***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: P.A.

Date of Birth: [REDACTED]

ODR No. 15270-1415AS

CLOSED HEARING

| Parties to the Hearing: | Representative: |
|---|---|
| Parent[s] | Catherine Merino Reisman, Esq.<br>Freeman Carolla Reisman & Gran<br>19 Chestnut St<br>Haddonfield, NJ 08033 |
| Pennsbury School District<br>134 Yardley Avenue<br>PO Box 338<br>Fallsington, PA 19058 | Jane Williams, Esq.<br>Sweet Stevens Katz & Williams<br>331 E. Butler Avenue<br>New Britain, PA 18901 |

Dates of Hearing: 12/08/14, 12/16/14, 01/19/15

Record Closed: 02/13/15

Date of Decision: 03/02/15

Hearing Officer: Brian Jason Ford

## Introduction

This matter arises under 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 Parents bring this due process hearing on their own behalf and on behalf of their child, the Student.[1] The Student has [redacted] disorder and has engaged in self harming behaviors. The Parents claim that the District committed a child find violation by failing to propose a special education evaluation and offer appropriate services. The Student currently attends a residential program in [another State].

## Issues

1. Did the District violate its Child Find duties by failing to propose an evaluation for the Student?

2. Did the District deny the Student a free appropriate public education (FAPE) under either the IDEA or Section 504 and, if so, is the Student entitled to compensatory education as a remedy?

3. Are the Parents entitled to tuition reimbursement?

## Findings of Fact

### Background Educational History Prior to the 2012-13 School Year

1. At all times pertinent to this matter, the Parents have resided within the geographical boundaries of the District.

2. There is no dispute that the District publishes information about its special education programs, including information about evaluation procedures and the right to seek special education evaluations on its website and in its handbooks. J-40.

3. The Student began attending District schools in Kindergarten, the 2003-04 school year. J-6 at 1.[2]

4. The Student's health records prior to February 19, 2014 are unremarkable. J-6.

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[1] References to the Parents' and Student's names and other identifying information is omitted to the greatest extent possible.

[2] Exhibits in this matter were submitted jointly in accordance with ODR's generally applicable pre-hearing directions except as explicitly noted. Exhibits were submitted electronically as part of ODR's pilot program for electronic submissions. Counsel for both parties are highly commended for their work in coordinating with each other to present exhibits jointly through the pilot. This work is indicative of the civility and professionalism that were hallmarks of this hearing. This hearing officer truly appreciates the attorneys' recognition that courtesy and zealous advocacy can go hand in hand.

5. The Student was an 8th grader in the 2011-12 school year. During that year, the Student earned Bs in all classes except for a C in Social Studies and an A in German. J-1.

**2012-13 School Year (9th Grade)**

6. In the District, 9th grade is the first year of high school. NT *passim*.

7. At the high school, the District uses block scheduling. As a result, in general, class periods are longer and some subjects convene for only one semester of the school year. NT *passim*.

8. Several of the Student's teachers testified concerning the Student's academic progress and their observations of the Student. As a whole, the teachers described the Student as average to above average in terms of academic performance. None of the teachers testified that they observed anything of concern regarding the Student's behaviors or physical presentation. *See* NT 589-614.

9. The Student took an honors-level German class at the start of the 2012-13 school year. The Student's German teacher was not available to testify.

10. In November of 2012, the Student's mother wrote to the Student's Science teacher regarding incomplete lab assignments. The Student's mother described missing assignments as usual for the Student. J-56 at 2-3.

11. In the first semester of the 2012-13 school year, the Student's final exam grades were a C in Honors German, an F in History, and a D- in Science. The Student's final grades for the first semester were a B- in Honors German, a C+ in History, and a D+ in Science.

12. Student had two guidance counselors over the course of the 2012-13 school year (9th grade), Ms. S. and Ms. L. NT 33.

13. In February, 2013, the Student's mother wrote to Student's guidance counselor (Ms. S) saying that the parents were "wondering about focus issues with [Student]. [Student] is very bright, but I feel as if [Student] is struggling more as [Student] gets older." J-56

14. At the High School, guidance counselors are instructed to alert the Supervisor of Guidance if they have unusual social-emotional concerns about a student or if they observe or suspect self-harm. NT 709, 711, 722-723. As a matter of practice, teachers report such concerns to guidance counselors.

15. The Student's mother testified that she had conversations with the Student's guidance counselor in the winter of 2013 about the Student engaging in self-harming behaviors. The Student's mother also testified that one of the Student's teachers observed cuts on the Student's arm, and reported that observation to the Student's

guidance counselor. NT at 417-481. No documents or other testimony support or corroborate this testimony.

16. In March of 2013, the Student's mother contacted the Student's Science teacher by email concerning the Student's final grade and a missing book fee. In response to that email, the Science teacher wrote back explaining that the semester started well, but that many missing assignments at the end of the semester combined with a poor final exam brought the grade down. J-56 at 1-2.

