

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: D.J.

ODR #18281 / 16-17-KE

Date of Birth:
[redacted]

Dates of Hearing:
November 8, 2016
December 9, 2016

OPEN HEARING

Parties to the Hearing:

Parent[s]

Freire Charter School
2027 Chestnut Street
Philadelphia, PA 19103

Date of Decision:

Hearing Officer:

Representative:

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January 26, 2017

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

Background

Student¹ is a mid-teen aged eligible student who was enrolled in the Charter School (School) for the 2015-2016 school year only. In August 2015, just prior to the start of 9th grade, Student was diagnosed with a medical condition, [redacted] that causes pain in the large and small joints as well as fatigue. Student was also found to have another medical condition, [redacted] in which individuals experience an abnormal sensitivity to pain. In mid-October 2015 when Student's mother (Parent) first made the School aware of these diagnoses the School developed a 504 Plan pursuant to §504 of the Rehabilitation Act of 1973² and also proposed to evaluate Student for eligibility for special education under the Individuals with Disabilities Education Act (IDEA)³. As of January 22, 2016 Student was found eligible for special education programming under the classifications of Other Health Impairment and Specific Learning Disability in reading. An IEP was not immediately implemented because the Parent did not approve the NOREP until April 5, 2016. Student left the School at the end of 9th grade and now attends a public school operated by the school district of residence.

The Parent requested this hearing under both Section 504 and the IDEA, alleging that the School denied Student a free appropriate public education (FAPE). With regard to the 504 Plan, the Parent alleges that the various accommodations in the plan were not provided or were provided inconsistently, and that the Behavior Contract that accompanied the 504 Plan was not appropriate. With regard to the IEP, the Parent alleges that she was denied meaningful participation in its creation, and that it was not appropriate and/or appropriately implemented. The Parent also alleges that Student was disciplined inappropriately, without regard for the provisions in the 504 Plan and/or the IEP. Finally, the Parent believes that the School inappropriately required Student to repeat 9th grade and seeks an order that Student be promoted to 10th grade for the current school year.

After a careful review of the entirety of the parties' documentary and testimonial evidence, and considering the parties' written closing arguments, I find for the Parent in part and for the School in part.

Issues

1. Were the provisions of the 504 Plan provided/provided consistently?
2. Was the Behavior Contract accompanying the 504 Plan appropriate?

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 29 U.S.C. § 794.

³ 20 U.S.C. §§ 1400-1482.

3. Did the school discipline Student inappropriately in light of Student's disability?
4. Was the Parent denied meaningful participation in developing the IEP?
5. Was the IEP appropriate/implemented appropriately?
6. Was the School's not promoting Student to 10th grade inappropriate?
7. If the School denied Student FAPE in any or all the above areas, what remedy is appropriate?

Findings of Fact

Start of School Year

1. Student enrolled in the School for 9th grade at the beginning of the 2015-2016 school year, transferring from another charter school. [NT 54, 118, 375-376]
2. Student entered the School as a regular education student without a 504 Plan or an IEP. [NT 262, 477]
3. The School requires all its incoming 9th graders to wear a green shirt in school and on school-related trips⁴. The green shirt is a vehicle for an incentive program to promote good study habits and homework completion; the program includes twice-weekly mandatory attendance at an after school Skills Center. Freshmen are expected to earn their way out of wearing the green shirt, but can remain in or be put back into the green shirt for various acts and omissions. [NT 70, 102-103, 132, 273-274; J-15, P-27 pp 46-47]
4. From the beginning of the 2015-2016 school year until October 29, 2015 when Student received a 504 Plan, Student had fifteen disciplinary write ups: five were for disruptive talking; two were for defiance; three were for failure to complete classwork; one involved covering the green shirt; three were for having head down; and one was for lateness.⁵ Some write-ups required Student to attend after school detention. [NT 90-91; P-22]
5. On September 21, 2015 a teacher made a positive entry on the Discipline Log: "[Student] has been respectful to me and [Student's] peers. The quality of

⁴ Parent's written closing argument asserts that the green shirts had to be worn "en route" to and from school. Although that may have been the practice the Student Handbook does not so specify. [P-27; Parent's written closing argument]

⁵ Although the Parent's written closing total count and my total count of write-ups are the same (15) we differ on characterization of the write-ups. [P-22; Parent's written closing argument]

- [Student's] work has improved, and [Student] has made valuable contributions to class. I hope to continue to see [Student's] progress. [P-22]
6. Due to teacher observations of Student's behaviors noted in the Discipline Log the School issued a Behavior Contract on October 16, 2015. [P-9, P-22]
 7. At a meeting convened when the School issued the Behavior Contract the Parent informed the School for the first time that Student had [medical condition] and shortly thereafter the School was provided written confirmation from the hospital that had diagnosed Student with [medical condition]. [NT 480-481, 485-486; P-1, P-13]
 8. Student was also diagnosed with [medical condition]. The combination of Student's [medical condition] and [medical condition] is associated with severe joint pain and "locking up" of the joints, fatigue, headaches, concentration difficulties, working memory deficits and an abnormal sensitivity to pain. [NT 55, 63, 97, 108, 190-191, 215]
 9. The physical pain associated with [medical condition] affects daily functioning including academics. [NT 190-191]
 10. The Parent was aware of Student's [medical condition] diagnosis before the 2015-2016 school year started, as a local hospital for children had conferred the diagnosis on August 19, 2015. The Parent did not share this information with the School at the beginning of the school year.⁶ [NT 377, 479-480; P-1, P-12]

504 Plan Development

11. Upon learning on October 16, 2015 of Student's [medical condition] diagnosis the School obtained input for a 504 Plan from the hospital that diagnosed Student, spoke with the Parent on October 23rd and October 26th, and held a 504 meeting on October 29, 2015. [NT 139, 141; J-4]
12. On October 29, 2015 the School team which included the 504 Coordinator, the Director of Special Education, the Assistant Head of Academic Supports, and the School Psychologist met with the Parent and developed Student's 504 Plan based upon information from the hospital, input from the Parent and input that the 504 Coordinator obtained from teachers. [NT 139, 141, 263-265, 522, 524; J-5, P-13]

⁶ The Parent's written closing argument that the School "was well aware that [Student] was experiencing health issues as early as September 8, 2015" because the School received an excuse note from the hospital indicating that Student should be excused from school because Student had been seen in the cardiology clinic [P-13] is not persuasive. An excuse note for a doctor's appointment does not impose a burden on an LEA to inquire about a student's condition, and such an inquiry may even be construed as an invasion of privacy. The Parent admitted that she deliberately did not share Student's [medical condition] diagnosis with the School when Student first enrolled.

