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: B. M.

Date of Birth: [redacted]

Dates of Hearing: 02/22/2017, 02/24/2017, 03/16/2017, 04/19/2017

ODR File No. 18379-1617AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents Parent[s]	Student Attorney Hollie John, Esq. Jacobson & John LLP 99 Lantern Drive, Suite 202 Doylestown, PA 18901
Local Education Agency Quakertown Community Sch. Dist. 100 Commerce Drive Quakertown, PA 18951	LEA Attorney Mark W. Cheramie Walz, Esq. Sweet Stevens Katz & Williams LLP 331 E. Butler Avenue New Britain, PA 18601
Date of Decision:	05/22/2017
Hearing Officer:	Brian Jason Ford, JD, CHO

Introduction

The parents (Parents) requested this special education due process hearing on behalf of their child (Student), against the Quakertown Community School District (District).[1]

The Student exhibits significant school avoidance behaviors. Currently, the parties are unable to get the Student to attend school. This matter concerns the appropriateness of the District's actions in the years leading up to the current situation, and the parties' current efforts to return the Student to school.

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*.

Specifically, the Parents claim that the District failed to suspect that the Student has a disability and initiate the IDEA's evaluation process, violating the IDEA's Child Find requirements, described below. Eventually, the Student was identified as "protected handicapped student" under Section 504, and received a Section 504 service agreement (504 Agreement). The Parents claim that the 504 Agreement was inappropriate. Ultimately, the Student received an IDEA evaluation, that evaluation was documented in an Evaluation Report (ER). Through the ER, the Student was found eligible to receive special education. An Individualized Education Plan (IEP) was drafted for the Student. The Parents claim that the ER and resulting IEP were both inappropriate.

Explained below, I find partly in favor of the Parents and partly in favor of the District.

Issues

On January 19, 2017, the Parents clarified via email that they are only seeking relief from October 25, 2014, forward. The issues in this case were phrased differently at various points in the testimony and in the Complaint. My synthesis of those various phrasings results in the following issues:

1. From October 25, 2014 through March 2, 2016, was the Student entitled to a free appropriate public education (FAPE) under the IDEA and, if so, did the District provide a FAPE and, if not, is the Student owed compensatory education?

2. From March 2, 2016 through September 14, 2016, was the Student's 504 Agreement appropriate and, if not, is the Student entitled to compensatory education?

3. From September 14, 2016 onward, was the Student's IEP appropriate and, if not, is the Student entitled to compensatory education?

[1] Other than the cover page of this decision, identifying information is omitted to the extent possible.

Findings of Fact

2013-14 School Year — 6th Grade

1. The Parents expressed concerns, in writing, that the Student may have a "processing disorder" on July 16, 2013 — the summer before 6th grade. S-1.

2. The District rephrased this as concerns about "processing and memory," and sought the Parents' consent to conduct a special education evaluation on September 11, 2013. S-1. The Parents provided consent the same day. S-1.

3. The evaluation included a structured observation of the Student in class, teacher input, and a review of interventions used at the time. S-2.

4. The evaluation also included an administration of both the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV), which is a standardized, normative assessment of cognitive ability, and the Wechsler Intelligence Scale for Children, Third Edition (WIAT-III), which is a standardized, normative assessment of academic achievement. S-2.

5. The observation, input, and testing were documented in an Evaluation Report dated September 26, 2013 (2013 ER). S-2.

6. The 2013 ER also included a cursory amount of parental input, mostly restating the concerns that prompted the Parents to request the evaluation. S-2.

7. Regarding the teacher input, the 2013 ER notes that teachers from the prior school (5th grade) year shared the Parents' concern about processing ability. S-2.

8. As part of the 2013 ER, 5th grade teachers expressed concern about the Student's organization, long-term memory, ability to solve multi-step problems, reading comprehension, and attention. S-2.

9. As part of the 2013 ER, 5th grade teachers also expressed concern about "low self esteem and possible depression or anxiety." S-2.

10. The 2013 ER included no input from the Student's then-current teachers. S-2.

11. The 2013 ER included no specific assessment of the Student's executive functioning. The WISC-IV revealed relative weaknesses in both working memory and processing speed. Both were in the "Low Average" range while other scores were all in the average range. S-2.

12. The 2013 ER concluded that the Student was on task in class, despite a need for some prompting to remain on task. S-2. Further, the 2013 ER concluded that the Student's intellectual ability and academic achievement were both in the average range. S-2.

13. The ER concluded that the Student did not have a disability and, therefore, was not eligible for special education. S-2.

14. During the 2013-14 school year, the Student was marked "Unexcused Tardy to School" 16 times. (S-4). Eight of those occurred between April 30, 2014 and June 17, 2014. (S-4). The

Student had only one “Unverified Absence” during the 2013-14 school year on June 16, 2014, but six “Full Day Excused” absences. S-4.

15. During the 2013-14 school year, the District switched grading systems. Rather than issuing letter grades, students were placed into performance ranges based on standardized testing. The Student scored “proficient” or “advanced” in all areas assessed except for two marking periods each of math and social studies during which the Student scored “approaching proficiency.” P-1.

2014-15 School Year — 7th Grade

16. The District switched back to traditional grading in the 2014-15 school year.

17. On October 2, 2014, the Student’s Science teacher wrote to the Parents, raising concerns about missing homework. The Parent responded that the Student has always had difficulty with homework, organization, and understanding directions. P-28.

18. The Parents and Science teacher agreed that the Parents would provide additional support at home. The Parents would check the Student’s notebook and take away privileges. S-28.

19. The Student’s difficulties with homework from the start of the 2014-15 school year were across classes (Science just happens to be an example of how the problem immediately manifested itself). *See* P-28.

20. On October 10, 2014, the Student met with District personnel to discuss a homework “routine.” The plan was for the Student to mark down everything that had to be completed during a “resource” period at the end of the day. This way, the Parents would also know what the Student had to do at home. P-28.

21. By October 26, 2014, the Student had Fs in both Math and Tech Ed. Those grades were, in large art, a result of missing work. *See* P-28.

22. In mid-November, 2014, the Student scored poorly on a RELA (Reading, English, and Language Arts) quiz, despite studying for it with the Parents. P-28.

23. This resulted in back and forth emails between the Parents and the RELA teachers. The Parents said that the Student “was struggling in many classes, both for lack of hard effort and also we are finding [that the Student] has difficulty learning. … [The Student] struggles in school, it lowers [Student’s] self-esteem more and more, causing a sort of deflated self-worth in addition.” P-28 at 13.

