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

Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name: O. F.

Date of Birth: [redacted]

ODR No. 16546-1516AS
CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Andrew Favini, Esq. Jeni Hergenreder, Esq. Disability Rights Network of Pennsylvania 429 Forbes Avenue, Suite 701 Pittsburgh, PA 15219
South Western School District 225 Bowman Road Hanover, PA 17331	Brooke Say, Esq. Leigh E. Dalton, Esq. Stock and Leader Susquehanna Commerce Center East Suite E 600 221 West Philadelphia Street York, PA 17401

Dates of Hearing: 01/26/2016, 01/27/2016, 03/07/2016, 03/09/2016, 03/10/2016, 03/11/2016

Record Closed: 04/22/2016[1]

Date of Decision: 05/13/2016

Hearing Officer: Brian Jason Ford, JD, CHO

[1] The record closed upon receipt of the parties' closing briefs.

Introduction

This special education due process hearing was requested by the Parents, on behalf of their minor child, the Student, against the School District (District).[2] The Parents claim that the District violated the Student's educational rights in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*.

The Student has Prader-Willi syndrome (PWS). PWS is a rare, genetic disorder. The parties agree that the Student has PWS. The parties also agree that symptoms of PWS generally include cognitive disabilities, behavior problems, and hyperphagia. Hyperphagia, generally, is a persistent feeling of extreme hunger even after eating. Individuals with hyperphagia, and especially individuals with hyperphagia as a symptom of PWS, may compulsively seek food and overeat to a dangerous extent.

Despite the parties' agreement that the Student has PWS, they disagree about how (or whether) the Student exhibits PWS symptoms in school, and what accommodations should be made for the Student. Specifically, the Parents claim that the District's failure or inability to limit frequent and unpredictable uses of food and images of food in the Student's classroom creates an unsafe environment for the Student, which is a violation of Section 504. Further, the Parents claim that the District's proposal to increase the amount of time that the Student spends outside of the regular education classroom, without first conducting a Functional Behavior Assessment (FBA) to determine what supports could make a more inclusive placement appropriate for the Student, violates the IDEA.

To remedy these alleged violations, the Parents demand both specific performance and compensatory education. Regarding specific performance, the Parents demand changes to the Student's Individualized Educational Plan (IEP). Specifically, the Parents demand an IEP that places the Student in regular education classrooms with supports that are recommended by a private evaluator, an appropriate positive behavior support plan (PBSP) to address the Student's behaviors. Regarding compensatory education, the Parents argue that the District's failure to have appropriate supports in place resulted in behaviors which caused frequent removals from the classroom. The Parents demand compensatory education to remedy this time out of the classroom.[3] The Parents also demand attorneys' fees and costs, which I have no authority to give.

The hearing convened over six (6) sessions, some of which were extended sessions running from the morning into the evening. The duration of this hearing was a direct result of the parties'

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[2] Except for the cover page of this decision, identifying information including the name of the school district has been omitted to the extent possible. The Student's genetic condition is rare, which has prompted this greater than usual effort to maintain the Student's privacy.

[3] The Complaint also presented a demand for compensatory education to remedy the increased time that the Student spent out of the regular education classroom without parental consent, alleging that the District unilaterally changed the Student's placement. The Parents seem to have abandoned that claim in their closing brief, as they seek no remedy to increase or restore the amount of time that the Student spends in regular education classes. Moreover, as discussed below, the Parents correctly note that the District proposed IEPs placing the Student out of regular education for increasing portions of the school day. Those IEPs were never approved or implemented - except for one IEP that was approved *after* the Complaint was filed.

motions to abrogate time allotments for certain witnesses – as opposed to the complexity of this case. The extreme inefficiency with which evidence was presented in this matter will serve as a lesson to this Hearing Officer going forward.

Issues[4]

1. Must the District revise the Student's IEP to include accommodations that require the complete removal of food and food images from all lessons?

2. Must the District completely remove food from all events that fall outside of the Student's eating schedule?

3. Must the District restrict the amount and type of food in all events that occur during the Student's eating schedule?

4. Is the Student entitled to compensatory education for time spent out of the regular education classroom, resulting from food-related behavioral issues that were not appropriately accommodated in the Student's IEP?

Findings of Fact

The record of this matter is vast and sprawling, especially relative to the period of time in question. The entire record, including every document presented, was carefully considered. However, I make findings of fact only as necessary to resolve the issues presented. A significant amount of the record, including much of the multi-day testimony from the Student's mother, is hearsay. That hearsay was taken over standing objections. As explained to the parties during the hearing, hearsay is admissible in special education due process hearings, but cannot be used to form the basis of this decision.

Similarly, a large amount of information was presented regarding PWS itself, and how PWS symptoms usually present. The amount of this general information is significant even in comparison to the amount of evidence presented about how PWS manifests in the Student. This is an important distinction. By analogy, simply saying that a student has Autism Spectrum Disorder says almost nothing about the student's actual presentation; only that the student met certain diagnostic criteria. Saying that a student is dyslexic says nothing about the student's actual ability to read. In this case, saying that the Student has PWS tells me very little about the Student's actual presentation in school, and how the Student's needs should be addressed. As discussed below, the District's obligations are connected to the Student's needs, and not any particular diagnosis. Consequently, the fact finding below focuses on the evidence that is specific to the Student, and provides general information about PWS only as necessary for context.

