

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: M.D.
ODR #15949 / 14-15-AS
Date of Birth:
[redacted]

Dates of Hearing:
May 19, 2015
June 26, 2015
July 1, 2015
September 23, 2015
November 3, 2015
November 4, 2015

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Central Bucks School District
16 Welden Drive
Doylestown, PA 18901

Date Record Closed:
Date of Decision:

Hearing Officer:

Representative:
Ilene Young, Esquire
Law Offices of Ilene young
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Scott Wolpert, Esquire
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December 15, 2015
January 19, 2016

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is a post-high school age individual formerly enrolled in the District who was eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] and Pennsylvania's Chapter 14 under the classification of Other Health Impairment² (Obsessive Compulsive Disorder [OCD] and Anxiety Disorder³). Prior to being identified as eligible under the IDEA and Chapter 14 Student was identified as a qualified handicapped person / protected handicapped Student under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and Pennsylvania Chapter 15.

The Parents asked for this hearing under the IDEA, Section 504 and Title II of the Americans with Disabilities Act (ADA)⁴ alleging that the District denied Student a free, appropriate public education (FAPE) under inappropriate and/or not implemented 504 Service Agreement[s]⁵ for the last trimester of 10th grade and for 11th grade and under inappropriate and /or not implemented IEP[s] for 12th grade. Further, the Parents also allege that the District discriminated against Student because of Student's disability during the tryouts for a sports team.

The District maintains that it provided Student with FAPE at all relevant times and that it did not discriminate against Student during the team tryouts or at any other time.

The relevant period for this matter is from February 26, 2013 of Student's tenth grade school year through Student's graduation from the District in June 2015.

I find that the Student's 504 Plans and IEPs were reasonably calculated to provide meaningful benefit, and that they were implemented. I also find that the District's actions during the sports team tryouts were not discriminatory based on Student's disability⁶ and did not violate section 504 or Chapter 15. Therefore, I must deny the Parents' request for relief.

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² The Parents' Complaint lists Student's exceptionality as "Emotional Disturbance" [S-1]. The District's evaluating psychologist classified Student with Other Health Impairment. [P-1/S-11] The private evaluator disagreed, opining that Emotional Disturbance is the appropriate classification. [NT 80-81, 912] This hearing officer who is a clinical psychologist and a certified school psychologist (PA licensed and PA certified respectively) believes that under the IDEA either classification could be reasonably argued, but agrees with the District's psychologist who noted that the outcome is irrelevant since a student's needs, not the classification, drive the programming. [NT 1708-1709]

³ The District's evaluating psychologist opined that Anxiety was subsumed under OCD. The treating therapist opined that it was free-standing. [NT 913, 1356-1357]

⁴ ADA violations were raised in the complaint. As I believe I do not have jurisdiction over ADA other than insofar as the issues are co-extensive with the IDEA and Section 504 I do not address ADA in this decision. It has been raised however for purposes of administrative exhaustion. [NT 45]

⁵ Pennsylvania's Chapter 15 imposes an affirmative obligation on school districts to provide a written "service agreement" that sets forth "the specific related aids, services or accommodations the Student shall receive." 22 Pa. Code § 15.7(a).

⁶ The District does not contest that Student's OCD is a disability for purposes of section 504 and Chapter 15, and that it is a recipient of federal funds, obligated by those laws not to discriminate on the basis of disability.

Issues

1. Did the School District deny Student reasonable accommodations and thereby deny Student FAPE under Section 504 both in terms of the adequacy of the 504 Service Agreements and/or the implementation of the 504 Service Agreements⁷?
2. Did the District deny Student FAPE by failing to identify Student as a Student eligible under IDEA in a timely fashion?
3. Once identified as a Student eligible for special education under IDEA, was Student denied FAPE?
4. If the District failed to offer Student FAPE what remedy is appropriate?
5. Did the District discriminate against Student because of Student's disability?
6. If the District discriminated against Student, did that discrimination rise to the level of deliberate indifference or intentional discrimination?

Findings of Fact⁸

The Student:

1. Student was first diagnosed with Obsessive Compulsive Disorder (OCD) in February of 6th grade. Student has also been diagnosed over time with Anxiety Disorder Not Otherwise Specified (NOS), depression, and social anxiety. [NT 227-230; P-1, P-5, P-6, P-7]
2. In January 2014 Student was diagnosed with Postural Orthostatic Tachycardia Syndrome (POTS) and Restless Leg Syndrome (RLS). [P-3]
3. Student is color blind. [S-34]
4. As of the first hearing date Student's only medication was Prozac. [NT 77]
5. Student's OCD is of the "Bad Thoughts" variety, specifically, "Loss of Essence." Individuals with Loss of Essence OCD believe they risk losing the (desirable) qualities of themselves or taking on the (undesirable or different) qualities of others, or even becoming someone else through their actions. The complexity of this symptom led, for

⁷ In the body of the Decision the 504 Service Agreement[s] will be referenced as 504 Plan[s]

⁸ The testimony of every witness, and the content of each exhibit, was reviewed and considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. I deferred ruling on the admission of exhibit S-4. Upon review and reflection exhibit S-4 is admitted into the record. P-4 was objected to and not admitted into the record but will be transmitted to ODR along with the other exhibits under separate cover. The parties' closing arguments were likewise carefully considered.

example, to Student's being concerned that singing Mozart pieces would change Student in some way that was not for the better or would make the music Student wrote not bad but different from the music Student likes to compose. The belief that there is risk involved in certain behaviors, proximity, or thoughts leads persons with OCD to do "rituals" to avoid that outcome. Neither the fear nor the antidote is logical. [NT 70, 538-541, 559-560, 584-585, 696, 1346-1349, 1363-1365; P-7, P-9]

6. Student's OCD-related rituals manifested in various ways, including for example: rechecking each page read, returning to the page, and repeating the reading; needing a "lucky pencil" for writing; having repetitive and unwanted thoughts; having to re-write what Student had written if a bad thought interfered. Student was bothered by certain numbers and symptoms were triggered when numbered books or laptops were handed out to the class because Student always had to have a certain number. [NT 212-214, 221-225, 581, 1430-1431; P-41]
7. In spite of having to rewrite because of OCD interference, Student is an excellent writer. When Student writes something Student's product is excellent, very thoughtful, and articulate. In AP History Student was given opportunities to produce Student's best work through re-writing if Student and the teacher did not feel Student's initial product was Student's best and Student took these opportunities. In 11th grade Student's writing skills helped earn an A- in AP US History, and in 12th grade Student was able to raise an English grade from a B+ to an A- by doing extra credit written work. [NT 424, 428-429, 920, 1800-1801, 1861-1862]
8. Student suffered from intense fearfulness; had contamination concerns; experienced anxiety related to high self-imposed standards; had some perfectionist behaviors; and, was concerned about what others might think or say about Student. Student's high standards at times led to Student's doing more work than other Students did. Student's fears of contamination extended to touching sheet music touched by other Students such that the choir director gave Student sheet music for Student's exclusive use. Orchestra occasioned the same difficulty with sheet music, with the added component of Student's difficulties around putting Student's instrument away. [NT 254, 557-558, 561-568; P7, P-24]
9. Student was very sensitive to being singled out and given special attention. For example, in 11th grade when a teacher collected classmates' Calculus quiz papers but did not collect Student's paper because Student had extended time to finish Student felt singled out. At another time Student was bothered when the 11th grade English teacher talked to Student "kind of out loud" about accommodations asking if everything was okay, and in 12th grade Student did not want to be checked on by the Statistics teacher. Student was bothered by the Statistics teacher having a folder set aside for Student's extra notes with Student's name on it; when Student explained the difficulty the teacher put the folder under Student's desk to which Student also objected. At the time of the SATs when an organizer [not a District employee] verbally specified the line into which all students with accommodations should go Student was extremely embarrassed. Although other students

were “called out” for various infractions in choir Student became very upset when the director “called out” Student. [NT 536-537, 552, 561-564, 585-586, 605-606, 686; P7]

10. Student’s OCD symptoms and anxiety/panic attacks interfered with Student’s functioning at home and in school. [NT 19, 76, 243, 532-536, 541-542, 1368-1370, 1760; P-1, P-6, P-11]
11. Student’s mother assisted Student with work done at home on a daily basis in the form of reading to Student so Student would not re-read, taking notes for Student so Student would not re-write, and organizing research for Student. [NT 1416-1421]
12. Mother and Student have a friendship and a bond such that on a daily basis starting early on and continuing throughout 12th grade mother would prompt Student to tell her about what happened during that day and she frequently followed up with school staff about Student’s reports. [NT 249-250]
13. On weekends in fall of 11th grade Student played on the fall [redacted team sport] team. [NT 658]
14. On weekends during the 11th grade school year and in summer 2014⁹ prior to 12th grade Student had a job dressing up as a character from The Little Mermaid movie or as a pirate for children’s birthday parties. There were “a lot” of these parties. [NT 645-647]
15. Teachers who chose to comment on peer relationships for a June 2014 (end of 11th grade) evaluation report wrote: “interacted appropriately with peers” (Calculus), “interacts with classmates seated around [Student], pleasant, smiling, talking with them (English), “has some friends in the class” (Chemistry). [S-11]
16. The District psychologist found Student to be engaging, polite and cooperative. [NT 917]
17. Student successfully completed high school requirements, went to the senior prom and attended the graduation ceremony with Student’s class, [NT 701, 927]
18. As of the final hearing date Student was attending a university in a Southern state. [NT 447-448]
19. Student’s therapist is an expert in OCD in children and adolescents. She started treating Student in February to November/December 2010. Student worked very hard especially during the first course of treatment, so they finished and the therapist did not see Student

⁹ Mother’s testimony initially puts this job into summer of 2013, the year after 10th grade, but she then put it in 2014, the year after 11th grade. Student said the job was during the year after 11th grade. There is no contradiction as to Student’s engaging in this job during the 11th grade school year.

again until July 2011 and there were just a few sessions over the summer.¹⁰ She then saw Student in January 2012 for two sessions, and then not again until June 2012 briefly; Student had been doing better and well at that time. She resumed treatment of Student in February 2013 because there had been some increase in symptoms over time and Student was returning to ritualizing. She treated Student until the end of December 2013, and then on and off from April 2014 until Student started college. Treatment sessions were generally about every two weeks. [NT 1358-1359, 1366-1367, 1413; P-38]

20. After the first course of treatment Student's OCD symptoms were diminished for periods of time which is not unusual in children and adolescents. Subsequently they did return, which is also not unusual. [NT 1366-1367]
21. Student's therapist and Student agreed that while Student is away at college Student would contact the therapist to have sessions as needed. As of November 3, 2015 (the 5th hearing session) Student's therapist had consulted with Student at Student's request only twice since the start of college. [NT 1390-1391]