24. In the same email exchange, the Parents made a point to express that the Student’s performance was not the result of a lack of effort on their part. P-28.

25. By the end of the first marking period, the Student’s grades were as follows (S-18):

    Math - D
    Physical Education - B
    Reading and Writing Strategies - B
    RELA - C
    Science - B
    Social Studies - C

Tech Ed - F

26. The District uses an Instructional Support Team (IST) as a form of intervention for students with academic difficulties. IST is a regular education intervention, provided by a certified special education teacher. IST is informal, and does not include formal assessment, entry and exit criteria, or progress monitoring. *See, e.g.* NT 60, 63-65, 125-126.

27. On November 20, 2014, the Parents attended a conference with the Student's teachers. During that conference, the Parents and District agreed to remove the Student from a "Reading Strategies" class, and place the Student into IST, two days per week. The Student also had the option to go to IST during a resource period. P-28.

28. By the end of the second marking period, except as noted, all of the Student's grades had improved, significantly in some classes. Exceptions were Reading and Writing Strategies, which remained a B, and Science, which decreased from a B to a C. S-18. The grades were:

    Math - C
    Physical Education - A
    Reading and Writing Strategies - B
    RELA - B
    Science - C
    Social Studies - B
    Tech Ed - B (This was a two-semester class. The final cumulative grade was a D)

29. In January 2015, the Parents placed the Student on a gluten-free diet, in the hope that would improve the Student's "mental fogginess, memory, and learning difficulties," and be "a piece of the puzzle in helping [the Student] improve … grades and overall health." The Parents informed the District of this change, and the diet appeared to help a small amount. P-28; NT at 508-509.

30. In late February or early March, 2015, the Student reported to the Parents that the Student was being bullied on the school bus. The Parents chose to not bring that to the District's attention immediately. P-28.

31. On March 12, 2015, [the District was informed] that the Student was cutting []self and threatening suicide. District personnel spoke with the Student, confirmed that the Student had threatened suicide, and had researched how to commit suicide in the past.[2] P-28.

32. The March 12, 2015 incident prompted several back and forth emails between the Parents and District personnel. During this exchange, the Parents informed the District of the following, all of which occurred before March 12, 2015 (S-28):

    a. The Parents had taken the Student to a private play therapy group, but that was not successful.

    b. The Parents also informed District personnel about the alleged school bus bullying at this time.

[2] The record is somewhat ambiguous as to whether the Student was actually cutting at that time. *See, e.g.* P-28 at 35.

c. The Student was diagnosed with Celiac disease.

d. The Student's "doctor (who is not familiar with [the Student])" suspected Attention Deficit Disorder, and referred the Student to a psychiatrist.

e. The Parents took the Student to a psychiatrist. The psychiatrist prescribed Concerta "based on [the Student's] grades" and the 2013 ER.

f. The Parents did not place the Student on Concerta, hoping to achieve results through an organic, gluten-free diet instead.

33. In the same exchange of emails (around March 12, 2015), District personnel recommended that the Parents obtain outside counseling for the Student. District personnel provided the names of three therapists. The Parents took the Student to one of the therapists. The therapist recommended that the Parents obtain an independent neuropsychological evaluation. P-28; NT 77, 79, 510-514.

34. The District did not initiate any sort of evaluation of its own, either under the IDEA or Section 504 at this time.[3]

35. The Student began taking Health at the start of the third marking period, and earned an A during that marking period. The Student's Math and Science grades improved again, both from Cs to Bs. Social Studies also improved from a B to an A. RELA fell from a B to a C, and Physical Education fell from an A to a B. S-18. The grades were:

    Math - B
    Physical Education - B
    RELA - C
    Science - B
    Social Studies - A
    Health - A

36. By the end of the fourth marking period, the Student had maintained As in both Health and Social Studies, and maintained a B in Math. Physical Education improved from a B to an A, and RELA improved from a C to a B. Science fell from a B to a C. S-16. The fourth quarter grades, and cumulative final grades were:

    Class - Fourth Quarter - Final Grade
    Math - B - C
    Physical Education - A - B

[3] The primary District personnel on the March email exchanges was under the impression that only academic problems trigger the District's obligation to consider whether a student is eligible for special education. That individual was also under the impression that the District had no obligation to address mental health issues, regardless of whether those issues impact upon a student's education; and that a medical diagnosis is a prerequisite for obtaining a Section 504 agreement. N.T. 56-58, 61, 78, 80, 99-100, 115-116. Those factors, in part, explain the District's inactions during this time. However, the underlying reasons for the District's inactions are not relevant. Whenever an LEA violates the IDEA, the underlying reason for the violation, or anything analogous to intent, is not a factor unless parents or third parties are hindering the LEA's efforts.

RELA - B - B
Science - C - C (the final grade was 79, one percentage point away from a B)
Social Studies - A - B
Health - A -A (Health was a two-semester class)

37. The Student took the PSSAs on April 15, 2015. P-2. There is some ambiguity in the record as to when the results were available, but it appears that the results were not reviewed until the summer of 2015. *See* NT 69, 112, 141-143. The Student scored in the "Basic" range in English Language Arts, the "Below Basic" range in Math.[4]

38. During the 2014-15 school year, the Student had five "unverified absences." Four of those five occurred after January 2015, and three of those five occurred between March 20 and May 5, 2015. There was one additional "half day unexcused" absence, three full day absences that were either marked as excused with a doctor's note or excused for some other reason, and one "half day excused" absence. S-6. In sum, whether excused or not, the Student missed nine days of school in 7th grade. S-6.

39. In addition to the absences, the Student was tardy to school twice, excused with a note from the Parents both times. S-6.

2015-16 School Year — 8th Grade

40. On August 31, the Parents sent an email to the Student's 8th grade teachers. The Parents explained that the Student had not been diagnosed with ADD, but may show ADD-like symptoms when not following a strict diet. The Parents notified the teachers that the Student historically has had problems with following directions, understanding instructions, general comprehension, completing assignments on time, and completing class work on time. *See* S-29 at 1.

41. All students are assigned to a "resource" period in 8th grade. Students can take advantage of IST during the resource period, but are not "assigned" to IST unless District personnel believe that is necessary. NT 154-157.

42. The Student was assigned to a new guidance counselor at the start of 8th grade. The 8th grade guidance counselor was not made aware of the Student's history of cutting or threatening suicide at the start of the 2015-16 school year. NT 149-151.