[4] While the parties phrase the issues somewhat differently, even shifting their own phrasing over time, I partly draw from the Parents' closing brief to identify their demands. However, in their closing brief, the Parents demand an "appropriate amount" of compensatory education to remedy IDEA and 504 violations. This is inconsistent with their complaint, which relates compensatory education demands directly to time spend out of the classroom. A broader demand for compensatory education is not presented in the Complaint and, therefore, I cannot consider it. *See* 20 U.S.C. § 1415(f)(3)(B),

I find as follows:

1. There is no dispute that the Student is a "child with a disability" as defined by the IDEA at 20 U.S.C. § 1401.

2. The Student follows a strict diet and eating schedule. In general, the Student is not permitted to eat even a small amount of food that is inconsistent with the diet, or does not fall within the schedule. NT *passim*.

3. In addition to the symptoms described in the introduction section above, individuals with PWS often experience extreme anxiety related to food, wanting to know when they will eat next, or what they can eat. This anxiety can be displayed in many ways, including skin picking, plucking, and other obsessive compulsive symptoms, and problematic behaviors. In general, keeping a strict diet and food schedule helps compensate for this anxiety by providing what is called "food security" – a system in which the person with PWS has no doubt about when food is coming, no hope of getting impermissible food or permissible food at an impermissible time, and no disappointment about not receiving food. In contrast, exposure to impermissible food, exposure to permissible food at an impermissible time, or failure to properly store food in a way that the person with PWS cannot access it, all tend to increase anxiety for individuals with PWS. NT *passim, see e.g.* P-31.

4. The Student is not able to verbally explain the Student's own behavior, or whether that behavior is related to food. NT *passim.*[5]

5. The District became the Student's LEA at the start of the 2014-15 school year when the Student enrolled in kindergarten. At that time, the Student attended the District's regular, half-day kindergarten program, and an additional half-day Learning Support (LS) program, placing the Student in the District's programming for a full school day. *See, e.g.* NT at 143.

6. The Parents created a packet of information about PWS. P-1. The Parents shared that packet with the District prior to the start of the 2014-15 school year.

7. The Parents and Student attended a school orientation program shortly before the start of the 2014-15 school year. During that orientation, there were Hershey Kisses on a table in the Student's classroom. NT at 154, 1405.

8. The week before school started, the Parents and teacher exchanged emails. Those emails confirm that food would be used in the classroom on "special days" (e.g. the 100th day of school), and for classroom activities (counting with M&Ms or Skittles, sampling food to learn about different tastes and seasonal fruits). The teacher assured the Parents that they would be notified whenever the use of food was planned, so that the Parents could choose whether to let the Student participate, or whether the Student should be directed to an alternative activity. P-3.

9. Those emails also confirm the Parents' preference for the Student to eat with peers in the cafeteria, since the Student would be monitored by a Personal Care Assistant (PCA). The

[5] While I derive this finding from the record in its entirety, there is some direct testimony on this point at NT 70. That testimony is from a third part evaluator. That evaluator's testimony is all somewhat muddled as to what pertains to the Student, and what usually pertains to people with PWS. Regardless, the entirety of the record supports the conclusion that the Student is unable to articulate a basis for the Student's own behaviors.

Parents also asked for modifications of the food planned for special days so that the food would conform to the Student's diet, and so that the Student could eat the same food as peers. P-3.

10. The Student's kindergarten class [had a nickname] that was related to a particular food item, and a picture of that item was] used [within the classroom] for at least part of the 2014-15 school year. NT 1416-1418.

11. Beans were used as counting manipulatives in the classroom. NT at 1441.

12. Throughout the school year, food that was intended to be eaten (as opposed to manipulatives) was used in the classroom on several occasions; at least 10 times between the start of school and early November, 2014. Each time, the Parents were given roughly 24 hours' notice prior to the event. Each time, the event fell outside the Student's eating schedule. P-4, P-7, P-12, P-13, P-14. On each of these occasions, the Parents were given the choice of letting the Student participate, or having the District remove the Student to do another activity. The Parent typically let the Student participate, and sometimes provided alternative food for the Student.[6] *Id,* NT *passim*.

13. Other activities in which the District provided food outside of the Student's schedule, or food that the Student could not eat, continued over the course of the school year (e.g. Octoberfest on October 2, 2014). P-9.

14. The classroom door had a sign [with a food item] to remind the students to walk quietly in the hallway. NT at 1425.

15. The Student's kindergarten classroom contained images of food and food toys.[7] [Redacted.] NT at 1425-1447.

16. Also, the kindergarten classroom contained a [box with a food image that] was removed sometime in October of 2014. NT a 1472.

17. The teacher kept a "personal chocolate stash" out of sight in her desk. NT at 1450.

18. Birthdays were celebrated monthly in the classroom. On these days, the District would provide a birthday snack. The Student could not eat the birthday snack because it was incompatible with the Student's diet. NT 177, 1463.

19. Given the location of the kindergarten classroom, the LS classroom, and the cafeteria, the kindergarten classroom sometimes smells like food and the LS classroom smells like food often. NT 1456-1457, 1309.

[6] The Parent testified that the District presented only two options: participate or do something else. The Parent testified that her preference would be to modify the activity to use food that the Student could eat at a time that the Student could eat it. This testimony is somewhat supported by various email chains that were entered into evidence.

[7] Throughout this decision, I will refer to non-realistic or cartoonish drawings of food as "images of food." I will refer to photographs of food or realistic pictures of food as "pictures of food."