504 Plans:

22. After communication during 7th grade between the guidance counselor and the mother, meetings between the Student and the guidance counselor, meetings among the teachers and the guidance counselor and a lengthy conversation between the guidance counselor and the specialist treating Student for OCD Student received the first 504 Plan in April of Student's 7th grade year. On or about March 24th Student's therapist provided a list of suggested accommodations to the Parents who then shared them with the District either before or at the 504 Plan meeting; each of the accommodations was considered at the 504 Plan meeting. The Parents had the assistance of a special education attorney at that time¹¹. [NT 360, 362, 714-755, 808-809, 812-814, 829-830, 1353-1354; P-7, P-22]
23. The Parents had many concerns throughout middle school, wanting to make sure that everyone working with Student was following the 504 Plans, and mother questioned the teachers in emails about her concerns. [NT 767-768, 799]
24. The teachers were careful to follow the 504 Plans and they met frequently with the guidance counselor to address mother's concerns. The guidance counselor had direct involvement in making sure the 504 Plans were implemented. [NT 768-771, 779-780]
25. Once a 504 Plan was in place Student had daily meetings with the guidance counselor in middle school to help Student with organization. When Student was overwhelmed the guidance counselor would help Student prioritize tasks. If Student had any concerns about implementation of accommodations Student could take these up with the counselor. [NT 771-772, 776]

¹⁰ This is common in the specialist's treatment. When an adolescent or child or family has learned the strategies through a course of treatment to really get things under control (if possible) then the adolescent or child has "booster sessions" as needed.

¹¹ Not the Parents' current attorney.

26. When Parents reported a concern about Student's OCD getting worse and asked that Student not be placed in an Advanced English class going into 10th grade the guidance counselor made that change in Student's roster of 10th grade classes. [NT 776-778; P-23]
27. In June of 9th grade as part of her duties in ensuring a good transition for all her students from 9th to 10th grades, the middle school guidance counselor met with the high school guidance counselor and went over Student's 504 Plan, to be sure she had the 504 Plan and made sure she understood it. [NT 781-782, 831, 1055-1056]
28. On December 21, 2012, Student's existing 504 Plan was updated. It was further revised on January 3, 2013; this 504 Plan was approved by the Parents and was in effect for the last third of the 2012-2013 school year (10th grade), the time the relevant time period in this matter began. [NT 468, 1064-1067; S-8, S-24, S-32]
29. The thirteen (13) Service/Aids/Accommodations on the December 21, 2012 504 Plan were as follows: "Teachers will assist [Student] in breaking assignments into smaller increments or "chunks". Teachers will break core assessments into smaller chunks and provide [Student] with due dates for these parts of the core assessment; Teachers will provide [Student] with written directions and rubrics for assignments and assessments, if available; Extended time to complete assessments, exams and assignments as needed. [Student] will write "need more time" on top of test. [Student] will discuss [Student]'s need for extended time on homework and other assignments with [Student]'s teachers; Teacher will call on [Student] when [Student] raises [Student]'s hand to participate; [Student] may take tests and quizzes in an alternate test location. Teacher and [Student] will discuss the need to take the test in an alternate test location before the test is given; [Student] will email teachers to check in about upcoming tests/quizzes; [Student] may get a pass to the library instead of staying in study hall. [Student] will get a pass from [Student]'s teacher, guidance or nurse; [Student] will use a blackberry (or other device) to record daily assignments and long range projects. If [Student] is unable to complete [Student]'s homework, [Student] will contact the teacher to discuss work completion; Teachers will provide study guides for tests, Power Point slides and other notes, if available. [Student] will contact [Student]'s teachers for notes and other information if class notes are not available; [Student] will be given an "Anytime Pass" to nurse or guidance; [Student] and [Student]'s parents are encouraged to check teacher websites, and the Parent Portal for information about assignments and long-term projects; [Student] will be encouraged to access the Patriot Tutor Center as an academic resource for assistance with [Student]'s classes. The guidance/nurse office will assist [Student] in accessing the Patriot Tutor Center, as needed; [Student] has difficulty putting [Student]'s name on [Student]'s school work and tests. This causes [Student] anxiety and sets off some of [Student]'s compulsive behaviors. Teachers must be aware that [Student] is working towards overcoming this anxiety." [S-32/P-15]
30. At the end of 10th grade a private evaluator the Parents engaged conducted a Partial Neuropsychological Evaluation intended, in part, to make recommendations about extracurricular accommodations. The private evaluator gleaned his knowledge about

OCD from dealing with one or two children with the condition and doing research on the condition. [NT 53-57]

31. The private evaluator gathered information from the Parents about Student's functioning in the classroom and from the Student. He reviewed 9th and 10th grade 504 Plans and the Parents' OCR complaint as well as the District's response to the OCR complaint¹². He did not review any District assessments or review a letter from the therapist who had been treating Student for OCD since 2010. He administered the Comprehensive Assessment of Attention and the Children's Yale-Brown Obsessive-Compulsive Scales. [NT 57-62, 127]
32. The private evaluator did not observe Student in school and did not interview any of Student's teachers, the guidance counselor, or anyone else at the District. He did not review any of Student's report cards. He received all his information about school problems, home problems, 504 Plan implementation, alleged bullying and alleged discrimination solely from Student and Student's mother. He did not speak with the specialist treating Student for OCD. [NT 146-147, 150-152; P-6]
33. Although the private evaluator saw Student on May 25th, June 1st and June 11th of 2013, the report was not issued until September 18, 2013, on the same day he re-interviewed the mother. The private evaluator provided the report to the Parents; when they provided the report to the District is not in the record. Mother was not certain that she provided the appendix when providing the report to the District, but the District psychologist remembers that the appendix was not part of the original report she reviewed. [NT 117-120, 161-162, 356-357, 841; P-5, P-6]
34. The private evaluator concluded that Student "did indeed have an obsessive compulsive disorder" and the disorder impacted important areas of Student's life such as "note taking and writing, reading and studying, homework, long-term projects, tardiness to school", and also Student's "athletic life as well as to a certain extent social ramifications as well as activities of daily living". [NT 60-61; P-6]
35. The private evaluator issued a report in September 2013 of the results of his evaluation done in May and June of 2013¹³ and in addition to recommendations for athletics he made a range of academic recommendations regarding accommodations. These academic recommendations were:
 - a. Technology Accommodations - a software program to read to Student; a speech to text software to assist with writing.¹⁴
 - b. Scheduling of Classes - priority scheduling of classes especially math.
 - c. Physical Arrangement of the Classroom- preferential seating near the teacher.

¹² Later the witness denied reviewing the OCR documents. [NT 139] Compare with NT 57-58 where he specifically names the Parents' complaint to OCR and the District's answer among the things he reviewed.

¹³ It is unclear to me exactly when the Parents or Parents' counsel provided the private evaluation at P-6 to the District, although this date may be contained somewhere in the large volume of exhibits.

¹⁴ The private evaluator did not conduct any assessments of Student's reading abilities or of any other academic skill. [NT 159-161]

- d. Lesson Presentation - provision of an outline prior to the lesson in addition to the course syllabus and required readings prior to each lecture so that Student can read the material ahead of time; provision of copies of teacher prepared notes or provide a peer note taker. Student should be encouraged to listen to class lectures without taking notes; assisting Student in breaking assignments into smaller increments or chunks of work and breaking core assessments into smaller chunks as well as providing Student with due dates for these parts of the core assessment; teachers speaking slowly, presenting a limited amount of oral information at one time, writing the essential learning points on the board, checking for Student's understanding and repeating the essential learning points at the end of each lesson; only calling on Student when Student raises Student's hand to participate and not calling undue and unwanted attention to Student in front of classmates; giving Student a pass to the library instead of study hall from the teacher, guidance counselor or school nurse.
- e. Assignments - providing Student with written directions and rubrics for assignments and assessments; providing notes, study guides and answer keys for all homework with documents posted online at the teacher site each day on the due date of the homework; permitting Student to put a star (*) on tests and work papers instead of Student's name and not penalizing Student for failing to write Student's name, date or page numbers on papers; giving alternative and shortened homework assignments that focus on essential learning points; permission to use an iPhone or other electronic device during class to record daily assignments and long-range projects; provision of two additional school days to complete schoolwork without the need for prior teacher notice and approval; extended time up to five additional school days to turn in long-term assignments or projects; all handouts and other written documents provided on white paper with black letters. Any items on documents that contain color or require color shall be clearly labeled with the identified color; Student and parents are encouraged to check teacher websites and the parent portal for information about assignments and long-term projects and teachers will keep these websites up to date; the availability of math tutoring from a staff math teacher on an as needed basis rather than peer assistance.
- f. Test-Taking – at midterm and final exam time Student should not be required to take more than one exam per day or back-to-back exams on two consecutive days, and exams should not be scheduled when student must take state-mandated exams; Student may take tests and quizzes in an alternate location; Student will be permitted to e-mail teachers to check in about upcoming tests/quizzes; teachers will provide notes and study guides with answer keys for tests one week prior to a test or quiz; extended time not to exceed double time to complete assessments, exams and quizzes. Student will write “need more time” on top of the test/quiz. Student should never be required to miss another academic class in order to have extended test taking time in a class. The extra time should be scheduled during a specials class without penalty; on math tests and quizzes Student should be permitted access to “math cue cards” that list step-by-step procedures for solution of math problems; Student's guidance counselor or academic advisor responsible for requesting accommodations for the SAT will request the maximum allowable extended time.
- g. Pass Privileges - Student will be given an “anytime pass” to the nurse or guidance office.
- h. Staff Training - any staff coming in contact with Student during the school year should be required to review the 504 plan within five days of the beginning of school with a staff

member identified as 504 case manager; all staff responsible for teaching or coaching Student need to receive in-service training on OCD and specifically how this disorder affects Student.

