

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 Due Process Hearing Officer Final Decision and Order

Open/Closed Hearing

ODR File Number

22523-1920AS

Child's Name

Z.J.

Date of Birth

[redacted]

Parent(s)/Guardian(s)

[redacted]

Counsel for Parent(s)/Guardian(s)

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Hearing Officer

Brian Jason Ford, JD, CHO

Date of Decision

08/10/2020

Introduction

This matter concerns the educational rights of a child with disabilities (the Student). The Student's parent (the Parent) alleges that the Student's local educational agency (the District) violated the Student's rights by failing to timely identify the Student as a child with a disability in need of special education (referred to as a Child Find violation), and then by failing to offer a free, appropriate public education (FAPE) to the Student.

For reasons discussed below, I find partly in favor of the Parent and partly in favor of the District.

Issues

The issues presented in this matter are:

1. Did the District breach its Child Find obligation to the Student?
2. Did the District deny the Student a FAPE?

Findings of Fact

I carefully considered the record in its entirety. I make findings of fact, however, only as necessary to resolve the issues presented. I find as follows:

Background – Early Educational History

1. The Student first enrolled in School District 1. At School District 1, the Student experienced academic issues and behavioral issues including temper tantrums. The behavioral issues resulted in School District 1 sending the Student home from school and suspensions. NT at 28-32.
2. While the Student attended School District 1, the Parent obtained outside counseling and placed the Student in publicly funded programs for struggling students. NT at 28-32.
3. After the Student's initial enrollment in School District 1, the Parent and Student moved several times. These moves were the result of financial circumstances. The Parent and Student also experienced a

period of homelessness. For a portion of this time, the Student was enrolled in School District 2. NT at 28-32.

Background – The 2014-15 School Year (7th Grade)

4. For the 2014-15 school year, the Parent and Student moved back into School District 1. The Student re-enrolled in School District 1 as a 7th grade student. NT at 28-32.
5. During the 2014-15 school year, School District 1 placed the Student at [redacted], a therapeutic school that accepts students with and without Individualized Education Plans (IEPs). NT at 59, 63, 33, 118-119; P-2.
6. While attending [the therapeutic school], the Student engaged in negative behaviors including inappropriate interactions, disrupting class, not following directions, profane language, horseplay, and disrespect towards staff. To address these behaviors, [the therapeutic school] removed the Student from class 80 times. The Student self-removed from class an additional 25 times. P-2.
7. [The therapeutic school] discharged the Student in June 2015. At that time, [the therapeutic school] noted that the Student's progress was "inconsistent" but recommended that the Student attend School District 3's high school, continue to develop conflict resolution and anger management skills, and participate in outside counseling. P-2.
8. Sometime in the summer of 2015, the Student began living with the Parent's sister within School District 3. NT 35-36.

Background – The 2015-16 School Year (8th Grade)

9. The Student attended school at School District 3 during the 2015-16 school year for 8th grade. The Student lived with the Parent's sister during this time. The Student continued to experience academic and behavioral difficulties. NT at 35-36.

The Student's Enrollment in the District

10. In the summer of 2016, the Student began living with the Parent within the District. The Parent enrolled the Student in the District prior to the start of the 2016-2017 school year as a 9th grade regular education student. NT at 28-29; S-3.