17. The Student began to receive private psychotherapy in March of 2013. That continued through September of 2013. NT 466-467.

18. In May, 2013, Student's Culinary teacher wrote to [Student's] guidance counselor regarding Student: "[T]his [Student] has 22 Tardy and 5 absences. When [Student] is here [Student] does not work and socializes, pretty much getting nothing done. [Student] is in 9th grade, maybe we can help."

19. In the second semester of the 2012-13 school year, the Student's final exam grades were a C- in English, C- in Algebra, D- in Science. The Student's final grades were a C in English, C+ in Algebra and D+ in Science. J-1.

**2013-14 School Year (10th Grade)**

20. The Student was enrolled in the District for the entirety of the first semester of the 2013-14 school year. During that semester, the Student was enrolled in German (first Honors German, then German, as discussed below), Biology, Career Connections, Physical Education, and Safety Education. J-3

21. The first semester of the 2013-14 school year was divided into four "periods". The record is somewhat confusing as to whether all of the Student's first semester classes ran for all four periods. Regardless, the Student earned a B- in Safety Education in Period 1, a C- in Biology during Period 2, and an F in Career Connections during Period 3. No other grades for the first semester are reported. There are either blank spaces or "NG" for "no grade" in all other spaces. J-3.

22. In the first semester of the 2013-14 school year, the Student was marked as absent on 35.5 days and as tardy on three days. J-3

23. Mrs. G. was the Student's guidance counselor at the start of the 2013-14 school year. NT 33. At all times, Mrs. G. acted with the understanding that if she believed that a student required an evaluation, she should refer the student to the District's child study team (CST). Otherwise, it was Mrs. G.'s understanding that special education evaluations were initiated by parental request. NT at 100-101.

24. Mrs. G. did not have contact with either of the 2012-13 guidance counselors and did not receive documents from them. NT 33-34, 91.

25. The [redacted] Center (Center)[3] is a clinic for individuals with [condition redacted]. NT *passim*. The Student attended an inpatient program at Center at the start of the 2013-14 school year, as described below.

26. According to a letter from Center dated October 18, 2013, the Student started a 30-day inpatient, residential program at Center on September 9, 2013. J-11. September 9, 2013 is not the day that the Student started attending Center. The Student started attending on September 30, as discussed below. *See* J-19.

27. The record does not reveal exactly when the Parents informed the District that the Student would be attending Center. Regardless of the date, information was shared by phone and email. Testimony from District personnel and the Student's mother suggests that the Student's mother shared information about Center with the District by phone before sending email, but it is not clear when those calls were placed or exactly what information was shared.

28. On September 25, 2013, the Student's mother sent an email to inform Mrs. G. that the mother had picked up the Student early from school for an intake interview at the Center. *See, e.g.* NT 35, 85-86, 745.

29. The next day, September 26, 2013, the Student's mother informed the District by email that the Student would be attending Center for 30 days inpatient, starting the next Monday, which would have been September 30, 2013. The Student's mother asked the District for help with school work, and asked what forms the District needed from Center. J-9.

30. While attending Center, the Student was permitted only 1.5 hours per day for academic work. J-10.

31. On October 2, 2013, Mrs. G. contacted the Student's teachers asking for "notes/independent work [to] pass along to [the Student]." J-10.

32. On October 2, 2013, the Student was enrolled in Honors German 2.[4] In response to the request for notes or independent work, the Student's German teacher expressed concerns about the Student's ability to participate in Honors German 2. The teacher stated that the Student "really didn't retain anything from German 1 … [and] had zero drive to catch up or attempt to learn new material." However, the teacher was "somewhat aware of [the Student's] personal issues, so [he understood] where [the Student's apparent lack of motivation] was coming from." J-10

[3] It is common practice for hearing officers to not mention private facilities by name, even in the original, un-redacted copy of the decision. In this case, as multiple facilities are part of the record, I refer to the facilities by name for clarity. [NOTE: Names were redacted after original decision was issued.]

[4] The Student ended the prior school year with a B- in Honors German 1, but the entirety of that class took place in the first semester of the 2012-13 school year, and so the Student had not had any German for half a year by the start of the 2013-14 school year.

33. In the same email, the teacher reported that he would send work, but that the work was not intended to be completed independently. It involved listening comprehension and readings that some of the "top students" were not expected to complete on their own. J-10.

34. The email from the Student's German teacher prompted an internal discussion within the District, resulting in a decision to drop the Student from Honors German 2 to a lower-level German class without penalty, if Center would send necessary paperwork. The particulars of the District's internal conversation, and the email from the Student's German teacher were not shared with the Parents contemporaneously. Regardless, Center sent the paperwork, the change was made, and the Parents ultimately were aware of and approved the change. J-10, J-11, J-12, J-13, J-14.