20. On September 4, 2014, the Student's IEP team met and developed an annual IEP for the Student.[8] P-6.

21. The September 2014 IEP notes that the Student "has dietary restrictions and guidelines for meals." P-6 at 10. The Student's snack, lunch, and fluid intake schedule are listed as a program modification. P-6 at 22. The Student's PCA is listed as a related service, as is monitoring the Student's fluid intake, and checking and cleaning the Student's g-tube.[9] P-6 at 23.

22. The September 2014 IEP makes no other reference to or accommodations regarding food, the Student's exposure to food, food pictures, or food images. P-6.

23. The September 2014 IEP placed the Student in a supplemental level of Learning Support. The supplemental level means that the Student received special education supports from special education personnel for more than 20% but less than 80% of the school day.[10]

24. The September 2014 IEP calculated that the Student would spend 3.5 hours in regular education classrooms over the course of a 6.75 hour school day. As such, the Student would spend 52% of the school day in regular education.

25. In September of 2014, the Parent scheduled an appointment with a physician. The physician had requested a list of the Student's in-school behaviors prior to the appointment. The Parents, in turn, requested a list from the District. The District provided a list to the Parents on September 26, 2014. P-8, NT at 476-477.

26. The list of the Student's in-school behaviors included work refusal, drawing on the desk, throwing pencils and crayons, crying, crawling under the desk and tables, noncompliance, pushing desks, taking shoes and socks off, hitting and biting staff, destroying school property, difficulty with transitions, and pulling hair out. A note on the list indicates that some of the behaviors (hitting, biting, destroying property, taking shoes and socks off) occurred only "a few times" but the duration of "noncompliance" lasted "from a few minutes to 20-30 minutes." P-8.[11]

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[8] Typically, far more detailed information about an IEP would follow. As noted, I make findings of fact only as necessary to resolve the issues presented. In this case, no issues are raised about academics, IEP goals, Specially Designed Instruction (SDI) and the like. Rather, the issues relate to PWS-related behavioral accommodations, and inclusion in the regular education classroom.

[9] A g-tube is a medical device by which nutrition can be placed directly into the Student's stomach.

[10] The full-time support from the Student's PCA is not factored into this conclusion.

[11] Here, the unusable hearsay that made up a significant portion of the Parent's testimony is noteworthy. The Parent testified that she brought the District's list to a doctor, and the doctor expressed an opinion (verbally only, without any documents) that the listed behaviors are a function of food insecurity in school. So, the doctor told the Parent, and then the parent told me, that the Student's behaviors are a function of inappropriate IEP accommodations. Regardless of the Parent's credibility, and regardless of the fact that the doctor apparently relied exclusively on the Parent's description of the classroom to draw this conclusion, I cannot use those statements to conclude that the Student's behaviors are a function of food insecurity caused by inappropriate accommodations – or use those statements for fact finding at all.

27. On October 16, 2014, the IEP team reconvened. Pertinent to the issues presented in this case, the team discussed the Student's behaviors, and the need for an FBA. P-10 at 1. At the meeting, the Parents provided written consent for the District to conduct an FBA. *Id*. The Student's Individualized Health Plan (IHP) was also discussed. *Id.*

28. The Student's IEP was also revised at the October 16 meeting, but in ways that are not relevant to the issues presented in this case (mostly regarding Occupational Therapy and Physical Therapy). Nothing was changed regarding food, or the amount of time that the Student spends in the regular education classroom. P-10.

29. On November 20, 2014, the FBA approved during the October meeting was finished and presented to the Parents along with a PBSP. P-15. The PBSP was written before the FBA was conducted. NT at 952. The FBA, technically a Simple Indirect FBA, was based on three observations on three different days in three different settings. Each observation was 20 to 30 minutes long. NT at 963.

30. The FBA reached a hypothesis that the Student's behaviors functioned to avoid or escape demands, to gain access to preferred items or activities, or to gain attention from adults. P-15. The FBA makes no reference to food, food toys, food images, food pictures, or the Student's reaction to or behaviors concerning any of those. P-15.

31. Starting on November 24, 2014, the District collected daily behavioral data for the Student. This data collection was relative to IEP and PBSP goals and objectives. Data was collected on behavior charts, which tracked the amount of teacher prompting that was required for the Student to comply with teacher directions. Sometimes, the charts include notes describing the Student's behavior, or what was happening when the behavior occurred. These charts – which cover about 105 school days – are substantively silent regarding food, food images, food pictures, or food toys. P-50.

32. The behavior chart for December 22, 2014, stated that the Student "seem[ed] hungrier today than normal" and two of the behaviors listed for that day indicate that the Student was crawling under and trying to get into the teacher's desk. On that day, negative behaviors spiked at 11:30 a.m. and subsided by 1:00 p.m. The rest of the day was noticeably good, and the teacher's comment did not link the Student's perceived hunger to the behaviors. P-50 at 15.

33. Between December 17, 2014 and January 30, 2015, the District tracked incidents during which food (actual food) was used as part of a classroom activity. Leading up to the winter holiday break, food was used every day, and sometimes multiple times per day, between December 17 and December 23, 2014. S-35F.