[4] The PSSA (Pennsylvania System of School Assessment) is an annual, state standards-based, criterion-referenced assessment. No evidence was presented in this case (or *ever* in my experience as a Hearing Officer) to suggest that an individual student's scores on the PSSAs are in any way indicative of an individual student's actual academic growth or performance. During the PSSA, students are assessed relative to state standards, not in relation to a cohort of other students (as is the case with normative assessments). In the absence of evidence to the contrary, at best, a *school's* performance on the PSSA may correlate to how well the school (as a whole) is teaching to state standards. In the absence of evidence to the contrary, the PSSA has very little probative value in regard to any individual student. The cursory testimony about the PSSAs in this case (NT 144, 516) does not establish that the Student's PSSA scores are in any way indicative of the Student's actual academic abilities or performance. To the contrary, to the extent that District personnel were surprised by those scores, the testimony suggests that the PSSAs did not accurately reflect the Student's academic performance in school.

43. From the start of the 2015-16 school year, the Student had problems with homework completion and keeping up in classes. P-29.

44. On September 16, 2015, the Student met with the guidance counselor to discuss homework strategies. During that conversation, the guidance counselor learned that the Student did not want to continue [participating in an extracurricular activity], but perceived that [participating in that activity] was the Parents' expectation. This was a source of stress for the Student. P-29, NT 154.

45. By September 21, 2015, the Parents and District personnel were in frequent conversation about the Student's poor performance in Math and Science. The Student was not keeping up with textbook assignments, was having trouble remembering how to log into online educational programs, and was described in emails by teachers as being in "catch up mode." P-29. Around this time, the Student was permitted to attend IST during the resource period. P-29. Eventually, at various times, the Student was assigned to either the Math or Science teacher during resource period as well. P-29.

46. Around September 28, 2015, the Student skipped school to avoid [the extracurricular activity]. In general, around that time, the Parents expressed a belief that the Student was using [the activity] as an excuse for falling behind, and that blaming [the activity] was an "easy way out." P-29 at 33. At the same time, however, the Parents also expressed concerns about "some sort of depression, or a learning disability" in writing to [District personnel involved in the extracurricular activity]. *Id.*

47. Around the same time, the Parents started having difficulty getting the Student to school. The student was becoming school avoidant. P-29.

48. The Student dropped [the extracurricular activity] but the school avoidance continued. P-29.

49. By October 11 2015, the Parents were checking in with all of the Student's teachers in a group email at least weekly. At this point, the Student had failed to turn in a Tech Ed assignment worth one third of the grade for the class. P-29.

50. In an October 11, 2015 email, the Parents informed the teachers that they were in the process of obtaining a private neuropsychological evaluation for the Student, as recommended by the private therapist roughly six months prior. The Parents informed the District that the Student was diagnosed by the neuropsychological evaluator with Attention Deficit Hyperactivity Disorder - Inattentive Type (ADHD). P-29 at 49.

51. The private testing was concluded on October 14, 2015. S-5. The evaluator, a doctoral-level psychologist, drafted a psycho-educational evaluation report based on the testing.

52. Testing included the 5th edition of the WISC (WISC-V), the WIAT-III, a standardized test of visual-motor integration, the Behavior Rating System for Children, Second Edition (BASC-2), the Connors 3 behavioral rating scale, certain sub-tests of the NEPSY-II (a standardized neuropsychological evaluation), certain sub-tests of the D-KEFS (a standardized test of executive functioning), a questionnaire completed by the Parents, a clinical interview of the Student, and a review of the 2013 ER. S-5.

53. The private evaluator did not contact the District directly to obtain information as part of the evaluation. S-5.

54. The 2015 administration of the WISC-V produced results consistent with the 2013 administration of the WISC-IV in that both concluded that the Student's full scale IQ is in the average range. However, on the 2015 WISC-V, the Student scored in the "Average" range in both Working Memory and Processing Speed, representing a modest improvement in those sub-scales. C/f S-2, S-5.

55. The 2015 administration of the WIAT-III placed the Student in the "Average" range for both Reading and Math, and in the "High Average" range for both Written and Oral Expression. However, sub-test math scores revealed a difficulty with Math fluency, indicating that while the Student had mastered math concepts and was able to do calculations, the Student had not memorized math facts for quick recall without a calculator. S-5.

56. Rating scales completed by both parents and the Student aligned with medical diagnostic criteria for ADHD (the Connors 3) strongly indicated that the Student has difficulty with sustained attention, consistent with ADHD. S-5. Assessments of the Student's executive functioning abilities were consistent. S-5.

57. Regarding the Student's social and emotional functioning, both the BASC-2 and the evaluator's clinical interview with the Student revealed clinically elevated indicators consistent with both anxiety and depression. Indicators of withdrawal, anxiety, depression, and somatization (physical symptoms of psychological distress, sometimes associated with avoiding or escaping whatever is producing anxiety), were all elevated. S-5.

58. During the clinical interview, the Student indicated cutting and suicidal ideation in the past. The Student would also avoid school when feeling unprepared rather than face teachers and feel judged. The evaluator was concerned that the Student was untrusting of professionals, such as therapists, who may be in the best position to help. S-5.

59. Of particular note, the private evaluator was concerned that the Student's "avoidant pattern will become habitual or a life style without necessary treatment/intervention." S-5 at 15. Unfortunately, that was prescient.

60. Ultimately, the private evaluator concluded that the Student had both ADHD, inattentive type, and Adjustment Disorder with Mixed Mood (anxiety and depression). S-5. The evaluator urged the "school team" to consider whether the Student qualifies for special education and recommended numerous accommodations and instructional strategies. S-5.

61. On December 14, 2015, the Parents shared the private psycho-educational evaluation with the District. P-29 at 98. The Parents asked to keep information about self-harm confidential, and wanted to discuss "the possibility of a 504 plan." *Id.*

62. By December 14, 2015, the Student had accrued six, full-day excused absences. Those were all excused because the Parents sent in a note that the Student was sick. By the same date, the Student had accrued an additional four "unverified" absences, and two excused half-day absences. In sum, the student missed about 11 days of school between the start of the school year and the District's receipt of the private evaluation. S-11.

63. In the same period of time, the Student was "unexcused tardy" to school on an additional 11 days (the same period of time that the Parents were starting to report difficulty getting the Student to school in the morning - *see above*). S-11.

