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

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: N.M.

Date of Birth: [redacted]

Dates of Hearing: 6/16/2016

Closed HEARING

ODR File No. 17397-15-16

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney Drew Christian Esq. 105 Claremont Avenue Clarks Summit, PA 18411
Local Education Agency Wyoming Valley West School District 450 North Maple Avenue Kingston, PA 18704	LEA Attorney Angela J Evans Esq. 2 South Main Street, Suite 303 Pittston, PA 18640
Date of Decision:	August 12, 2016
Hearing Officer:	Charles W. Jelley Esq. LL.M.

Findings of Fact

The first N.M. v. Wyoming Valley West School District #16242-1415 KE[1]

1. The Student[2] is a now a mid-teenaged person with a disability within the meaning of the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (Section 504). The Student's school district of residence is the [redacted, hereinafter 'school district of residence'] (P#1).
2. At all times relevant to the first and second Due Process Complaints, the Student has been eligible for special education under the disability category of Emotional Disturbance with secondary exceptionalities of Autism and Specific Learning Disability (P#1).
3. The Student's pendent last agreed upon Individual Education Program (IEP) is dated February 4, 2014 (P#1 p.1). The Student is projected to graduate in 2020 (P#1 p.1).
4. The present levels in the 2014 IEP note while in 6th grade the Student had a 1st grade reading level, and a 3rd grade math level (P#1 p.7). When the Student resided in the school district of residence, the Student attended a partial hospitalization program where the Student received full-time emotional support (P#1 p.7).
5. On February 25, 2015, the Student was admitted to an emergency room at a local hospital. Thereafter the Student was taken by ambulance to [redacted] Hospital (ODR FILE #16242-1415 KE, Findings of Fact (FOF) ##5-6).
6. The student's mother inquired about education while the student was at Hospital (ODR FILE #16242-1415 KE, Findings of Fact (FOF) #11). While at Hospital in 2015, the Student did not receive instruction under the then pendant IEP. *Id.*
7. Hospital is a private psychiatric hospital serving children, adolescents and is located within the District (NT p.14).
8. [Redacted, hereinafter 'Private School'] is a licensed private school affiliated with Hospital. *See*, [website redacted]

[1] A copy of the decision is attached hereto and incorporated by reference herein.

[2] But for the cover page of this Decision, in the interest of confidentiality and privacy, the Student's name and gender, and other potentially-identifiable information are not used in the body of this decision. The following District Exhibits #1, 2, 3, and 4, were admitted into the record. The following Parent Exhibits 1, 2, 3, 4, 5, 6 were admitted into the record.

9. Sometime in the spring of 2015, the Parents filed a due process complaint, alleging that the School District had a duty to provide the Student with FAPE as a nonresident student residing at a psychiatric facility within the District boundaries (ODR FILE #16242-1415 KE).
10. On August 4, 2016, Hearing Officer Jake McElligott Esq. issued a decision finding the District denied the Student a free appropriate public education (ODR FILE #16242-1415 KE). Although the District denied the Student FAPE, the hearing officer did not award compensatory education. Hearing Officer McElligott, found that 24 P.S. §1306 along with the IDEA required the District to provide the Student with FAPE (ODR FILE #16242-1415 KE). Although the District denied the Student FAPE, the hearing officer did not award compensatory education. *Id.* The District never appealed the decision on the finding that the Student was in a Section 1306 facility (NT pp.91-93).
11. The Parents, as the aggrieved party filed an action in the Middle District seeking compensatory money damages for acts of discrimination (NT p.12).

The Student's second hospitalization and second due process complaint

12. On February 5, 2016, following an incident at home where the Student threatened [self-harm] the Student was readmitted to Hospital (T. 21-22, N.T. 40).
13. First, the Parents took the Student to another hospital's emergency room. From [that] emergency room, the Student was transported by ambulance to Hospital (N.T. p.14, pp.69-70).
14. At the time of the hearing, the Student involuntarily resided, as a nonresident student of the District, at Hospital for four months (N.T. p.70-71).
15. The testimony is clear that both from an educational, social and behavioral health perspective during the course of the commitment to Hospital, the Student continued to need specially-designed instruction. The staff at Hospital and at Private School did not communicate with the Parents; at times, the mother's testimony was unintentionally incomplete about the Student's current educational, social, or behavioral health needs (N.T. 29-23). At one point in the testimony, the mother was visibly distraught to learn for the first time, from medical records obtained under a subpoena in the pending federal court action that the Student continued to punch walls and head bang (NT pp.49-50).
16. [The] School District was not notified of the Student's admission to Hospital (N.T. p.55).
17. The mother signed papers at the time of the Student's admission authorizing the Private School to educate the Student (N.T. pp.55-56).