- i. Official School Records – Student’s official school records need to accurately reflect Student’s school tardiness in addition to absences. Student should never be marked tardy when there’s a doctor’s appointment for therapy or medication review as long as Student brings in an excuse from the doctor.
36. Student’s 504 Plan for the second half of the 2013-2014 school year (11th grade) was drafted at a meeting held on December 20, 2013. The Parents requested a number of revisions in “more than a few” emails to the District, largely based on their wanting all/most of the private evaluator’s recommendations included and precisely worded. The Parents indicated their intent to sign the final 504 Plan in an email dated February 25, 2014. The 504 Plan was later revised again at the Parents’ request on or about March 5, 2014. [NT 397, 1093-1094, 1107-1109; S-8]
37. Once the 504 Plan was finalized and signed it was uploaded into the District’s system and the high school guidance counselor/504 Plan manager followed up with an email to the teachers indicating that there was now a new 504 Plan. During the process of putting together that 504 Plan she had regular communication with the teachers indicating that there was not yet a finalized new 504 Plan, but trying to give them advance notice of the kinds of things that were being requested and what was of most import, and asking them to keep those in mind. The teachers were very much a part of the process of sculpting the 504 Plan that was eventually signed in February. [NT 1094-1095, 1109-1110, 1140]
38. The 504 Plan contained thirty-two (32) Service/Aids/Accommodations as follows:
“Teachers will assist [Student] in breaking assignments into smaller increments or “chunks”. Teachers will break core assessments into smaller “chunks” and will provide [Student] with due dates for the established benchmarks as well as core assessments. [Student] will automatically be given an additional two days to complete homework and other assignments without notice to the teacher. If it is determined that more time is needed [Student] will inform the teacher; Teachers will provide [Student] with written directions and rubrics for assignments and assessments via email or handout; [Student] may have up to double extended time to complete assessments, exams and assignments. [Student] will discuss [Student]’s need for extended time on homework and other assignments with [Student]’s teacher on an as needed basis; [Student] will be provided with notes of all material covered in class lectures or presentations by the teacher or teacher-selected students prior to each class; Teachers will post assignments and homework on teacher websites on a daily basis; Teachers will provide study guides for tests, Power Point slides and other notes. [Student] will contact teacher for additional information as needed; [Student] may take tests and quizzes in an alternate test location. Teacher and [Student] will discuss the need to take the test in an alternate test location before the test is given; As needed, [Student] will be allowed to type [Student]’s homework, assignments and notes, or write in ink or pencil to better manage [Student]’s OCD symptoms. In addition [Student] is permitted to have [Student]’s homework

assignments transcribed as needed and may type class work on [Student]'s own device; Whenever possible [Student] will be provided with a textbook that is free of names or markings; [Student] will use an iPhone or other device provided by the family to record both daily assignments and long range projects. [Student] will be permitted to use this device during class for this purpose. [Student] may also e-mail the teacher with questions. If [Student] is unable to complete [Student]'s homework [Student] will contact the teacher to discuss a plan for work completion; [Student] is permitted to indicate a * on [Student]'s paper to identify [Student]'s work instead of writing [Student]'s name if [Student] prefers. Student will not be penalized for omission of identifiers such as name, date or page number; [Student] will not be required to prepare, write or submit any outlines or notes and will be exempt if any grade is assigned for outlines; In math classes [Student] will be allowed to have math formulas and/or teacher notes in front of [Student] as [Student] completes assessments where deemed appropriate by the teacher; All handouts and other written documents shall be provided on white paper with black letters to accommodate [Student]'s colorblindness; [Student] and [Student]'s parents are encouraged to check teacher websites, available Blackboard sites and the Parent Portal for information about assignments and long-term projects as well as additional information on instruction. Teachers will keep their sites updated; [Student] will be given alternative and shortened homework assignments that focus on "essential learning" or "proof of concepts" (i.e. Rather than having to solve 10 math problems [Student] would be assigned three that would show [Student]'s understanding of the concept being practiced as deemed appropriate by course); [Student] will be provided with photocopies of music for choir and orchestra which [Student] can keep to use during class and performances. Student will also be allowed to request a change in seat assignments or performance position; Being assigned random numbers in the form of folders, lockers, etc. can often trigger OCD symptoms. Whenever possible [Student] should be given the opportunity to select a locker or folder number that does not cause the trigger; Having [Student]'s picture taken is a trigger for [Student]'s OCD. When possible [Student] will be permitted to stand in a place where [Student] is less likely to be in the range of photographs or videotape; During the summer [Student]'s House Principal and Guidance Counselor will "flag" [Student]'s preliminary schedule and make an effort to accommodate requests for specific semester and time of day classes, particularly in math; As a senior [Student] may request late arrival contingent on the restrictions of the master schedule, [Student]'s course requests and graduation requirements; [Student] will not be called on in class unless [Student] raises [Student]'s hand signaling to the teacher that [Student] is comfortable being called on; Teachers will not comment publicly on any facet of [Student]'s appearance; Parents may choose to investigate <http://www.bookshare.org/community/parent/home> and/or <http://naturalreaders.com> (also available as a free app) as assistive technology options; [Student] will be given an "anytime" pass to the nurse or counselor; [Student] may choose to go to the library or the house office/guidance instead of study hall. [Student] may get a pass from the teacher, guidance counselor or nurse; A meeting will be held with [Student]'s teachers at the start of each new class to ensure that all teachers are familiar with and understand [Student]'s 504 service agreement; With regard to athletic accommodations, if [Student] indicates to the coach that [Student]'s performance on an individual skill assessment was compromised [Student] will be given the opportunity to redo the assessment in private at

the end of the tryout or practice. [Student]'s performance during simulated game situations will not be reassessed; If [Student] is to be presented with new material in class that must be processed and a product prepared (debate, group project, assessment) from that material during that same class period, the teacher will provide [Student] with the material to be read a day or two in advance (e.g. given via e-mail or handout for [Student] to read in advance); Teachers will allow [Student] to participate in debates or presentations from [Student]'s seat within the class as [Student] is uncomfortable speaking from the front of the room; [Student] will not be penalized for not participating in overnight or multi-day trips with the music ensembles; [Student] will contact the teacher via e-mail the night before an assessment if [Student] needs more time to study and does not feel prepared for the assessment. The teacher will give [Student] a pass to the library or to the house office as agreed to by [Student] and the teacher.” [S-8, P-11]¹⁵

39. The 504 Plan closely tracked the recommendations for accommodations that the private evaluator had made in his September 2013 report. [P-6]
40. In his September 2013 report the private evaluator did not recommend that Student be evaluated to see if Student was eligible for an IEP, but did note that this should happen if Student's educational performance worsened significantly. [NT 135-136, 389]
41. In 10th and 11th grade Student's main contact person for issues that arose was the guidance counselor. Student received accommodations of extended time for tests and for assignment completion and Student scheduled these separately with each teacher with help from the guidance counselor as needed. [NT 544, 549]
42. The mother sent almost daily emails to various school staff – guidance counselor, teachers, and/or principal during Student's 11th grade school year. [NT 402]
43. The high school house principal was a special education teacher and department coordinator in another Pennsylvania school district where he worked for nine years; he was also an IEP case manager and at times the LEA representative there. Additionally he was a wrestling and a soccer coach. He holds an undergraduate degree in psychology and a graduate degree in elementary and in special education. He has teaching certification in elementary education, in special education through 12th grade, in middle school math and science and a principal certification. [NT 927-929]
44. The high school house principal was involved in the development of Student's 504 Plans in high school and then worked with the guidance counselor and the teachers and other school staff on planning the best schedule for Student and working on things the school could do to best support Student. He attended most of Student's 504 Plan meetings. [NT 931-932]

¹⁵ Although S-8 contains drafts of the 504 Plan as well as the final draft of accommodations on pp 26-28, I could not locate a finalized standalone 504 Plan document in the record and neither could either counsel. [NT 1723-1725, 1765] The District's June 2014 Evaluation Report [S-11/P-1] contains what I believe to be a complete recounting of the 2013-2014 (11th grade) 504 Plan and that recounting is what is referenced in the finding of fact.

45. The high school guidance counselor/504 Plan manager met with Student's teachers individually to go over the 504 Plan that was in place at the start of the 11th grade school year. On an ongoing very regular basis, she was in touch with all Student's teachers all three years, and with the IEP case manager in 12th grade, she met with Student frequently, and communicated very frequently with the Parents about various issues that came up with respect to Student's needs and concerns. [NT 1054, 1068-1069, 1783-1785]
46. The 10th grade 504 Plan manager (school nurse) and the high school guidance counselor/504 Plan manager had frequent contact with the teachers and the Parents around the details of 504 Plan implementation. [NT 1062-1063, 1071; S-24]
47. The high school guidance counselor became the 11th grade 504 Plan manager and assumed more responsibility for Student and the 504 Plan implementation. She had "a very hands-on" contact with Student, with the Parents, with managing the subsequent revisions of the 504 Plan and making sure that the teachers were very clear on what was happening with regard to Student during that year. She uploaded Student's 504 Plan to Infinite Campus where teachers viewed it. Student was frequently in the guidance office for various things and at times Student's difficulties, for example with writing/rewriting, were able to be observed in that setting. [NT 1075-1076, 1085-1085, 1115, 1164, 1891]
48. The high school guidance counselor/504 Plan manager was in touch with the teachers every day. Frequently they came to her asking if she thought they might be able to do a certain thing differently; for example, when Student did a very good job on an in-class essay, the teacher wanted to see if they could get a little more out of Student the next day knowing full well that the accommodations were in place and that they would always defer to the accommodations, but they wanted to see if they could get more from Student. Student was very bright and clearly doing well in school and the teachers wanted to continue to capitalize on that. [NT 1100-1101, 1157-1160]
49. The AP History teacher taught Student for the first three marking periods of 11th grade. She had been advised of Student's disability and of the 504 Plan by the high school guidance counselor/504 Plan manager prior to the start of school. For the first two marking periods Student's study hall period coincided with this teacher's prep period so they had frequent communication outside class time. She and Student had a good relationship. She found Student to be pleasant, cooperative, open and proactive about needing extra time on assignments and other of the accommodations such as being called on in class. Student participated in class debates and presentations. The AP History teacher fully implemented Student's 504 Plan, including dropping a requirement for outlines as per a 504 Plan revision. In all other respects Student successfully completed the requirements for this advanced placement class. Student shared with the teacher that perhaps Student would be a history teacher. AP History was a difficult course but Student was capable and did well; the course was appropriate for Student. [NT 1785-1792, 1805-1837, 1839-1841, 1844-1845]