64. The Student's first and second marking period grades were as follows:

Class - Marking Period 1 - Marking Period 2
Art - A - A (Art was a two-semester class. The final grade was an A)
English and Language Arts (ELA) - C - B
Health and Physical Education (HPE) - C - B (This was a two-semester class. The final grade was a B)
Pre-Algebra - D - F
Science - D - C
Social Studies - B - C
[Foreign Language] - C - D
Tech Ed - C - B (Tech Ed was a two-semester class. The final grade was a C)
Tech Ed B - B (Tech Ed B was a two-semester class. The final grade was a B)

65. On January 14, 2016, the Parents and District personnel had an informal meeting to discuss potential accommodations under Section 504. The next day, the Parents wrote to District personnel urging the District to consider the many recommendations in the private psycho-educational evaluation, noting that some of those "look like an IEP." P-29 at 133.

66. On January 28, 2016, a friend of the Student told the Parents that the Student was threatening suicide. The Parents sought emergency care for the Student at a local hospital. From there, the Student was transferred to an outpatient psychiatric hospitalization program. The Student received both psychiatric care and educational services at that program from January 28, 2016 through February 8, 2016. P-29, S-7.

67. The Parents immediately informed the District about the incident and the hospitalization. *See* P-29 at 150. The Parents also informed the District that the medical staff at that program was changing the Student's medication.[5]

68. Around the same time, the Parents reported to District personnel that school was a primary trigger of the Student's anxiety. P-29.

69. When the Student left the hospitalization program, the program drafted a discharge summary. The Discharge summary notes that the Student was suffering from ADHD and Major Depressive Disorder. S-7. The Guidance Counselor typically receives discharge summaries, but there is no clear evidence that the Guidance Counselor received the discharge summary in this case. However, if the Guidance Counselor received the discharge summary, he would not have shared it with other District personnel. *See, e.g.* NT 246.

70. On February 8, 2016, the Guidance Counselor contacted the Student's teachers and advised them of the situation. He explained that school is a stressor for the Student, and asked for the Student to be excused from all non-necessary assignments, and given extra time to complete necessary assignments. The Student was also removed from [a foreign language class] and placed into a Reading class at this time. P-29 at 203-204.

[5] Preponderant evidence supports a finding that the Parents did not start the Student on Concerta when it was first prescribed. The record also indicates that the Student's medications were changed several times, and that the Student did not always take medicine or adhere to dietary restrictions as prescribed or as encouraged by the Parents. Consequently, I make no findings as to what medication the Student was taking at various points in time. As discussed below, however, it is important to note what information the Parents told the District and when.

71. On February 25, 2016, the District invited the Parents to a Section 504 meeting. The purpose of the meeting was to discuss eligibility for Section 504 accommodations, and to develop a Section 504 plan. S-8.

72. The meeting convened as scheduled on March 2, 2016. A Section 504 Agreement was drafted by the District and agreed to by the Parents the same day. S-8. The agreement provided the following accommodations:

> "redirection as needed to help keep [Student] focused"
> "preferential seating"
> "extended time for testing if needed and requested"
> "access to guidance as needed"
> "regular contact between school and home as needed"

73. With the exception of extended time for testing (if needed and requested), all other accommodations were in place before the Section 504 Agreement was drafted. NT *passim.*

74. The Section 504 Agreement was silent as to the basis of the Student's status as a "protected handicapped student." S-8.

75. The Section 504 Agreement provided no accommodations regarding homework, school attendance, anxiety, or depression. S-8.

76. Between the District's receipt of the private psycho-educational evaluation on December 15, 2015 and its implementation of the Section 504 Agreement on March 2, 2016, the Student spent seven days in the hospitalization program. Of the remaining days, the Student was "excused" absent on three days and "unverified" absent on one day. The Student also missed two half days (once with a doctor's note, and once for a funeral). S-11.

77. In addition to the absences, from December 15, 2015 through March 2, 2016, the Student was "unexcused" tardy on eight days. S-11.

78. The District contracts with a private company that specializes in school attendance issues. This company employs people who go to homes and help children get to school, but this is not a therapeutic support. Through the District, the Parents requested assistance from this company in March 2016. The record preponderantly establishes that the family worked with the company from March 2016 through October 2016, and discontinued the service when the company's employees threatened to involve law enforcement or initiate legal processes to remove the Student from the Parent's home. P-29; NT 202-203, 551, 571-573.

79. The Student attended school on March 2 and 3, 2016 (a Wednesday and Thursday), but then had a half day unexcused absence on Friday, March 4. The Student was unexcused tardy the next Monday, March 7. The Student was then unverified absent from Tuesday, March 8 through Friday, March 11, 2016. S-11. During this time, the Student simply refused to go to school, and disciplinary measures taken by the Parents at home were ineffective. NT *passim.*

80. The Parents, in communication with the District, researched therapeutic programs for the Student. The Parents identified a different outpatient psychiatric hospitalization program that they believed would help the Student. That program did not have space for the Student until March 21, 2016. The Parents and District agreed to place the Student on Homebound Instruction during the week of March 14 through 18, 2016. P-29, S-11.

81. On March 19, 2016, the District issued paperwork indicating the placement into the new outpatient psychiatric hospitalization program. The District issued a "Change of Placement" form, indicating that the Student was attending an "alternative school setting" during this time. S-7.

82. Around the same time, the Parents scheduled an appointment for the Student at a clinic specializing in adolescent anxiety, and shared that information with the District. P-29.

83. The Student initially refused to attend the new outpatient psychiatric hospitalization program. By March 23, 2016, the Student had again threatened suicide. This prompted the Parents to bring the Student to an inpatient psychiatric hospitalization program. P-29, S-7.

84. On March 23, 2016, the District issued a "Change of Placement" form, indicating that the Student moved from the new outpatient hospitalization program to the inpatient hospitalization program. The District considered the Student to be attending an "alternative school setting" during this time. S-7.

85. The Student received no grades for the third marking period of the 2015-16 school year. S-18.

86. On April 5, 2016, the Parents sent an email to the District, asking to convene the Student's 504 team to plan for transition back to school. In the same email, the Parents requested an IEP. P-29 at 305.

87. On April 7, 2016, the District sought the Parents' consent to conduct an IDEA evaluation by sending a consent form. S-9.

88. On April 18, 2016, the Student was discharged from the inpatient hospitalization program, with an expectation of returning to the District on April 19, 2016. S-7.

89. On April 20, 2016, the Parents signed and returned the consent form, giving the District permission to evaluate the Student. S-9. As detailed below, the District's evaluation was completed within the statutory timeline, but after the 2015-16 school year ended. S-12, P-1.

90. The Student's 504 Agreement was modified when the Student returned to school to permit the Student to [perform an activity] when needed to help with anxiety — an accommodation recommended by the Student's outside therapists. S-10.