18. [The] School District had no knowledge of the Student's commitment to Hospital until the filing of the due process complaint (N.T. pp.87-88).
19. When District resident students are in foster care, detention centers and in alcohol treatment centers, the District monitors their educational programs (N.T. pp.103-104).
20. The special education director communicates with the special education teachers at Private School when students who are District residents are at the Private School (NT p.83 lines 1-4).
21. After receiving the 2016 due process complaint, the District's director of special education contacted the chief executive officer of the Hospital to inquire about the Student. The chief executive officer refused to release any information about the Student. The director of special education had another conversation about the Student when she attended a discharge planning conference for a District resident student staying at Hospital (NT pp.85-90, NT p.101).
22. Although aware the Student was at Hospital; the District did not issue a permission to evaluate, they did not send a letter requesting records, and they did not issue a notice to participate in an IEP meeting to the Parents or Hospital (NT pp.104-106).
23. When asked what the District did to educate the nonresident Student, the director of special education stated: **"**We did nothing" (NT p.105).
24. Neither the Parents nor the District reported the Private School to the Department of Education for failing to educate the Student (N.T. p.110). The Parents reported Hospital to the Board of Medicine for failing to care for Student correctly from a clinical standpoint (N.T. p.110).
25. The District's IDEA local special education plan concedes the fact that the District has an obligation under Section 1306 of the Pennsylvania Public School Codes as the host District to provide FAPE to non-resident students (P#3 p.4).
26. The District's local special education plan does not identify Hospital or Private School as a Section 1306 facility (P#3, NT pp.80-83).
27. Hospital is a facility within the meaning of Section 1306 of the Pennsylvania Public School Code (ODR FILE #16242-1415 KE).

Applicable Legal Principles and Discussion

Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the

party asking for the hearing. If the moving party provides evidence that is equally balanced, or in equipoise, then the party asking for the hearing cannot prevail, having failed to present sufficient evidence.[3] In this case, the Parents asked for the hearing and thus bore the burden of proof. There were instances of conflicting testimony where credibility and persuasiveness determinations were made to establish a fact. Some witnesses were, however, more persuasive on some points than others. In each instance, this hearing officer was able to draw inferences from which one could ultimately determine the facts.

Credibility and Persuasiveness

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence, assessing the persuasiveness of the witnesses' testimony 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.[4]

Thus, all of the above findings are based on a careful and thoughtful review of the transcripts, a reading of all of the exhibits and a direct observation of each witness; therefore, the decision is based upon a preponderance of the evidence presented. While some of the material evidence is circumstantial, the hearing officer can derive inferences of fact from the witnesses' testimony and the record as a whole. On balance, despite inconsistencies, the hearing office found all of the witnesses' testimony represents their best recollection and understanding of the events.

IDEA Free Appropriate Public Education

The IDEA requires that a state receiving federal education funding provide FAPE to disabled children. 20 USC §1412(a)(1); 20 USC §1401(9). FAPE is special education and related services at public expense that meets state standards 20 USC §1401(9).

School districts must provide FAPE by designing, implementing and administering a program of individualized instruction that is outlined in an IEP. 20

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[3] *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3d Cir. 2012).
[4] *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); *Blount v. Lancaster-Lebanon Intermediate Unit,* 2003 LEXIS 21639 at *28 (2003

USC §1414(d). The IEP must be reasonably calculated to enable the child to receive meaningful educational benefits and significant learning in light of the student's intellectual potential.[5]

Meaningful benefit means that an eligible child's program affords him or her the opportunity for significant learning *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). To provide FAPE, the child's IEP must specify and provide specially-designed instruction to meet the child's unique needs and must be accompanied by such supplemental or related services as are necessary to permit the child to benefit from the instruction.[6] 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.[7]

A school district is not required to provide the best possible program to a student or to maximize the student's potential.[8] An IEP is not required to incorporate every program, device, or service that parents desire for their child. *Ibid.* Rather, an IEP must provide a basic floor of opportunity for the child.[9]

The appropriateness of the program and the reasonableness of the program should be judged based on the data known or what should have been known to the school district at the time when the FAPE offer was made.