35. The record as a whole supports a finding that the District did gather some notes and independent work for the Student while the Student attended Center inpatient. The record is ambiguous as to whether that work ever reached the Student. Regardless, the District did not provide direct instruction to the Student while the Student attended Center. *See* NT 40.

36. On November 4, 2013, the District sought additional information from Center via email. Although Center sent a letter on October 18, 2013, the District said that its pupil services department "never received any letter from Center regarding [the Student]." J-15. Specifically, the District sought information about the date of the Student's intake and expected discharge. The District needed information about these dates to figure out the Student's schedule and to determine "whether or not to keep marking [the Student] absent or withdraw then re-register [the Student] upon return." J-15.

37. In response to the District's November 4, 2013 inquiry, Center reported that the Student's anticipated discharge date was November 12, 2013, but that more time may be needed. J-15

38. A day later (November 5, 2013), Center sent a letter to the District saying that the Student began the residential program on September 30, 2013 and was tentatively set to be discharged on November 12, 2013. The letter reports that the plan was to discharge the Student to a partial hospitalization program for approximately four weeks, and that the Student would not be able to attend school while attending the partial hospitalization program. J-17.

39. On November 11, 2013, Center sent another letter to the District with recommendations for school upon the Student's return. Broadly, the recommendations were for reduced work, extra time to catch up, permission to leave class to speak with a counselor, and permission to eat lunch in the counseling office or nurse's office. J-20.

40. In the context of Center's November 5, 2013 letter, the recommendations in the November 11, 2013 letter are either suggestions for the Student's return to school from the partial hospitalization program which, at that time, was still four weeks away, or are suggestions for academic programing from the District while the Student attended the partial hospitalization program.

41. On November 13, 2013, Parents submitted paperwork for homebound instruction. J-21. That paperwork indicates a diagnosis of [redacted]. Through that paperwork, the Parents told the District that the Student could not attend school because the Student was attending a day treatment program (i.e. a partial hospitalization), confirming the information in Center's letter of November 11, 2013.

42. On November 18, 2013, the District referred the Student to its child study team (CST). J-23. In accordance with the District's practices, the Parents were not informed of that referral at that time. NT 117.

43. On November 21, 2013, the Supervisor of Guidance explained to the Parents that a team of psychologists and teachers would "gather to talk about interventions that [the Student] would need to meet with success…" NT 725. It is not clear as to whether the Supervisor of Guidance ever referred to the team as the CST specifically when talking with the Parents, but the general procedure and purpose of the meetings were explained to the Parents. NT 429-430, 511, 724-725.

44. In November of 2013, the Student's mother and Mrs. G. communicated about the Student's struggles in Algebra. On November 22, 2013, Mrs. G. sent an email to the Parents to inform them that she would be going out on maternity leave. Mrs. G. gave the name of her sub – Ms. L. – and suggested that the Parents should consider a peer tutor or a private tutor at the Parents' expense once the Student returned to school. J-56.

45. On November 25, the Student engaged in self-harming behavior. The Parents shared that information with the District the next day. NT 728-729.

46. Prompted by this information, the District generated a Permission to Evaluate (PTE) form. The form is dated November 27, 2013. J-26. The District's school psychologist also drafted a cover letter for the PTE, indicating that the PTE should have been sent with a Developmental History Form and a Behavior Assessment [System] for Children, Second Edition (BASC-2) for the Parents to complete and return. J-53. The cover letter is dated November 27, 2013, and it is not signed.

47. No District witness could testify affirmatively that the PTE, cover letter, and accompanying forms were ever sent to the Parents. *See, e.g.* NT 355, 372-373. As late as January of 2014, the District personnel who worked most closely with the Parents were unaware of the PTE. NT at 69-70. The Parents affirmatively testified that they did not see the PTE and other documents until March of 2014. NT 432-433.

48. Based on the foregoing facts, I find that the District drafted but did not send the PTE with the cover letter and accompanying documents on November 27, 2013.

49. On November 27, the Student was readmitted to Center. Center sent a letter to the District dated December 4, 2013, saying that Student was readmitted. At that time, it was expected that the Student would remain in residential treatment though December 26, 2013. J-30.

50. When the Student returned to residential treatment at Center, the District discontinued homebound instruction. During the period that the Student was on homebound (November 12 to 27, 2013), the Student received two hours of instruction in Biology. This was the only direct instruction provided by District while the Student was on homebound, but work for other classes may have also been sent home. *See* J-35.

51. The record in its entirety supports a finding that the District did not provide work to the Student when the Student was readmitted to Center in November of 2013. However, it seems clear that academic work was, quite appropriately, not a priority for the Student at that time, but the record cannot support a definitive finding in this regard.