34. The Parents argue that there is a correlation between the increased exposure to food in the classroom between December 17, 2014 and December 23, 2014 as seen on the behavior charts (P-50). As a matter of fact, I find that the behavior charts do not support this correlation. During this time, the Student had some remarkably good days (P-50 at 12, 13, 16) and some problematic days (P-50 at 14, 15). The Student also exhibited both good and problematic behaviors on days in which there is no data to correlate food exposure. P-50.

35. In December 2014 and January 2015, the kindergarten classroom participated in an estimation exercise. Each student had a day to bring in a jar filled with objects from home, and the other students would estimate how many of the objects were in the jar. The Parents expressed concerns about this exercise, since some students were likely to bring in food.

Some students actually did bring in food. There is insufficient data in the record to match the Student's behavior charts to days in which peers brought in food to estimate (i.e. the record does not reveal which days other students brought food in the jars). P-23, P-50.

36. The Student's day to bring in an estimation jar was January 30, 2015. The Student did not bring in food. The Student's behavior chart for January 30, 2015 shows a very high volume of very problematic behaviors, including trying to bite the teacher. The teacher attributed some of the behaviors, especially in the morning, to another student refusing to hold the Student's hand. While the behaviors are described, with the exception of the hand-holding incident, the chart does not reveal any antecedent to the behaviors or comment about food at all. P-50 at 34.

37. On February 5, 2015, the Parent sent an email to the kindergarten teacher raising concerns about food-related activities for the 100 days of school celebration. The teacher responded that the District would address those concerns by removing the Student from the activities. P-24. The Student's behaviors were good in the morning but problematic in the afternoon of February 6, 2015, when the celebration occurred. P-50 at 39.

38. Throughout February of 2015, the Parents and District were in frequent communication with each other, and had at least one team meeting. The Parents frequently expressed concerns about the Student's behavior, and their belief that the Student's behavior was triggered by food and food images. During this time, the Parents asked the District to seek input from a PWS expert, and remove images of food from the classroom. In general, the District responded to the Parents by stating that they observed no correlation between the Student's behavior and food, refusing to track incidental exposure to food images, and an overall belief that food images could not be completely eliminated and removing all references to food would compromise the education of the other students in the class. The District did, however, consult with an individual from the PWS Association. That person provided general information about school accommodations for students with PWS. That information indicates that food is "never OK in the classroom" for students with PWS. *See, e.g.* P-24, P-25, P-27, P-31; NT *passim.*

39. Around the same time, the District proposed an evaluation for Occupational Therapy, Physical Therapy, Assistive Technology and Adaptive PE. The Parents consented to this evaluation. P-29, P-30.

40. In February and March of 2015, District personnel met without the Parents to discuss the Student. The meetings were documented. S-38. During these meetings, the District discussed the option of increasing the Student's time in the LS classroom, and revising the IEP so that the Student would spend the maximum amount of time in the LS classroom without changing the Student's supplemental status. *Id.*[12]

[12] The Parents' arguments linking these meetings to the Student's behavior borders the disingenuous, and counsel is cautioned against such specious arguments in the future. It is true that the Student exhibited noticeably poor behavior on the same day the District met without the Parents. Nothing in the record establishes that the Student's program changed in any way on the days of the meetings, or that the Student (or Parents) even knew that the meetings were occurring. Attempting to link the day of the meetings to the Student's behavior charts is misleading at best. *See, Parents' Closing Brief* ¶ 47, pages 13-14.

41. On March 20, 2015, the District had an event [involving a specific food and family members]. The District gave the Parents the choice to participate in the event or not. Fearing that excluding the Student from the event would upset the Student, the Parents permitted the Student to participate. The Student and [family] ate an alternative snack [in a different location]. P-33, NT at 655-656.

42. On March 10, the individual from the PWS association drafted a letter to the District, at the Parents' direction, stating that food in the classroom should be avoided. The letter stresses that the classroom should not have food, smell like food, and students should not eat snacks that a student with PWS is not allowed to have. The letter opined that failure to implement these accommodations causes "high anxiety and can result in behavior problems." The recommendations and opinions in the letter are generic to all students with PWS, and not specific to the Student. P-32.

43. On April 2, 2015, a pediatric endocrinologist wrote and sent a letter to the Parents, at their request, recommending accommodations for the Student.[13] Regarding food, the doctor recommended that the classroom "should never have food or easily-accessed pieces of food, at any time other than meal-time. … Food should NEVER be used as a reward, a punishment, or a motivation for completing tasks … [Student] should only eat food sent from home… If food can be completely removed from class events, that would be ideal… Food or things that are in any way edible (e.g. dried beans) should not be used as a teaching tool in [Student's] classroom…" P-36, emphasis in the original. The letter makes no reference to pictures of food, images of food, or food toys.

44. On April 24, 2015, the IEP team (including Prents) reconvened. The Parents gave the pediatric endocrinologist's letter to the District during the meeting, and the recommendations in that letter were subsequently copied into the present education levels section of the IEP. P-39. The recommendations were not added to the IEP as accommodations (either SDI or program modifications). *Id.*

45. During the April 23, 2015 meeting, the Parents continued to reiterate their belief that the Student's behaviors are caused by exposure to food and images of food. The District stated its belief that the Student would benefit from increased time in the LS classroom. NT 1344.

46. The District drafted a revised IEP after the April 23, 2015 meeting. The revisions page of the IEP indicates that changes were made to the present levels section (to note the pediatric endocrinologist's recommendations), and to the SDIs. P-39 at 2. The revision to the SDI was the inclusion of the following at P-39 at 25:

> Due to behavioral concerns, [Student] needs the following accommodations: brush teeth in the nurse's office, individual Kindergarten work will be completed in the Learning Support classroom, First Then cards, Token system for Positive Reinforcement, 123 Magic.