11. As part of the enrollment process, the Parent completed various forms including an information form (S-3 at 2), a registration statement (S-3 at 6), and a special health needs form (S-3 at 18).
12. On the information form, the Parent indicated that the Student did not have a Section 504 Plan and was not "at risk." The term "at risk" is not defined on the form. The form asks nothing about special education history or needs (section 504 addresses regular education accommodations, not special education). S-3.
13. On the registration statement, the Parent checked boxes saying that the Student was not and had not been suspended or expelled. Despite strong admonitions on the form to answer honestly, that statement was not true. S-3.
14. The registration statement asks nothing about special education history or special education needs. S-3.
15. On the special health needs form, the Parent circled responses saying that the Student had no special medical needs (e.g. convulsions, allergies, etc.). The form asks nothing about special education history or needs. S-3.
16. During the 2015-16 school year, the Student experienced at least one incident of [redacted]. The Parent did not report that to the District at the time of enrollment. NT at 35-36, 78-80. None of the District's enrollment paperwork solicited that type of information. See S-3
17. At the time of enrollment in the District, the Parent knew and understood the Student's history of educational and emotional difficulties, including behavioral difficulties in school. The Parent understood the purpose and history of the Student's out-of-school counseling, had information about the Student's multiple suspensions, and believed that the [therapeutic] placement was the result of in-school behavioral issues. The Parent did not report this information to the District upon enrollment. NT at 30-31, 59-66, 118-119, 172; P-2.
18. With the exception of the report of prior suspensions, the Parent accurately completed all enrollment paperwork. Nothing in the registration materials presented in this case called for the Parent to report academic concerns, behavioral concerns other than a suspension or expulsion, special education concerns, or a special education history. S-3.

19. The Parent completed the registration packet in August 2016. On August 29, 2016, the District requested records from School District 3. S-2. In response, School District 3 provided the Student's emergency contact information from the 2015-16 school year, the Student's schedule, a Student Health History form, a PSSA report, a report card, an attendance report, and a request for records that School District 3 sent to School District 1. S-2.
20. There is some ambiguity in the record as to who completed the School District 3's Student Health History form. Regardless, the form indicates a family history of several conditions including drug and alcohol addiction. The form also indicates "family problems such as housing, employment, food, etc." S-2.
21. The PSSA report showed that the Student scored in the basic range in English/Language Arts and Science, and in the below basic range in Mathematics. S-2.
22. The School District 3's report card showed that the Student earned strong grades during the 2015-16 school year with proficient scores in English and advanced scores in College Prep Math. The Student's lowest grade was a basic score in Physical Education.¹ S-2.

2016-17 School Year (9th Grade)

23. All students in the District are divided into six (6) groups per grade level. One guidance counselor is assigned to each group. The Student was assigned to Guidance Counselor M upon enrollment. NT 125, 127.
24. Among other responsibilities, Guidance Counselor M was responsible for facilitating individual, small and large group counseling, assisting with student scheduling and attendance, and generally assisting in preparing students for their futures. S-31; NT 125.
25. During the entire 2016-17 school year, the Student was marked as "Unexcused Absent" on 3 full school days. However, the Student would skip classes or come late to classes with some frequency. Excluding the days that the Student was out of school all day without an excuse, the Student was absent from or tardy to class on 75 days, often for multiple classes during each of those days.

¹ The School District 3 report card presents number grades from 0 to 100, and places those grades in descriptive ranges. For example, the Student earned an 89 in College Prep Math which is in the "advanced" range. The advanced range runs from 80 to 89.

26. In addition, the Student was suspended three times during the 2016-17 school year: a one-day suspension on March 28, 2017; a two-day suspension from April 28 through May 1, 2017; and a three-day suspension from June 6 through 8, 2017. P-17.
27. Documentation about the suspensions during the 2016-17 school year is lacking. The only documentary evidence of the Student's 9th grade suspensions is the Student's attendance report, which provides no information about what triggered the suspensions. Some testimony reveals that the suspensions may have been automatically triggered by the number of times that the Student arrived late to or skipped class. That testimony, however, was far from certain. NT 136-137.
28. Guidance Counselor M. maintained a contact log during the 2016-17 school year. Not every interaction between Guidance Counselor M. and the Student was noted in that log. Interactions and attempted calls between Guidance Counselor M. and the Parent were noted. Three other District employees made one note each on the same log. S-6 pages 3-4. On the whole, the log documents conversations about the Student's lateness, collecting work during a period where the Student was out of school for an illness, and the Parent's preference for the Student to take weighted honors classes during the 2017-18 school year. S-6.
29. The bulk of Guidance Counselor M.'s work with the Student and communications with the Parent during the 2016-17 school year was an effort to address the Student's class lateness and skips. *See, e.g.* NT 136-137.
30. The Parent was frequently difficult to reach during the 2016-17 school year. *See, e.g.* S-6, NT 140-143.
31. While the log references conversations with the Parent about school discipline and lateness, the log says nothing about why the Student was suspended. The log does not explicitly link the Student's lateness to the suspensions. The log also does not indicate chronic or serious behavioral issues. S-6.
32. The lack of documentary evidence concerning suspensions resulting from behavioral incidents suggests that the suspensions were for another purpose. *See* NT 158-161.