13. The School at this time also proactively proposed an evaluation for possible eligibility for special education services under the IDEA. The Notice for Initial Evaluation dated October 29, 2015, stated that teachers had noted increased argumentative behaviors and work refusal, that Student was exhibiting behaviors that had the potential to impede academic progress, and that Student was failing four classes. [J-6]
14. The Parent participated in the development of the 504 Plan and had no unanswered questions about the 504 Plan. The Parent gave her consent both to the 504 Plan and to the School's proposed evaluation. [NT 263-264, 487]
15. Following the October 29th meeting the 504 Coordinator provided the finished 504 Plan to each of Student's teachers by email and spoke about the 504 Plan at the 9th grade teachers' meeting. When teachers had initial questions about the 504 Plan, the 504 Coordinator provided guidance. [NT 527-528, 635; J-3]
16. The 504 Coordinator and the Director of Special Education went over the 504 Plan with Student at Student's first check-in, and the 504 Coordinator had biweekly meetings with Student to monitor academic progress. [NT 532-533]
17. At least as of November 9, 2015, the beginning of the second quarter of the School's calendar, Student's 504 Plan was in place. [P-16]

Implementation of 504 Plan: Discrepancies in Testimony

18. Student was given a Late Pass, an Elevator Pass, a Bathroom Pass and an Administrative Pass. The intensive math teacher testified to knowing Student had this accommodation and honoring it. The teacher also noted that Student did not walk around the School carrying a large backpack of books. *Student alleges that teachers disregarded the pass. Student also alleged that Student was written up for going to Student's locker between classes to avoid having to carry books and binders around.* [NT 68-69, 75, 529, 640, 651; J-5]
19. As discussed with and agreed to by the Parent, Student was permitted to wear warm clothing *under* the green shirt. Student wore hoodies under the green shirt. *Student alleged Student was "written up" for covering the green shirt with warm clothing.* [NT 534, 644]
20. Student was to be given a laptop or iPad to use to take notes in English, Physical Science and World Cultures. Student would receive this device at the morning check-in with the Case Manager, but often Student skipped the check-in and had to be tracked down by various School staff and given the device. Although laptops were not used in math class, the intensive math teacher saw Student with a laptop or an iPad every day. The School witnesses asserted there was never a situation when Student could not have a device due to a dead battery. *Mother testified that in their family round table discussions Student said that 'sometimes'*

- there was not a laptop ready. Student alleges Student did not receive a laptop or iPad on a consistent basis. [NT 66-67, 80-81, 84, 167-169, 416, 533, 638-639, 675, 691; J-5]*
21. An extra set of textbooks were to be given to Student to keep at home *Although Student and Parent testified that Student did not receive the extra set of textbooks, extra textbooks were not provided because Student and Parent did not want the extra textbooks. [NT 73, 83, 536; J-5]*
 22. The intensive math teacher confirmed with the Director of Special Education that Student was not to have head down on the desk in class and was instructed how to respond when Student exhibited that behavior. As per the 504 Plan, the teacher would tap Student's desk and remind Student to put Student's head up or go get a drink. In intensive math class Student would rest on a binder as a support, was never written up for doing so, and was never told not to do so. *Student alleges that the teacher(s) did not implement the accommodation to address posture when seated. [NT 65-66, 382-383, 529, 531, 636-637, 639-640; J-5]*
 23. Student was provided with guided notes in intensive math class. *Student alleged guided notes were not offered. [NT 67, 651; J-5]*
 24. The intensive math teacher testified that Student was permitted to finish tests after school if they were not finished in class, but that Student would never return to finish the test and would have to be tracked down by the Special Education Coordinator to finish the test. *Student alleged that instead of being permitted to complete tests after school Student was required to turn in the test as it was and was graded on the incomplete work. [NT 69, 84, 642-643; J-5]*
 25. Student received modified workload on assignments that were different from other students' assignments. On an English vocabulary test the teacher instructed Student to do all problems on the test except for certain numbers. In intensive math Student was always given modified assignments that had fewer problems (and those problems were easier to calculate). *Student asserted that Student was not given reduced assignments, such as doing fewer problems, to help reduce fatigue. [NT 72, 120-121, 152, 646; J-5, P-18]*
 26. As a function of [medical condition], at times when Student sits for long periods Student's joints become stiff and lock up and Student cannot move. [redacted]. *Student testified that Student was not permitted to stand, take breaks or walk around to loosen up large joints. [NT 55, 71, 82-83, 637-638, 645; J-5]*
 27. The 504 Plan provided that Student could do finger exercises in class to relieve small joints. The intensive math teacher never observed Student doing finger exercises, but saw that Student [redacted]. *Student alleged that teacher[s] did not permit finger exercises, saying that Student was playing with a pencil. [NT 68, 642; J-5]*

28. The School provided Student with [redacted] in certain classes and [redacted]. *Student did not [redacted]*. [NT 529, 652; J-3, J-4]
29. On October 23, 2015 it was noted that Student was to be evaluated for OT services. On November 10, 2015 Student was evaluated for occupational therapy services at the School. *Student denied receiving an OT evaluation from the School.* [NT 73; J-5, J-7, J-10]

Skills Center

30. As a 9th grader in a green shirt Student was required to go to the Skills Center for an hour and a quarter twice a week to complete homework or complete tests. While in the Skills Center Student did not attempt to do assignments, at times because of not understanding the work, and alleged that the teacher in the Skills Center did not help Student, quoting the teacher as saying the students had to “be quiet” and that she “didn’t know the answers to the homework” and “couldn’t help with anything”. [NT 60, 69-70, 83]
31. Student testified that Student never received help in Skills Center going over homework or incomplete tests. [NT 70, 83]
32. Student noted that in Skills Center the students “would sit there...and we would be either playing -- we would have a pencil, a book, or a paper, or a reading book on our desk for when [the 9th grade advisor] would come around [so it would] look like we doing something”. [NT 69]
33. Although the Director of Student Services testified that Skills Center offered lessons in organizational skills and gave the students support with their homework, she then acknowledged that she is not a Skills Center teacher, is not in the Skills Center, and doesn’t know whether or how Skills Center tracks students’ planner completion. She summarized, “I’m not in the class, so I don’t know what happens. I don’t know.” [NT 273-274, 286-287.)
34. The School psychologist, testified that she was familiar with the Skills Center, “but [doesn’t] work directly in it or with it,” and has never observed it. [NT 625]
35. The Intensive Math teacher testified that Skills Center hosts varying numbers of students, up to 30, and is supervised by one teacher, who “is there to tutor and go over assignments as needed”. She stated that Skills Center may involve “whole group instruction” or “peer-to-peer instruction”, but asked if there was any tutoring done in Skills Center, she said, “I was not in [Student’s] skills center, so I cannot say.” [NT 693-694]