[13] The pediatric endocrinologist testified as an expert, and there is no doubt that the doctor has considerable expertise regarding PWS. However, it is not correct to call this doctor the Student's doctor. The doctor runs an out-of-state clinical research facility, connected to a university. The Student participated in the doctor's research, and the doctor saw the student on a few occasions in that capacity. While the doctor provided recommendations to the Parents, the doctor did not treat the Student, as that term is colloquially used.

47. The change in SDI required more time in the LS classroom. Under the proposed IEP, the Student would spend 2.75 hours per day in the regular education classroom, a decrease from 3.5 hours in the prior IEP. As a result, the percentage of time that the Student would spend in the regular education classroom decreased to 41% from 52% in the prior IEP. While the amount of time that the Student spent in the LS classroom increased, the amount of time that the Student received special education services remained at the supplemental level (between 20% and 80% of the school day). P-39.

48. The new SDI, the corresponding recalculation of time in regular education classrooms, and the note concerning the doctor's recommendations in the present education levels were the only changes in the proposed IEP and PBSP. P-39.

49. After drafting the April 2015 IEP revisions, the District sent only the changed pages to the Parents to approve by initialing. P-37. In response, the Parents requested a complete copy of the revised IEP, and the District sent a complete copy. P-39.

50. The Parents did not approve the April 2015 IEP revisions.

51. On June 5, 2015, the IEP team reconvened. At this meeting, the District presented the reevaluation report (RR) based on the reevaluation that the Parents approved in February of 2015.[14] Again, the Parents approved an Occupational Therapy, Physical Therapy, Assistive Technology and Adaptive PE evaluation. *See above*. The Student was evaluated by a masters-level, registered, licensed occupational therapist (OTR/L or Occupational Therapist). Testing included observations of the Student's handwriting and behavior, a Vineland II Adaptive Behavior Scale completed by the "LS teacher, Kindergarten teacher, staff, and therapist" (not the Parents), the DTVP-2 (a test of visual perception), a handwriting test, and the WRAVMA (a test of visual motor abilities). P-40.

52. Based on this testing, the Occupational Therapist drew conclusions about the Student's fine and gross motor skills (both should be supported and improved with OT services) and some conclusions about the Student's processing speed in response to visual and motor tasks. P-40

53. The Occupational Therapist also wrote out the behaviors that the Occupational Therapist observed. These, in general, are in line with what is reported in the Student's behavioral charts. The Occupational Therapist also wrote out observations about the Student's exposure to food in the classroom. By the time of the observation, the Occupational Therapist noted that there was no food in the classroom, and that food was not used for instruction in any way. The Student did not exhibit negative behaviors when the Occupational Therapist brought out her own lunch, but rather asked if she could arrange the Occupational Therapist's food in order for the Occupational Therapist to eat. The Student brought out the Student's own lunch at this time, and ate with the Occupational Therapist without incident. Further, the Occupational Therapist noted that the Student had no adverse reactions to images of food in some of the testing materials. P-40.

54. Although the Occupational Therapist is not a behavioral specialist, and holds no licenses or certifications in behavioral fields, the Occupational Therapist's observations prompted the Occupational Therapist to opine that the Student's behaviors should be targeted "separate from the [PWS] diagnosis." P-40 at 10. Moreover, the Occupational Therapist concluded that

[14] The Parents raise no complaint about the amount of time it took the District to complete this evaluation.

since food had been eliminated “as a trigger,” the Student’s behaviors could not be related to food. P-40.

55. A tremendous volume of testimony from the Student’s teachers support a finding that by the time of the Occupational Therapist’s observations, the Student’s teachers had taken extraordinary measures to remove food, images of food, and pictures of food from the classroom (both regular and LS). The teachers went out of their way to reduce even incidental references to food in instructional materials (although complete elimination could not be achieved), and eliminated some instructional materials from the entire class for that reason. This had a direct impact upon the education of other students in the class, but the record does not enable a determination of the extent of that impact. NT *passim*.

56. During the June 5, 2015, IEP team meeting, the District again proposed the April 2015 IEP revisions. The Parents continued to not approve those revisions. *See, e.g.* P-42 at 1.

57. During the June 5, 2015, IEP team meeting, the District and Parents discussed alternative placement options, including placement in a classroom run by the Intermediate Unit (IU) in which the District is located. *See, e.g.* P-43.

58. On June 19, 2015, the IEP team reconvened and the District proposed a new, annual IEP for the Student for 1st grade (2015-16 school year). P-43, P-45. Unlike prior IEPs, this IEP would place the Student in an IU run LS classroom, housed in the same elementary school that the Student attended in kindergarten. P-45.

59. Under the proposed June 2015 IEP, the Student would spend 1.4 hours per day in the regular education classroom, a decrease from 2.75 hours in the proposed April 2015 revisions, and a decrease from 3.5 hours in the last approved IEP. As a result, the percentage of time that the Student would spend in the regular education classroom decreased to 21%, down from 41% in the proposed April 2015 revisions, and down from 52% in the last approved IEP. As with the proposed April 2015 revisions, the June 2015 proposed increasing the amount of time that the Student would receive special education services, but the increase was to 79% of the school day. Therefore, the IEP continued to offer learning support at a supplemental level (between 20% and 80% of the school day). P-45.

