulations permit such practical considerations, but it is clear that the Parent rejected the April 2013 IEP *in toto*, that the April 2013 IEP was appropriate, and that IDEA regulations prohibit the District from implementing a rejected, initial IEP.

For the forging reasons, the Student is not entitled to compensatory education from April 24, 2013 through the date of this decision.

IEE at Public Expense

The Parent's right to an IEE at public expense is predicated upon a disagreement of the District's last evaluation. The Parent received the ER on March 26, 2013 and requested an IEE roughly three months thereafter. In other cases, I have determined that a significant lag between receipt of a LEA's evaluation and a demand for an IEE

evidences that there was no disagreement with the LEA's evaluation. In this case, whether or not the Parent affirmatively and contemporaneously disagreed with the March 2013 ER, it is clear that the Parent objected to anything suggesting that the Student requires emotional support. On this basis, I determine that the threshold conditions triggering the Parent's right to request an IEE at public expense are present in this case. As such, the District must prove that its ER was appropriate.

The Mach 26, 2013 ER was appropriate. As an initial evaluation, the ER must substantively comply with 20 U.S.C. § 1414(b) and (c). These requirements are numerous, but all have been satisfied. The District's evaluator used multiple, technically sound instruments, and no one instrument was used as the sole criteria for the eligibility determination. All areas of suspected disability were assessed by trained, knowledgeable personnel. To the extent that standardized, normative assessments were used, those assessments conformed to the publisher's guidelines. The resulting report was thorough, comprehensive, and provided sound recommendations to the IEP team.

It is noteworthy that the March 2013 ER was the driving force behind the April 2013 IEP. The Parent agrees that the April 2013 IEP is appropriate but for the provision of emotional support. I have found that the inclusion of emotional support was necessary. It stands to reason that if an IEP is appropriate, the ER from which that IEP is derived is also appropriate. This principle may not apply in all cases, but in this case the ER and IEP are both appropriate, and the IEP is clearly derived from the ER.

As the District has proven the appropriateness of its last evaluation, the Parent is not entitled to an IEE at public expense.

Dicta

The tragedy of this case is that both parties agree that the Student requires but is not receiving special education. The negative consequences of terminating special education are obvious and ongoing. The Pre-Hearing Order was drafted in such a way to enable the parties to put agreeable services in place without compromising their positions in this hearing. I hope that the parties have taken advantage of this leeway, and will find a way to put services in place for the Student if they have not done so already.

ORDER

Now, January 17, 2014, it is hereby **ORDERED** as follows:

1. The Student was not denied a FAPE from August 16, 2011 through September 11, 2012, and is not owed compensatory education for this period of time.

2. The District violated Title 22, Chapter 15 of the Pennsylvania Code by failing to develop a Section 504 plan from September 11, 2012 through April 24, 2013.

3. Despite the violation of Title 22, Chapter 15 of the Pennsylvania Code, the Student was not denied a FAPE in violation of Section 504 from September 11, 2012 through April 24, 2013, and is not owed compensatory education for this period of time.

4. The Student was not denied a FAPE from April 24, 2013 through the date of this Order, and is not owed compensatory education for this period of time.

5. The District's ER of March 2013 was appropriate and, consequently, the Parent is not entitled to an IEE at public expense.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER

Parents H.S., Student v. Northampton Area School District	ODR No. 14177-1314AS ODR No. 14208-1314AS

Preliminary Decision - CORRECTED[7]

Introduction and Procedural History

This is a preliminary decision concerning two threshold issues that were bifurcated from a consolidated case. The cases that were consolidated are ODR No. 14177-1314AS and ODR No. 14208-1314AS.

ODR No. 14177-1314AS was requested by the District upon denial of the Parent's request for an independent educational evaluation (IEE). The District's Complaint raises claims under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (IDEA).

ODR No. 14208-1314AS was raised by the Parent, who alleges that the Student was denied a free appropriate public education (FAPE) from the 2011-12 school year through the present. The Parent's Complaint arises under both the IDEA and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4.

The threshold issues concern pendency (i.e. the services that the student must receive while this hearing is pending) and the scope of the hearing. Regarding pendency, the Parent seeks to enforce a Notice of Recommended Educational Placement (NOREP). The District claims that the NOREP in question is a forgery and was not issued by the District. Regarding the scope of the hearing, the parties dispute the impact of the Parent's withdraw of consent for IDEA services upon Section 504 claims.