91. Between the Student's return to school on April 19, 2016, and the end of the school year on June 9, 2016, the Student accrued 13 unverified absences, one full-day excused absence, five half-day unexcused absences, and was unexcused tardy on 11 additional days. S-11.

92. By the end of the 2015-16 school year, the Student was attending only 10% of classes on days that the Student came to school. S-13.

93. The Student's fourth marking period and final, cumulative grades for the 2015-16 school year were (S-18):[6]

[6] It is not clear how the missing third semester impacted upon the final grades in year-long classes. Those classes were English and Language Arts, Pre-Algebra, Science, and Social Studies. S-18.

Class - Marking Period 4 - Final Grade
College and Career Readiness - F - F
English and Language Arts (ELA) - F - C
Library Research Skills -B -B
Pre-Algebra - F - F
Reading - F - F
Science - C - C
Social Studies - F - D
[Foreign Language] - C - D

2016-17 School Year — 9th Grade

94. The District evaluated the student and issued an Evaluation report on August 23, 2016 (2016 ER). S-12.

95. The 2016 evaluation included a structured observation of the Student in school that occurred sometime between April 20, 2016 and the end of the 2015-16 school year, the teacher ratings from the third edition of the BASC (BASC-3), a re-administration of both the WISC-V and the WIAT-III, Student input, and teacher input. S-12.

96. As part of the evaluation, the District asked the Parents to complete the parent rating scales of the BASC-3, but the Parents did not return the rating scales. S-12. However, the District neither solicited nor used any other form of parental input other than noting that the evaluation was prompted by the Parents' concern for the Student's academic, emotional, and behavioral difficulties. S-12.

97. The re-administrations of the WISC-V was consistent with the prior administration. On the WISC-V, the Student placed into the average range across all domains and sub-tests, including working memory and processing speed. S-12.

98. On the WIAT-III, the Student again scored in the average range on both reading and math composites, and in the "well above average" range in the written expression composite. Math fluency continued to remain a relative weakness, in the "low average" range. S-12.

99. During the structured observation, the Student engaged 78% of the time, which was slightly more on task than peers in the same class. S-12.

100. The BASC-3 teacher rating scales were completed by two teachers. Generally, ratings were consistent between the two teachers. S-12

101. Both teachers rated the student in the average range for both "externalizing problems" and "school problems." Externalizing problems includes indicators for hyperactivity, aggression, and conduct problems. School problems includes indicators for attention and learning problems. S-12.

102. One teacher rated the Student in the "at risk" range for "internalizing problems." The other teacher rated the Student in the "clinically significant" range for internalizing problems. Internalizing problems includes indicators for anxiety, depression, and somatization. S-12.

103. The largest difference between the teacher ratings on the BASC-3 was for adaptive skills. One teacher rated the Student in the average range, and the other rated the student

in the "clinically significant" range. Adaptive skills includes indicators for adaptability, social skills, leadership, study skills, and functional communication. S-12

104. The Student's self-ratings indicated depression, anxiety, social stress, and a sense of inadequacy. S-12. At the time, the Student's relationship with the Parents was strained. Further, the Student was "having significant difficulties with a pervasive mood of unhappiness and depression and is developing physical symptoms of fears associated with attendance at school." S-12 at 11. Those problems with attendance had occurred "to a marked degree" and also "have negatively impacted upon [the Student's] educational performance to a significant degree." *Id*.

105. Synthesizing the BASC-3 results and teacher input, the evaluator concluded that the Student was exhibiting "behaviors stemming from worry, nervousness, and fear." S-12 at 10. The evaluator also concluded that the Student had "extreme difficulty" adapting to new situations, and "difficulty" with social skills, decision making, organization, study skills, and turning in work on time.

106. The 2016 ER concluded that the Student is a child with a disability under the IDEA eligibility category of Emotional Disturbance, and requires specially designed instruction. S-12. Therefore, the 2016 ER concluded that the Student was eligible to receive special education. S-12.

107. The 2016 ER made recommendations to the IEP team. Specifically, the 2016 ER recommended development of a positive behavior support plan (PBSP), focusing on anxiety management. The 2016 ER also recommended direct instruction of anxiety management skills, breaks to alleviate anxiety, a check-in / check-out system, and a "smaller environment" to work in when the Student feels anxiety or needs to catch up on work. S-12.

108. On September 14, 2016, the Student's IEP team convened. The District issued an IEP with a Notice of Recommended Educational Placement (NOREP) the same day. The Parents approved the IEP for implementation, via the NOREP, also on the same day. S-13, 14.

109. Between August 29, 2016 (the first day of 9th grade) and September 14, 2016 (the day of the IEP team meeting), the Student attended only the first day of school and one other day. The Student accrued eight excused absences, and three unverified absences. S-17, P-1.

110. The IEP included a PBSP. S-13 at 11-14, 26-27. The PBSP called for the Student to have access to a trusted adult, a weekly "review" of coping skills with the Guidance Counselor, opportunity to work in a "quieter" place when requested, and versions of the accommodations in the Section 504 Agreement. The PBSP also called for giving the Student free time as positive reinforcement, and the ability to choose which group to work with - or work individually, when classes call for group work.

111. The IEP included two goals: The first goal was for the Student to increase class attendance from a baseline of 10% to 80%. Mastery would be demonstrated when the Student attended 80% of classes over 10 consecutive weeks.[7] The second goal called for the Student to complete 85% of class assignments over two consecutive months. The

[7] The goal discusses "behavioral checklists" but the actual goal calls for, and was to be measured by, the Student's class attendance. *See* S-13 at 23.

baseline for that goal was to be assessed during the first marking period of the 2016-17 school year. S-13.

112. The IEP included all of the accommodations in the 504 Agreement and the PBSP as specially designed instruction (SDI). The IEP also added extended time for assessments as determined by District personnel, weekly organizational check-ins, and use of a calculator in math classes. S-13.

113. The IEP included no goals or SDI to improve the Student's school attendance (as opposed to class attendance on days that the Student came to school).

114. After the IEP was drafted, the Student stopped attending school through September 28, 2016.

115. Around the same time, the Parents went to a new medical group to manage the Student's psychiatric care and medication. On September 28, 2016, the Parents sent a letter from the Student's treating psychologist (the letter is also dated September 28). The letter explains that the Student had been diagnosed with "major depressive disorder, recurrent, with severe psychotic symptoms" and that the Student's "current symptomatology [impaired the Student's] ability to regularly attend school." The psychologist advised that the Student's absences should be medically excused. P-30 at 266.