36. Student's Case Manager, testified, "I'm not in Skill[s] Center, so I can't say what it is." [NT 711]⁷

Evaluation and IDEA Eligibility

37. On October 29, 2015, the same day the 504 Plan was created, the School proposed that Student also receive an evaluation to determine eligibility for academic support through special education because of the recent [medical condition] diagnosis, because Student was failing four classes, and because Student was exhibiting behaviors that had the potential to impede academic progress. The Parent signed the Permission to Evaluate the same day. [NT 169, 171-173, 178, 265, 524; J-6]
38. The School's Psychologist conducted an evaluation to determine eligibility for special education services. As part of the evaluation process the Parent provided input in written form and in a conversation with the Psychologist. On December 10th the Psychologist also consulted with Student's [medical condition] hospital program provider who shared information about Student's progress in the program and about how manifestations of Student's diagnosis were affecting Student. [NT 601; J-7]
39. The School's evaluation included standardized cognitive and achievement testing as well as a standardized survey of Executive Functioning. [NT 601- 602; J-7]
40. In consultation with School staff the School Psychologist decided not to conduct a functional behavior analysis (FBA) because the behaviors Student displayed were connected to Student's medical diagnoses. Additionally the Parent did not report any concerns about Student's social or emotional presentation at home. [NT 596-598]
41. In her report the School Psychologist noted that she would conduct an FBA should the IEP team not see any improvement in behavior or work refusal once all Student's IEP provisions were in place. [NT 608; J-7]
42. Instead of conducting a direct observation of Student in the classrooms, the School Psychologist relied on information the teachers provided about Student's behavior and functioning, opining that they knew Student better because of their day-to-day contact. [NT 598-599]
43. At the Parent's request the School Psychologist removed information the English teacher had provided because the Parent believed that this teacher did not know Student well. [NT 600]

⁷ Notably, Student was the first witness on the first hearing day. The LEA representative was present for Student's testimony. Presumably if the School had a witness who could credibly contradict Student's statements about the Skills Center, the School would have produced one. Therefore Student's account is deemed reliable as it concerns the Skills Center.

44. The results of the November 2015 OT evaluation were incorporated into the School's evaluation report. The OT evaluator examined postural/stability control, range of motion/muscle control, hand dominance, developmental hand skills, visual motor integration/visual processing skills, fine motor coordination/handwriting, and keyboarding skills. No difficulties had been reported to the OT evaluator regarding self-help skills or sensory modulation/attention skills. [J-7]
45. On the basis of the OT evaluation the OT evaluator found that Student demonstrated the motoric skills necessary to participate within the educational environment and consultative OT was recommended to monitor Student and advise teachers. [J-7]
46. Student was found eligible for special education on the basis of other health impairment and a specific learning disability in reading. [NT 265, 605; J-9]
47. On January 22, 2016 the School held a meeting to discuss the evaluation report with the Parent. The School's psychologist was present for this discussion and went over the Evaluation Report page by page. Parent participated and asked questions. The IEP meeting followed on the same day. [NT 266-268, 673, 605-608; J-9/J-10]
48. An IEP was offered on January 22, 2016 but the Parent did not approve the related Notice of Recommended Educational Placement (NOREP) issued on January 28, 2016. The Parent was distressed about the finding that Student demonstrated a specific learning disability in reading (which is not an uncommon reaction from parents), did not understand that finding, and felt the School was forcing her to sign the NOREP. She distrusted the School and felt she needed outside help. [NT 268, 304-305, 500, 672-674; J-13 pp 27-30]
49. As medical recommendations regarding managing [medical condition] included not encouraging Student to dwell on pain, the Parent directed Student not to speak to School staff about Student's emotional state or how Student was feeling and therefore discussion of nursing services was removed from the Evaluation Report and the IEP. [NT 180, 488-489, 676; J-10]
50. The School convened a follow-up meeting on March 10, 2016 and encouraged the Parent to bring an advocate to assist her in understanding the IEP. The Parent and her advocate participated in the meeting. On April 5, 2016 the Parent signed the NOREP that allowed the revised IEP to be implemented. [NT 270, 471-472, 675; J-10, J-11]

Transition from [medical condition] Program

51. During the time Student had a 504 Plan, but not an IEP, Student spent a month (January 11, 2016 through February 15, 2016) in a day program for [medical condition] management operated by the hospital for children that had diagnosed Student. The [medical condition] program stipulated that Student was to do no schoolwork during the weeks Student spent in the program. The School created a plan to transition Student back to school by talking with the hospital [medical condition] team, and the Parent. All Student's teachers were informed and involved, and Student was supported in completing mastery assignments to determine where Student was at that time and how to proceed forward with material Student had missed. [NT 279, 408-409, 411, 510, 541; P-13]
52. Student was not responsible for work missed while out of school in the [medical condition] program and Student was exempted from many of the assignments that followed Student's return to the School (see purple diamonds and blue/green number in PowerSchool). [NT 540; HO-2]

IEP

53. Student's IEP was in place as of the Parent's signing the NOREP on April 5, 2016. [J-10]
54. A goal on reading comprehension requires Student to achieve 70% accuracy on three probes of knowledge of explicit and inferential meaning of instructional level text, citing text to support conclusions. There is no baseline of what percentage of accuracy on this type of probe Student was achieving at the time the IEP was written. [J-10]
55. A goal referencing reading requires Student to achieve a score of 70% when presenting information, findings and supporting evidence on instructional level material with organization, development and style such that listeners can follow the line of reasoning. There is no baseline as to what level of competence Student performed this skill when the IEP was written. [NT 328-329; J-10]
56. The IEP contains a list of Specially Designed Instruction that relates to Student's other health impairment classification and to accommodations, but not specialized instruction to remediate, [the] reading disability. [NT 323; J-7, J-10]
57. A goal regarding homework completion requires 70% completion of assigned homework but does not provide a baseline as to what percentage of homework Student was completing when the goal was written. [J-10]
58. Other than Case Management Check-Ins, the IEP does not provide Specially Designed Instruction for assisting Student through direct instruction in

organizational skills to address deficits in executive functioning as noted in the BRIEF results.⁸ [NT 337-338; J-7, J-10]