Issues

[7] This copy of a preliminary decision, originally issued on November 1, 2013, was corrected to fix typographical errors. This copy was issued on November 20, 2013. Three corrections were made: 1) in FF 3, the date of the NOREP rejection was corrected from June 8, 2013 to June 8, 2012, 2) in the last sentence of the fourth full paragraph on page 7, "June 2013 ER" was corrected to "June 2013 NOREP" and 3) in the first sentence of the fifth full paragraph on page 7, "June 2013 ER" was corrected to "June 2013 NOREP."

1. What is the Student's pendent placement?

2. Are claims arising under Section 504 available after the Parent withdrew consent for IDEA special education services?

Findings of Fact

1. On June 14, 2011, the District offered a NOREP placing the Student in Supplemental Emotional Support. The Parent approved the NOREP the same day. S-7.

2. The June 14, 2011 NOREP includes an underlined blank in which the Student name is typed, an underlined blank in which the "date sent" is typed, an underlined blank in which the Parent's name and address is typed, a salutation line with an underlined blank in which the Parent's name is typed, an underlined blank in which the District's Superintendent's name is typed, an underlined blank in which the Superintendent's name is signed by insertion of a digitized stamp of the Superintendent's signature, an underlined blank in which the name and title of a contact person for the Procedural Safeguards Notice is typed, and an underlined blank in which the contact person's phone number is typed. S-7.

3. On June 4, 2012, the District offered a NOREP placing the Student in Full Time Emotional Support. The Parent rejected the NOREP on June 8, 2012. S-17.

4. The NOREP included a blank space for the Parent to write the reason for rejection. In that blank, the Parent wrote: "My child is not going to [redacted]. There has to be other options." The reference to [redacted] is to the location of the full-time emotional support program. S-17

5. The June 4, 2012 NOREP includes an underlined blank in which the Student name is typed, an underlined bank in which the "date sent" is typed, an underlined blank in which the Parent's name and address is typed, a salutation line with an underlined blank in which the Parent's name is typed, an underlined blank in which the District's Superintendent's name is typed, an underlined blank in which the Superintendent's name is signed by insertion of a digitized stamp of the Superintendent's signature, an underlined blank in which the name and title of a contact person for the Procedural Safeguards Notice is typed, and an underlined blank in which the contact person's phone number is typed. S-17.

6. On July 23, 2012, the District offered a NOREP. The Parent rejected this NOREP on July 24, 2012.[8] S-20.

7. The NOREP included a blank space for the Parent to write the reason for rejection. In that blank, the Parent wrote: "My [child] belongs in [redacted] Elementary. [The District's Director of Special Education] is singling my [child] out due to medication side effects. We have in home help with [the Student]." S-20.

8. The July 23, 2012 NOREP includes a blank in which the Student name is typed, a blank in which the "date sent" is hand written, a blank in which the Parent's name and address is typed, a generic salutation line, an underlined blank in which the District's Superintendent's name is typed, an underlined blank in which the Superintendent's name is signed by insertion of a digitized stamp of the Superintendent's signature[9], an underlined blank in which the name and title of a contact person for the Procedural Safeguards Notice is typed, and an underlined blank in which the contact person's phone number is typed with a handwritten extension number and cell phone. S-20.

9. On August 27, 2012, the District offered a NOREP placing the Student in Itinerant Emotional Support. The Parent approved the NOREP the same day. S-24 at 30-33.

10. The August 27, 2012 NOREP includes an underlined blank in which the Student name is typed, an underlined blank in which the "date sent" is typed, an underlined blank in which the Parent's name and address is typed, a salutation line with an underlined blank in which the Parent's name is typed, an underlined blank in which the District's Superintendent's name is typed, an underlined blank in which the Superintendent's name is signed by insertion of a digitized stamp of the Superintendent's signature, an underlined blank in which the name and title of a contact person for the Procedural Safeguards Notice is typed, and an underlined blank in which the contact person's phone number is typed. S-24 at 30-32.

[8] It is somewhat unclear what placement is offered in that NOREP. The reference to Supplemental Emotional Support on page two of the NOREP appears to be an error. Page one of that document indicates that the Student requires placement in an emotional support classroom, and that supplemental emotional support in a regular education placement was considered and rejected. S-20.

[9] The signature is difficult to make out in the copy of the NOREP that was provided, but the parties agree that it is there.

11. The August 27, 2012 NOREP was the document by which the District offered a revised IEP and PBSP, both also dated August 27, 2012. S-24.