50. Student took Calculus for the first two semesters of 11th grade. The 504 Plan manager went over the 504 Plan with the teacher prior to the beginning of the school year. When the Calculus teacher accidentally called on Student at the beginning of the year Student answered the question correctly but after class respectfully came up to the teacher and reminded her about the provision in the 504 Plan about not being called on unless Student raised a hand. There were many times during the year that Student did raise a hand to be called on. [NT 1893-1894, 1927]
51. Student and the Calculus teacher had a good relationship and good rapport; most of their communication was daily and face-to-face although some was by email. In Calculus class Student was focused, and had a nice relationship with peers. The Calculus teacher and Student would take time in the period right after class for her to give Student notes on what Student missed when Student was late or absent, to go over the missed work and to make plans for where and when Student chose to make up assessments. [NT 1911-1914, 1920-1922, 1926-1927, 1933-1934]
52. All students in the Calculus class had homework, but homework was not graded, rather it was a way for students to master the concepts. [NT 1922-1923]
53. When students in Calculus worked in small groups Student had the option to work in a small group or a paired activity or using the library pass. The Calculus teacher could not remember a time that Student chose to opt out of the small groups or pair activities. [NT 1895-1896, 1910-1911]
54. Information for students and checking on whether students understood the Calculus material was put out in several ways, such as the teacher walking around and communicating during class about the work being done; posting an agenda on the Promethian Board and going over it; electronically posting class notes, assignments, worksheets and answer sheets on Schoolwires about every other day; using SmartBoards and a chalkboard during class. [NT 1896-1909]
55. The Calculus teacher followed the 504 Plan and gave Student the accommodations required. In addition she worked closely with Student's private math tutor who had worked with Student since 8th or 9th grade, a woman she respected highly. Because after the first marking period Student was coming in late and missing instruction and falling behind she and the tutor arranged that Student could take assessments with the tutor rather than at school. [NT 1914-1920, 1926-1929, 1953-1954, 1959-1961]
56. When Student's 504 Plan was in revision around the beginning of the second marking period "open notes during assessments" was being put into the 504 Plan so that Student could have open notes during Calculus. Student informed the teacher about this new accommodation and although she had not yet been told about this officially she allowed Student to have an open book for assessments from about the end of October on because she wanted Student to be successful. There is not a formula sheet for Calculus. [NT 1929-1931, 1946-1950]

57. When the roster changed mid-year and Student was going to have some different teachers the high school guidance counselor/504 Plan manager suggested that the AP History teacher speak with these teachers to help them understand and work with Student. [NT 1837-1838]
58. The high school guidance counselor/504 Plan manager had “extensive, very regular” email communication with Student’s mother during 11th grade. She was not always aware of contacts the mother had directly with the teachers. As part of self-advocacy Student communicated with teachers through email and in person. The high school guidance counselor/504 Plan manager was not always aware of contacts directly between the teachers and Student. [NT 1089, 1126-1127, 1160]
59. The first time that the high school guidance counselor/504 Plan manager heard the private evaluator’s opinion that the District should have provided Student with Cognitive Behavior Therapy in school was when he testified at the due process hearing. [NT 1091]
60. As the Parents had requested that teachers receive information about Student’s OCD, in the winter of Student’s 11th grade a District psychologist working at the high school reviewed Student’s file including the private evaluator’s September 2013 report, spoke with the guidance counselor/504 Plan manager who had extensive communication with the mother, and did some research in order to become familiar with the ‘loss of essence’ type of OCD and Student’s specific challenges. She then provided education to the teachers on an individual basis about ‘loss of essence’ OCD and about how this condition was affecting Student, as well as addressing any concerns they had about implementing the accommodations and Student’s workload. [NT 1663-1667, 1714-1715, 1719-1720, 1727-1731, 1754-1759, 1769-1770, 1773-1776; S11/P-1, S-21 p 24, P-39]

IEPs:

61. During 11th grade, the high school guidance counselor who was also the 504 Plan manager having frequent contact with Student did not notice that Student was depressed but did notice an increase in anxiety. However she also noticed that Student was becoming more comfortable communicating with the teachers. [NT 1085]
62. Following Student’s being diagnosed with POTS and RLS, an agreement that Student’s OCD symptoms were worsening, Student’s falling behind in some work in higher level challenging classes, and Student’s coming in late and being absent more frequently, the District issued a Permission to Evaluate on February 21, 2014. After reminders from the District in various emails the Parents agreed to the evaluation on or before March 27th and signed the Permission to Evaluate on April 27, 2014.¹⁶ [NT 311, 479-482, 842-845, 866, 892, 1110-1112; S-10, S-21]

¹⁶ The typed “date received” box on the exhibit references April 14, 2014, but the mother’s signature is dated April 27, 2014 in handwriting. I choose to rely on the Parent’s written date, and note that according to mother there may have been some delay with Student giving the permission form to school personnel. What is unclear is why both these dates are in conflict with an email from the District thanking the Parent for the parent input form and the permission to evaluate. [NT 313-314, 500-501]

63. Although Student's 504 Plan included many accommodations that did find their way into the IEP the District believed that Student would benefit from an IEP because it came with a case manager with far fewer students on her caseload to oversee all the accommodations rather than having the guidance counselor with a large caseload responsible for this task. [NT 843-844, 1136-1137, 1139, 1207-1208]
64. The District psychologist asked the mother about speaking with Student's therapist and the mother indicated that it would be better to speak with the private evaluator and better yet to review the private evaluator's report which she herself would provide. The private evaluator's report given to the District psychologist did not include the appendix. [NT 860-862, 897-898]
65. The District's Evaluation Report was issued on June 13, 2014 with an accompanying NOREP. The Parents agreed with the evaluation. [NT 319, 1117; S-11/P-1, S-14, S-19, S-20]
66. Student was found eligible for special education on the basis of an Other Health Impairment. [S-11/P-1]
67. A primary benefit of Student's having an IEP for 12th grade was that there would be an IEP case manager with more time to devote to direct case management of Student's needs. [NT 1117, 1266-1268]
68. The Parents accepted the District's evaluation report and did not request that any changes be made. [NT 881-882]
69. The District's evaluation report contained a complete verbatim version of the accommodations in Student's last 11th grade 504 Plan. [NT 919; S-11/P-1]
70. Subsequent to an IEP meeting which Student attended along with Parent and District staff, Student's first IEP was implemented at the start of Student's 12th grade year.¹⁷ The original parentally-approved IEP which began at the start of 12th grade was revised in September 2014 when a teacher inadvertently called on Student in class and the Parents wanted the exact same language put into the IEP as had been in the 504 Plan, and again in March 2015 when the study skills goal was replaced with a self-advocacy goal since Student was not taking the Study Skills classes. The Parents approved each of the revisions. [NT 1202-1205, 1217-1221; S-14, S-15, S-19, S-20, S-22, S-26, S-32, P-11]
71. The therapist noted that self-advocacy was an area of difficulty for Student. Student made progress in 12th grade in the area of self-advocacy skills. [NT 1222-1227, 1243-1245, 1374]

¹⁷ The private evaluator, having not previously seen Student's IEPs, reviewed the IEPs a few weeks prior to his testimony on May 19th, a week or two before Student's high school graduation. [NT 134-135]

72. The IEP case manager created a spreadsheet so she could track Student's 504 Plan accommodations, SDIs, Parents' concerns about wording and revisions made at Parents' request. [NT 1216-1217; S-36]
73. To ensure implementation of the IEP, a day or two after the IEP meeting even though it was the summer and teachers are not in school, the IEP case manager sent a copy of the IEP to all the teachers as well as a brief overview because one of the SDIs that was important for Student was requiring only "essential assignments" and the case manager wanted teachers to start thinking about what assignments they would consider essential under the summative/formative grading system. [NT 1209]
74. The IEP case manager also met face-to-face to go over the IEP with the teachers directly during the first two days that staff were back from summer break, and also met with the guidance counselor and with Student's first marking period teachers. After the September revision she then communicated to them about the revision and uploaded the revised IEP into Infinite Campus. [NT 1209-1210]
75. Although Student had a case manager in 12th grade Student also still went to the guidance counselor/504 Plan manager for a variety of things. When the guidance counselor was free she would see Student immediately and if not she would follow up later. [NT 649-650, 653, 655]
76. Student's original July 2014 IEP contained a measurable annual goal regarding managing assignments and timely work completion. In March 2015 the goal was replaced by a goal addressing self-advocacy skills. The IEPs also carried three goals related to Student's ambitions/transition: attend four year college, obtain competitive employment and independent living. [NT 1265-1266; P-11, S-19]
77. In the first marking period of 12th grade a Study Skills class was offered for the first period of the day. In that class the special education teachers could more directly manage Student's anxiety and give overall support on a regular basis. At the IEP meeting the team talked about a plan that Student not be engaged in the standard Study Skills curriculum, but rather to use that time to manage coursework, help to develop some skills to manage anxiety, and assist with time management as well. Student declined to take that class, mainly because it was taught by [a sports team] coach (although the District then changed the teacher) but also because as a secondary consideration Student's OCD was worse in the morning and affected by Student's lack of/minimal amount of sleep the night before. [NT 573-577, 1120-1121, 1162-1163, 1167]
78. In the second marking period of 12th grade Student was assigned a Study Skills class at the end of the day. Although Student thought that it would be a time to make up work and get help there were assignments involved in that class to help Students who were having some academic issues; Student was to be exempt from these assignments. Unfortunately the teacher who knew and understood how Student was to use that time in

Study Skills was absent on the first day of the marking period and, consequently, the substitute was unaware that Student was to be functioning under different rules in the classroom. Student dropped the class after attending one time because Student thought it made Student look as though Student needed academic help and any assignments added to Student's workload. The Parents approved Student's decision. [NT 578-579, 693-694, 1121, 1168-1169, 1228-1229, 1702-1704]

79. In the third marking period of 12th grade Study Skills was put on Student's roster for first period but Student exercised advocacy skills requesting that it be removed because winter had been difficult and Student really needed mornings free. [NT 1170]
80. Despite Student's decision not to avail Student's self of the offered Study Skills assistance the District addressed Student's difficulties, for example with writing, in a variety of ways through the SDIs. Additionally the IEP case manager moved her location and was right next to the English teacher's area so she could check on Student's needs and progress daily. Student accessed the IEP case manager frequently. [NT 1194-1196, 1198-1199, 1230]
81. In Student's 11th grade the District offered Student the opportunity to participate in an anxiety reduction / stress management Project in the first marking period of Student's 12th grade year. The Project involved looking at emotional regulation, thinking patterns and educational strategies to address anxiety and workload management. [NT 1667-1681, 1747-1743; S-21 p 1]
82. The District's psychologist¹⁸ working at the high school was the person providing the Project. She had been a psychiatric nurse, then continued on to obtain a master's degree in clinical psychology. She worked in the mental health profession in inpatient psychiatry, outpatient treatment and partial hospitalization programs. She has a knowledge of OCD through her work on inpatient units where a number of patients had OCD, one unit in particular being a long-term unit in a psychiatric institute specializing in anxiety with one of the areas of specialty being OCD. [NT 1658-1659]
83. Student and Parents declined the opportunity. Student thought it would be just one more thing to add to Student's stress and because other Students would know Student was attending the class. [NT 697; S-21]
84. The IEP contains modifications and specially designed instruction as follows, much of which was also in the previous 504 Plan: Student will have the opportunity to take tests in an alternate testing location and also receive clarification of test items and directions as allowed; for all assignments requiring a rubric Student will be provided with a copy of the rubric; break down large assignments into smaller segments, inclusive of providing due dates; Student has double extended time to complete assignments, assessments and exams. Student will discuss with Student's teachers Student's needs for extended time on homework and other assignments; classroom teachers will identify assignments deemed essential to the overall scope and sequence of the course and excuse Student from those