59. A goal is included in the IEP requiring Student to utilize the “Keys to Work” program to research and relate careers to individual interests, abilities and aptitudes. The baseline is listed as “Field of Art”. This goal seems to be a transition goal or activity but is not designated as such. [J-10]
60. Although the Penn Data report indicates that Student will spend one hour of every 7-hour day outside the general education classroom, there is no way to tell from reading the IEP how and where Student will receive the hour of special education services.⁹ [NT 316; J-10]
61. The IEP does not include a Positive Behavior Support Plan, or a revision of the Behavior Contract issued in mid-October 2015 prior to the School’s learning of Student’s medical diagnoses. [J-10]
62. The IEP’s Specially Designed Instructions were largely lifted from the 504 Plan. [NT 307; J-9, J-10]

IEP Implementation

63. Specialized instruction in Student’s IEP provides for a modified curriculum.¹⁰ Student’s work was modified such that it was different from work assigned to Student’s peers, and Student was required to complete 70% of this modified work. Thus, Student’s grades were based on modified work and on completion of a portion of this assigned modified work. [NT 309-312]
64. Once the NOREP was signed and the IEP was implemented, modifications to Student’s grades were made as per the PowerSchool tracking system¹¹ in Intensive Reading (blue number scores and purple diamonds), Physical Science

⁸ See above section on Skills Center. Although not a special education setting, support could have been provided to Student by a special education teacher in Skills Center.

⁹ However, it is important to recognize that the percentage used for PennData statistical reporting purposes is not necessarily dispositive in evaluating the appropriateness of the IEP, including adherence to LRE principles. Special education may be provided in a variety of settings that cannot be captured by the PennData page of the IEP. As the Pennsylvania Department of Education explains on its annotated IEP form, “Educational environment reporting is not an indication of the amount of special education service a student with a disability receives”. Individualized Education Program (IEP) – (Annotated) – School Age – English, available at http://www.pattan.net/category/Legal/Forms/Browse/Single/?id=584b001a150ba0a76c8b4569&bor=ag=School%20Age%20Annotated**1=English (last visited January 16, 2017).

¹⁰ There were many questions and many lines/pages of testimony about how Student’s work and grades were or were not modified. None of the explanations were crystal clear, and almost all were extremely confusing and obtuse. Although her testimony on this point was not in accord with the Parent’s theory of whether Student’s curriculum was modified appropriately, I found the testimony of the Principal who was called as an expert by the Parents to be credible and reliable in this and other areas, so I accept her conclusion as fact.

¹¹ See color codes on HO-2.

(purple diamonds), World Cultures (purple diamonds and blue number score), Algebra I (blue number scores) and English I (purple diamonds). [HO-2]

65. The Parent had access to Student's grades through PowerSchool, but she did not use the system to review the comments regarding Student's final grades. [NT 517-518]
66. The IEP carried over the accommodations from the 504 Plan and listed them under Specially Designed Instruction, with a few additions. As with the 504 Plan, Student alleged that most of these were not carried out. [NT 91-95; J-10]

Discipline Following School's Knowledge of Student's Medical Conditions

67. In the period from November 4, 2015 (after issuance of 504 Plan) through the end of the school year in June, Student received a total of 34 negative Discipline Log entries as follows: eleven for sleeping/head down¹²; eight for defiance towards teachers; four for covering the green shirt; three for cursing; three for work refusal/lack of work completion; three for lateness; and two for talking/disruption.¹³ [P-22]
68. Student's disruptive behavior in math class involved frequently calling out answers out of turn, calling across the room to peers or turning around to talk to peers, or laughing when it was inappropriate to be laughing. [NT 665]
69. Notably, all eight of the entries about defiance were in the period from April 18, 2016 after the Parent approved the NOREP for Student's IEP through the end of the school year. [P-22]
70. The Discipline Log also contains three positive entries from two teachers: November 5th - teacher was proud of Student's behavior, sitting in correct seat, actively engaged in class, asking for help when needed, and volunteering answers; December 10th - teacher noted Student volunteered to help [redacted]; December 11th - teacher proud of Student for effort including raising hand and actively participating in class. [P-22]
71. The IEP specifically states, "It is important to note that PowerSchool Log Entries have been used as a means of data collection to monitor [Student's] behaviors; they are not a form of discipline and will not be accompanied by a consequence." The School Psychologist explained to the Parent that the Discipline Log was not used for discipline for Student but instead was used to track observations of all types of behaviors both positive and negative. [NT 615-616; J-10]

¹² Please note FF # 22 – Student was not permitted to have head down/sleep in class.

¹³ Some of the entries overlapped, for example defiance and cursing in the same entry, talking and defiance in the same entry. I counted only one offense per entry, categorizing the more serious behavior.

72. Homework completion requirements with reference to the green shirt are adjusted for all students with IEP goals related to homework completion. Student's homework completion requirements as they related to the green shirt were adjusted prior to the initiation of the IEP once the School and the Parent and Parent's advocate met on March 10, 2016 and a signed NOREP was expected to be forthcoming. Student's green shirt scores for March 18, 2016 were adjusted for the first time in anticipation of a signed NOREP. [NT 274-277; P-17]
73. Student's green shirt homework scores were modified according to IEP provisions for modified work. Modified scores reflected modified work assignments and modified standards for completion of the work. Use of the assignment planner was discontinued for Student and the study skills grade was accordingly reflected as N/A. [NT 276-277, 282, 285; J-16]
74. According to an IEP goal, Student was required to complete 70% of the modified work, and if Student did so Student would receive a 100% grade. All 9th graders were initially required to complete 75% of homework toward exiting from the green shirt. When the homework percentage for all 9th graders to exit the green shirt increased from 75% to 80%, Student's homework requirements remained modified according to the IEP and Student was still only required to complete 70% of all Student's modified assignments.¹⁴ [NT 276, 713]
75. Once the Parent signed the NOREP on April 5, 2016 allowing the IEP to be put in place, further adjustments were reflected on Student's April 29, 2016 green shirt report with respect to assignment planner and study skills requirements. [NT 277-278, 285-286; J-16]

Behavior Contract vs. Positive Behavior Support Plan

76. The Behavior Contract prepared for Student in mid-October 2015 provides that Student "cannot receive more than 12 write-ups for disruption, defiance or disrespect. If [Student's] unprofessional behavior continues and [Student] exceed[s] 12 write-ups while on a Behavior Contract at [School] more severe consequences may occur, these could include: Suspension (must be reinstated during Parent Meeting); Probationary Contract; Being asked to leave [School]." [P-9]
77. Although the Behavior Contract was made part of the 504 Plan, it was not revised to acknowledge that some of the target behaviors may have been

¹⁴ The School and the witnesses overly complicated this, with no help from either counsel. Reading testimony in various places through the transcript, I believe that what happened was that while non-disabled peers were required to complete 75% and then towards the end of the year 80% of unmodified homework, from the time of the March IEP meeting Student had only to complete 70% of unmodified work (prior to the NOREP being signed) and then once the IEP was in effect, also 70%, but of modified work. Again, as indicated in Footnote #10, testimony was muddled throughout discussions of how, whether and when work was modified. At best the evidence is in equipoise on this issue, such that the Parent has not produced a preponderance to persuade me on this point.