12. Following an incident in school and a meeting with District officials, the Parent revoked consent for special education services. In response, the District issued a NOREP on September 11, 2012. That NOREP states that the Parent revoked consent for special education services. Although the District recommended Emotional Support, the NOREP returned the Student to regular education in response to the revocation. The Parent approved this NOREP on September 11, 2012. S-26.

13. The September 11, 2012 NOREP includes a blank in which the Student name is typed, a blank in which the "date sent" is typed, a blank in which the Parent's name and address is typed, a generic salutation line, an underlined blank in which the District's Superintendent's name is typed, an underlined blank in which the Superintendent's name is signed by insertion of a digitized stamp of the Superintendent's signature[10], an underlined blank in which the name and title of a contact person for the Procedural Safeguards Notice is typed, and an underlined blank in which the contact person's phone number is typed. S-26.

14. The Parent sent a Permission to Evaluate - Evaluation Request Form (PTE - Request) to the District on January 5, 2013. S-27

15. The District issued an Evaluation Report (ER) on March 26, 2013. S-31. Broadly, the ER recommends emotional support and finds that the Student is IDEA-eligible with a primary disability category of Emotional Disturbance and a secondary category of Specific Learning Disability.

16. After the ER was drafted, but before the IEP team convened, the Parent sent an email to the District indicating that the Parent "will not agree to any emotional support." S-32.

17. The Student's IEP team convened and an IEP and PBSP were drafted on April 24, 2013. S-34. This IEP called for a supplemental level of Emotional Support (meaning that the Student would be outside of regular education for more than 20% but less than 80% of the school day). S-34 at 24.[11]

[10] The signature is difficult to make out in the copy of the NOREP that was provided, but the parties agree that it is there.

[11] I find that the description of services in the IEP comports with a supplemental level of emotional support. As such, the Penn Data section of the IEP (stating that the Student would be in regular education for 92% of the school day) is not accurate. *c/f* S-34 at 24 and S-34 at 25.

18. On April 24, 2013, the District issued a NOREP for the IEP and PBSP of the same date. The NOREP offered Supplemental Emotional Support. The Parent rejected the NOREP the same day.[12] S-35.

19. The NOREP included a blank space for the Parent to write the reason for rejection. In that blank, the Parent wrote: "[The Student] will not [be] going to your Emotional Support program! It is a hazard for [the Student] and made [the Student] worse in 5th grade." S-35

20. The April 24, 2013 NOREP includes a blank in which the Student name is typed, a blank in which the "date sent" is typed, a blank in which the Parent's name and address is typed, a generic salutation line, an underlined blank in which the District's Superintendent's name is typed, an underlined blank in which the Superintendent's name is signed by insertion of a digitized stamp of the Superintendent's signature, an underlined blank in which the name and title of a contact person for the Procedural Safeguards Notice is typed, and an underlined blank in which the contact person's phone number is typed. S-35.

21. After the Parent rejected the April 24, 2013 NOREP, the District did not implement the April 24, 2013 IEP. *Stipulation* NT at 47-48. As such, the Student remained in regular education.

22. On June 26, 2013, the District received a NOREP from the Parent. The Parent signed this NOREP, approving it, on June 25, 2013. This NOREP offers Itinerant Learning Support, and indicates that full-time placement in a special education classroom was considered and rejected based on the Student's progress in regular education. The IEP states that the Student "will receive instruction in the regular education classroom with supports listed in [the] IEP." The NOREP does not indicate which IEP that statement is in reference to. S-37.

23. The June 26, 2013 NOREP includes a blank in which the Student name is typed; a blank in which the "date sent" is typed (04/24/2013 is typed in that space); a unfilled blank for Parent's name and address; a generic salutation line; an underlined, unfilled blank for District's Superintendent's name; an underlined, unfilled blank for the Superintendent's signature; an underlined, unfilled blank for the name and title of

[12] The Parent wrote 4/23/13 in the date line by her signature. Whether the NOREP was issued on April 23 or April 24 does not make a difference in this case.

a contact person for the Procedural Safeguards Notice; and underlined, unfilled blanks for that person's phone number and email address. S-37.

24. On July 1, 2013, the District's Assistant Superintendent sent a letter to the Parent that, to the District's knowledge at that time, the District did not issue the NOREP that it received on June 26, 2013. In that letter, the District said that it would investigate. S-38.

25. The District investigated the origin of the NOREP, and concluded that it did not generate the document. *See, e.g.* NT at 33-36, 55, 70-71, 120-122, 198-200, 220-222, 236, 240-241.