60. The proposed June 2015 IEP offered some additional food-related accommodations as either program modifications or SDI. In addition to everything previously offered, this IEP calls for the complete removal of food from class events “when possible,” and the prohibition of edible teaching tools, and the replacement of any “curriculum involving food.” P-45 at 27.

61. On July 2, 2015, the Parents requested this due process hearing by filing their Complaint with ODR and providing a copy of the Complaint to the District via counsel.

62. Sometime after Parents filed the Complaint, the District reissued the proposed June 2015 IEP with revisions. While the exact date is not clear, for convenience I will refer to this IEP as the July 2015 IEP.

63. The July 2015 IEP no longer proposed the IU’s LS classroom but rather the District’s LS classroom (all still in the same elementary school). This IEP placed the Student in regular education for 44% of the school day. P-49.

64. Along with the July 2015 IEP, the District also revised the Student's PBSP to include a statement that the Student has a "biochemical urge to eat." P-49 at 42.

65. The Student's eating schedule and dietary restrictions remained essentially unchanged from kindergarten to 1st grade.

66. As in kindergarten, several events occurred throughout 1st grade that involved food. *See, e.g.* P-35, P-55, P-57, P-59, P-64, P-67, P-70.[15] The District's communication with the Parents about when these events were scheduled, and the extent to which food would be involved, was sometimes lacking. On some occasions, when the event involved food as a reward and alternative, non-food rewards were not used, the Parents did not permit the Student to participate. On other occasions, the Student participated in food events without the Parents' knowledge. On other occasions, the Student participated in events that exposed the Student to incidental images of food. *Id.*

67. As in kindergarten, the District continued to collect behavioral data, but did not link that data to food, or collected data in such a way that any correlation between behaviors and food can be drawn.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to a student who qualifies for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

[15] The record contains many individual, specific examples of individual incidents in which the Student was or may have been exposed to food during 1st grade (the 2015-16 school year to date). I decline to address each incident individually, especially given the lack of evidence correlating each (or any) of those incidents to behavioral problems. The same is true for kindergarten (the 2014-15 school year). This absence of evidence is addressed in the discussion section below.

Substantively, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

More specifically, 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). 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 confirm 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. *See, e.g., J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, 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).

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

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool,* 916 F.2d 865 (3d Cir. 1990).

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

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia,* 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endured by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.").

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

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

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

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

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

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

Section 504 / Chapter 15

At the outset, it must be noted that an LEA may completely discharge its duties to a student under Section 504 by compliance with the IDEA. Consequently, when a Student is IDEA-eligible, and the District satisfies its obligations under the IDEA, no further analysis is necessary to conclude that Section 504 is also satisfied. Conversely, all students who are IDEA-eligible are protected from discrimination and have access to school programming in all of the ways that Section 504 ensures.

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

The test is somewhat more defined under Chapter 15. Chapter 15 defines a "protected handicapped student" as a student who:

1. Is of an age at which public education is offered in that school district; and

2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and

3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

If a student is a handicapped person, Section 504 prevents school districts from discriminating on the basis of disability by denying the student participation in, or the benefit of, regular education. *See* 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from *regular* education.

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

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

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

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

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

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

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

Discussion

The most striking aspect of this case is the near-total lack of evidence establishing any sort of causal connection between the Student's exposure to food, food images, or food pictures, and the Student's behaviors. On the one hand, this absence of evidence is surprising, given the massive volume of evidence (both documents and testimony) presented, the issues raised by the Parents, and the defenses presented by the District.[16] On the other hand, this absence of

[16] One of the District's primary defenses is their claim that evidence establishes that there is no connection between food images and behaviors. I reject this because there is no evidence one way or another. One of the District's secondary arguments is that the Parents' demands constantly changed, painting a moving target for the District. There is good evidence in this case that the Parents' demands were a moving target, but there is no basis in the law for this defense. The District must provide whatever is necessary for FAPE, regardless of parental demands. It is the District's job to figure out what the Student needs and offer it, even if parental

evidence is not at all surprising, given the lack of any systematic effort on the District's part to determine whether exposure to food, food images, or food pictures correlates to problematic behaviors.

Before delving further into the evidence that was not presented, it is worthwhile to discuss what the evidence establishes. There is no doubt that individuals with PWS experience hyperphagia. Hyperphagia is a hallmark of PWS. Moreover, it is more likely than not that the Student experiences hyperphagia. To paraphrase testimony from both parents, it is reasonable to assume that the Student experiences a feeling of starvation even when completely full of food. For purposes of this decision, I will assume that the Student experiences hyperphagia on a regular basis.

There is also no doubt that individuals with PWS experience anxiety related to food, and that anxiety may manifest as undesirable behaviors. Although there is no persuasive evidence to support a finding of fact, for purposes of this decision, I will assume that the Student experiences anxiety about food. Given that assumption, the record also establishes that maintaining "food security," as described above, is the best way to address that anxiety. Food security, in turn, requires strict, rigid adherence to both a diet and food schedule, as well as making food that the Student cannot have inaccessible.

All evidence yields a conclusion that the District did an admirable job in establishing food security for the Student. With the exception of a single incident over a nearly two school-year period, the Student did not seek out food.[17] When that happened, the Student was unable to access the food. The District maintained the Student's eating schedule. No evidence supports a finding that the Student ever consumed food that was not either sent by the Parents, or approved by the Parents beforehand (albeit sometimes with short notice).