- disability-related and to include strategies the School would use to help Student. [P-9]
78. In addition to targeting behaviors that could be due in part to medical issues, the Behavior Contract had no positive reinforcement system for shaping behavior such as a token economy, no provision for teaching Student alternate behaviors, no strategies for shaping responses, and no plan for addressing skill deficits. [NT 193, 201-202; P-9]
 79. Rather than a positive system, only a punishment system was articulated in the Behavior Contract. [NT 201-202]
 80. The Behavior Contract does not provide for data collection, timely review and modification in accord with data. [NT 193-194, 217-218; P-9]
 81. The achievement target specified for moving from the green shirt was directed toward an area in which Student had known deficits potentially related to medical issues and staying in the green shirt removed positive incentives. [NT 87, 133-134, 194-196, 200-201; P-9]
 82. Student met with a private licensed psychologist who is both a neuropsychologist and a board certified behavior analyst on October 31, 2016; after meeting with Student, speaking briefly by phone with the Parent, and reviewing Student's records the private psychologist issued a report of her impressions. [NT 187-188, 207-209; P-2, P-4]
 83. The private psychologist identified that the inadequacies in Student's Behavior Contract created a situation of 'learned helplessness' in Student, a well-researched response whereby persons faced with no foreseeable way to change a situation just give up trying. [NT 202-203]
 84. In addition to medical issues, fatigue, and learned helplessness, homework/assignment completion was likely compromised by academic skill weaknesses in the areas of processing speed, working memory, and reading that were identified in the School's evaluation report. [NT 203-205, 214]
 85. The Parent called a seasoned public school principal with a doctorate in curriculum and instruction as an expert witness to review the IEP and the 504 Plan. [NT 296-297]
 86. The Principal's expertise is around familiarity with an IEP, familiarity with a 504 service agreement, school policies, and school practices. She prepared a report following record review. [NT 300; P-5]
 87. The Principal reviewed the portion of the green shirt policy that students are able to rotate out of the green shirt, but if they are not doing well academically or socially or behaviorally they have to go back into the green shirt. In her

experience, highlighting children who are struggling in any way is not best practice¹⁵ with regard to supporting or encouraging students, particularly children with disabilities. [NT 330, 332-333]

Retention in 9th Grade

88. Student's IEP does not address promotion to 10th grade. [NT 325; J-10]
89. Given that Student's medical condition was newly diagnosed in August 2015, and then not revealed and thus not addressed from the beginning of the year through October 2015, the Parent requested that the IEP reflect that Student's first and second quarter failing grades be reconsidered so that they would not affect Student's academic standing. [NT 226-229, 233; J-10, J-13]
90. The School adjusted all Student's failing grades to 75, which is passing, and this was explained to the Parent. When grades for the year were calculated, the grades of 75 were included in the calculation. [NT 228-230]
91. Despite the adjusted grades, Student's third and fourth quarter grades combined with the adjusted grades did not meet criteria for promotion. [HO-2]
92. Student missed a month of high school and a great deal of material is covered in that time. [NT 340]
93. The School did not promote Student to 10th grade.¹⁶ [NT 54-55, 115]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parent

¹⁵ LEAs are not required to employ best practices, but the green shirt policy has deficits that render it inappropriate for Student.

¹⁶ Reportedly, Student is currently repeating 9th grade in a high school operated by Student's school district of residence. However, Student's current grade placement is not independently verified in the record. Student testified Student thought there was a 504 Plan and an IEP but that neither were finalized yet as of the first hearing session on November 8th. [NT 123]

asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014).

I found the Parent’s and the Student’s testimony to be unreliable in certain regards. Although the Parent clearly cares deeply about her child and is acutely distressed about the current and long-term effects of Student’s medical conditions, I had difficulty relying on some aspects of her testimony because of inconsistencies/contradictions in her accounts of events that I could not excuse as memory lapses. The Parent initially testified that she shared Student’s medical condition with the School when Student started in September, then later acknowledged that she did not disclose the information to the School until October at a meeting to discuss the Behavior Contract. In fact, in September the only thing she shared with the School was an excuse note for a medical appointment that she gave Student to turn in to an unspecified staff member. [NT 379] The Parent again demonstrated inconsistency when she initially insisted that she had initiated the 504 Plan process because Student would come home from school in pain, but shortly afterwards testified that she disclosed that Student had a medical condition when the School convened a meeting about the Behavior Contract, the meeting after which the School began gathering information to develop a 504 Plan. [NT 378-379, 479-487] These inconsistencies within her own testimony diminished her credibility. Additionally, when the Parent’s version of events at the meeting to discuss the School’s evaluation, specifically the extent to which the Parent was able to ask questions, contradicted the School’s psychologist’s version of events the psychologist’s testimony was judged to be accurate as the latter conveyed a clear and precise recollection of the meeting.

There were numerous discrepancies between what School witnesses said about the implementation of the 504 Plan and what Student alleged. On the whole, School witnesses claimed that the 504 Plan was implemented. At almost every turn the Student claimed that the 504 Plan was not implemented. The Student’s testimony, when compared with testimony from School staff, was deemed to be unreliable in some respects. Although the absolute facts about what happened almost certainly do not fall completely on either side, I find the Student’s account less credible than the School’s account. While I do not believe that every teacher in every single instance implemented the 504 Plan with precision, I give less weight to Student’s broad allegations that all or most accommodations were never implemented. In making this finding I do not conclude that the Student was deliberately lying, rather I conclude that the Student, in a

developmentally typical manner, was taking the part for the whole. Those of us who are parents are familiar with this tendency and are absolutely sure to have heard our teenagers making exaggerated complaints such as “You never cook anything I like” or “You never buy me anything”. I believe, for example, that Student once in a while did not get a laptop, but I do not believe that this was usually the case. I can believe that a teacher may have denied Student a break for a specific reason, but do not believe that this was the norm. The extent to which I could rely on Student’s testimony also came into question through the School psychologist’s credible account of an incident when Student asserted that the psychologist had told Student to rip pages out of the Planner, but later when questioned by the psychologist, Student admitted that this was not the case. [NT 631] However, for the reasons set forth in Footnote 7, Student’s account is deemed credible as it concerns the Skills Center.