Section 504's Nondiscrimination Standards

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Section 504 states, in relevant part, "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance". 29 U.S.C. §794(a). The statute defines program or activity to include all of the operations of the local educational agency. 29 U.S.C. §794(b)(2)(B). To prevail on a Section 504 discrimination claim, parents must show the Student has a disability, is otherwise qualified to participate in a school program, and, was denied the benefits of the program or otherwise subject to discrimination because of their disability.[10] The IDEA, on one hand, governs the LEA's affirmative duty to provide FAPE to disabled

[5] *Shore Reg'l High Sch. Bd. of Ed. v. P.S.,* 381 F.3d 194, 198 (3d Cir. 2004).
[6] *Board of Education v. Rowley*, 458 U.S. 176, 181-182 (1982).
[7] *M.C. v. Central Regional School* District, 81 F.3d 389, 396 (3d Cir. 1996).
[8] *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3d Cir. 2012).
[9] *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995).
[10] *G.C. v. Pa. Dep't of Educ.*, 735 F.3d 229, 235 (3d Cir. 2013).

students, while Section 504 establishes a negative prohibition against depriving disabled students, based upon a disability FAPE.[11] The IDEA provides a remedy for inappropriate educational decisions, regardless of discrimination, while Section 504 prohibits and provides both a legal and equitable remedy for discrimination.[12]

Section 504 Denial of FAPE

Section 504's implementing regulations provide a detailed scheme for fashioning FAPE for students with a qualifying Section 504 disability. 34 C.F.R. §104.30-104.36. Similar to the IDEA requirements, Section 504 requires districts to conduct a comprehensive evaluation of the student needs 34 CFR §104.33, and provide FAPE, including regular and special education, in the least restrictive educational environment 34 CFR §§104.33-104.34. When the parties disagree about the provision of FAPE, the District must provide procedural safeguards 34 CFR §104.36.[13]

The Section 504 regulations provide that the implementation of an IEP under the IDEA may also meet the substantive FAPE requirement of Section 504, but not necessarily all of Section 504 FAPE requirements of 34 CFR 104.33 (b)(1)(ii) and 34 CFR 104.33(b)(2).

Title II of the ADA

The Congressional findings contained in the ADA state that "discrimination against individuals with disabilities persists in such critical areas as . . . education". 42 U.S.C. § 12101(a)(3). The ADA requires that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. To prove a Title II claim, a student must show (1) he or she is a qualified individual with a disability; (2) he or she was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and,

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[11] *W.B. v. Matula*, 67 F.3d 484, 492-93 (3d Cir. 1995).

[12] *Hornstine v. Twp. of Moorestown*, 263 F. Supp. 2d 887, 901 (D.N.J. 2003) (although the student received FAPE, the district's policy denying her valedictorian status was nonetheless discriminatory under Section 504).

[13] 34 CFR §104.34 (a); *Letter to Williams*, 21 IDELR 73 (OSEP 1994) (Section 504 requires districts to educate students with disabilities in the LRE**)**; *In re: Student with a Disability*, 113 LRP 42334 SEA NY 2013) (concluding that a violation of Section 504's LRE requirement at 34 CFR §104.34, requiring comparable services and activities, is not analogous to any IDEA regulations).

(3) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. *Id.*

The Title II regulations set forth the general prohibitions against discrimination that apply to schools as public entities. 28 C.F.R. § 35.130(a). Schools may not, on the basis of disability, deny students with disabilities the opportunity to participate in or benefit from the aid, benefit, or service the entity provides. § 35.130(b)(1)(i). Nor may schools deny students with disabilities an equal opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others. § 35.130(b)(1)(ii). Schools must provide all services, programs, and activities in the most integrated setting appropriate to the needs of the individual with disabilities. §35.130(d). Also, schools must make reasonable modifications to their policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity, or would result in undue financial or administrative burdens. §35.130(b)(7); §35.164.