52. On December 17, 2013, the Parents informed the District that the Student would not be returning for the remainder of the 2013-14 school year. J-28. At that time, the District did not know where the Student would be going.

53. [redacted] Residential Treatment Center (Residential Treatment Facility) is a residential treatment center located in [another State]. Residential Treatment Center is affiliated with a [another State] school. The school at Residential Treatment Center is accredited to provide both general and special education. NT 279-280.

54. At Residential Treatment Facility, the school and residential programs are in separate buildings. NT 303-304. Students attend school from 8:00 a.m. to 1:30 p.m., four days per week, year round. NT 258.

55. While not attending school, students at Residential Treatment Facility participate in a residential therapy program. The therapy program is leveled, and students exit the program after completing Level 7 of the therapy program, regardless of their academic progress.

56. Students attending Residential Treatment Facility receive regular progress updates and are placed on a Master Treatment Plan that is intended to integrated therapeutic, residential, medical and educational components. J-46.

57. The Parents enrolled the Student in Residential Treatment Facility on January 2, 2014. J-46.

58. Although the Parents previously informed the District that the Student would not be returning, the Parents did not immediately inform the District that they had sent the Student to Residential Treatment Facility.

59. On January 3, 2014, Mrs. G. returned from maternity leave. NT 87.

60. On January 10, 2014, Mrs. G. contacted Center to learn the Student's status. Center replied, saying that the Student had left Center and urged the District to contact the Parents for more information. J-33.

61. On January 15, Mrs. G. contacted the Parents by phone. The Student's mother told Mrs. G. that they had placed the Student in a boarding school in [another State]. J-34.

62. On January 23, 2014, the Student's mother wrote to Mrs. G. expressing concern about a letter from the District saying that the Student was failing classes. The Parent expressed confusion about how the Student could fail classes that the Student was medically excused from, and explain that the Student would be in school in [another State] though the summer. J-35.

63. Sometime after January 23, 2014, but before February 19, 2014, the District advised the Parents to withdraw the Student from school. NT 441-442, 445-446. The District sent that message through Mrs. G., who in turn was instructed by the District's attendance office.

64. Parents withdrew the Student from the District on February 19, 2014.

65. Residential Treatment Facility developed a Master Treatment Plan (MTP) for the Student on February 5, 2014. Regarding academics, the MPT at J-46 includes the following goal:

> Given daily classroom instruction, teacher feedback, and educational guidance counseling, the student will become an independent learner through participation in and completion of the objectives of the school level program by earning level 6 [in the therapeutic program].

65. The "educational support services" provided by Residential Treatment Facility to enable the Student to achieve the academic goal in the MTP were

- Regular School Program
- Monthly Progress Reports
- Term Grades
- Daily Work and Observation
- Term Parent-Teacher-Student Conference
- Academic Probation
- Small class size
- Limited academic class load
- Structured and monitored study time

- Instruction in study skills
- One-on-one tutoring as requested by the student
- Direct instruction in study skills
- Extra time to do homework
- Un-timed testing
- Test and homework instructions read to and clarified to student, upon request

66. The Student's transcript from Residential Treatment Facility reflects grades of mostly As and a few Bs in all classes. J-47.

67. A Licensed Clinical Social Worker who works with the Student at Residential Treatment Facility testified that the Student benefited from the therapeutic program at Residential Treatment Facility, that the Student has made significant strides regarding emotional wellbeing, and that the therapeutic supports at Residential Treatment Facility were "absolutely essential" for the Student to be able to access education. NT 267.

68. On March 4, 2014, the District, through its Supervisor of Special Education, sent a letter to the Parents saying that since November 27, 2013, the District had tried three times to obtain parental consent to evaluate the Student, did not have a reply but remained willing to evaluate. J-36. There is no evidence of any attempt on the District's part to secure permission to evaluate, save the PTE of November 27 – which was not transmitted to the Parents.

69. The March 4, 2014 letter included a copy of the November 27, 2013 PTE. J-36.

70. On March 24, 2014, the Parents wrote to the District to inform them, *inter alia*, that they intended to seek tuition reimbursement. J-37.

**2014-15 School Year**

80. The Parents requested this due process hearing on July 31, 2014.

81. The Student remains at Residential Treatment Facility and is expected to remain there for the entirety of the 2014-15 school year.