116. In response to the September 28 letter, and another letter from the same practice (also dated September 28 but sent to the District on October 3, 2016) (P-17), the Student was placed on Homebound Instruction from September 28, 2016 through November 9, 2016.

117. On October 25, 2016, the Parents filed the Complaint initiating these proceedings. An initial hearing session was set for November 25, 2016. Around the same time, the parties were negotiating additional evaluations of the Student, potential IEP revisions, and were hopeful that the dispute could be resolved amicably. Consequently, the hearing was continued several times.

118. After the Complaint was filed, but before the hearing convened, the IEP team reconvened on November 8, 2016, and revised the Student's IEP. The most significant change was the creation of a plan for the Student to attend school for one day per week, receiving five hours of instruction in academics and 15 minutes of instruction in coping and anxiety management. The plan called for the Student to increase attendance in phases. S-16.

119. The attendance plan was initially successful, and the team determined that the Student should move to phase two of the plan, which increased the Student's attendance to two days per week, and increased instructional hours to 10 hours per week. Instruction in coping and anxiety management remained the same. S-16.

120. Phase two was less successful, as the Student would avoid school on test days, and stopped attending to avoid moving to phase three.

121. On February 16, 2017, the Parents obtained an independent functional behavioral assessment (FBA) conducted in the Student's home. S-25.

122. On February 22, 2017, this hearing convened.

Legal Principles

The Burden of Proof

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

Child Find

In the parlance of special education law, "Child Find" is a term of art describing a school's obligations under 34 U.S.C. § 300.111 and 22 Pa. Code § 14.121. Those regulations require LEAs to have in place procedures for locating all children with disabilities, including those suspected of having a disability and needing special education services although they may be "advancing from grade to grade." 34 U.S.C. §300.111(c)(1).

The Child Find regulations require LEAs to evaluate children suspected of having a disability. See 34 C.F.R. § 300.111(a)(1)(i). In this case, if the District had reason to suspect that the Student had a disability, the District was obligated to propose a special education evaluation in accordance with IDEA requirements.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to a student who qualifies for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

More specifically, in *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034. 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits."

Historically in the Third Circuit, the benefits to the child must be 'meaningful'. Meaningful educational benefit must relate to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

Under the historical “meaningful benefit” standard, a school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than “trivial” or “*de minimus*” benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Recently, the United States Supreme Court considered what quantum of benefit is required by the IDEA. In *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the Supreme Court effectively agreed with the Third Circuit by rejecting a “merely more than *de minimus*” standard, holding instead that the “IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be “appropriately ambitious in light of [the child’s] circumstances.” *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be “appropriately ambitious” for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics — as is clearly evident in this case.

In general, *Endrew F.* is consistent with the standard that had been applied in the Third Circuit previously. The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student’s circumstances in the least restrictive environment.

Compensatory Education

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

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

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

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

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

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

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being".

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.,* 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila*., Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F., Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006)*; *M.L. v. Marple Newtown Sch. Dist.,* ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.,* ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

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

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

Section 504 / Chapter 15

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

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

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

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

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

3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

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

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

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

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

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

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

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

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

Discussion

2013-14 School Year (6th Grade)

The Parents do not demand relief until October 25, 2014. However, as a general matter, the Parents contend that violations occurring during the 2013-14 school year impacted upon later years and, in part, substantiate their claims.

During 6th grade, the District satisfied its Child Find requirements by evaluating the Student and issuing the 2013 ER. Child Find, in the context of this case, requires only that the District assess the Student when it has reason to believe that the Student may have a disability. The District had reason to believe that the Student had a disability on July 16, 2013. The District was, therefore, obligated to propose an evaluation. The District proposed an evaluation on September 11, 2013, and then completed the evaluation on September 26, 2013. Regardless of whether flaws in the 2013 ER may amount to a violation of other parts of the IDEA, once the District proposed the evaluation, it satisfied its obligations.

Although the District satisfied its Child Find obligations, the 2013 ER was imperfect. Those imperfections, however, do not render the 2013 ER inappropriate.

At the time of the 2013 ER, teachers from the prior school year expressed concern about the Student's potential anxiety and depression. It appears nothing was done to follow up on that concern. If the evaluator asked the Parents or the Student's then-current teachers about anxiety or depression, the 2013 ER is silent as to that effort. No social or emotional assessments were conducted.

The District was obligated to assess all suspected areas of disability. Those obligations flow not from Child Find, but rather from the IDEA's evaluation requirements. 20 U.S.C. § 1415(b)(3)(B). Both anxiety and depression can form the basis of IDEA eligibility. If the District knew, or had reason to know, that the Student was suffering from anxiety or depression, the District was obligated to assess those areas. However, nothing in the record indicates that the District had reason to suspect anxiety or depression at the time of the 2013 evaluation. That was not the Parents' concern when requesting the evaluation, or during the evaluation. The evaluator conducted a structured, in-school observation and did not note external symptoms of anxiety or depression. The Student was "Unexcused Tardy to School" twice between the start of the 2013-14 school year and the 2013 ER. That, by itself, also does not indicate anxiety or depression.

It would have been better for the District to follow up on the 5th grade teachers' comments. That flaw, however, does not render the 2013 ER inappropriate, in light of the information that the District obtained at the time.

2014-15 School Year (7th Grade)

The Student immediately fell behind in homework and class work at the start of the 2014-15 school year. The District responded with IST supports. Academically, the Student appeared to respond well to that intervention as evidenced by improving grades (dramatic improvements in some cases).

On March 12, 2015, the District learned that the Student had threatened suicide, and was engaging in self-harm. This prompted email exchanges between the Parents and District in

which the District learned that the Student was in therapy, had been prescribed medicine, had Celiac disease, and was suspected of having ADD. Consequently, the District had actual knowledge that the Student may be a "child with a disability" for IDEA purposes and was a "protected handicapped student" for Section 504/Chapter 15 purposes.

The District can be excused, however, for not initiating an evaluation at this time. The Student's grades were improving in response to regular education interventions (IST), and academic improvement continued through the third and fourth marking period, for the most part. Also, the District had evaluated the Student in the prior school year. Further, during the 2014-15 school year, there was no pattern, or (relatively) significant amount of, attendance problems. This analysis is not intended to minimize the seriousness of suicidal threats. Rather, I find that the District acted appropriately by taking the threat seriously, investigating it, coordinating with the Parents, and offering to connect the Parents with outside supports. In weighing a single but serious incident against a general, ongoing pattern of improvement, I find that the District acted appropriately.

In the particular context of this case, the District violated neither the IDEA nor Section 504 through its actions or inactions during the 2014-15 school year.