26. I take judicial notice that, in Pennsylvania, NOREPs are issued on standard forms, and that blank copies of those forms are available to the public, online, through the Pennsylvania Training and Technical Assistance Network (PaTTAN), the Office for Dispute Resolution (ODR) and other organizations. I advised the parties that I would take judicial notice of this, and of the blank form itself. *See* NT at 61.

Discussion

Pendency

The IDEA provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed. until all such proceedings have been completed." 20 U.S.C. § 1415(j).

The term "any proceedings under this section" has been interpreted to include administrative due process proceedings and all federal appeals. *See M.R. v. Ridley Sch. Dist.*, 2012 U.S. Dist. LEXIS 113600 (E.D. Pa. Aug. 13, 2012). A hearing officer's order that sets a student's placement constitutes an agreement between the State and the parents. *See id* at *9. More importantly for the issue *sub judice*, the pendency provision provides an "automatic preliminary injunction" that requires LEAs to the then-current educational placement. *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996) citing *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982).

"In determining what constitutes the student's current placement, courts generally look to the operative placement actually functioning at the time the dispute arose—that is, the placement indicated in the IEP." *M.R.* at *8 citing *Drinker* at 875. The purpose of this

provision is to prevent LEAs from unilaterally changing a child's placement when a dispute arises, and to preserve the status quo during disputes. *M.R.* at *10 citing *Drinker*, 78 F.3d at 864; *L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ.*, 384 Fed. Appx. 58, 62 (3d Cir. 2010); *Ringwood Bd. of Educ. v. K.H.J.*, 469 F. Supp. 2d 267, 270 (D.N.J. 2006) (citing *N. Kitsap Sch. Dist. v. K.W.*, 130 Wn. App. 347, 123 P.3d 469, 482 (Wash. Ct. App. 2005)). At the administrative due process level, this standard suggests that the pendency rules require a continuation of the services that the Student is actually receiving, even if those services are different than what is written into the Students IEP. It is equally valid to find that the last agreed-to program and placement is pendent, and order implementation of that program and placement.

In this case, the Parent argues that I should impose the last agreed-to program and placement, as described in the NOREP that the District received on June 26, 2013 (the June 2013 NOREP or the NOREP). If that NOREP is pendent, the Student should be placed in Itinerant Learning Support. The Parent testified, unequivocally, that she did not draft the June 2013 NOREP. The Parent was much less certain about how she came into possession of the NOREP, but testified that – one way or another – it came from the District. The District personnel who testified were equally unequivocal that the District did not draft the NOREP, and this testimony was supported by testimony concerning the District's investigation into the matter. The District is certain that the Parent forged the NOREP. This contradicting testimony could be resolved by a credibility determination, but I decline to do so. I believe that it is unwise at this point to make credibility determinations about witnesses who are very likely to testify again in the plenary hearing. Fortunately, credibility is not the only way to resolve this preliminary issue.

Despite the District's certainty, it is also unnecessary for me to determine whether the Parent forged the NOREP. If the District issued the NOREP and the Parent approved it, the District is bound to it. If the District did not issue the NOREP, it is not bound to it – regardless of who drafted it.

To determine whether the District issued the NOREP, I examine its content in relation to the other NOREPs that were entered into evidence. There are very minor variations between undisputed NOREPs. Some of those NOREPs include underlined blanks, others include open blanks. There are also very minor variations in the format of the Parent's address in the undisputed NOREPs.

In comparison, the June 2013 NOREP is significantly different from the rest. It is the only NOREP that omits the Parent's address. It is the only NOREP that does not include the Superintendent's typed name. It is the only NOREP that does not include the Superintendent's signature stamp. It is the only NOREP in which the date line by the

Superintendent's signature is blank. It is the only NOREP that leaves the blanks for the Procedural Safeguards Notice contact person's name, title and phone number unfilled.

District personnel testified that the District's software fills in those blank spaces, and that is the reason why those blanks are filled in on every other NOREP. Even without this testimony, and regardless of the mechanism, the evidence in this case clearly demonstrates that the District routinely and consistently fills in those blanks when issuing NOREPs. The omissions in the June 2013 NOREP are striking in comparison.