Further, while a small amount of not especially persuasive evidence suggests that images and pictures of food can spark behavior-causing anxiety in individuals with PWS, no evidence even suggests that removing all images and pictures of food is a part of food security. However, the same evidence suggests that exposing individuals with PWS to images and pictures of food may have undesirable consequences. More importantly, the District knew that the Parents believed (and still believe) that exposure to images and pictures of food was the underlying cause of the Student's behaviors in school. The District took that concern seriously and, without adjusting the Student's IEP, took action based on that concern.

As noted above, the teachers went to extraordinary lengths to ensure that the Student would not have exposure to images and pictures of food, even incidentally. This resulted in the teachers changing or abandoning instructional materials, even though that sometimes impacted upon the education of other students. The teachers worked diligently to this end, even in the absence of an obligation to do so in the Student's IEP or to establish food security. It is unfortunate that the teachers' considerable work is not reflected in the Student's IEP.

Despite the teachers' efforts, all pictures and images of food cannot be removed from a school. The Student continued to have incidental exposure to food pictures and images throughout kindergarten and first grade. To be clear, the Parents do not demand that images and pictures

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demands constantly change (or even if the Parents do not know what to demand). *See, M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996).

[17] I conclude that the Student did try to get to the teacher's "personal chocolate stash" on December 22, 2014.

of food be removed from the Student's school entirely. In fact, to their credit, they realized the impossibility of such demands during their testimony. Similarly, no school is ever in complete control over what food students bring to school. By analogy, even schools that have established nut-free campuses cannot (and should not) search every student's lunchbox as they pass through the schoolhouse gate. Instead, schools develop policies and enforce them as well as possible. The District cannot, and need not, guarantee that the Student will never be exposed to or gain access to impermissible food, food at an impermissible time, or be exposed to pictures and images of food. Rather, the District must do its best to ensure food security, and must make a serious inquiry as to whether exposure to food pictures and images is connected to the Student's behaviors. This brings us back to the evidence that was not presented.

Given the Parents' burden of proof, I cannot find that exposure to pictures and images of food are an antecedent to the Student's behaviors. The District's equally vigorous contention that exposure to pictures and images of food are *not* an antecedent to the Student's behaviors falls equally flat, and for the same reason. Just as there is no evidence linking the Student's behaviors to such exposure, there is no evidence that the two are not connected. The evidence shows that the Student exhibited problematic behaviors close in time to events in which food was a significant component. The evidence also shows that the Student exhibited problematic behaviors not close in time to such events. The events in question concern real food that was meant to be eaten. Evidence correlating the Student's exposure to pictures and images of food to behavioral incidents is simply absent. The District tracked the Student's exposure to food images for a period of time, but did so separately from the Student's behavior logs, and it is impossible to connect the two documents in a meaningful way.[18]

Given the foregoing, the Parents cannot establish that exposure to pictures and images of food is an antecedent to the Student's behaviors. This makes it impossible for the Parents to establish entitlement to much of the relief that they demand. To highlight the obvious, the Parents cannot present evidence to support their claim because the District did not thoroughly investigate the Parents' concerns – concerns that the District validated through its actions.

There is an analogy between this situation and a *very* recent decision from the U.S. District Court for the Eastern District of Pennsylvania in *Sch. Dist. of Phila. v. Drummond*, 2016 U.S. Dist. LEXIS 48753, Case 2:14-CV-02804-NS (E.D. Pa. Apr. 12, 2016). In the due process hearing proceedings in that case, the Parent demanded an independent educational evaluation (IEE) at public expense, and compensatory education to remedy deficiencies in the child's IEP. The Hearing Officer (coincidentally me) determined that the Parent was not entitled to an IEE at public expense, and that the Parent failed to put on evidence about what should have been in the IEP. The District court reversed. First, the District court concluded that the Parent was entitled to an IEE at public expense. Second, and pertinent to this case, the District court found that the reason why the Parent failed to present evidence about what should have been in the

[18] It is telling that the Parents make no argument directly connecting the behavior logs at P-50 and food exposure log at S-35F. The record also indicates that teachers increased their efforts to remove pictures and images of food after the tracking in S-35F stopped. Along the same lines, the Parents argue that the Student's exposure to the smell of food in the LS Classroom may be an antecedent to the Student's behaviors, but the Student exhibited behaviors across settings, regardless of the smell of food.

IEP was because the Student did not receive the IEE. *Id* at 11-12. To remedy this, the court order an IEE, and a new IEP thereafter.[19]

Drummond stands for the proportion that when an LEA fails to evaluate a student in a way that reveals the student's needs, and that failure makes it impossible for a parent to present evidence of the student's needs at a due process hearing, the Hearing Officer ought to compel the LEA to generate the needed information. I have authority to compel LEAs to do this, or to require LEAs to fund IEEs to accomplish the same. *See, e.g.* 34 C.F.R. § 300.502(d).

In this case, the Parents expressed a concern that the Student's exposure to food images and pictures is an antecedent to the Student's behaviors. The District legitimized that concern by going to extreme lengths to reduce the Student's exposure to food images and photos to the greatest extent possible. But the District did not collect meaningful data that would either establish or negate a connection between such exposure and the Student's behaviors. In the absence of this data, the Parents cannot prove that removal of "food images entirely from lessons" is a necessary accommodation. *Parents Closing Brief* at 31. Consequently, I will order the District to collect such data, analyze it in a report, and then reconvene the IEP team to determine whether the demanded accommodation is needed.