## Witness Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit,* 2003 LEXIS 21639 at *28 (2003); *See also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

In this case, all witnesses testified credibly in the sense that each witness told the truth as he or she remembered it. No witness was evasive; all were candid. This does not mean, however, that I assign equal weight to all witnesses. The testimony of the Parent's expert, a licensed psychologist who is also a certified school psychologist and a Diplomate of the American Board of School-Neuropsychology, is afforded no weight. Although the Parent's expert testified as an expert in school psychology, the clear function of his testimony was to instruct the Hearing Officer as to the District's legal obligations and/or to say what he would have done were he in the District's shoes. The Parents' expert did not evaluate the student, and his testimony sheds no light on the Student's needs. I have no doubt that the Parents' expert's testimony was honest. It was certainly responsive to the questions he was asked. But it was not helpful for purposes of fact-finding. Such testimony is very closely analogous to the so-called expert report in *Lebron v. N. Penn Sch. Dist.*, 769 F. Supp. 2d 788, 794-795 (E.D. Pa. 2011). That "report" was a critique of a Hearing Officer's decision, not an assessment of a student's needs. Testimony as to how I should resolve the case (as opposed to what actually happened or what should happen next) is unhelpful for the same reasons.

## 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 the party seeking relief and must bear the burden of persuasion.

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). Compensatory education is an equitable remedy. *Lester H. v. Gilhool,* 916 F.2d 865 (3d Cir. 1990).

### *IDEA Eligibility*

The IDEA and its implementing regulations establish a two-part test to determine eligibility. First, a student must have a qualifying disability. Second, by reason thereof, the Student must require specially designed instruction (SDI). *See* 34 C.F.R. § 300.8.

### *Child Find*

The IDEA statute and regulations require school districts to have in place procedures for locating all children with disabilities, including those suspected of having a disability and needing special education services although they may be "advancing from grade to grade." 34 U.S.C. §300.311(a), (c)(1).

### *Free Appropriate Public Education (FAPE)*

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

> Students with disabilities 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*

Compensatory education is the remedy for a denial of FAPE. Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorsees this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia,* 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of

FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or type of compensatory education is needed to put the Student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

*Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being." *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.,* 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila*., Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F., Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006)*; *M.L. v. Marple Newtown Sch. Dist.,* ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.,* ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a

LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona.* If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

### *Tuition Reimbursement*

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three-part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the *"Burlington-Carter"* test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

### *Section 504 / Chapter 15*

"Eligibility" under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504. Section 504 protects only "handicapped persons," and the question of whether a student is a handicapped person calls for an inquiry into how that term is defined. The definition is provided in the Section 504 regulations at 34 CFR § 104.3(j)(1): "Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."

The test is somewhat more defined under Chapter 15. 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.

*See* 22 Pa. Code § 15.2.

If a student is a handicapped person, Section 504 prevents school districts from discriminating on the basis of disability by denying the student 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.

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.

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

In this case, the Parents allege that the District violated its Child Find duties by not identifying the Student as IDEA-eligible. The Parents further allege that the District violated the Student's right to a FAPE by not providing special education and, at times, no education at all, and that the lack of an offer of FAPE from the District drove them to seek placement elsewhere. The Parents finally allege that the District's actions and inactions in this case also violated the Student's rights under Section 504. As remedies, the Parents seek compensatory education from September 25, 2013 to December 31, 2013, and tuition reimbursement at Residential Treatment Facility from January 2, 2014 through the present.

### *Child Find Claims*

Resolution of the Child Find claim requires a determination of when the District suspected or should have suspected that the Student had a disability. The Student's right to be found is in no way contingent upon the Parents' efforts to alert the District to the possibility of a disability, or upon the Parents affirmatively seeking an evaluation.[5]

The Student's academic progress through middle school was unremarkable, and there is no evidence of social or emotional trouble before the 2012-13 school year (9th grade). The Student finished the first semester of the 2012-13 school year – the end of some classes for the year under block scheduling – with a B-, C+ and D+. The D+ (a Science grade) stands out in comparison to prior grades, but one noticeably poor grade during the first half of the first year of high school, in and of itself, does not suggest the need for a special education evaluation. The Student's grades at the end of the second semester of the 2012-13 school year were somewhat lower – a C, C+, and D+. This year of lower grades as compared to middle school was appropriately concerning (especially to the Parents), but I do not find that these grades by themselves were enough to require the proposal of a special education evaluation.

What is more concerning than the Student's grades in the 2012-13 school year is the report of the Student's self harm in the winter of that year. The Student's mother testified that teachers observed self harm, and that she reported self harm to the District. I cannot give credence to this testimony for several reasons. First, regarding what the teachers saw, the testimony is uncorroborated hearsay – which is admissible in a due process hearing but cannot be used to form the basis of a decision. Second,

[5] Parental efforts to conceal a disability certainly mitigate against a school district's child find duties, but that is not the case in this matter.

self harm is not mentioned in any of the correspondences between the Parent and the District at that time. This stands in contrast to the documentation that was generated when self harm was reported in the 2013-14 school year. The evidence indicates that the Student engaged in inappropriate, but not atypical behavior during the 2013-14 school year, but these facts do not amount to a Child Find trigger.