Beyond form, the June 2013 NOREP is also striking in its substantive differences from all other NOREPs. Starting in June of 2012, the Parent consistently rejected all NOREPs that called for the Student to spend significant time in an Emotional Support (ES) classroom. The Parent approved a NOREP that called for some emotional support, but outside of an ES classroom. The argument between the Parent and the District leading up to the April 2013 IEP meeting focused on whether the Student should be placed in an ES classroom. The Parent preemptively rejected any such placement. Similarly, the Parent rejected the April 2013 NOREP because it called for an ES classroom placement.

At the same time, the District has consistently determined that the Student requires some level of emotional support services. All of the undisputed NOREPs call for emotional support, and all but one of the undisputed NOREPs call for significant time in an ES classroom. Even when the Parent revoked consent, the revocation NOREP notes the District's belief that the Student requires emotional support. The June 2013 NOREP is the only NOREP that makes no reference to emotional support (the service or the classroom). It is the only NOREP that references Learning Support.

If I were to accept the Parent's contention, I would have to believe that the District made a radical departure from all prior recommendations to issue a NOREP that conforms to the Parent's desires. I would also have to believe that the District chose to ignore its most recent ER. I would also have to believe that the District was willing to ignore the large portions of its last-offered IEP that relate to an ES placement. I would also have to believe that District broke from its established NOREP-drafting practices when making these changes. Again, without any credibility determination, the preponderance of documentary evidence in this case makes it impossible for me to find that the District drafted the June 2013 NOREP.

I make no finding concerning how the June 2013 NOREP came into existence. I find, however, that the District did not draft it. I will not bind the District to a NOREP that it did not draft.

Concluding that the June 2013 NOREP is not the Student's pendent placement is only the first step in determining what the Student's pendent placement is. The parties stipulate that the last offered IEP was never implemented because it was rejected by the Parent. Therefore, continuation of the services that the Student is actually receiving places the Student in regular education during pendency. Similarly, the last-approved NOREP is the document that removes the Student from special education based on the revocation of parental consent. Imposing the last approved placement, therefore, also yields placement in regular education during pendency.

I am exceedingly reluctant to conclude that regular education is the Student's pendent placement. Both parties agree that the Student is currently in need of support. The District has offered a rather intensive level of emotional support. The last-implemented IEP also provides emotional support, albeit at a much less intense level. Of course, occurrences under the last-implemented IEP are what prompted the Parent to revoke consent for special education, and the Parent alleges that the last-implemented IEP was not appropriate. As a result, maintenance of the status quo, implementation of the last-approved NOREP, or implementation of the last-implemented IEP all yield results that both parties believe are contrary to the Student's interest.

Despite my reservations, I must conclude that the Student is a regular education student for purposes of pendency. I will, however, require the parties to meet and discuss what services can be provided during the pendency of these proceedings. If the parties agree to the implementation of any services during pendency, such an agreement may not be presented as evidence during this hearing, and the District will assume no continuing obligation to provide those services when pendency expires. Bluntly, my order is intended to be a mechanism by which the parties may put mutually-agreeable services in place without compromising their positions.

Revocation of Parental Consent for Special Education Services

Regarding parental consent for special education services, in pertinent part, the IDEA requires as follows:

> If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent … the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency requests such consent …

20 U.S.C. § 1414(a)(1)(D)(ii)(III), (III)(aa). As a result, when parents withdraw consent for special education services, schools face no liability for failure to provide the services for which consent is withheld.

The facts clearly establish that the Parent withdrew consent for special education services on September 11, 2012. The Parent argues that consent was provided again when the Parent approved the June 2013 ER, but the District did not issue that document. From September 11, 2012, the only NOREP offered by the District was the NOREP of April 24, 2013. The Parent rejected that NOREP because she disagreed with the District's offer of an ES placement. In doing so, the Parent did not reject special education outright, but rather expressed a disagreement with the offered services. The Parents comments on the April 2013 NOREP, and the Parent's email of April 23, 2013, compel the conclusion that the Parent desired (and desires) special education services – just not the services that the District offered.

In a technical sense, the Parent never provided consent for special education after revoking consent in September of 2012. I find that it is inequitable, however, to preclude IDEA claims arising after April 24, 2013 simply because the Parent was unwilling to approve services that she believed were inappropriate. As such, the Parent's revocation effectively expired on April 24, 2013. This does not imply that the District was obligated to implement programs or placements that the Parent explicitly rejected. It is quite possible that the District completely discharged its IDEA obligations through the issuance of the April 24, 2013 IEP and NOREP. I make no finding in that regard at this preliminary stage because there is no record concerning the appropriateness of the offered-but-rejected April 2013 IEP. Rather, I find only that the absolute bar on IDEA claims that flows from the revocation of consent is lifted after April 24, 2013.