¹⁸ Not the District psychologist who evaluated Student in June 2014.

identified as nonessential; when available Student will be provided with notes of all classroom materials prior to the lesson; teachers will make available study guides for tests, PowerPoint slides and other notes; in advance of testing Student will use Student's self advocacy skills to make arrangements with the classroom teacher to take Student's tests in an alternate testing location; to help accommodate Student's needs as a Student with an OHI Student will be permitted to word process Student's homework assignments or notes or write in ink or pencil; when possible Student will be provided with a textbook free of names or other markings; Student will use an iPhone or other device provided by Student's family to record both daily assignments and long-term project; teachers will allow Student to participate in debates or presentations from Student's seat within the class as Student is uncomfortable speaking from the front of the room; teachers will not call on Student in class unless Student signals Student's teacher by raising Student's hand to signify that Student is comfortable doing so; teachers will not comment publicly on any facet of Student's appearance; Student has the opportunity to go to the library or the house office when feeling overwhelmed or for work completion; on papers requiring handwritten names Student will have the opportunity to use an asterisk on Student's paper to identify Student's work. Student will not be penalized for not having a traditional heading; Student will not be required to prepare, write or submit any outlines or notes and be exempt if any grade is assigned for outlines or notes; when participating in math class and when deemed appropriate by the classroom teacher Student will be allowed to have math formulas and/or teacher notes in front of Student as Student completes assignments; Student will be given alternative and shortened homework assignments that focus on essential learning or proof of concepts; Student will be provided with photocopies of music for Choir which Student can keep to use during class and performances; when participating in Choir Student will be permitted to request a change in seat assignment or performance position; to accommodate Student's colorblindness all handouts in written documents will be provided on white paper with black letters; when presented with new material in class that must be synthesized that day in class, the classroom teacher will provide Student with the material a day or two in advance; Student will not be penalized for not participating in overnight or multi-day Choir trips; Student will utilize Blackboard and other teacher websites and the student portal for information about assignments and long-term projects as well as additional instructional information; should Student find that Student needs extra time for an assignment Student will contact the teacher the night before the due date to make arrangements for completion. [NT 1200-1202; P-11]

85. The IEP contains support for school personnel as follows: a copy of the IEP will be provided to all regular education teachers who work with student. Student's placement was itinerant special education learning support provided in the school in which student would attend if not disabled. [P-11]
86. Student's IEP case manager was familiar with Student prior to Student's having an IEP because in 11th grade second semester Student would take tests in her room at times. [NT 1182-1184]
87. In addition to ongoing contacts with Student's teachers the IEP case manager conducted more formal progress monitoring through twice per marking period checks with teachers

to see how Student was doing. She used these checks to see if any adjustments needed to be made. [NT 1190-1193; S-9]

88. The IEP case manager was involved on a daily or nearly daily basis with Student's 12th grade teachers to ensure IEP implementation, assist with any difficulties and to check on Student's progress. [NT 1198, 1232-1240, 1269-1272]
89. Although in 11th grade the high school guidance counselor/504 Plan manager had requested that Student have 100% extended time for SATs the College Board only granted 50% extended time. Shortly after receiving the report from the private evaluator in September/October the high school guidance counselor/504 Plan manager re-submitted an accommodation request online along with the treating therapist's letter and Student's 504 Plan to the College Board, again requesting 100% extended time for the SATs. 100% extended time was granted by the College Board in December 2014 but Student did not subsequently take the SATs. [NT 1079-1080, 1134-1135, 1176-1177, 1213-1216; P-31]

Testing and Grades:

90. In the June 13, 2014 District Evaluation Report Student's cognitive ability scores on the individually-administered Wechsler Adult Intelligence Scale – Fourth Edition were as follows: Verbal Comprehension Index 130 (Very Superior Range), Perceptual Reasoning Index 115 (High Average Range). Index scores for Working Memory and Processing Speed were not calculated due to their subtests' variability from below average to very superior, and in the evaluator's judgment this variability was a factor of Student's OCD. [S-11/ P-1]
91. In the June 13, 2014 District Evaluation Report Student's academic achievement scores on selected subparts of the individually administered Wechsler Individual Achievement Test – Third Edition were as follows: Word Reading 123 (Above Average), Reading Comprehension 120 (Above Average), Numerical Operations 125 (Above Average). In June 2014 Student's academic achievement score on the Test of Written Language – Fourth Edition was 113 (Above Average). Again the evaluator opined that Student's performance was affected by OCD. [S-11/P-1]
92. These achievement scores were earned at the end of 11th grade, when Student had been receiving 504 Plans since mid-7th grade and specifically during the relevant period starting at the last third of 10th grade. [NT 869]
93. Student's final 9th grade¹⁹ report card academic grades were as follows: English B+, US History B+, Geometry/Trig B-, Science A, Spanish B-. [S-23, S-49]
94. Student's final 10th grade transcript academic grades were as follows: English B+, Modern World History A, PreCal/Trig 3 B+, Biology B+, Spanish B. [S-23; S-49]

¹⁹ Although 9th grade is outside the relevant period these grades are provided as a baseline for purposes of comparison.

95. Student's final 11th grade transcript academic grades were as follows: English A-, AP US History A-, Calculus B, Chemistry A-. AP US History and Calculus were rigorous and challenging courses. The grade of B in Calculus is considered a good grade. [NT 422, 919, 1096, 1792-1798, 1892, 1936-1939; S-23, S-49]
96. Student's final 12th grade transcript academic grades were as follows: English A, Global Relations A, Statistics/Data Analysis B, Physics A. Student was a Distinguished Honors Student during the first semester of 12th grade. Student and Parent wanted a somewhat less rigorous schedule for 12th grade than Student had in 11th grade. [NT 439-440, 1119; S-49]
97. Given the OCD symptoms Student had to work hard to get the grades Student received. [NT 888]
98. Student's SAT scores were as follows: June 2014- Math 520, Reading 490, Writing 550; November 2014 – Math 490, Reading 420, Writing 550.²⁰ [S-23]
99. Student was absent on 8.54 out of 182 school days in 10th grade, on 32.20 out of 184 school days in 11th grade, and on 15.97 days out of 184 school days in 12th grade. [S-49]
100. Student was tardy on 19 of 182 days in 10th grade, on 40 of 184 school days in 11th grade and on 45 of 184 school days in 12th grade.²¹ [S-49]
101. Although Student worked hard and did well academically in 11th and 12th grades, Student is upset because Student got very close (3.64) to a cum laude GPA (3.7) but did not make it. Student believes that if Student had gotten more accommodations in school Student could have achieved this distinction. [NT 660]

Bullying:

102. Student met daily with the middle school guidance counselor as part of the 504 Plan implementation. Student did not bring up any concerns about being bullied to the guidance counselor in 7th, 8th or 9th grades. [NT 772-774]
103. When the mother brought the District's attention to an incident in middle school when a friend hit Student's arm during horseplay in the community, the District made sure that the other student was never in Student's homeroom classes again. [NT 773-774]

²⁰ The Test Center Supervisor for SATs is employed by the College Board. This individual was responsible for posting the list of students having accommodations. In March 2015 when the guidance counselor and the IEP case manager learned that Student's name had been posted on a list on a door twice and that this caused Student discomfort and embarrassment the IEP case manager went directly to the Test Center Supervisor to have a change made. Student however did not take the SATs after this intervention with the Test Center Supervisor. [NT 1172-1173, 1258-1262, 1357]

²¹ Although Student's excused tardiness was addressed on the record as a function of OCD, this data is provided here because it shows the relative amount of instructional or study time that Student missed. The Parents and the District agreed that Student could arrive late. [NT 440-441]

104. At a meeting with the house principal and others after [team sport] tryouts the Parents alleged that Student was bullied at the tryouts but would not permit the house principal to speak with Student. The Parents believed that nothing was done in middle school and that nothing would be done in high school and they did not want Student to have any repercussions about telling. [NT 938-940]
105. Because it bothered the house principal that there was an allegation of bullying that he could not address directly with Student he spoke with the homeroom teacher and the security guard. He also talked with the principal, fellow house principals, the guidance counselor, the athletic director and the [team sport] coaches. He could not confirm the Student's allegation of bullying. [NT 941-948]
106. When Student was evaluated by the District psychologist in June 2014 Student talked about concerns over school work and about Student's ill grandmother, and told her about being teased, but did not make any mention of issues about bullying. [NT 886-887, 898]
- [Team Sport]:²²
107. [Team sport] is extremely important to Student and to Student's family. Student has played [team sport] from the start of [a youth program] until the end of the tryouts in March 2013. [NT 597, 617-618, 1303-1305, 1439-1443, 1530-1531]
108. Student played on community teams, some of which involved group tryouts. Student did not have any accommodations during tryouts. [NT 470-472; 641-642, 1308, 1482; P-33 (video on memory stick)]
109. The District middle school guidance counselor and the Parents engaged in 504 Plan meetings throughout 8th and 9th grades. [NT 758-759]
110. The Parents did not request any accommodations related to participation in [team sport] or [team sport] tryouts during those meetings. [NT 759]
111. In seventh, eighth and ninth grades the Parents did not ever ask the guidance counselor for any accommodations during [team sport] tryouts because of Student's [specific characteristic]. [NT 763]
112. In speaking with the private evaluator the Parents characterized Student as "an elite" [team sport] player. The private evaluator knows "nothing about [team sport]" and did not view any videos of Student playing [team sport]. In his evaluation report he uses the "elite" descriptor twice, both in reference to the Parents' characterization, but does not convey the impression that he either affirms or questions this characterization. In

²² Although generally the specific sport is not named in decisions to protect the privacy of Students, here the sport is named in the decision because writing around it would not convey some of the necessary facts. However, when the redacted version appears on the ODR website the sport will not be named and other distinguishing details will be removed.

testimony he noted that he does not know one way or another how well Student plays [team sport]. [NT 138, 142-144; P-6]