[Redacted] and self harming behaviors do not suddenly appear. I have no doubt that the Student's [redacted] disorder began to manifest sometime during the 2012-13 school year. I must base this decision, however, on what the District knew or should have known at the time, and the evidence does not support a finding that the District should have suspected a disability during the 2012-13 school year.

The Student's wellbeing clearly took a turn for the worst during the summer of 2013, and the Student was placed into an inpatient treatment center for the treatment of [redacted] by the end of September of 2013. From September 26, 2013 the District knew that the Student was at an inpatient facility for individuals with [redacted]. *See* FF 29. Even if the District did not know what Center is (it did), from October 18, 2013, the District had confirmation that the Student was in treatment for [redacted]. *See* FF 26. Notice that a student requires full time, inpatient treatment for [redacted] is certainly information suggesting that the Student may have a disability, and may require specially designed instruction. Letters from Center during the Student's inpatient treatment suggesting the need for educational accommodations and modifications both support the need for testing and should have come as no surprise.

Even if I were to accept the District's argument that a PTE form was sent on November 27, 2013, the District took no action for over a month after learning of the Student's placement. I do not, however, accept the District's contention that the PTE and related documents were sent to the Parents on November 27, 2013. The documents were generated on November 27, 2013, but a preponderance of evidence suggests that they were not sent. The cover letter for the documents was never signed. The letter of March 4, 2014 references three attempts to obtain consent, but provides no dates. No evidence suggests that those attempts were made, and the testimony from District witnesses strongly suggests that there was no follow up. I would not accept the Parents' testimony alone as proof that the PTE was not sent in November of 2013, but the District's lack of documentation, combined with the fact that no District witness could affirmatively testify that the PTE was sent compels me to conclude that the Parents' version of events is accurate. The first time that the Parents received a PTE from the District was on March 4, 2014.

In addition to IDEA Child Find obligations, the initial placement at Center also triggered the District's obligations under Chapter 15. From receipt of Center's October 18, 2013 letter, the District had actual knowledge that the Student had physical or mental disability (redacted) which substantially limits or prohibits participation in the entirety of the Student's school program. At this point, the Student became a protected handicapped student under Chapter 15. As such, the District was obligated to determine whether accommodations were needed to enable the Student to access its programs

and, if necessary, offer accommodations in writing. The District did not do any of this. It must be noted that an IDEA evaluation would have satisfied the District's obligations under both the IDEA and Chapter 15, and that the Parents are not entitled to any additional remedy because both laws were violated. Rather, even if the Center placement did not trigger Child Find, the District still was obligated to determine what accommodations the Student needed.

### ***Compensatory Education Claims***

From September 26, 2013 through March 4, 2014, the District violated its duties under the Child Find provision of the IDEA by not proposing to evaluate the Student. This is a violation of the Student's procedural rights. To determine whether compensatory education is owed, however, requires a determination as to whether the Child Find violation caused a deprivation of educational benefits. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(III). The scope of that inquiry is limited from September 26, 2013 through January 2, 2014, the date that the Student enrolled in Residential Treatment Facility. Remedies after January 2, 2014 are limited to tuition reimbursement.

From September 30, 2013 through November 12, 2013, the Student was inpatient at Center. There, the Student could receive only 1.5 hours of academics per day, per Center's treatment procedures. Moreover, had the District immediately proposed an evaluation, it is difficult to imagine any circumstances under which the District could have completed an evaluation that complies with the IDEA while the Student was inpatient at Center. During this time, the Student was unavailable for education or evaluations. Although the District's failure to *propose* an evaluation was a procedural violation, this violation did not result in substantive harm while the Student was inpatient at Center.

From November 12, 2013 through November 26, 2013, the Student participated in a partial hospitalization program and received homebound instruction (albeit only two sessions). Although an evaluation should have been offered, I cannot conclude that the District's failure to evaluate the Student during these eleven (11) school days resulted in a substantive denial of FAPE.

On November 27, 2013, the Student returned to Center inpatient. As with the prior period of inpatient treatment, the District should have proposed an evaluation, but that failure did not result in substantive harm for the same reasons stated above. There is no evidence to suggest that the District could have evaluated the Student while the Student was inpatient at Center, and the record as a whole strongly suggests the contrary.

Further, for the entire period from September 30, 2013 through January 2, 2014, the Student was unable to attend school. Even if the District had somehow evaluated the Student during this time and offered services, the Student would not have been able to

benefit from those services. As such, I cannot find a substantive violation of the Student's right to a FAPE warranting compensatory education during this period of time.

### *Tuition Reimbursement Claims*

**Appropriateness of the District's Placement**

To resolve the Parents' demand for tuition reimbursement, the first step is to determine whether the District was offering a FAPE when the Parents placed the Student into Residential Treatment Facility on January 2, 2014. This placement occurred in the midst of the District's Child Find violation – roughly three months after the District was on notice that it should evaluate, and roughly two months before the PTE reached the parents. As such, at the time of the placement the District had not proposed an evaluation, much less determined eligibility or offered programming.