The specific question at hand, therefore, is whether the Parent may pursue claims arising under Section 504 between September 11, 2012 and April 24, 2013. The Parent argues that withdrawal of consent for IDEA services has no impact upon the Student's rights arising under Section 504. As such, the Parent argues that the Student may be entitled to compensatory education between September 11, 2012 and April 24, 2013 if the District violated Section 504, even though IDEA consent was withdrawn.[13] District

[13] The threshold issue addressed in this preliminary decision is whether the Student's claims under Section 504 can survive the revocation of the Parent's consent for IDEA services. By necessary implication, the Parent argues that the Student was 504-eligible at all times. All IDEA-eligible students are also protected by Section 504, and (based on the evidence and testimony so far) it appears that the District has never claimed that the Student is not IDEA-eligible, even while consent for IDEA services was revoked. For its part, the District has not yet presented a position or argument about the Student's 504 eligibility. The question is whether the claim can go forward, not whether the Student was eligible during the time in question.

takes a contrary position, arguing that the IDEA revocation terminated the District's obligations both under the IDEA and Section 504.

I find the Parent's argument persuasive. Although they are related, the IDEA and Section 504 accomplish different goals. Section 504 is a *regular education* law, assuring freedom from disability-based discrimination by providing access to *regular education* programs. With appropriate Section 504 accommodations, students with disabilities are able to access the same educational opportunities offered to their non-disabled peers. In contrast, the IDEA is a *special education* law, assuring that students with disabilities obtain a meaningful benefit from *special education* programs. With IDEA programming, students with disabilities are able to access different educational programs that are not typically offered to their non-disabled peers. It is logical that a parent can refuse special education while still demanding access to regular education.

There are, however, connections between the IDEA and Section 504. All IDEA-eligible students are also 504-eligible. The District correctly points out in its brief that Section 504 regulations specify that compliance with the IDEA, through implementation of an appropriate IEP, is one way that schools can satisfy their Section 504 obligations. *See* 34 C.F.R. § 104.33(b)(2).

The Office for Civil Rights (OCR) has also considered the interplay between the IDEA and Section 504. In *Letter to McKethan*, OCR Guidance Letter (1996), 25 IDELR 295, 25 LRP 4267, OCR considered this question: "Once a school district has determined a student disabled within the meaning of IDEA and has developed an IEP which conforms to requirements, can parents reject IDEA services and then compel the school district to develop an individualized education program under Section 504?" *Id*. In answering this question, OCR opined as follows:

> Essentially, there are two groups of students who are "qualified students with a disability" under Section 504. The first group includes students who qualify for regular or special education and related aids and services under Section 504 and, additionally, are eligible for services under the IDEA. The second group would include students who are qualified for purposes of Section 504 but do not have a disability recognized by the IDEA. For the first group of students (qualified for services under Section 504 as well as under the IDEA), the implementation of an IEP developed under the IDEA is how the Section 504 requirements found in Section 104.33 are met. Some other means of providing an appropriate education under Section 504 must be available for those students in the second group (qualified under Section 504 but not under the IDEA).
>
> Therefore, the answer to your question would be that by rejecting the services developed under the IDEA, the parent would essentially be rejecting what would be offered under Section 504. The parent could not

> compel the district to develop an IEP under Section 504 as that effectively happened when the school followed the IDEA requirements.

In its brief, the District points to *Letter to McKethan* in support of its argument. As applied to this case, I find that *Letter to McKethan* does not, by itself, preclude the Parent's Section 504 claims from September 11, 2012 to April 24, 2013. I make this conclusion on the following bases:

First, unlike the circumstances implied by the question in *Letter to McKathan*, the Parent did not reject services developed under the IDEA and then demand an IEP. There are significant, substantive differences between IEPs and Section 504 agreements. The former is designed to conform to the mandates of the IDEA. The latter is a comparatively informal statement of a student's needs and the accommodations that the student will receive. The Parent does not claim entitlement to an IEP during the period in which the IDEA revocation was in place. At least one court outside of this jurisdiction has recognized the importance of this distinction:

> Even without resort to *Letter to McKethan*, the IDEA's implementing regulations are clear that a school district has no obligation to develop an IEP once parental consent is revoked. *See* 34 C.F.R. § 300.300(b)(4)(iv). However, *Letter to McKethan* has no direct applicability to this case, as Plaintiffs do not seek to "compel the district to develop an IEP under Section 504," but rather request a Section 504 plan.