The psychiatrist who saw Student and the Parent at the request of Student’s counsel is clearly qualified to assess and treat adolescents. She reviewed medical records and is familiar with [medical condition] and with [medical condition]. However I could credit her testimony with little weight because, spending about an hour with Student and about a half-hour with the Parent, she relied upon their accounts to form the basis of her opinion that Student was harmed by the experience of attending the School. She did not review Student’s grades prior to attending the School, or Student’s grades while in the School. While this witness testified that she did review the IEP and the 504 Plan, the Parent adduced no evidence that this witness has the professional background to offer an opinion about these educational records. [NT 442-451]

I found the principal the Parents called as an expert witness to be eminently credible and relied on her testimony about the IEP deficits, the inadequacies of the Behavior Contract and the inappropriateness of the green shirt policy. As put forth above, I accepted and relied upon her interpretation of the situation regarding modification of assignments.

Charter Schools: A charter school acts as the LEA for its students, and assumes the duty to ensure that a FAPE is available to a child with a disability in compliance with IDEA and Section 504 and their respective implementing regulations. 34 C.F.R. 300.209(c); 22 Pa. Code §§ 14.103, 711.3. Chapter 711 *et. seq.* of the Pennsylvania School Code, “Charter School and Cyber Charter School Services and Programs for Children with Disabilities”, contains regulations specific to individuals with disabilities being educated in charter schools and cyber charter schools. Chapter 711 incorporates by reference all the IDEA regulations at 22 Pa. Code 711.3. Chapter 711 also incorporates relevant antidiscrimination provisions in Section 504 and its implementing regulations. Charter schools and cyber charter schools must comply with 22 Pa. Code Chapter 4 relating to academic standards and assessment, 22 Pa. Code Chapter 11 relating to pupil attendance, and 22 Pa. Chapter 12 relating to discipline of students 22 Pa. Code §711. *et. seq.* Further references therefore will be to the IDEA and/or its regulations as well as to Section 504 and/or its regulations.

Were the provisions of the 504 Plan provided/provided consistently? Answer: YES

A “service agreement” (also called a “service plan”, a Section 504 Plan” or an “accommodation plan”) is 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. 22 Pa. Code § 15.2.

Section 504 of the Rehabilitation Act of 1973, § 794 (“Section 504”) protects “handicapped persons”. The definition is provided in the Section 504 regulations at 34 CFR § 104.3(j)(1): “Handicapped person means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” Under Section 504 and its implementing regulations, 34 C.F.R. §§ 104.31 *et seq.*, public school districts must provide a FAPE to each qualified disabled child in elementary and secondary school. For purposes of Section 504, a FAPE is “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.” 34 C.F.R. § 104.33(b)(1).

With regard to nonacademic services, the 504 regulations provide that (1) A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped Students an equal opportunity for participation in such services and activities. § 34 CFR 104.37(a)(1).

Under Pennsylvania Chapter 15, a “protected handicapped student” is a student who 1) Is of an age at which public education is offered in that school district; and 2) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program; and 3) Is not IDEA eligible. *See* 22 Pa. Code § 15.2. In this case Student was not initially IDEA-eligible and therefore the Section 504 FAPE standards were controlling for the first part of the school year.

Notwithstanding language which, by its plain terms, proscribes discriminatory conduct by recipients of federal funds, in the context of education the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled Student with a free, appropriate public education. *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009) Borrowing from analogous IDEA case law “meaningful” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood*. An eligible Student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996), *cert. den.* 117 S. Ct. 176 (1996); *Polk*.

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

As noted earlier, there were numerous discrepancies between what School witnesses said about the implementation of the 504 Plan and what Student alleged. Mother’s testimony supported her child’s, but for the most part her information came from the Student rather than from direct observation. Perfection in implementation of a 504 Plan is not required, but good faith effort is expected. On this issue I find that the School substantially complied with the requirements of Student's 504 Plan based upon the testimony of credible witnesses.

Was the Behavior Contract accompanying the 504 Plan appropriate? Answer: NO

Pennsylvania regulations under IDEA direct that school districts and charter schools employ *positive*, research-based behavior support programs to address a student’s perceived behavioral difficulties. As of the issuance of the Permission to Evaluate on October 29, 2016 Student was not only recognized as being entitled to a 504 Plan, but was also a “Thought to Be Eligible” student under the IDEA.

Positive rather than negative measures shall form the basis of positive behavior support programs.... Behavior support programs must include research based practices and techniques to develop and maintain skills that will enhance an individual student’s opportunity for learning and self-fulfillment. 22 Pa. Code §§ 14.133(a), 711.46(a).

A “positive behavior support plan” (PBSP) includes “methods that utilize positive reinforcement and other positive techniques to shape a student’s behavior, ranging from the use of positive verbal statements as a reward for good behavior to specific tangible rewards”. §§ 14.133(b), 711.46(b).

The December 28, 2015 evaluation report recommended that Student “have a reinforcement system for work completion”. No such reinforcement system was included in the IEP. [J-7, J-10]

Was the Parent denied meaningful participation in developing the IEP? Answer: NO

Parents must have the opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child. U.S.C. § 1415(b)(1) Parental participation must be meaningful. *See Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 317 F.3d 1072, 1078 (9th Cir.2003) (“The IDEA ‘imposes upon the school district the duty to conduct a meaningful meeting with the appropriate parties.’”) (*quoting W.G. v. Board of Trs. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1483 (9th Cir.1992)).

The IDEA prohibits LEAs from providing special education and related services to a student under an IEP without the Parent’s consent. 20 USCS § 1414(a)(1)(D)(ii)(III)(aa). 20 USCS § 1414(a)(1)(D)(ii)(III)(aa).

A recent Pennsylvania Commonwealth Court opinion emphasized a parent’s obligation to cooperate with an LEA as an adjunct to the right to participate in development of the child’s special education program. Senior Judge James Gardner Colins wrote, “Of significance, the hearing officer found that the inability to offer a FAPE was not attributable to the district, and specifically that the district did not delay in making a final offer of a FAPE to [the student] or take actions that amounted to a denial of FAPE.” *Z.Z. v. Pittsburgh Pub. Sch. Dist.*, 116 LRP 50377 (Pa. Commw. Ct. 11/30/16).

The Parent participated in the first IEP meeting, questioning and disagreeing with Student’s IDEA classification. At the second IEP meeting, with the assistance of an advocate, the Parent objected to nursing services and asked that they be removed from the IEP and the School acquiesced. Additionally, the Parent wanted the English teacher’s input removed from the ER and the IEP because she believed that teacher did not know Student well, and on this point the School also acquiesced. I conclude that Parent had the opportunity for and did exercise her right to meaningful participation in the IEP development.