[C]omplying with the IDEA is sufficient to disprove educational discrimination under the Section 504 and the ADA.[14] Conversely, the "f]ailure to provide a FAPE violates Part B of the IDEA and generally violates the ADA and RA because it deprives disabled students of a benefit that non-disabled students receive simply by attending school in the normal course—a free, appropriate public education".[15] However, if the IDEA claim and the Section 504 or the ADA claims do not share a similar factual basis, they will be addressed separately.[16]

In *CG v. Pennsylvania Dep't of Educ.*, 734 F.3d 229, 234 (3d Cir. 2013), the court held, "With limited exceptions, the same legal principles govern ADA and RA claims". Both require parents to (1) establish the person has a disability as defined under the statutes, (2) the person is otherwise qualified to participate in the program, and, (3) the qualified individual was precluded from participating in a program or receiving a service or benefit because of their disability.[17] However, under the ADA, unlike Section 504, the student does not need to show the school receives federal funds. *Id.*

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[14] *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 487 (W.D. Pa. 2010) (noting that if an IDEA claim fails, ADA and RA claims brought on the same core facts must also fail); *Miller v. Bd. of Educ.*, 565 F.3d 1232, 1246 (10th Cir. 2009).

[15] *CG v. Pennsylvania Dep't of Educ.*, 734 F.3d 229, 236 (3d Cir. 2013)

[16] *GC* 734 F.3d at 235; *Taylor* 737 F. Supp. 2d at 487-88; *Hornstine v. Twp. of Moorestown*, 263 F. Supp. 2d 887, 901 (D.N.J. 2003).

[17] *CG* 734 F.3d at 235.

In *CG*, the court discussed the differences between, "The statutes' respective causation elements…" see 42 U.S.C. § 12132 (by reason of such disability); 29 U.S.C. § 794(a) (solely by reason of her or his disability). The RA allows a plaintiff to recover if he or she were deprived of an opportunity to participate in a program solely on the basis of disability, while the ADA covers discrimination on the basis of disability, even if there is another cause as well.[18] However, Title II claims like Section 504 discrimination claims do not require intentional or overt discrimination.[19]

The District's Duty to provide FAPE to Section 1306 nonresident Students

I adopt the clear, detailed description of the requirements of Section 1306 set forth by Hearing Officer McElligott in the [decision at] #16242-1415 KE regarding the provision of FAPE.

> Under the terms of Section 1306, "(t)he board of school directors of any school district in which there is located any orphan asylum, home for the friendless, children's home, or other institution for the care or training or orphans or other children, shall permit any children who are inmates of such homes, but not legal residents in such district, to attend the public schools in said district….".9
> Section 1306 requires that: "whenever a student described in this section is…(an) identified eligible student as defined in 22 PA Code Chapter 14…, the school district in which the institution is located is responsible for: providing the student with an appropriate program of special education and training consistent with this act and 22 PA Code Chapter 14…; and maintaining contact with the school district of residence of the student for the purpose of keeping the school district of residence informed of its plans for educating the student and seeking the advice of that district with respect to the student."10 The provisions of Section 1306 also envisions that systems for educating non-resident students in facilities are in place, and communications flow between the school district where the facility is located and school districts of residence. Namely,

[18] *CG*, 734 F.3d at 236.

[1919] *CG*, 734 F.3d at 236, citing with approval *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995) ([W]e will not eviscerate the ADA by conditioning its protections upon a finding of intentional or overt discrimination)

> "(t)he student's school district of residence and the school district in which the institution is located may agree to an arrangement of educational and procedural responsibilities other than as contained in (24 P.S. §13-1306(c)), provided that the agreement is in writing and is approved by the Department of Education after notice to and an opportunity to comment by the parents of the student."11 (footnotes omitted)

Compensatory Education

In *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) the court endorsed a "complete" make whole remedy favoring relief for the entire period of the violation *G.L.* 802 F.3d at 626. Compensatory educations " 'accrue[s] from the point, that the school district knows or should know of the injury to the child, and the child 'is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem". " [20]

G.L.'s adoption of the "make whole" remedy, however, left unanswered several threshold questions. First, assuming the parent's complaint is timely *G.L.* did not address how far back the parent could claim a denial. Second, *G.L.* did not address the question how the make whole remedy would factor in injuries, violations or claims, that are otherwise barred by 20 U.S.C. §1415(f)(3)(C). Third, GL did not comment on who bears the burden of proof in substantiating the type of services or the amount of compensatory education relief. Fourth, *GL* did not describe what a hearing officer should do when parents establish liability for FAPE violation(s), yet do not meet their burden of proof to quantify the amount of the "make whole" relief. One option is to adopt the *MC* "cookie cutter" approach. The second option is to employ the *Reid* "qualitative" approach. The third compensatory education option is to make an equitable determination about the time and services necessary to provide appropriate relief.[21] Each option, however, assumes the record is properly developed to support an equitable finding. This decision implicates questions of first impression three and four,