Kimble v. Douglas County Sch. Dist. Re-1, 925 F. Supp. 2d 1176, 1184 (D. Colo. 2013).

Second, both the school's question and OCR's answer in *Letter to McKethan* presume that the rejected IEP would have offered appropriate Section 504 accommodations. Even assuming that the "IEP under Section 504" referenced in *Letter to McKethan* is completely analogous to a Section 504 agreement, the appropriateness of the offered services is a precondition to the letter's applicability. As discussed above, no record has been made concerning the appropriateness of the accommodations offered in the IEP that was in place when the Parent withdrew consent (as measured by the IDEA or Section 504).

Third, *Letter to McKethan* is neither a law nor a regulation. I am unaware of any precedent in this jurisdiction (Pennsylvania or the Third Circuit) that adopts, or even references, *Letter to McKethan.* Elsewhere, only one court has found *Letter to McKethan* persuasive: in *Lamkin v. Lone Jack C-6 Sch. Dist.*, 2012 U.S. Dist. LEXIS 188808 (W.D. Mo. Mar. 1, 2012), the United States District Court for the District of Missouri dismissed Section 504 claims and found that "Plaintiffs' revocation of services under IDEA was tantamount to revocation under § 504 and the ADA." *Id* at *12.

However, this was – explicitly – an alternative reason for dismissal. The primary reason for dismissal was failure to exhaust administrative remedies. *Id* at *10-11. The alternative nature of the *Lamkin* court's reference to the OCR letter was noted by the *Kimble* court when rejecting the applicability of the *Lamkin* decision:

> The Court finds the *Lamkin* decision unhelpful, as its primary focus was on the plaintiffs' failure to exhaust administrative remedies, and its reliance on *Letter to McKethan* was an alternative basis for its holding and did not consider the larger statutory and regulatory context.

Kimble v. Douglas County Sch. Dist. Re-1, 925 F. Supp. 2d 1176, 1183-1184 (D. Colo. 2013).

Fourth, again looking outside this jurisdiction, the only other court to explicitly consider *Letter to McKathan* is the United States District Court for the District of Colorado in the aforementioned *Kimble v. Douglas County*. In that case, the court ultimately held as follows:

> Thus, the Court holds parental revocation of consent for special education and related services under the IDEA does not eliminate the broader protection of Section 504 and the ADA. For a student with a qualifying disability under Section 504 and the ADA, the student's right to be free from discrimination under those statutes exists without regard to her eligibility, or her parents' consent for, services under the IDEA.

Kimble v. Douglas County Sch. Dist. Re-1, 925 F. Supp. 2d 1176, 1184 (D. Colo. 2013). As such, the only court to directly consider *Letter to McKathan* (not as an alternative) determined that an IDEA waiver does not constitute an automatic Section 504 waiver.

The applicability of *Letter to McKathan* notwithstanding, the District also points to a number of cases as standing for the proposition that "§ 504 claims premised on the absence of FAPE must be dismissed when FAPE-based IDEA claims are rejected." *District's Brief* at 6. Specifically, the District cites to *Sellers by Sellers v. Sch. Bd. Mannassas, Va.,* 141 F.3d 524, 528-29 (4th Cir. 1998); *N.L. ex rel. Mrs. C. v. Knox County Schools,* 315 F.3d 688 (6th Cir. 2003); *Monahan v. Nebraska,* 687 F.2d 1164 (8th Cir. 1982); *Mark H. v. Lemahieu,* 513 F.3d 922 (9th Cir. 2008); *Urban,* 89 F.3d 720; *Lamkin v. Lone Jack C-6 School Dist.*, 2012 WL 8969061 (W.D. Mo. 2012); and *Doe v. Arlington Cnty. Sch. Bd.,* 41 F.Supp.2d 599, 608 (E.D. Va. 1999). I will address these cases in order:

Sellers by Sellers v. Sch. Bd. Mannassas, Va., 141 F.3d 524 (4th Cir. 1998) says nothing about the availability of claims under Section 504 after consent for IDEA services is revoked. *Sellers* concerns the availability of remedies under Section 504

after coextensive IDEA claims are defeated on the merits. The case is, in some ways, similar to *P.P. v. West Chester Area School District*, 585 F. 3d 727 (3rd Cir. 2009).