2015-16 School Year (8th Grade)

Unfortunately, the progress that the Student seemed to make during the 2014-15 school year was obliterated during the 2015-16 school year. The Parents advised the District to be on the lookout for ADD-like symptoms before the school year started. Even with this warning, as with the prior year, the Student immediately fell behind in both homework and class work. Moreover, early in the school year, the Student's pattern of school avoidance began to appear. By the end of September, the Parents were discussing their concerns about both depression and a potential learning disability with the District. Whether or not the District was also concerned, it took no action to assess the validity of the Parents' concerns.

By October 11, 2015, regular education interventions were ineffective and the District again had actual knowledge of suspected disabilities. The Parents shared specific concerns with the District, triggering the District's obligation to evaluate the Student, but also explained that they were obtaining a private evaluation. The District neither offered to conduct its own evaluation nor pay for the private evaluation.

The 2013 ER does not satisfy the District's Child Find obligations in perpetuity. When an LEA has reason to suspect that a child has disabilities, the District is obligated to evaluate even if a prior evaluation concluded that the Student was not eligible. There is no hard and fast rule about how much time must pass between a prior finding of ineligibility, and new information suggesting an evaluation is warranted, to re-trigger Child Find. In this case, the totality of the circumstances illustrates that Child Find was re-triggered on October 11, 2015.

The District was obligated under the IDEA's Child Find requirements to propose an evaluation, regardless of the Parents' stated intention of obtaining an evaluation on their own. The District violated its Child Find obligations by failing to do so.

By December 14, 2015, the District had the private evaluation. At this point, the Student was clearly a "protected handicapped student" for Section 504/Chapter 15 purposes based on the diagnoses and conclusions in the private evaluation. Also, at this point, the District's Child Find violation was significantly compounded. The District had actual knowledge that the Student was

diagnosed with conditions that fall into IDEA eligibility categories. After comprehensive testing, the private evaluator specifically urged consideration for IDEA eligibility and gave prescient warnings about what was likely to happen in the absence of a plan to curb the Student's burgeoning school avoidance.

At this point, the District argues that the Parents should have known better than to request a Section 504 Agreement. The Student's mother is a school nurse, but I reject that argument as a matter of fact. Regardless, the Parents' knowledge is completely irrelevant. When a school violates a child's educational rights, acquiescence to parental preferences is not a defense. The Student had a right to a special education evaluation. The District had an obligation to seek the Parents' consent to conduct that evaluation. The fact that the Parents requested a 504 Agreement does not terminate that obligation. The Parents' action in no way prohibited the District from seeking consent to evaluate. The District cannot blame the Parents for its failure to discharge its duties, or for violating the Student's educational rights.

By January, the Student's grades were showing modest improvement in some classes, and were declining in others. In late January, the Student was hospitalized for threatening suicide. The District knew about this, and implemented significant academic modifications (no unnecessary work, extra time to complete assignments, reassignment from [a foreign language] to Reading). This series of events also should have prompted the District to consider the need for a special education evaluation, especially when viewed together with the private evaluation. Instead, the District put the Section 504 Agreement in place in late February.

The Section 504 Agreement was inappropriate. The 504 Agreement was silent as to the Student's disabilities. The District did not conduct an evaluation of any kind. *See* 22 Pa. Code § 15.6. The accommodations also bore no resemblance to the recommendations in the private evaluation. Rather, at best, the 504 Agreement was a recitation of the services that were already in place for the Student. The Student's problems with homework, school attendance, anxiety, and depression were all documented at that time. There is no nexus between the 504 Agreement and the difficulties that the Student was facing.

By March, as anticipated in the private evaluation, the Parents were having great difficulty getting the Student to school and, with the District's support, sought assistance from a truancy prevention company. This proved ineffective, the Parents' own efforts also proved ineffective, and the Student refused to go to school.

At this point, the District argues that it cannot be blamed for the Parents' inability to control the Student. I agree with the District that some of the Parents' actions, well-documented in the record of this case, at this point in time and after, were questionable. The parties disagree about the consistency with which discipline was imposed at home. The District argues that the Parents' actions reinforced the Student's school avoidance. There is some support for that claim in the record, but nothing preponderant. Regardless, the Parents' home discipline is not relevant in this case. If the District had taken efforts to improve the Student's attendance, I would consider whether the Parents' actions thwarted that effort. But the District took no such efforts, so I will not.[8] Since the District was not trying to improve the Student's attendance, the impact of the Parents' actions on the Student's attendance is not relevant.

[8] Above, I make no finding as to whether the Parents enabled or reinforced the Student's behavior because, as explained here, that is not relevant. Further, the District's contract with the truancy elimination company does not change this analysis. The services provided by that

The Parents then informed the District that they were seeking a therapeutic program for the Student, and treatment from an adolescent anxiety clinic. The District did nothing. Next, the Parents informed the District that it had found a program for the student — an outpatient psychiatric hospitalization — and the District's only response was to excuse the Student's attendance until a spot was open.[9] By March 23, despite outpatient treatment, the Student was again threatening suicide and required even more intensive care. The Parents kept the District informed every step of the way.

The District offered an IDEA evaluation only after the Parents requested an IEP. The District started that process with an evaluation consent form on April 7, 2016, roughly four months after receipt of the private evaluation. The evaluation was not finished until August. This was within the IDEA's timeline. Nevertheless, by this point, the Student had effectively missed the third marking period, had stopped going to school — and stopped attending class when in school — and was failing classes.

2016-17 School Year (9th Grade)

Just before the start of 9th grade, the District completed its evaluation. Based on information virtually identical to what was provided in the private evaluation, and information that was available to the District at any time during the prior school year, the District concluded that the Student was eligible to receive special education.

After the evaluation, the District offered an IEP. That IEP was inappropriate. First, the IEP included a PBSP, but the PBSP was drafted without the benefit of an FBA. Without first attempting to understand the functions of the Student's behaviors, the District had no reason to believe that its strategy to reduce those behaviors would be effective. The IEP's goals (improving work completion and improving class — as opposed to school — attendance) were laudable. However, the IEP included no SDIs to enable to the Student to obtain those goals. A goal describes the progress that a student is expected to make. SDIs describe what the school will do to enable that progress. The SDIs in the IEP were necessary, but insufficient. To the extent that the SDIs were simply a carry-over from the 504 Agreement, those were already proven ineffective. To the extent that the SDIs were based on the PBSP, the District had no reason to believe that they would be effective, given the lack of an FBA. There is a connection between the organizational check-in SDI and the work completion goal, but that is hardly sufficient. Moreover, given the severity of the Student's symptomatology (multiple psychiatric hospitalizations, multiple suicide threats, a history of cutting, and increasingly entrenched school avoidance), a weekly review of coping skills was not reasonably calculated to enable the Student's progress.