33. Guidance Counselor M. did not have concerns about the Student's behavior during the 2016-17 school year. NT 141-142.
34. At one point in the 2016-17 school year, a District employee heard the Student make an inappropriate comment. In response, the employee did not impose discipline but rather took an interest and invited the Student to participate in "Gear Up," a federally funded college readiness program. The Student participated in Gear Up. See, e.g. NT 278.
35. Despite the absence of direct evidence, I find that the Student's suspensions during the 2016-17 school year were not the result of conduct violations. Taken as a whole, the record establishes that it is more likely than not that the Student was suspended in accordance with District practice as a result of the Student arriving late to class or skilling classes without an excuse.² *Passim*.
36. Academically, the Student's grades in the first three of four marking periods were fairly consistent within each class. Biology was a notable exception. In Biology, there was more variability between marking periods (55, 73, 65 in the first three marking periods). This was also the class in which the Student's scores were the lowest. S-5.
37. In nearly all classes, the Student's scores on midterm and final exams lowered the Student's fourth marking period grade and final grade. The Student ended the 2016-17 school year with Cs in English I, Study Skills, Law, Algebra I, Spanish I, Career Technology I, and Wellness.³ The Student finished by a B in World Cultures and Literature, and an F in Biology I. S-5.
38. The Student's Law class was "Introduction to Law." The Student was engaged and attentive in the Law class. At some point in the 2016-17 school year, the Student approached the Law teacher and asked about becoming emancipated from the Parent. The teacher asked questions about that question and the Student revealed that the Student did not want to live with the Parent. As a mandated reporter, the teacher

² The Parent testified that the Student was suspended for disciplinary infractions. This testimony is inconsistent with the lack of documentation and the recollection of all other witnesses who testified as to that point. From a credibility perspective, I have no doubt that the Parent believed what the Parent said. However, the preponderance of evidence, formed mostly by an absence of documents, favors a contrary finding.

³ The Student's performance in Career Technology I was strong enough to yield a final grade of C despite the fact that the Student scored 0 on the final. Wellness was a two-marking period course with no final that fills a health/PE requirement (the Student scored 88 and 54 in the third and fourth marking periods respectively). S-5.

inquired about abuse. The Student reported abuse and the teacher reported information as required. NT 818-826.

39. The appropriate agency investigated the report. The Parent learned that the Law teacher made the report and came to school to confront the Law teacher. The Parent was intercepted at the school office and the confrontation did not occur. NT 823-824.

2017-18 School Year (10th Grade)

40. During the 2017-18 school year, the Student took: English II; Video Production; U.S. History I; Algebra 1 Keystone Enrichment; Geometry; Biology; Introduction to Business; and Piano I. S-15. The U.S. History class was a weighted honors class. The Student took a weighted honors class at the Parent's request and against teacher recommendations. District policy enabled this. *Passim*.
41. Throughout the 2017-18 school year, the Student's habit of arriving to class late and skipping classes continued. P-17.
42. On September 19, 2017, the Student would not disengage from roughhousing with another student. This resulted in a disciplinary referral but, rather than receive discipline, the Student and the other student participated in mediation and signed a behavior contract. There were no other behavioral referrals in September 2017. P-18.
43. On October 12, 2017, the Student came to class with a backpack and was instructed by the teacher to return the backpack to the Student's locker. The Student then left class for 25 minutes. The teacher filed a disciplinary referral, resulting in a detention. P-18.
44. On October 16, 2017, the Student received another disciplinary referral for leaving for lying about the Student's whereabouts between breakfast in the cafeteria and the start of the school day. This resulted in a second detention. P-18.
45. On October 25 and 26, 2017, the Student was involved in minor altercations with a peer. The Student and the peer participated in district-facilitated mediation and signed a behavioral contract. S-7. The District informed the Parent by phone. S-6.
46. The Student received no behavioral referrals from October 26, 2017 through January 29, 2018. See P-18.