113. Student tried out for the school [team sport] team in spring of 7th grade but did not make the team and also tried out for the school [team sport] team in spring of 8th grade but did not make the team. [NT 619, 1299, 1319]
114. In 9th grade Students tried out for the high school team and Student did not make the team in 9th grade. [NT 368, 620]
115. There was a “fall team” in 10th grade for which there were no tryouts; the coaches just took the first 36 youngsters who applied. Student played on that team. [NT 620-621, 1578-1580]
116. Tryouts for the 10th grade [team sport] team were held from March 4th through March 8th in 2013. Any student in grades 9 through 12 was eligible to try out for the team. [NT 279, 1629]
117. Along with other Students, Student was given opportunities to demonstrate Student’s skills to some of the coaches in both informal fall 2012 [team sport] and during winter workouts that preceded the [team sport] tryouts in March 2013. Not all the students who participated in fall [team sport] or winter workouts made the team after the March 2013 tryouts. [NT 620-626; 1580-1582]
118. The [team sport] coach is a middle school [class] teacher; he does not teach in Student’s former middle school. He is [experienced with team sport]. [NT 1532, 1537, 1539-1540]
119. The [team sport] coach has Students with 504 Plans and with IEPs in his classroom. [NT 1533]
- 120.** The [team sport] coach was [experienced with team sport]. [NT 1534-1536]
121. Prior to the March 2013 tryouts Student was provided with notice of the tryouts via a [team sport] informational meeting and an informational form. The informational form specifically provided advance notice of the ten identified [team sport] criteria that would be considered by the coaches during tryouts[including] work ethic, [redacted]/team needs, potential, [team sport] IQ and “coach-ability”. The form noted that actual tryouts started at 3:15 and stated “We get loose at 3:00.” Additionally the form provided results of the 2012 tryouts, during which 72 Students tried out and 39 Students made the team. [NT 1571-1572, 1599-1600; S-43]
122. The [team sport] coach planned, and along with his assistant coaches conducted, the [team sport] tryouts in March 2013 over five days. Two days were held outside and three were held inside. [NT 1541-1544]

123. Student was present for each of the days of tryouts and had an opportunity to demonstrate [team sport] skills in the various areas that were evaluated. [NT 624-636, 669; S-4]
124. At the time of the tryouts the [team sport] coach did not know that Student had a disability and had a 504 Plan. [NT 998, 1577, 1618, 1623-1624]
125. At the time of the tryouts neither Student nor the Parents asked the coach to give Student any accommodations. [NT 1577-1578, 1597]
126. During the tryouts the coach tried not to use [specific items] during the tryouts. Neither the Student nor the Parents made any prior request or request while tryouts were in process to the coach to use exclusively [specific items] for Student's tryouts. [NT 1605-1606]
127. Student was evaluated by the head coach and several assistant coaches, all with [team sport] experience and expertise, who collectively made the decision regarding the students that made the [team sport] team. The coaches conducted structured tryouts, using specific activities to determine the skills and abilities that had been delineated in the notice of tryouts. These skills were not measured on just one occasion, but were assessed on multiple occasions during the week of tryouts. Additionally, Student, along with a few other Students who were trying out, was invited back on the last day of tryouts so that the coaches could get a further look at Student's [team sport] skills. [NT 1472-1473, 1545-1550, 1583-1587, 1622-1623; S-43, S-44]
128. As they did for each of the aspiring players, during tryout week the coaches recorded specific detailed numerical data regarding Student's skills and abilities as demonstrated during the tryouts.
129. In the professional opinion of the coaches Student did not demonstrate sufficient [team sport] skills to make the team. In addition to numerical data, the [team sport] coach in response to an OCR investigation later provided anecdotal comments about Student's strengths and weaknesses. Seventy-six Students tried out for the team in 2013 including eight Students with disabilities. Forty Students were selected for the varsity and junior varsity teams; two Students with disabilities were selected for the varsity team and one Student with disabilities was chosen for the junior varsity team. [NT 592, 676-682, 973-74, 1472- 1473, 1514, 1550-1576, 1583-1587, 1593-1595, 1597-1598, 1606-1607; S-4, S-44]
130. Student reported experiencing OCD and anxiety symptoms during the 2013 tryouts, "had to line [items] up – couldn't [redacted]"...panic attacks, trouble breathing, shaking, "just couldn't relax". Father observed Student being anxious the night before Student was to be looked at with a few other students in a final Friday call-back tryout. [NT 591-592, 1328-1329]

131. On Monday or Tuesday, the week of the tryouts, Student reported being harassed by a classmate and becoming upset.²³ Although Student reported this to the Parents, Student did not tell the coaches, the guidance counselor or anyone else at the school about this. The Parents did not report this information to the school but on Wednesday March 6th mother emailed the school and asked to schedule an appointment for a meeting, writing, “I wonder if it is possible for me to request a meeting, for [Student] to discuss how this 2nd semester is going. [Student] is struggling a bit”. The mother did not tell the secretary that the meeting was needed because of a concern about the [team sport] tryouts that were in progress, even when the secretary emailed her back and told her that the next available time for everyone to meet was the following Tuesday. [NT 279, 281, 286, 946, 1331-1332, 1518, 1520, 1528-1529, 1600-1603; P-17 pp 1, 8-9]
132. The meeting was scheduled for March 12, 2013. After a meeting concerning the 504 Plan the mother asked that a second meeting follow that day, without Student present. At that meeting the Parents alleged that the coaches discriminated against Student because they knew Student had a disability. The Parents gave the house principal an OCR “Dear Colleague” letter detailing a district’s responsibilities to Students with disabilities in sports and asked that Student be given another chance at a tryout due to the OCD difficulties encountered during the original tryouts; they followed up with an email requesting a response to their request. Student was not given an additional tryout. [NT 286, 288, 934-938, 980, 1070, 1331, 1519-1520; P17 pp8-9, P-42]
133. Prior to Student’s [team sport] tryouts the high school guidance counselor/504 Plan manager was not aware of any parental request made that accommodations for [team sport] be put into the 504 Plan. [NT 1088]
134. At or after the March 12th meeting the Parents asked for accommodations during extracurricular activities to be added to the 504 Plan. [NT 1014; P-17]
135. On March 12 and 13, immediately after the meeting the high school house principal followed up on the Parents’ allegations that the coaches had discriminated against Student based on Student’s disability. He interviewed the athletic director, the head coach and one of the assistant coaches. The high school principal conducted the full interview of the [team sport] coach. The house principal concluded that Student was given “an absolute fair chance to make the [team sport] team over the tryout period” and he communicated this conclusion in a telephone call to the Parents on March 14th. The high school house principal did not find any incident of Student being discriminated against during the tryouts. [NT 963-966, 977, 1006]
136. Initially pro se, then in April 2013 within one month of tryouts, the Parents retained counsel and filed a discrimination complaint with OCR, alleging the District refused to properly consider their request to add provisions related to [team sport] to the

²³ Student’s therapist testified that [team sport] was not a unique situation in that it was, like other settings, a situation that could cause fears of loss of essence if Student were near or seeing another player perceived as less skilled. The therapist testified that teasing by a peer, while it could cause Student to feel upset, would not trigger OCD symptoms. [NT 1360]

504 Plan and treating the Student differently than nondisabled Students by denying participation on the [team sport] team. In response to questions from OCR, the District denied that Parents had requested accommodations, that Student had been disadvantaged, or that any negative effects occurred at the tryouts. The [team sport] coach acting alone prepared a description of Student's [team sport] abilities as observed at the tryouts. [NT 391, 1614-1616, 1618; S-4, S-34]

137. After conducting an investigation, applying a preponderance of the evidence standard OCR found insufficient evidence to support either of the Parents' allegations. [S-4]
138. The Parents engaged a private evaluator to assess whether Student required additional accommodations in extracurricular activities. The Parents had also "lost confidence" in the District's accommodations in the classroom and sought the private evaluator's advice. [NT 56-57; P-6, P-35]
139. Regarding Athletic Accommodations the private evaluator made the following recommendations: Although Student is not guaranteed membership on the [team sport] team Student is entitled to accommodations during tryouts and, if making the team, during practices. Intimidation, teasing or taunting of Student by others will not be tolerated by the coaches. In the event this occurs during the normal course of tryouts Student will be afforded the opportunity for a private skills assessment provided by the [team sport] coaches. [P-6]
140. When the private evaluator saw Student in May and in June 2013, a few months after not making the [team sport] team, he conducted a clinical interview and testified that there "was no indication of depression at that time" and did not recommend psychological or psychiatric treatment for a depressive disorder. [NT 167, 377-378, 381, 854; P-6]
141. Student's high school guidance counselor who also became the 504 Plan manager in 11th grade had frequent contact with Student during 10th grade. She did not notice any difference in Student after the March tryouts than before the tryouts. [NT 1082-1083]
142. Neither the private evaluator, nor Student's treating therapist, nor Student's prescribing psychiatrist communicated that Student was experiencing any depression leading into or during Student's 11th grade year after not having made the [team sport] team at the end of 10th grade. The treating therapist did not diagnose Student with depression although she did note some depressive symptoms. [NT 1086-1087, 1363]
143. Upon a request from Parents' counsel to comment on the "emotional and psychological impact of recent events upon [Student]" the private evaluator saw Student again on September 23 and October 10, 2013. At that time he interviewed Student and administered self-report inventory scales addressing anxiety and depression as well as another self-report inventory addressing a wide spectrum of potential disorders. The private psychologist's conclusion in a report dated November 8, 2013 and sent only to

Parent's attorney was that Student was at that time suffering from Major Depressive Disorder: Single Major Depressive Episode of Moderate Severity with a Moderate Level of Anxious Distress. The private evaluator concluded that Student's disorder is "believed to be due to [Student's] refusal to play any more [team sport] following the District's denial of [Student] being on the school's [team sport] team". [NT 175-188, 194; P-5]