At the time that the IEP was drafted, the Student's school avoidance was a clear symptom of the Student's emotional disturbance. The Student's truancy unambiguously negatively impacted upon the Student's education. I am generally sympathetic to the District's argument that it has little control over (or responsibility for) what happens in the Parent's home. That argument, however, is not persuasive in this case. If the District had made any effort through the IEP to

company were not therapeutic in nature, not effective in practice, not supported by any evaluation at that time, and ultimately contraindicated by the recent in-home FBA.

[9] The Student was technically placed on homebound instruction at this time.

improve the Student's school attendance, I would consider whether the Parents' actions thwarted that effort.[10] Despite a very clear need, no such effort was made.

The Student stopped attending school shortly after the IEP was drafted and ultimately was placed on Homebound Instruction. This was not a sudden change, but the natural progression of events that started years prior. The private evaluation explicitly warned of this outcome. I am generally sympathetic to the District's argument that it never had a real opportunity to implement the IEP. That argument, however, is not persuasive in this case. Similar to the above, if the District had made any effort to improve the Student's school attendance through the IEP, I would consider whether the Student's non-attendance thwarted the District's efforts. Despite a very clear need, no such effort was made.

The District's first effort to improve the Student's school attendance came on November 8, 2016, when it revised the IEP to include a phased transition back to school. Unfortunately, that plan was drafted without the benefit of an FBA, and therefore it was flawed for the same reasons that the PBSP was flawed.[11] Said simply, the District's plan to address the Student's behavior (school avoidance) was not based on an evaluation of the Student's behavior. The plan showed some initial promise, but was ultimately unsuccessful. Regardless of outcomes, IEPs are appropriate if they are reasonably calculated to provide the level of benefit required by the IDEA at the time they are issued. When the IEP was revised on November 8, 2016, the District was in no position to calculate the likely benefit because it had not evaluated the Student's behaviors in a systematic way via an FBA.

Compensatory Education

Despite the division of the issues as presented by the parties, the violations in this case break down as follows:

From October 11, 2015, (notice of suspected disability) though April 7, 2016, (issuance of the IDEA evaluation consent form) the District violated the Student's rights by failing in its Child Find obligations.

Overlapping with the Child Find violation, from March 2, 2016, (implementation of the Section 504 Agreement) through September 14, 2016, (the IEP team meeting), the Student received services pursuant to an inappropriate Section 504 Agreement.

From April 7, 2016 through November 8, 2016, (the date that the IEP was revised to include an attendance plan) the Student received services pursuant to an inappropriate IEP. The November 8, 2016 IEP was a step in the right direction, but still inappropriate because the District had no basis to believe that the truancy plan would be effective when it was offered.[12]

For the above reasons, compensatory education is clearly owed. The Parents argue that full days of compensatory education are owed, given the pervasiveness of the Student's disabilities.

[10] As seen in subsequent IEPs, it is possible to develop an IEP that targets truancy.
[11] As illustrated in the February 16 FBA, it is certainly possible to conduct a thorough evaluation of the Student's behaviors, and use those evaluations to craft interventions, even when a student is not attending school.
[12] Again, I do not judge the attendance plan by its results. I judge it by the lack of information available to the District at the time it was offered, and the lack of effort on the District's part to obtain that information.

I agree. The District's lack of action in this case exacerbated the Student's educational decline. I do not blame the District for the Student's mental health challenges. Rather, the District's 'not my problem' stance compounded the educational impact of the Student's mental health. The educational consequences of the District's inactions are seen both in the Student's inability to attend school, and the decline in the Student's grades.

A "full day" compensatory education award is also more consistent with the IDEA's remedial scheme than a "make whole" remedy in this case. As noted in the Parents' closing brief, regardless of appropriateness, the District implemented a 504 agreement, an IEP, and a revised IEP — all of which failed. As such, the Student was "at risk" and, under the terms of *Cordero v. Commonwealth of Pennsylvania and Pennsylvania Dept. of Education*, 795 F. Supp 1352 (E.D. Pa. 1992), the District should have initiated an intensive interagency process.[13] *See also* 20 U.S.C. § 1412(a)(12). That interagency process, in accordance with a Memorandum of Understanding (MOU) between the Departments of Education, Human Services, Labor & Industry, and Health, enables the District to coordinate the provision of FAPE across agencies. Ironically, had the District initiated this process, the District could have worked in close coordination with agencies that are more able to provide services inside the Parents' home.

Either on its own or through the interagency process, the District is now obligated to implement a plan that is reasonably calculated to bring the Student back to school, enable the Student to attend to academics while present in school, and remediate the academic losses that come from the education that the Student missed. These are the sort of problems typically addressed through 'make whole' remedies. In this case, in light of *Cordero*, the typical 'make whole' remedy is all part of the District's *current* FAPE obligation. Compensatory education cannot be spent down to satisfy the District's current FAPE obligation. I choose 'full day' compensatory education both because it is warranted in this case, and because it must not be commingled with the District's current FAPE obligation.

An order consistent with the foregoing follows.

[13] If the District has not already done so, they are ordered to do so below.

ORDER

Now, May 22, 2017, it is hereby **ORDERED** as follows:

1. The Parents' demand for compensatory education from October 25, 2014 through October 11, 2015 is denied. I find no violation of the IDEA or Section 504 during this period of time.

2. From October 11, 2015, (notice of suspected disability) though April 7, 2016, the District violated the Student's rights by failing in its Child Find obligations.

3. From March 2, 2016, through September 14, 2016, the District violated the Student's rights under Section 504 and Chapter 15 because the Student's Section 504 Agreement was inappropriate.

4. From April 7, 2016 through November 8, 2016, the District violated the Student's rights under IDEA and Chapter 14 because the Student's IEP was inappropriate.

5. From November 8, 2016, the District violated the Student's rights under the IDEA and Chapter 14 because the Student's IEP was inappropriate.

6. As explained in the accompanying memorandum, the Student is entitled to full days of compensatory education. Full days are awarded starting on October 11, 2015 and accrue until either 1) the November 8, 2016 is revised or replaced with parental approval, or 2) the District invites the Parents to an interagency meeting consistent with the accompanying memorandum, whichever occurs first.

7. The Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP.

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

/s/ Brian Jason Ford
HEARING OFFICER