Evidence concerning actual food is different. As discussed above, the District has taken reasonable measures to ensure food security when it comes to actual food. The Parents seek an order that would require removal of actual food from lessons, completely remove food from activities that occur when the Student is not scheduled to eat, and, if the event falls at a permissible time, restrict the type and amount of food to something that the Student can eat. I will take these in order.

Regarding food as part of lessons, the record as a whole persuades me that food has already been removed from the Student's lessons. I will order the District to reflect that fact in the Student's IEP, thereby making the actions that the District has already taken mandatory.

Regarding food at unscheduled times, the record very clearly establishes that there are both classroom activities and District-wide events that involve food in some way that occur throughout the school year. I do not find that the presence of food at these events precluded the Student's participation in violation of Section 504. In fact, the record establishes that the Student attended many such events with the Parents' consent and without incident.

Regarding food restrictions during events that occur at a time when the Student can eat, some level of accommodation beyond what is already in the Student's IEP is necessary. The record, as a whole, establishes that the Student must only eat food sent in from home. If an event with food occurs at a time when the Student may eat, the District must ensure that the Student can eat what the Parents packed without isolating or excluding the Student. Alternatively, the District may remove food from the event. The Student's IEP must be adjusted accordingly.

Finally, I will address the Parents' demand for compensatory education. Unlike the broad demand in their closing brief, the demand for compensatory education in the Parents' complaint is specific, as described above. The demand is directly connected to time excluded from the classroom as a result of the Student's behaviors, which were not appropriately

[19] The court also concluded that any disagreement about the IEP following the IEE would be a new claim, subject to administrative exhaustion. *Drummond,* 2016 U.S. Dist. LEXIS 48753 at 6.

accommodated.[20] For all of the reasons described above, it is impossible to determine whether the Student's behaviors flow from inappropriate accommodations because there is insufficient data to determine the antecedents to the Student's behaviors. Better data is needed. Moreover, even if the Parents had the evidence to prove that inappropriate accommodations led to negative behaviors led to removal from class, the Parents did not put on evidence as to how often the Student was removed. Arguably, this is also a function of the District's data collection. It is not possible to go back through the records and determine how frequently the Student was removed from the classroom with any accuracy. Also, were it possible to come up with a number, and then use that number to calculate compensatory education contingent upon establishing the antecedents to the Student's behaviors, doing so would create a perverse incentive (either for the District to find that there is no connection between images of food and the Student's behavior, or for the Parents to select an evaluator to find the opposite).

Because of the foregoing, and with no better option, I will simply conclude that the Parents have failed to establish the amount of time that the Student was removed from the classroom as a result of behavioral incidents. As they demand compensatory education equal to this unknown, unproven amount of time, the Parents have not proven their claim for compensatory education.

[20] I note, again, that the Parents' Complaint also demands compensatory education for a reduction of time in the regular education classroom, before appropriate interventions were implemented, effectuated either through IEP revisions or through the District's unilateral action. Nothing in the record substantiates a unilateral reduction, although the District discussed that internally. None of the IEPs that reduced time in regular education were approved or implemented, except for the IEP filed after the hearing was requested. That IEP was implemented during the pendency of this matter.

ORDER

Now, May 13, 2016, it is hereby **ORDERED** as follows:

1. Within ten (10) days of this Order, the District shall revise the Student's IEP to include a modification or SDI that prohibits the use of food as part of the Student's lessons.

2. Within ten (10) days of this Order, the District shall revise the Student's IEP to include a modification or SDI that permits the Student to eat food from home whenever an event involving food occurs at a time when the Student is permitted to eat, but in such a way that the Student is not isolated or excluded from the event. Alternatively, the District may choose to eliminate food from such events.

3. The District shall collect data over a four-week period to determine whether exposure to pictures and/or images of food are an antecedent to the Student's behaviors. The District may design the data collection instrument, provided that the instrument includes both a time log of when the Student is exposed to pictures or images of food, a brief description of the circumstances of such exposure, and information about the time, duration, intensity, and type of the Student's negative behaviors.

4. The District shall submit that data to an individual of the District's choosing, who will conduct an FBA and report findings in writing to the Student's IEP team. The FBA must include a hypothesis as to whether or not exposure to food pictures and/or images is an antecedent to the Student's behaviors. The FBA must include recommendations to the IEP team concerning the programing for the Student's behaviors. The individual must be a Board Certified Behavior Analyst, or have an equal certification, and must have training and experience in working with children with PWS. Alternatively, the District may submit the data to an individual with different credentials with the Parents' written consent. The FBA and report shall be at the District's expense.

5. After the FBA report is complete, the District shall reconvene the Student's IEP team and revise the IEP as necessary. Any disagreement about the FBA itself, or the IEP proposed subsequent to the FBA, including but not limited to disagreements about the extent to which the IEP places the Student in the least restrictive environment, is a new matter subject to administrative exhaustion.

6. The Parents' demands for compensatory education, and to completely remove food from activities that do not occur at times when the Student is permitted to eat, are both denied.

7. The District shall complete and return the Assurance Form accompanying this decision, in accordance with instructions accompanying this decision.

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

/s/ Brian Jason Ford
HEARING OFFICER