N.L. ex rel. Mrs. C. v. Knox County Schools, 315 F.3d 688 (6th Cir. 2003) deals primarily with predetermination, and says nothing about the impact of an IDEA revocation upon Section 504 claims. *N.L.* does illustrate, however, that Section 504 claims do not survive after IDEA claims are defeated on the merits when both claims arise out of the same actions.

Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982) concerns an inconsistency between Nebraska law and the federal special education law that came before the IDEA. As with the cases referenced above, *Monahan* does not discuss the issue *sub judice*. To the extent that Section 504 was an issue, *Monahan* suggests that when IDEA and Section 504 claims arise out of the same actions, Section 504 claims should be dismissed if the IDEA claims are unsuccessful on the merits.[14]

Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008), like the cases cited above, says nothing about the impact of IDEA revocation upon the availability of Section 504 claims. Moreover, in *Lemahieu*, the Ninth Circuit concluded that the "district court held that the availability of injunctive relief under the IDEA precludes suits for damages under § 504 for government actions that violate both statutes. This conclusion was erroneous…" and "The district court thus erred when it held that the H. family's § 504 claim attempts "to correct what is in essence a mere violation of a [FAPE] under the IDEA," and that the IDEA is therefore the H. family's exclusive remedy." *Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir. Haw. 2008). "In sum, availability of relief under the IDEA does not limit the availability of a damages remedy under § 504 for failure to provide the FAPE independently required by § 504 and its implementing regulations." *Id* at 935. To the extent that *Lemahieu* is on point at all, it suggests that Section 504 and the IDEA are separate, and that Section 504 claims may survive even after IDEA claims fail.

Lamkin v. Lone Jack C-6 School Dist., 2012 WL 8969061 (W.D. Mo. 2012) is discussed extensively above. I do not find it to be persuasive for the reasons stated above.

Doe v. Arlington Cnty. Sch. Bd., 41 F.Supp.2d 599, 608 (E.D. Va. 1999) holds that "where the IDEA claims are subject to dismissal the § 504 claims based upon the same allegations, must also be dismissed." *Doe v. Arlington County Sch. Bd.*, 41 F. Supp. 2d 599, 608 (E.D. Va. 1999). As with the other cases, *Doe* does not discuss consent revocation.

[14] Both the Nebraska and federal special education laws changed significantly after *Monahan.*

In sum, with the exception of *Lemahieu*, all of the cases cited by the District can fairly stand for the proposition that when 1) IDEA claims and Section 504 claims arise out of the same facts and 2) there is a decision on the merits regarding the IDEA claims and 3) the IDEA claims are not successful then 4) the Section 504 claims also fail. As such, these cases are off point. The question at hand is whether the Parent can proceed with Section 504 claims after IDEA consent was revoked. None of these cases speak to that question.

I am persuaded by the logic of the Parent's argument, and I find *Letter to McKathan* both distinguishable and unpersuasive. With the exception of *Lamkin v. Lone Jack C-6 School District,* I am unaware of any case that supports the District's argument. *Lamkin* is not binding in this jurisdiction, and I find it unpersuasive for the same reasons articulated in *Kimble v. Douglas County.* I, therefore, find that revocation of consent for IDEA services does not, by itself, preclude claims arising under Section 504 during the same period of time.

Conclusions

The Parent points to a NOREP as the document establishing pendency. The Parent failed to establish the authenticity of that NOREP, and I conclude that NOREP was not issued by the District. Instead, September 11, 2012 NOREP, by which the Parent revoked consent for special education, constitutes the Student's last agreed-to placement, and regular education is the status quo. Regular education is, therefore, the Student's pendent placement.

Nothing in this decision requires the parties to maintain a placement that both parties agree does not serve the Student's needs. The parties must meet and discuss what services can be implemented during pendency, in accordance with the decision above and the order below.

The Parent revoked consent for IDEA services on September 11, 2012, and that revocation remained effective until April 24, 2013. During this period of time, the Parent may not pursue claims arising under the IDEA, but may pursue claims arising under Section 504.

ORDER

And now, November 1, 2013 it is hereby **ORDERED** that:

1. The Student's pendent placement is regular education without an IEP.

2. As soon as possible, the Parties shall meet and discuss what services, if any, are mutually-agreeable. The District shall provide those services during the pendency of these proceedings. Evidence concerning any such agreement shall not be admitted in these proceedings. The District assumes no obligation to continue any such service once pendency expires.

3. The Parent may pursue claims arising under Section 504 between September 11, 2012 and April 24, 2013.

/s/ Brian Jason Ford
HEARING OFFICER