Compensatory education is appropriate relief that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the

[20] *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

[21] . *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

IDEA.[22] Compensatory education should place the child in the position they would have been in but for the violation. [23]

As an *equitable* remedy, compensatory education is intended to provide more than "some benefit" or for that matter "meaningful educational benefit and significant learning."[24] The factors included in the compensatory education relief hinge on student specific facts like how much more progress the student might have shown if he or she had received the required special education services, the student's age, ability, past achievement, stage of learning, unmet needs, and the student's current present level. Therefore, the make whole calculation requires some evidence about the type and amount of services needed to place the student in the same position he or she would have occupied but for the LEA's violations of the IDEA.[25] Also after *GL* following *MC,* the parents must establish when the District either "knew or should have known" the child was not receiving FAPE.[26] Assuming a finding of a denial of FAPE, the District, on the other hand, must produce evidence on what they suggest is the length of a reasonable rectification period to put the child back on the correct path. *Id.* Whether the parents follow *Reid* or *MC,* the make whole remedy must be supported by the record evidence. *Id.*

Discussion

The Parents contend once the District was on notice of the Student's return to the facility, based upon the first *NM* August 2015 decision, the District should have provided FAPE. The District, on the other hand, makes four interlinking arguments. First, they contend without notification of the Student's placement at Hospital the

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[22] *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing Reid *v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005).

[23] *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) IEPs are forward looking and intended to "conform[] to . . . [a] standard that looks to the child's present abilities", whereas compensatory education is meant to "make up for prior deficiencies". *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP "carries no guarantee of undoing damage done by prior violations," IEPs do not do compensatory education's job.

[24] *Boose v. District of Columbia,* 786 F.3d 1054, 1058 (D.C. Cir. 2015).

[25] *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid, supra.* (the parent, as the moving party, has the burden of "propos[ing] a well-articulated plan that reflects the student's current education abilities and needs and is supported by the record."); *Phillips ex rel. T.P. v. District of Columbia,* 736F.Supp.2d 240, 248 (D.D.C.2010) (citing *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F.Supp.2d 169, 172 (D.D.C.2008) (Facciola, Mag. J.); *Cousins v. District of Columbia,* 880 F.Supp.2d 142, 143 (D.D.C.2012). (the burden of proof is on the parents to produce sufficient evidence demonstrating the type and quantum of compensatory education that makes the child whole).

[26] . *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

FAPE duty did not arise. Second, they contend the refusal of the facility to provide information about the Student interfered with the FAPE obligation. Third, they contend the psychiatric nature of the facility and the placement is a factor in their favor. Fourth, they contend, the District does not have an affirmative responsibility to push services into the private facility. For all these reasons, they suggest the District cannot possibly be charged with the legal responsibility to provide the nonresident Student with FAPE. Essentially, the District contends when a third party interferes with the District's statutory duty they are relieved of their IDEA and Section 504 FAPE substantive and procedural obligations. As a result, the District suggests, like the first action, this hearing officer could find a denial of FAPE yet not award compensatory education. I disagree.

The Student arrived at Hospital on February 5, 2016; 13 days later the District knew the Student was in the hospital.[27] All students with disabilities must have an IEP in effect at the beginning and throughout each school year.[28] In a closely analogous situation when students transfer from one school district to another, the district is required to schedule an IEP meeting to review the out-of-district IEP.[29] Here the District's FAPE duty attached when they learned the nonresident Student was at the facility. In this instance, aware of the Student's right to FAPE the District did not act. Fully aware the Student was not receiving FAPE, but for an email exchange and passing comment at the end of a discharge conference for another resident student, the District did "nothing" (NT p.105). The District's argument that a third party prevented the District from providing FAPE is rejected. The IDEA contemplates this very situation when the District is either "unable" or "unwilling" to provide FAPE.