47. On January 30, 2018, the Student received a disciplinary referral for a verbal altercation with another student. This resulted in a one-day out of school suspension on January 31, 2018, with instructions to return to school on February 1, 2018. P-18.
48. The Student received no behavioral referrals from February 1 through March 5, 2018. See P-18.
49. The Student participated in an "Upward Bound" program. On February 13, 2018, the Student told Guidance Counselor M. that the Student wanted to run away from home to live with the Upward Bound teacher. Guidance Counselor M. informed the Parent of those remarks by phone. P-18.
50. On March 6, 2018, the Student spoke disrespectfully to a teacher and made threats of violence against other students. The teacher documented the incident both on a disciplinary referral form and in a note drafted on March 7, 2018. The incident was reported to school administration on March 8, 2018.
51. On March 9, 2018, the Student, Parent and building principal (the Principal) met at school to discuss the incident. The Principal advised the Parent to have the Student evaluated at by the same organization that had previously provided out-of-school therapeutic support. District personnel called that organization to help the Parent schedule an appointment. See, e.g. S-6 at 2.
52. In response to the incident, the District imposed a three-day suspension from March 12 through March 14, 2018. S-7.
53. Around the same time, the Student spent some time in a juvenile detention center. NT 210, 224.
54. On March 13, 2018, the Parent called the District twice in the morning and left messages for Guidance Counselor M. The Parent requested school work for the period that the Student was suspended and asked for an IEP. Guidance Counselor M. returned the call but was unable to leave a message. Guidance Counselor M. then followed up by email. Regarding the Parent's request for an IEP, in pertinent part, Guidance Counselor M. wrote (S-6 at 2):

In reference to your IEP question, we spoke last week about [Student] getting an evaluation at [an

agency] before moving forward so we could have input. Was [Student] seen?

55. On March 14, 2018, Guidance Counselor M. sent an email to the Student's teachers soliciting information about possible academic and behavioral concerns ("Does [Student] participate? Is [Student] distracted easily? Does [Student] interact with peers during class? Are [Student's] grades a reflection of ... ability? Does [Student] complete assignments on time? Is [Student] respectful? Have you had any disciplinary issues? Do you have any concerns?"). S-6 at 1-2.
56. On March 19, 2018, the District sought the Parent's consent to evaluate the Student to determine special education eligibility and needs. The Parent provided consent the same day. S-8.
57. On April 17, 2018, the District issued an evaluation report (ER) finding the Student eligible for special education services. S-9.
58. The determined that the Student is a student with specific learning disabilities (SLD) and a secondary disability of other health impairment (OHI). S-9. Regarding the SLD, the District determined that the Student had a specific learning disability in Reading Comprehension. The OHI determination was based upon a finding of a mixed disturbance of emotion and conduct, executive functioning and adaptive skill deficits. S-9.
59. As part of the ER, the District's psychologist observed the Student in the weighted honors History class with 25 students. The evaluator described the Student as more attentive and engaged than the Student's classmates. S-9.
60. As part of the ER, the District administered the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V). The Student obtained scores in the "Low Average" range for the following indexes: Verbal Comprehension, Visual Spatial, Fluid Reasoning, and Processing Speed. The Student obtained a score in the "Average" range for the Working Memory index. The Student's full-scale IQ score was found to be in the "Low Average" range. S-9.
61. The WISC-V is a standardized, normative assessment of cognitive ability. It is designed to be compared to the Wechsler Individual Achievement Test – Third Edition (WIAT-III), which is a test of academic achievement.