The IDEA and FAPE:

Was the IEP appropriate/implemented appropriately? Answer: NO

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amended the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). “Special education” is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of

the public agency that apply to all children. C.F.R. §300.26. A student's special education program is set forth in the Individualized Education Plan (IEP). The federal implementing regulations for the IDEA mandate that each LEA ensure that a "meeting to develop an IEP for a [student] is conducted within 30 days of a determination that the [student] needs special education and related services," and that as "soon as possible following development of the IEP, special education and related services are made available to the [student] in accordance with the [student's] IEP." 34 C.F.R. § 300.323(c)(1) & (2).

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

The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than "trivial" or "*de minimis*" benefit is required. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3^d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3^d 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, as noted in several recent federal district court decisions. See, e.g., *J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011) 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 (2^d Cir. 1989).

The determination of whether an IEP is appropriate may rely only on evidence that was available to a district when it made its program and placement decisions. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993) ("Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.") Evidence of a child's subsequent educational progress (or lack thereof) may be considered only insofar as it bears on the issue of whether the IEP was appropriate when it was created. *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir. 1995) (approving ruling in *Fuhrmann*).

Student's IEP was inappropriate in three respects. First, the Goals lacked baselines from which to assess Student's progress. Second, the SDIs lacked direct instruction to remediate Student's specific learning disability in reading and lacked direct instruction to address Student's deficits in executive functioning identified on the BRIEF which was administered during the School's evaluation. Third, the IEP lacked a positive behavior support plan to motivate Student to complete assignments and to actively seek help when needed.

I do not find the IEP inappropriate in the area of Occupational Therapy. Under IDEA, schools must provide not only special education, but also related services in order to furnish students with a FAPE. 20 U.S.C. §§ 1401(9), 1412(a). However, not all services that can be broadly construed as educational are cognizable under IDEA. An LEA must provide related services such as OT when they are required for a student to access the curriculum and the educational environment. When a student can access the curriculum and the educational environment, the LEA has no obligation to provide a related service such as OT when the purpose is clinical/medical. I find that the hospital recommendations for Student were either clinical/medical in nature and thus appropriate for outpatient occupational therapy (focus on isometric strengthening to avoid pain and injury to joints) or, or able to be covered in the monthly consultations (avoid any activity/positioning that puts additional stress on the joints and causes pain and fatigue, ergonomic set up in the classroom, adjusting pencil grip). [P-13]

Did the school discipline Student appropriately in light of Student's disability? Answer:
NO

I believe that the green shirt system is not appropriate for any student, and I draw the reader's attention to the Dicta that appears at the end of this decision; however, for purposes of this section I will approach the green shirt system from a neutral perspective.

Here we again must turn to Section 504 as the IDEA and §504 statutes differ in focus. The primary focus of §504 is to "level the playing field", *i.e.*, to assure that an individual, specifically, a school-aged student in this context, is not disadvantaged in education based upon a disability. As stated in *Chavez v. Tularosa Municipal Schools*, 2008 WL 4816992 at *14, *15: (D.N.M. 2008): "In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to a FAPE. In other words, the drafters of Section 504 were not only concerned with [a Student] receiving a FAPE (as was the case with the

IDEA), but also that a federally funded program does not treat [the Student] differently because [he/she is disabled]...Unlike the IDEA, Section 504 does not only look at what is a FAPE, but also what is fair.” *Ellenberg v. N.M. Military Inst.*, 478 F.3d at 1281-82 n.22 (quoting C. Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School*, 58 Stan. L.Rev. 1563, 1589 (2006)).

The discipline referenced in this hearing was Student’s having to continue wearing the green shirt because of not meeting the homework completion requirements for exiting the green shirt. Student was not treated differently when required to wear the green shirt; Student was treated like any other 9th grader at the School. But there were differences in how Student could meet requirements to account for Student’s disability. Under the 504 Plan beginning in November 2015 Student was to have a reduced workload. Under the IEP, and in fact even before the School was allowed to fully implement the IEP, the green shirt requirements were further modified, to level the playing field for Student. From the time of the third green shirt review then, the reduction in workload was quantified such that Student had only to meet 70% of homework assignments, whether the content was unmodified (prior to the IEP implementation) or modified (after the IEP implementation).

Section 504 requires that disabled persons receive equal treatment. Section 504 does not require preferential treatment. Student’s being required to wear the green shirt along with other 9th grade peers who had not yet met exit requirements was equal treatment. Student’s modifications to the general homework exit requirements and later to the assignment planner requirement was the preferential treatment that kept the playing field level so Student had an equal opportunity to meet the requirements. I do not find that the School disciplined Student inappropriately.

Was the School’s requiring Student to repeat ninth grade inappropriate?

Under the IDEA, students with disabilities are eligible for special education services, including transition services, until the end of the school year in which they turn 21 or until they graduate with a regular high school diploma, whichever comes first. 34 CFR 300.101 (a).

When there is a dispute over an eligible child’s educational placement that results in a due process complaint, the IDEA statute and regulations provide that “unless the state or local agency and the parents of the child otherwise agree, the child involved in the complaint must remain in his or her current educational placement.” 34 C.F.R. §300.518(a). Although the IDEA statute and regulations do not define “current educational placement”, it is generally considered to be “the operative placement actually functioning at the time the dispute first arises.” *L.Y. v. Bayonne Board of Education*, 384 Fed. Appx. 58, 61 (3d Cir. 2010), quoting, *Drinker by Drinker v. Colonial School Dist.*, 78 F.3d 859, 867 (3d Cir.1996). Accordingly, based on the record before me, Student’s operative placement at this time is 9th grade.

Although hearing officers have the authority to order a change in educational placement, I decline to do so. I am not convinced that a change in educational placement, over which I have authority, includes promotion to the next grade when student has not mastered the content or met the requirements for the current grade. Even assuming that I have such authority, I would decline to exercise it in this case. The Parent has failed to prove how shoehorning the Student into 10th grade is appropriate or necessary for the provision of FAPE. Consequently, regardless of my authority, I will not order the LEA to do so.

This matter raises an interesting question in that the Parent wishes the School to calculate Student's grades in such a way that Student is guaranteed to pass from 9th to 10th grade regardless of whether or not Student has mastered the material. Students are required to derive meaningful educational benefit from their schooling. If a student's disability is such that learning course material, or demonstrating that the course material has been mastered, is not accomplished, then it is not inappropriate for an LEA to require that student to repeat instruction in that coursework. Although the Parent's desire to shoehorn Student into 10th grade is certainly explained by the requirements of the "Debutante Program"¹⁷, a contrived advancement to 10th grade in light of Student's academic difficulties combined with missing a month of school while in the [medical condition] program does not serve Student well in high school and will almost certainly do a disservice to Student in college.