144. The private evaluator based his diagnosis on his application of DSM-5 criteria rather than on the results from Student's self-reports on the scales administered. On the Revised Children's Manifest Anxiety Scale Second Edition Student's Total Anxiety T-score was 62, within the moderately problematic range. Student's Social Anxiety was "no more problematic than for most students". On the Reynolds Adolescent Depression Scale Student had a T-score of 61, at the bottom of the "mild" clinical depression range (61 to 64). MMPI-A findings were positive for symptoms of anxiety and depression among other symptoms. [P-5]
145. For the June 2014 evaluation completed at the end of 11th grade the District psychologist utilized the BASC-2 to assess Student's emotional functioning. The Parent's rating, the ratings of two teachers, and Student's self-rating did not support a diagnosis of major depression at that time. The Parent's rating of 61 placed Student just barely in the at-risk range for depression (61-70), neither of the teachers' ratings on depression were clinically significant or at-risk, and Student's self-rating, like the teachers' ratings, was in the average range for age. [NT 870-872; S-11/P-1]
146. Sometimes students do not make the team one year and then make it in a subsequent year. Student did not try out for the [team sport] team in 11th grade despite there being a provision for accommodations in the 2013-2014 504 Plan. [NT 381-382, 597-599, 1636; P-11]
147. As of the time of Student's testimony on the second hearing day Student was not certain whether or not to try out for [team sport] at college. [NT 644]
148. Most college recruiting for [team sport] is not currently done through high schools. [Redacted.] This type of practice is very common in the local geographical area. [NT 1634-1635]
149. In the [team sport] coach's opinion Student did not have the talent to receive a scholarship to play collegiate [team sport]. [NT 1635]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the

parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parents asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

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); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

The mother and the father presented as very loving and supportive parents and as passionate and devoted advocates for Student. The District personnel presented as dedicated professionals who were invested in Student’s success. While certainly Student worked hard and the mother was extremely diligent in assisting with homework, it was striking that the mother gave credit so grudgingly to the District for Student’s success [NT 426, 431-432]. With regard to the private evaluator, although I have heard this expert testify in previous cases, and have found his testimony in those cases to be credible, reliable and helpful, I could not come to the same conclusion in the instant matter. His failure during his three-day evaluation in May/June 2013 to speak to any school staff or to contact Student’s long-term therapist who is an expert in OCD diminished his credibility. [NT 85-86] Although his recommendations for accommodations were largely adopted by the 504 Plan team at the urging of the Parents, the number and detail of these recommendations served to make implementation difficult for both Student and faculty. When most of his recommended 504 Plan accommodations were subsequently included in the IEP’s Specially Designed Instructions the private evaluator acknowledged on direct examination that “the sheer number of these would be overwhelming” and soon after interjected again, “Overwhelming” and yet again on cross examination, referring to his own set of recommendations for the 504 Plan, he commented candidly, “overwhelming the regular ed[ucation] teachers, I don't know that it made things any better. [NT 92-94, 171] The private evaluator’s recommendation that Student have access to the Kurzweil program [the program reads text out loud] was made without the evaluator conducting a reading assessment, as highlighted by the District’s evaluating psychologist²⁴ with whom I agree. [NT 856-857]

I found entirely inappropriate the private evaluator’s opinion that the District should have provided Student with Cognitive Behavior Therapy in school, and that this treatment should be woven into the fabric of the IEP with a special education teacher seeing Student to collect data on “50 to 100” items using the Subjective Units of Disturbance Scale (used by therapists in the

²⁴ It should be noted that both the District’s psychologist whom I accepted as an expert and the private evaluator who was also accepted as an expert received training in School Neuropsychology from the same educational institution and that both have extensive experience in the fields of education and mental health.

context of psychotherapy - NT 883, 1686-1688) for several reasons: Student was already seeing a psychotherapist with a specialty in treating OCD symptoms on a regular basis; the recommended mental health/ behavioral health treatment in school would eat up even more of Student's valuable class time and makeup time; and, especially, that the psychotherapy he promoted is outside the scope and the expertise of the educational system. [NT 86-90] This witness' opinion that Student's IEP should provide for two hours a day of individual work with a special education teacher and an additional two 45-minute periods of Cognitive Behavior Therapy weekly [NT 113-114] is inappropriate for the reasons noted above and, not of least importance, because it counters Student's entitlement to the least restrictive educational environment and clearly conflicts with Student's extreme difficulty when being singled out or treated differently from peers. I agree with the two District psychologists' professional opinions. [NT 852-853, 1694-1697] and note that a significant aspect of the success of the District's program, in addition to affording Student the opportunity both to access and to succeed in the general education curriculum, was that it kept Student in regular education classes throughout Student's high school career in spite of Student's challenges, a factor that most likely will serve Student well in the college atmosphere and in the working world.

It was striking and disturbing that the private evaluator adamantly refused to acknowledge that Student had been successful in 11th and 12th grades, and despite knowing that Student has consistently been treated by an OCD expert, forcefully opined that "this young [student] is not ready to manage [Student's] OCD directly because of the lack of special education that should have been provided to Student by the School District", a bold conclusion that I cannot accept and which is puzzling given that this witness has been [extensively professionally involved in the public education system], which experience should have given him a clearer understanding of the role of public education. [NT 152-157]

One important issue required a specific credibility determination: whether or not the Parents or Student ever asked for accommodations for [team sport] tryouts and whether or not the District ever told the Parents that a 504 Plan could not include accommodations for sports. Both Parents testified that they asked for accommodations at several 504 Plan meetings and that the District made this statement on more than one occasion, at least once with an attorney present, while the District denies ever making the statement. [NT 222, 234, 1295, 1298] The same contradiction was noted in the OCR report. I find the scales tip toward the District, not in small part because it seems unlikely that if the District made such a statement in the presence of an attorney it would go unchallenged and uncorrected. Even if I accorded equal weight to each party's evidence, which I do not, applying *Schaffer* the evidence would be in equipoise and having failed to produce a preponderance of the evidence on this point, the Parents' position would still fail. I therefore conclude that the first time the Parents requested that the District provide accommodations for extracurricular activities, specifically for [team sport], was after Student had been unsuccessful in the 10th grade tryouts.

The IDEA and FAPE: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). 'Special education' is defined as 'specially designed instruction...to meet the unique needs of a child with a disability'. The IDEA defines a 'child with a disability' as a child who has been evaluated and identified with one of a number of

specific classifications and who, ‘by reason thereof, needs special education and related services.’ 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. “There is no precise standard for determining whether a Student is in need of special education, and well-settled precedent counsels against invoking any bright-line rules for making such a determination.” *Chelsea D. v. Avon Grove School District*, 2013 U.S. Dist. LEXIS 98125 *24 (E.D. Pa. July 15, 2013) (quoting *West Chester Area School District v. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002)).

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034. 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district’s efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.” Benefits to the child must be ‘meaningful’. Meaningful educational benefit must relate to the child’s potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

However, a school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). In a homespun and frequently paraphrased statement, the court in *Doe v. Tullahoma City Schools* accepted a School District’s argument that it was only required to “...provide the educational equivalent of a serviceable Chevrolet to every handicapped student.” and that “...the Board is not required to provide a Cadillac...” *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993)

The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than “trivial” or “*de minimus*” benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement, as noted in several recent federal district court decisions. *See, e.g., J. L. v. North Penn School District*, 2011 WL 601621

(E.D. Pa. 2011). What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

“To prevail on a claim that a school district failed to implement an IEP, a plaintiff must show that the school failed to implement substantial or significant provisions of the IEP, as opposed to a mere *de minimis* failure, such that the disabled child was denied a meaningful educational benefit.” *Sch. Dist. of Philadelphia v. Williams*, 2015 U.S. Dist. LEXIS 157493 (E.D. Pa. November 15, 2015) citing *Melissa S. v. Sch. Dist. of Pittsburgh*, 183 F. App'x 184, 187 (3d Cir. 2006).

I find that the District acted in a reasonable and prudent manner when, having acquired additional new information about Student’s health and difficulties it decided to seek parental permission to conduct an evaluation to determine special education eligibility. Once identified, Student was afforded IEPs that were reasonably calculated to confer meaningful educational benefit. It is clear that one of the greatest benefits of the IEP for Student was that it came with an IEP case manager who could devote a significant amount of time interfacing with Student, with the teachers and with the Parents to ensure that Student was being afforded what Student needed to succeed in the general education curriculum.

I find that although the teachers did not always perfectly implement the IEP, they made substantial and sufficient efforts to do so and to be responsive to the Parents’ directives and sensitive to Student’s issues. I appreciate how difficult it must have been for District staff to provide a host of SDIs while at the same time trying not to single Student out. Student was likewise caught in this same dilemma of wanting accommodations and not wanting to stand out. I conclude that the IEP was written and implemented so as to be reasonably calculated to provide Student with the meaningful educational benefit to which Student was entitled. I find that any failure of implementation was *de minimis*. I find that in fact Student did receive meaningful educational benefit as illustrated by Student’s excellent grades, successful high school graduation and admission to a four year college.

Section 504 and FAPE: Section 504 protects “handicapped persons”. The definition is provided in the Section 504 regulations at 34 CFR § 104.3(j)(1): “Handicapped person 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.” Under Pennsylvania Chapter 15, a “protected handicapped student” is 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.

Notwithstanding language which, by its plain terms, proscribes discriminatory conduct by recipients of federal funds, in the context of education the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled Student with a free, appropriate public education (FAPE). *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009) Borrowing from analogous IDEA case law

“meaningful” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood*. An eligible Student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996), *cert. den.* 117 S. Ct. 176 (1996); *Polk*.

The federal court in the Eastern District has held, “[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002). An appropriate education under the Rehabilitation Act is one that reasonably accommodates the needs of a handicapped child. *Ibid.* The Third Circuit opined that “to offer an ‘appropriate education’ under the Rehabilitation Act, a school district must reasonably accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits.” *Ridley Sch. Dist. v. MR.*, 680 F.3d 22 260, 280 (3d Cir. 2012) *See also Blunt v. Lower Merion Sch. Dist.*, 2014 U.S. App. LEXIS 17629 (3d Cir. Sept. 12, 2014) Again borrowing from IDEA case law, what is guaranteed is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore*.

The evidence is clear that the teachers/counselors made significant efforts on an ongoing basis to implement the various accommodations in Student’s 504 Plans, but there is also evidence that there were times that they inadvertently did not follow through [e.g. calling on Student when Student’s hand was not raised, calling Student to the office without prior warning]. Perfect implementation of a 504 Plan is not a requirement of Chapter 15; as with the IDEA the standard is whether what is provided to a student is reasonably calculated to confer meaningful educational benefit. I find that the teachers and the counselors were substantially in compliance with the 504 Plans, and that they were assisted in this regard by the mother’s frequent communications. I conclude that the 504 Plans were written and implemented so as to be reasonably calculated to provide Student with the meaningful educational benefit, to which Student was entitled. I also find that in fact Student did receive that meaningful benefit as illustrated by Student’s achievement scores on nationally normed standardized testing recorded at the end of 11th grade, and excellent report card grades especially on AP History and on Calculus, two very challenging 11th grade courses.

[Team Sport]:

Nonacademic services.(1) A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped Students an equal opportunity for participation in such services and activities. § 34 CFR 104.37(a)(1).