At this point, it must be noted that nobody has ever evaluated the Student to determine whether the Student is IDEA-eligible. While the Student is certainly protected by Section 504 and Chapter 15, and while there is certainly a need to evaluate the Student for IDEA eligibility, that evaluation has yet to happen. An [redacted] disorder could fall under the IDEA disability category of Other Health Impairment, and there is some evidence to suggest that the Student may have or have had an emotional disturbance. But it is entirely possible that the Student is not in need of special education as a result of any disability. Evidence from Residential Treatment Facility suggests that an intensive therapeutic program helped make the Student amenable to academic instruction, and that instruction was individualized and differentiated for the Student. The same evidence does not suggest that the Student received specially designed instruction (as defined by the IDEA) at Residential Treatment Facility, despite the fact that Residential Treatment Facility is licensed to provide such instruction in [another State].

While it remains to be determined whether or not the Student is actually IDEA eligible, the Parents argue that the District's Child Find violation is enough to satisfy the first prong of the Burlington Carter test in and of itself. I agree. In *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230 (U.S. 2009), the Supreme Court determined that parents may be entitled to tuition reimbursement even when their children had never received special education from their LEAs. The Supreme Court determined that 20 U.S.C. § 1412(a)(10)(C)(i) created a safe harbor for schools by explicitly barring reimbursement, but only when the district made a FAPE available by "correctly identifying a child as having a disability and proposing an IEP adequate to meet the child's needs." *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 241 (U.S. 2009). As such, the Supreme Court looked not just to the provision of an appropriate IEP, but to the identification process as well to determine whether FAPE was on the table in a tuition reimbursement case.

In this case, the District violated the Student's rights by failing to propose an evaluation for five months after it had reason to know that an evaluation was required. The fact that documents were drafted but not sent may have been an unintentional oversight, but the

result is the same. When a student's disability is so profound that the Student is unable to attend school, and the only guidance from the District is to dis-enroll the student, parents are completely justified in seeking support elsewhere – which is what the Parents in this case did.

I note that the District cites to a post *Forrest Grove* case from the Third Circuit holding that Parents must give public schools a good faith opportunity to meet their obligations before seeking tuition reimbursement. *C. H. v. Cape Henlopen Sch.Dist*. 606 F.3d 59,72 (3d. Cir. 2010). *See also Patricia P. v. Board of Educ. of Oak Park,* 203 F.3d 462, 469 (7th Cir. 2000); *Lauren G. V. West Chester Area Sch. Dist.,* 906 F.Supp.2d 375 (E.D. Pa 2012). I do not see a conflict between these cases and *Forrest Grove*, but they are not applicable here. If the District had proposed an evaluation before the Parents sent the Student to Residential Treatment Facility, the District would have a very strong argument. As explained above, I am persuaded that the District drafted a PTE on November 27, 2013, but that document did not reach the Parents until March 4, 2014.

**Appropriateness of the Parent's Placement**

The Parents must prove that Residential Treatment Facility is appropriate, but I will start with a discussion of the District's argument that Residential Treatment Facility cannot be appropriate under current Third Circuit case law.

In *Munir v. Pottsville Area Sch. Dist.*, 723 F. 3d 423 (3d. Cir. 2013), the Third Circuit held that 1) when a residential placement is prompted by an emergency crisis (a suicide attempt), and 2) when the residential placement was chosen primarily for the treatment of mental health needs *and* 3) educational benefit within the residential placement is incidental, the placement is not appropriate under the *Burlington-Carter* test. *See id.*

In this case, the facts leading up to the placement at Residential Treatment Facility are striking similar. The Student went into crisis and engaged in self harming behaviors. Immediately subsequent to that incident, the Student went into an inpatient program at Center and remained there for about a month. Immediately after, the Student went to Residential Treatment Facility. It is impossible to believe that the Student's health, safety and emotional wellbeing were not the Parents' first and foremost considerations. As such, the first two *Munir* factors are resolved in the District's favor. However, the educational benefit at Residential Treatment Facility is not incidental. Residential Treatment Facility is affiliated with a school, is licensed as a school, and operates a school in addition to its therapeutic program. The Student receives 5.5 hours of academic instruction, including instruction in core subject areas, four days per week. The Student's work is graded, those grades are reported, and the Student is earning academic credit. While the primary purpose of Residential Treatment Facility is therapeutic, the educational components of the program raise it above the threshold established in *Munir*.