62. On the WIAT-III, the evaluator did not report range classifications. The Student obtained the following standard scores: Listening Comprehension, 69 (2nd percentile); Reading Comprehension, 80 (9th percentile); Math Problem Solving, 83 (13th percentile); Word Reading, 105 (63rd percentile); Pseudoword Decoding, 108 (70th percentile); Numerical Operations, 83 (13th percentile); Oral Expression, 92 (30th percentile); Oral Language Composite, 78 (7th percentile); Basic Reading Composite, 105 (63rd percentile); Math Composite, 82 (12th percentile). S-9.
63. The District also administered the Behavior Assessment System for Children-3 (BASC-3). The BASC-3 calls for teachers and the Parent to rate the Student across several behavioral domains.
64. Using the BASC-3, teachers rated the Student within normal limits on the following Scales: Hyperactivity, Aggression, Conduct Problems, Anxiety, Depression, Somatization, Attention Problems, Learning Problems, and Atypicality. The Externalizing, Internalizing, School Problems, and Behavioral Symptoms Index Scores were also all within normal limits. Teachers rated the Student in the "At Risk" range on the Withdrawal, Social Skills, Leadership, Study Skills, and Functional Communication scales. S-9.
65. On April 24, 2018, the District issued an invitation to an IEP meeting, scheduling the meeting for May 18, 2018. S-10.
66. The IEP team (which included the Student, the Parent, and the Parent's non-attorney advocate) convened as scheduled. S-11.
67. The Student's teachers, through reports, did not express behavioral concerns. Rather, they expressed concerns about the Student's attendance, homework completion, and study skills. See NT 323.
68. During the IEP team meeting, the Parent shared concerns about the Student's attendance and behavioral issues at home. See NT 364.
69. In response to the Parent's concerns about behavioral issues, and despite the fact that teachers did not report concerns about behavioral issues, the District agreed to conduct a Functional Behavioral Assessment (FBA) of the Student. See, e.g. S-13.
70. Although it agreed to conduct an FBA, the District also moved forward with presenting an IEP during the meeting. The District issued an IEP

which, if approved, was intended to be in place from May 19, 2018 through May 17, 2019 (the May 2018 IEP). S-11.

71. In addition to a fairly generic but not inappropriate transition goal, the May 2018 IEP included two goals: a study skills goal and an attendance goal.
72. The study skills goal called for the Student to move from a baseline of 11 of 16 to 12 of 16 on three consecutive probes as measured against a study skills rubric by a general education teacher. S-11.
73. The attendance goal called for the Student to have no unexcused absences or tardies to school per quarter over three consecutive quarters. S-11.
74. The May 2018 IEP nominally included modifications and specially designed instruction (SDI). S-11. I address this section of the IEP in the discussion section below.
75. The May 2018 IEP included an itinerant level of Learning Support in which the Student would receive instruction in general education for 99% of the school day. S-11.
76. There is no evidence that the District issued a Notice of Recommended Educational Placement (NOREP) with the May 2018 IEP.
77. On May 24, 2018, the Student engaged in a minor verbal altercation with another student that did not result in discipline. See S-7.
78. On June 5, 2018, the District issued an FBA report, which used the observation conducted as part of the ER to generate an FBA. S-13. The IEP team did not reconvene at that time.
79. The Student's attendance report for the 2017-18 school year reflects a continuation and solidifying of the Student chronic, habitual tendency to arrive late to class or skip class entirely. The Student was late to class or skipped class more than 125 times during 10th grade. See P-17 at 8-14. However, the Student's teachers were concerned about this issue and documents drafted at that time suggest that the attendance report does not capture the Student's skips and late arrivals. See, e.g. P-18 at 7. This is also reflected in the IEP attendance goal itself.