State Education Agency and Local Education Agency duties and obligations

Under the IDEA, the federal government makes grants of money to states to assist them in providing special education and related services to children with disabilities. 20 U.S.C. § 1411(a)(1). Section 20 U.S.C. 1412 *et seq*. identifies 25 different assurances the state's IDEA plan must contain to receive IDEA funds. The State

[27] The due process Complaint was filed on February 18, 2016; the initial hearing session was continued at the joint request of the Parties pending an interim ruling on pending motions in the federal court and the production of outstanding discovery from Hospital and Private School. The decision due date was extended, for cause, by joint request of the parties to enable each party time to issue subpoenas in the federal action for the production of the Student's records in the possession of Hospital and Private School. After the filing of the due process Complaint, the Parties and the hearing officer participated in a telephone case management conference call and exchanged 19 emails about the status of the instant action, the Student and the federal action.
[28] 34 CFR §300.323
[29] 34 CFR §300322(d)

Education Agency **(**SEA) is required to exercise "general supervisory responsibilities" over all other agencies to ensure proper administration of the statute. 20 U.S.C. § 1412 (a)(11)(A). The SEA is responsible for ensuring that: "(I) the requirements of [the IDEA] are met; and (ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State of local agency are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and (II) meet the educational standards of the SEA."[30]

Districts, aka LEAs, become eligible to receive IDEA funds if they demonstrate, to the satisfaction of the SEA, the existence of policies and procedures consistent with state-established IDEA policies and procedures. 20 U.S.C. §1413(a)(1). The LEAs can notify the SEA when they are either "unable or unwilling" to provide FAPE.[31] When LEAs inform the SEA they cannot provide FAPE, the SEA, after a public hearing, can use the district's IDEA funds to arrange for or directly provide the student with FAPE. *Id.*

The District never convincingly explained why they failed to notify the SEA that Hospital was, as they contend, interfering with the Student's FAPE.[32] The Parents, on the other hand, dissatisfied with Hospital filed a complaint with the State Board of Medicine. The unique procedural posture of this dispute gave the District the distinct advantage of having access to the full force of the Federal Rules of Civil procedure to stop the alleged interference by Hospital and Private School. The District had options to provide FAPE yet intentionally elected not to provide the nonresident Student FAPE. Accordingly, the evidence is preponderant the District denied the Student FAPE when they did not notify the SEA.[33]

The District's failure to act, knowing the Student was IDEA eligible, knowing the Student was not receiving FAPE, while at the same time in federal court on a money damage action for the previous FAPE denial, on an identical set of facts, was a deliberate choice. The director of special education was aware; the Superintendent was

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[30] 20 U.S.C. § 1412(a)(11)(A).
[31] 20 U.S.C. § 1412(a)(13); 20 U.S.C. § 1413(c); 20 U.S.C. § 1413(d)(2); 34 C.F.R. § 300.197(a).
[32] The Pennsylvania Department of Education has developed a series of intensive interagency supports for active and at risk students who are receiving services from a various state agencies. See, Intensive Interagency Coordination, 20 U.S.C. §1412(a)(12), Date of Issue: December 16, 2002 REPLACES: Services for Students Under the Cordero Court Order, BEC 22 Pa. Code §14.32, issued September 1, 1997, expired July 31, 2001; *Cordero v. Pennsylvania Dep't of Educ.*, 795 F. Supp. 1352 (M.D. Pa. 1992).
[33] 20 U.S.C. § 1412(a)(11)(A)(SEA has general supervision authority); 20 U.S.C. § 1413(g)(1)(A)and (B)(SEA is authorized to use district IDEA funds when the LEA is "unable or unwilling" provide FAPE that "meet the requirements of" the IDEA).

aware, yet with full knowledge of the consequences, the Student's and the Parent's IDEA and Section 504 rights were violated when the District decided to do "nothing" (NT p.105).

The conscious decision not to act is a textbook act of deliberate indifference.[34] The evidence is preponderant the District failed to provide the Student FAPE pursuant to Section 504. The evidence is also preponderant the District discriminated against the Student, based on Student's disability.

The FAPE denial blocked the Student"'s equal access to the aids, benefits, and services otherwise freely provided to similarly situated District residents. It is especially troubling the District attended meetings about District resident students, at Hospital, while at the same time; they openly acknowledged they did "nothing" for this Student. While the denial of FAPE is established, the calculation of the appropriate relief for this Student is, however, problematic.