Physical education and athletics. In providing physical education courses and athletics and similar aid, benefits, or services to any of its Students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped Students an equal opportunity for participation. § 34 CFR 104.37 (c)(1)

In December 2013, OCR issued a letter explaining that:

Section 504 requires that school districts provide Students with disabilities with an equal opportunity to participate in and benefit from the districts' nonacademic services, including their existing extracurricular athletic activities. Students with disabilities must be provided with equal access to those existing extracurricular athletic activities. It does not mean every Student with a disability has a right to be on an athletic team, and it does not mean that school districts must create separate or different activities just for Students with disabilities. Dear Colleague Letter of January, 62 IDELR 185 (OCR, Dec. 16, 2013).

The question in this case is, 'Did the District's [team sport] coach decide not to include Student on the [team sport] team because of Student's OCD, or because Student's technical skills were not strong enough to earn Student a spot on the team?' In other words, was Student "otherwise qualified" to participate on the District's high school [team sport] team in 10th grade? If so, then excluding Student from that opportunity may have been disability discrimination contrary to law. If not, then the District's decision to preclude Student from that opportunity was not discrimination as defined by the above laws. I must assess the weight of the evidence in order to make a decision in this matter. The Parents testified that [team sport] is extremely important to Student and the family and that Student has played well on various community teams from the age when [youth sports programs] began. They produced a charming video of Student as a toddler preparing to [engage in an activity] as well as a collection of good plays Student made in the course of various games. The Student testified that if given an individual private tryout in addition to being called back on the last day, or if Student had been given [additional attempts] during the callback, Student would have demonstrated a high skill level. Student also contends, however, based on no evidence but Student's personal feelings, that the real reason Student did not make the team was because the coach knew about Student's OCD and did not want Student on the team because of it. On the other hand, the District produced the credible testimony of the [team sport] coach who provided anecdotal descriptions of Student's strengths and weakness in [team sport], and who also produced a chart of the detailed data collected on every applicant for the team in an array of skill areas assessed. The Parent's counsel exercised strenuous advocacy in an effort to have this chart excluded from the record but I found no plausible grounds upon which to agree. The chart lays out the dimensions of [various skills] against which Student's performance was compared to the other applicants and overall the cumulative result was that Student did not have the same skill level as the other aspirants who made the team and was therefore not "otherwise qualified" to be on the team. Thus, the Parent's claim must fail on each of three alternate bases: 1) the evidence is preponderant that the coach was not aware that Student had a disability at the time of the [team sport] tryouts in March 2013; 2) there is no evidence that the coach's decision not to offer Student a place on the team was based upon Student's OCD; and 3) the Student was not 'otherwise qualified' to play [team sport] on the high school team at the time at which the decision was made. I therefore conclude that the District's decision not to offer Student a spot on the [team sport] team in 10th grade did not violate section 504.²⁵ At the due process hearing, testifying under oath, the Parents and Student did not adduce any credible evidence that would support their contention that Student was discriminated against during the [team sport] tryouts in 10th grade.

²⁵ It should be noted that I came to the conclusion above independent of the OCR report issued on September 10, 2013 having held off on reviewing S-4 and the portion of S-34 pertaining to OCR until after drawing my own conclusions.

Discrimination: The IDEA and §504 statutes differ in focus. The primary focus of §504 is to “level the playing field,” *i.e.*, to assure that an individual, specifically, a school-aged Student in this context, is not disadvantaged in education based upon a disability. As stated in *Chavez v. Tularosa Municipal Schools*, 2008 WL 4816992 at *14, *15: (D.N.M. 2008): “In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to a FAPE. In other words, the drafters of Section 504 were not only concerned with [a Student] receiving a FAPE (as was the case with the IDEA), but also that a federally funded program does not treat [the Student] differently because [he/she is disabled]...Unlike the IDEA, Section 504 does not only look at what is a FAPE, but also what is fair.” *Ellenberg v. N.M. Military Inst.*, 478 F.3d at 1281-82 n.22 (quoting C. Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School*, 58 Stan. L.Rev. 1563, 1589 (2006)). Public educational agencies are required to ensure that protected handicapped Students have equal opportunity to participate in the school program and extracurricular activities to the maximum extent appropriate to the ability of the protected handicapped Student in question. School districts are required to provide these Students with the aids, services and accommodations that are designed to meet the educational needs of protected handicapped Students as adequately as the needs of non-handicapped Students are met.

To assert a successful §504 educational discrimination claim, a parent must prove four elements: 1) that the Student has a disability; 2) that he or she is otherwise qualified to participate in school activities; 3) that the LEA receives federal financial assistance; 4) that the Student was excluded from participation in, denied the benefits of or subjected to discrimination at school. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490 F.3d 337, 350 (3rd Cir. 2005); *School District of Philadelphia v. Deborah A.*

Intentional discrimination requires a showing of deliberate indifference, which may be met by establishing “both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge.” *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). See also *J.S. III by J.S. Jr. and M.S. v. Houston County Bd. of Educ.*, 66 IDELR 8 (M.D. Ala. 2015).

Scouring the extensive record in this case, I do not find that the District acted in a discriminatory manner toward Student at any time, much less intentionally and in bad faith, with regard to academic courses, elective courses, and/or the [team sport] tryouts.

Compensatory Education: As Student has been able to successfully access the regular education curriculum and make meaningful educational progress there has been no educational deprivation under Section 504 or under the IDEA and therefore no compensatory education is due.

ADA: Whether special education hearing officers have jurisdiction over ADA claims is an unsettled question. This hearing officer holds that she does not have remedial power beyond the extent to which ADA and Section 504 claims are coextensive with denial of FAPE. Having raised claims under ADA, the Parents have exhausted this issue at the administrative level.

Discussion

The IDEA does not promise perfect solutions to the vexing problems posed by disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.

Student testified that Student didn't feel prepared for college because "there hasn't been a lot of support through the school or anything to help me" and that Student feared Student would have "a ton of symptoms even worse and be at college and not sure how to manage it". (NT 589-590) Student felt Student would have done much better if "someone was checking on me most of the time...helping me practice something like when I'm writing something down not to erase it, things like that to help me prep for college, and to be more prepared". (NT 613-614) I find that Student's assessment of what the District did not do, or should have done, is not at all supported by the evidence.

It is clear that like most academically successful high school students Student worked very hard on school assignments, sometimes into the early hours of the morning. Undeniably Student labored under a double burden: challenging high school courses and a disability that eroded Student's time and energy. Like many good parents of children who struggle, Student's mother spent hours of her time helping Student with assignments, at times both reading to and scribing for Student. Student presents a complex, heartbreaking picture of a teen with significant academic and musical and personal skills whose days are plagued by anxiety, fear and self-doubt. It is a hopeful sign, perhaps, that two months into the first year of college Student has felt the need to access Student's long term therapist only twice.

If I look at the Student's and the family's struggles on the one hand, I must also look at the District's ongoing efforts to accommodate Student's disability as far as possible or practical, and recognize that District teaching staff and administration were also facing a difficult battle. The school could not cure Student's OCD. The private evaluator's recommendation that in order to provide FAPE the District needed to provide Student with Cognitive Behavior Therapy in school for several hours a week was not only beyond the scope of the "reasonable accommodations" and the "floor of opportunity" the educational system must provide, but also highly inappropriate. Student was under the expert professional care of a clinician specializing in OCD for a number of years, and during most of the relevant period she saw Student every other week, sometimes every week for hour-long sessions. Student also received various medication regimens to address Student's symptoms. The specialist/therapist and the medication did not cure Student's OCD; clearly the District could not. The District did provide a guidance counselor/504 Plan manager who was virtually always present or on call, and in 12th grade also provided an IEP that came with a case manager because of the amount of the guidance counselor's time monitoring the 504 Plan was taking. Additionally, Student's teachers were closely working with Student on an ongoing and usually daily basis to be sure that Student received accommodations and that Student's needs were being met. The District provided many accommodations and also offered to provide specially designed instruction in the areas of stress

management and study skills. Unfortunately, one significant complicating factor in assisting Student under the 504 Plans and the IEPs was Student's extreme sensitivity to being singled out in any way, even to being called to the office by guidance. At times Student's testimony bore the characteristic adolescent tendency to demand help on the one hand and to reject it on the other. Student's situation was however far from that of the typical teen given that the severe OCD and the attendant anxiety permeated Student's mental and physical fiber. Student's testimony conveyed how hard it was to be Student, and the school staff's testimony conveyed how hard, at times, it was to be Student's educators. Student did the best Student could, many times going above and beyond what was required. I hold that the District also did the best that it could, many times going well beyond providing what was reasonable. Frankly, I am in awe of what the Student accomplished and of what the District, and the mother, did to help.

With regard to the [team sport] tryouts, Student contends that when Student was called back for a second look on the last day Student was not given a "fair shot" because Student was [not given a sufficient number of attempts to perform]. Student believes that if there had been [more, Student would have been successful]. Student believes that the coach should have given Student individual tryouts separate from the other players who were trying out. (NT 674-675, 683) Student also believes that the coach found out about the OCD and kept Student off the team partially because of that reason and that being eliminated "had nothing to do with the stats". [NT 676, 680] I find no basis upon which to find that the District acted in a discriminatory manner towards the Student in finding Student's [team sport] skills insufficient to make the team. Based on the credible testimony of the coach I find that Student was given a fair tryout for the team over the five day period, even being called back for a second look.

Dicta: After listening to six days of testimony I feel pressed to offer the following, specifically with regard to the information provided by the Student and the Parents. No doubt the blow to Student when denied a spot on the 10th grade [team sport] team was intensified by a variety of intrinsic personal factors related to OCD – Student's perfectionism, Student's fear of loss of essence – as well as to Student's self-concept as an excellent [team sport] player. Based upon the heartfelt testimony of the Parents I add the extrinsic factor of the high valence the family as a whole placed on [team sport]. During Student's 185 minute testimony, the one time Student broke down and needed to stop for a brief time was when Student looked at this father's face while talking about [team sport]. Student's other skills developed while dealing with the onerous burden of OCD – composing music, singing in the chorus, playing a musical instrument, maintaining an excellent GPA, producing excellent writing pieces, entertaining young children – seem to have been largely undervalued by Student and the family. It is greatly hoped that during Student's college years and beyond that Student and Parents focus on Student's many rich assets rather than on the area in which, objectively compared to a particular constellation of peers in a given year, Student fell short.

Order

In accordance with the foregoing findings of fact and conclusions of law, the Parent's requests for relief are hereby DENIED and DISMISSED. It is FURTHER ORDERED that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

January 19, 2016

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official