Although the District's *Munir* argument fails, it is still the Parents' burden to establish that Residential Treatment Facility is appropriate. In this case, this factor is confounded

by the lack of an appropriate special education evaluation. Such an evaluation would shed light on the interplay between the Student's disability and educational needs, and would provide information to suggest whether the program at Residential Treatment Facility is suited to those needs. Without such an evaluation, I look to the best evidence that was presented in the record. That evidence shows that the Student's emotional state has improved while at Residential Treatment Facility (though the improvement is impossible to quantify given the record), and that the Student has made academic progress as evidenced by the Student's strong grades.

The Parents argue that the Student's social and emotional needs are inextricably intertwined with the Student's educational needs, and so the District must reimburse the full cost of Residential Treatment Facility. In making this argument, the Parents cite to *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3d Cir. 1981) and several other cases reaching that conclusion. The Parents further argue that it is the therapeutic nature of Residential Treatment Facility that enables the Student to attend to academics. I agree that the Student benefited from the Residential Treatment Facility's therapeutic program, and that those benefits carried into the classroom. I am not persuaded that the Student's academic and therapeutic needs are inextricably intertwined. The therapeutic components of the Residential Treatment Facility program are, by design, separated from the academic program. The school at Residential Treatment Facility is physically separated from the therapy program, and occurs at specific times of day. Assuming that the Student requires a full time, residential therapeutic program to satisfy the Student's psychological needs, the Student is attending a fairly traditional academic program at the same time. In sum, the clear separation between school and therapy at Residential Treatment Facility establishes that the Student's educational and therapeutic needs can be separated. Equitable considerations notwithstanding, the Parents can be entitled only to the educational component of Residential Treatment Facility.

Evidence and testimony concerning what portion of tuition at Residential Treatment Facility was for the educational component. I reject that evidence because the documents do not square with the testimony, and because the generation of the documents was strange. Rather, testimony suggests that the Student receives 5.5 hours of educational services per day, every 4 days. Based on the time of day that the services are rendered, I must conclude that the Student stops to eat and take breaks during those 5.5 hours. As such, I must conclude that the Student receives 4 hours of actual instruction every 4 days, or 20 hours per week.

**Equitable Considerations**

The final part of the *Burlington-Carter* test is to determine wither equitable considerations weigh against tuition reimbursement. One of those considerations is whether the Parents gave the District notice before placing the Student into Residential Treatment Facility. The District argues that statutory notice is required by 20 U.S.C. 1412(a)(10)(C)(iii), but in *Forrest Grove, supra*, the Supreme Court found that the clauses of § 1412(a)(10)(C) are "best read as elucidative rather than exhaustive" *Forest*

*Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 242 (U.S. 2009). Regardless, an unjustified refusal to cooperate or a withholding of information on the Parents' part can certainly mitigate against tuition reimbursement.

In this case, the Parents received the District's PTE along with a notice of their procedural rights on March 4, 2014. On March 21, 2014 the Parents wrote to the District saying that they would seek tuition reimbursement. A strict reading of the statute suggests that notice should have come ten days prior to the placement, but the Supreme Court cautions against such a strict reading. Moreover, it certainly appears that the Parents acted quickly to send notice to the District once they were alerted to their obligation to do so.

The Parents' refusal to provide consent for the District to evaluate is more vexing. The District must be in a position to provide services to the Student when the Student returns. The District cannot hope to satisfy that obligation without evaluating the Student. If the Parents continue to withhold consent, that decision will surely mitigate against the District's ongoing obligations. That withholding compels me to cautiously explain how pendency should operate in this matter. The Parents' withholding of consent in this case, however, is not enough to make tuition reimbursement inequitable.

## Summary

The District committed a Child Find volition from September 26, 2013 through March 4, 2014. During that time, the District should have sought to evaluate the Student but did not do so. In light of the specific circumstances in this case, the Child Find violoation did not result in a substantive denial of FAPE warranting an award of compensatory education. The Student went to a residential program in [another State] starting on January 2, 2014. The Parents have met their burden to establish their right to reimbursement for the educational portion of that program from January 2, 2014 through the end of the 2014-15 school year. An order consistent with the foregoing follows.

## ORDER

Now, March 1, 2015, it is hereby **ORDERED** as follows:

1. The District committed a procedural Child Find violation as described in the decision above.

2. The Parents demand for compensatory education is **DENIED.**

3. The Parents demand for tuition reimbursement is **GRANTED IN PART.** Specifically:
   A. The full cost of tuition at Residential Treatment Facility shall be divided to determine a per-hour rate tuition rate.
   B. The Parents are entitled to reimbursement at the per-hour rate, multiplied by 20 hours, for each week that the Student attended Residential Treatment Facility

from January 2, 2014 through the last day of the 2014-15 school year on the District's calendar.

4. In light of the equitable considerations described in the decision above, Residential Treatment Facility shall not be considered the Student's pendent placement beyond the last day of the 2014-15 school year on the District's calendar.

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

/s/ Brian Jason Ford
HEARING OFFICER