The Parent failed to prove the breadth of the compensatory education relief

The Parents in their opening statement requested multiple forms of equitable relief. The requested relief includes a direction to issue a permission to evaluate, a direction to develop an evaluation report, a direction to develop and implement an IEP in the least restrictive environment, and a request for an equitable award of compensatory education. The Parents argue the award of compensatory education is premised on the hour for hour approach announced in *M.C., et. al. v. Central Regional School Board*, 81 F.3d. 389, 397 (3d Cir. 1996). In *M.C.* the court suggested appropriate relief is connected to the replacement of the missed hours of educational service minus the "reasonably rectification period" needed to correct the violation. In the absence of evidence about the rectification period, the Parents here rely on a Basic Education Circular (BEC) 22 Pa. Code 104. 14.102 (a)(2)(xiii) suggesting, the "reasonable rectification" period is five days (Parents" Closing pp.8-10).

The District, on the other hand, argues that even if a denial of FAPE occurred, equity requires the compensatory education award be reduced to zero. For all of the reasons set forth above the District's request, in this instance, is rejected. Unlike the first *NM* decision, the District here was totally aware the Student was not being educated and this time, like the first time did "nothing". This finding, however, does not end the inquiry. The Parents' suggested compensatory education calculations are fatally flawed. The Parents' calculations are linked to a partially implemented IEP,

[34] *A.C. v. Scranton Sch. Dist.*, 2016 U.S. Dist. LEXIS 76326 * 16 (M.D. Pa. June 13, 2016) citing *S.H. v. Lower Merion Sch. Dist.*, No. 12-3264 (3d Cir. Sept. 5, 2013).

developed in 2014, when the Student resided with the Parents, prior to the first hospitalization.

The compensatory education calculation is also premised upon the Parents' testimony; while credible, was clearly limited due to the lack of first hand observation of the Student or actual knowledge of the Student's schedule. In one breath the Parents contend the Student has not been evaluated by a school District for more than three years, and in another, they suggest the calculation of the relief is linked to a placement they contend never met the Student's needs. Beginning in the 2014-2015 and continuing throughout the 2015-2016 school year, the Student did not receive the benefits of FAPE in the least restrictive environment. The Student has also been denied the benefits of the regularly scheduled comprehensive evaluations. The Parent has not been provided the opportunity to participate in the development of an IEP. While the District signed off on assurances with the SEA that the District would comply with the previous hearing officer decision the assurance has not been fulfilled. Regrettably, the record as it currently exists does not describe the Student's present level of educational performance, educational needs, behavioral needs, social needs, or transition needs. While the Student is entitled to compensatory education, the proffered evidence does not properly support the magnitude of an award.

Consistent with *G.L.* to cure the gap in the record, I will deny Parents' request for compensatory education, without prejudice, thereby preserving the Parents' right to institute additional administrative proceedings to establish the breadth of relief. Accordingly, to make the Student's rights a reality, pursuant to 34 C.F.R. §300.508(d) the District is ordered to provide the Student with the following evaluations.[35]

To remedy the failure to evaluate the Student, pursuant to 34 C.F.R. §300.508(d), the District is Ordered to pay for a comprehensive evaluation in all areas of unique need, including but not limited to an evaluation of the Student's abilities, achievement, academics, social, behavioral, and transition needs. Based upon the Student's history of behavioral health needs, the District is Ordered to have the Student evaluated by a psychiatrist and/or a board certified behavioral analysist. The results of the behavioral evaluation will assist the team in determining what behaviors

[35] *Jackson-Johnson v. D.C.*, 2015 U .S. Dist. LEXIS 53909 *28 (D.D.C. Mar. 30, 2015) (hearing officer can order evaluation to develop the record and engage in the fact-specific inquiry essential to determine what, if any, compensatory education would be appropriate); *Phillips v. District of Columbia*, 736 F. Supp. 2d 240, 55 IDELR 101 (D.D.C. 2010) (action remanded to hearing officer with instructions to determine what, if any compensatory education would be appropriate to ameliorate the denial of a FAPE); *Henry v. District of Columbia*, 750 F. Supp. 2d 94 (D.D.C. 2010(same); 34 C.F.R.§300.508(d).

are impeding the Student's progress. Each evaluation should be conducted by a properly licensed, certificated or credential individual selected by the Parent. To the extent practicable, the evaluator, in a separate report, should set out the essential elements of a well-articulated compensatory education plan that defines the Student's present levels of educational performance, abilities, and unique needs. The make whole plan should include the type and amount of compensatory education services needed to place the Student in the same position the Student would have occupied but for the LEA's multiple violations of the IDEA and Section 504. Once the evaluations are completed, the District is directed to prepare an evaluation report, issue a notice of an IEP team meeting, and prepare an IEP.