Accordingly, I do not find that Student should have been promoted to 10th grade, and in fact am not persuaded that I have the jurisdiction to order the District Student now attends to make such an adjustment to Student's status. A far better approach would have been for the Parent to work with the current District at the beginning of this school year to see if a combination 9th/10th grade program could be crafted with the understanding that Student would have to fulfill all academic requirements to be promoted to 11th grade at the conclusion of the 2016-2017 school year. However, given Student's academic record in 9th grade, and in light of Student's debilitating illness, I am doubtful if Student would be successful in a combined program, and even if this were accomplished I have concerns about Student entering 11th grade on such a shaky foundation. Student's grades for the past school years and for the current year were not entered into evidence; if Student is doing very well at present, then perhaps a combined program would have been successful, and may be able to be still worked out in combination with a summer school requirement. The decision must be left up to the current District as I will not disturb the School's decision to retain Student.

Compensatory Education:

If the School denied Student FAPE in any or all the above areas, what remedy is appropriate? Answer: AS STUDENT WAS DENIED FAPE IN CERTAIN AREAS COMPENSATORY EDUCATION IS APPROPRIATE.

¹⁷ See NT 37, Parent's Opening Statement

Compensatory education is an appropriate remedy where an 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); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d. Cir. 1999). *Ridgewood* provides that a school district has a reasonable period of time to rectify a known issue.

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. Under the first method ("hour for hour"), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*. An alternate, more recent method ("same position"), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014); *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* 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."). The "same position" method has been recently endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) although the court also cites to *M.C.*

The "same position" method, while essentially ideal, has significant practical problems in that unless the parents produce a credible expert to testify about what is needed to bring the child up to the same position he or she would occupy but for the denial of FAPE the hearing officer is left with having to craft a remedy based on educated estimation. Although on several occasions this hearing officer has been able to do so with relative confidence, the instant matter does not present such an opportunity. Therefore the default "hour for hour" approach will be used.

Section 504: I find that the School's failure to provide Student with appropriate behavioral supports in light of Student's disability once it became known constitutes a denial of FAPE under Section 504 and entitles Student to one half-hour (.5) hour of compensatory education for every day Student attended school from November 5, 2015 (allowing the School time to distribute and acquaint staff with the October 29, 2015 504 Plan) to April 5, 2016 (the time of the Parent's approval of the IEP). Compensatory education will be calculated on days of attendance, and therefore excludes the period January 11, 2016 through February 15, 2016 when Student was in the [medical condition] hospital program.

IDEA: I find that the absence of an appropriate positive behavior support plan in the IDEA was a continuing denial of FAPE for which Student is entitled to one-half hour (.5 hour) of compensatory education for every day Student attended school from April 6, 2016, when Student's IEP was implemented, through the last day of the school year in

June 2016. Further, the IEP Student was offered was fatally flawed in that its goals for reading and homework completion were without baselines from which to assess Student's progress, and because it contains no Specially Designed Instructions relating to direct instruction to remediate Student's reading disability or to address Student's deficits in executive functioning as noted in the BRIEF results. Therefore Student is entitled to additional compensatory education in the form of 45 minutes (.75 hour) for reading and 45 minutes (.75 hour) per day for organizational skills for every day Student was in attendance from April 6, 2016 to the last day of school in June 2016.

Dicta: According to credible unrefuted testimony from expert witnesses and the Parent, the green shirt system makes its 9th graders, disabled or not, targets of ridicule and/or violence from bullies in the community. The Parent eloquently characterized the green shirt as an outward symbol that a child wearing it is a failure. [NT 476] The private neuropsychologist/BCBA noted, "Everyone knows that [students in green shirts] either have a conduct issue, they have a learning issue, [or] they're not doing some behavior correctly. So...it kind of is an outward signal to everyone." [NT 200] A psychiatrist who interviewed Student and the Parent in October 2016 at the request of Student's counsel called the green shirt "a visual reminder all around that certain students are meeting expectations and others are not..." and found that having to continue wearing the green shirt left Student with feelings of inferiority and sadness. [P-3] The Parent testified that on occasion Student would remove the green shirt on the way home from the School "because the kids fight them with the green shirt on." [NT 398-400] On December 11, 2015 the Head of School warned parents in an email of "altercations" with School students around the [local area] [P-19] and the Parent testified that she had known about similar altercations related to the green shirt before and after the email. [NT 401-404] In a log entry Student wrote about police monitoring SEPTA because students from other schools targeted the School's students in green shirts. [NT 400-401; P-16] None of the School's witnesses disputed the experts' or the Parent's or the Student's understanding of the incidents at [transit] stations or the content of the email.

Rather than making its children strive to shed a negative stigmatizing burden, the School might consider having its 9th graders work to earn a positive symbolic reward. One possibility would be earning a small lapel pin, or another type of similar token, that can be worn proudly but discreetly. Everyone in the School would recognize the symbolism, and while the green shirt is a clear signal of a student's status, I sincerely doubt that neighborhood bullies will go around looking for 9th graders who do not yet have a small lapel pin. While I found that each of the School staff who testified demonstrated genuine concern for the Student who was the subject of this hearing, I frankly find the green shirt system unwise and unkind.

Order

It is hereby ordered that:

1. The accommodations in the 504 Plan were provided appropriately.
2. The school did not discipline Student inappropriately.
3. The Parent was not denied meaningful participation in developing the IEP.
4. The School's not promoting Student to 10th grade was appropriate.
5. The Behavior Contract accompanying the 504 Plan was not appropriate.
6. The IEP was not appropriate in the areas of behavior support, reading instruction and instruction in executive functioning.
7. As the School denied Student FAPE under Section 504 and the IDEA Student is entitled to compensatory education as follows:
 - a) 504 Behavior Contract and IEP Behavior Plan: 30 minutes (.5 hour) per day for every day Student was present in school from November 5, 2015 through April 5, 2016, and from April 6, 2016 through the last day of school in June 2016.
 - b) IEP Reading: 45 minutes (.75 hour) for every day Student was present in school from April 6, 2016 through the last day of school in June 2016.
 - c) IEP Executive Functioning: 45 minutes (.75 hour) for every day Student was present in school from April 6, 2016 through the last day of school in June 2016
 - d) These hours are to be used for direct reading instruction, direct instruction in executive functioning skills, psychoeducational counseling, or any other relevant service or program that addresses Student's areas of need.
 - e) The Parent may use the hours to purchase services at the usual and customary rate for private providers of these services in [the local area] and/or the Pennsylvania counties geographically adjacent to [the local area].
 - f) The hours may be used after school, on weekends and/or in the summer until Student reaches age 21.

Any claims not specifically addressed by this decision and order are denied and dismissed.

Linda M. Valentini, Psy.D., CHO

January 26, 2017

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