In the event the initial evaluator(s) elects not to calculate the make whole relief, pursuant to 34 C.F.R. §300.508(d) the District is Ordered to pay the costs for a second evaluator(s) to prepare a make whole compensatory education plan. The second evaluator will prepare a report and set forth the essential elements of a well-articulated make whole compensatory education plan. The make whole compensatory education plan should include the type, range, and amount of services needed to place the Student in the same position the Student would have occupied but for the LEA's violations. The above equitable relief is not an offset to any other legal relief that may or may not be available to the Student for violations of Section 504.

ORDER

And Now, this August 12, 2016, it is hereby **ORDERED** as follows:

1. The District is Ordered to pay the costs for a comprehensive evaluation in all areas of unique need, including but not limited to an evaluation of the Student's abilities, achievement, academics, social, behavioral, and transition needs.

2. The District is Ordered to pay the cost for either a certified behavioral analysist or a psychiatrist to evaluate the Student's behavioral needs. The results of the comprehensive behavioral evaluation will assist the team in determining what behaviors, if any, are impeding the Student's progress.

3. To the extent practicable, the evaluators, in a separate report, should set out the essential elements of a well-articulated compensatory education plan that reflect the student's present levels of educational performance, abilities, projected levels of progress and needs. The plan should include the type and quantity of compensatory education services needed to place the Student in the same

position the Student would have achieved but for the LEA's multiple violations of the IDEA.

4. Once the evaluation(s) are completed, the District is directed to prepare an evaluation report. Once the evaluation report is completed, the District shall prepare an IEP.

5. A properly licensed, certificated, or credentialed individual should conduct each evaluation of the Student. The Parents can select any and all evaluator(s) needed to evaluate the Student in all areas of unique need.

6. In the event the first evaluator(s) do not prepare the comprehensive make whole compensatory education plan, the District is Ordered to pay for costs for a second evaluator(s), to prepare a report that sets forth the essential elements of a well-articulated make whole compensatory education plan.

7. The Parents have the authority to select any and all evaluators. The comprehensive evaluation in paragraph 1 of this Order and the behavioral analyst's report in paragraph 2 of this order should be completed within the standard timelines in 22 Pa Code Chapter 14. The IEP should be prepared and offered within the standard timelines in 22 Pa Code Chapter 14. To the extent that the comprehensive evaluation report in paragraph 3 of this Order does not include a make whole compensatory education plan, then the same evaluator will prepare and distribute a second report describing the essential elements of a make whole compensatory education plan, within 30 days of completing the comprehensive evaluation report. To the extent that the evaluator(s) in paragraph 3, of this Order, are unable or unwilling to prepare a well-articulated make whole compensatory education plan, then pursuant to paragraph 6 of this Order, a second evaluator(s), selected by the Parents, will issue a report describing the make whole compensatory education plan. Should the need arise, the second evaluator(s) should be prepared to provide the Parties the compensatory education make whole plan within 45 days of the receipt of the initial evaluations described above and the District's evaluation report.

8. The Parents claim for compensatory education is dismissed without prejudice, with the right to refile another request for a due process hearing, assuming the Parties cannot reach an agreement, upon receipt of the evaluator(s)' comprehensive make whole compensatory education plan. If the District disagrees with the essential elements of the comprehensive make whole compensatory education plan, the District should file a request for a due process hearing.

9. The District is Ordered to pay the full costs to provide the Student with the comprehensive make whole compensatory education plan. The Parents are authorized to select the individual(s) to provide the comprehensive make whole plan compensatory education plan.

10. The District is encouraged to file a complaint with, any and all, state and federal agencies to investigate the District's contention, that the hospital and /or the private school's refusal to cooperate denied the Student a FAPE and/or caused the Student to be denied equal access to the aids, benefits, or privileges otherwise provided to other resident or nonresident students within the District.

11. All other claims for appropriate relief or affirmative defenses are dismissed with prejudice.

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer

August 12, 2016