80. The Student's grades were more inconsistent marking period to marking period than they were the prior year but, taken as a whole, the trend was down across the board. The Student finished the 2017-18 school year with Bs in Video Production and Piano, Cs in English II, Biology, and Introduction to Business, and Ds in Honors U.S. History, Algebra 1, and Geometry. S-15.

2018-19 School Year (11th Grade)

81. The District assigned Teacher A as the Student's case manager for the 2018-2019 and 2019-2020 school years. S-35.
82. At the start of the 2018-19 school year, Teacher A scheduled bi-weekly check-ins with the Student. The Student did not attend all of those meetings at first but, as Teacher A build rapport with the Student, the Student would check in at least bi-weekly if not more. NT 546, 556.
83. Teacher A worked with the Student on self-regulation, emotional regulation, behavior regulation, executive functioning, self-advocacy and "adulthood." NT 630-631. This occurred during the time that the Student was scheduled to participate in the District's Academic Success Center (ASC), a support service available to students with and without disabilities. *See discussion below.*
84. The Student refused to participate in the ASC. The Student believed that it would make the Student stand out as a child with a disability. The Student denied having special needs or needing help. *See, e.g.* NT 548. The Student's schedule in the ASC also interfered with the Student's Spanish class. The Student told Teacher A that the Student would continue to skip ASC until the District placed the Student back into Spanish so that the Student could complete the District's language requirement.
85. Teacher A and the Student agreed that Teacher A would discuss the ASC placement with the Parent. Following that discussion, the Parent removed the Student from the ASC. When this happened, Teacher A met with the Student during the Student's lunch time. *See, e.g.* NT 547-548, 555-556.
86. Despite the Student's poor performance in Honors U.S. History I, and despite teacher recommendations to the contrary, the Parent requested the Student's placement in Honors U.S. History II during the

2018-19 school year. The District granted the Parent's request in accordance with its own policy. See, e.g. 863-864.

87. On September 26, 2018, the District sent an invitation to the Parent, inviting the Parent to an IEP team meeting scheduled for October 24, 2018 at 12:45 PM. The Parent did not return the invitation. The District made three attempts to contact the parent by mail. S-17.
88. When the Parent did not return any of the three invitations, Teacher A called the Parent and confirmed that the Parent would attend. The Parent came to the meeting as scheduled and signed documents indicating attendance and receipt of procedural safeguards. NT 615-616, S-18.
89. The Parent, the Student, Teacher A, three regular education teachers, an LEA representative, and the school counselor attended the meeting. Both Parent and Student provided input during the meeting. The teachers provided written input. S-18, NT 621.
90. By the time of the October 2018 IEP team meeting, the Parent was represented by an attorney. Sometime before that IEP team meeting, the Parent – via counsel – requested an FBA and a speech evaluation.
91. During the October 2018 IEP team meeting, the team reviewed the June 2018 FBA for the first time (it had been issued shortly after it was drafted but this was the first time that the IEP team reviewed the document together). After reviewing the FBA, the team agreed that the Student had no new behaviors and did not require another FBA. S-18, NT 543-544, 615, 621.
92. During the October 2018 IEP team meeting, the Student's English III teacher expressed no concerns about the Student's reading comprehension. The teacher was of the opinion that the Student was capable of producing – and actually produced – very high-quality work when the topic of the class interested the Student. The teacher was so impressed by the Student's work that she questioned why the Student was not placed in weighted honors English. At the same time, the teacher expressed concerns about the Student's motivation, which could adversely impact upon the Student's performance when the class topic did not interest the Student. NT 616-617, 872-874.
93. The IEP team discussed the Parent's request for a speech evaluation. The team concluded that there was no evidence that the Student

required a speech evaluation and the Parent withdrew the request. NT 624-625; S-18; P-7.

94. At the time of the October 2018 IEP team meeting, the Student had strong grades in all subjects (80s and 90s). The teachers, as a whole, described the Student as academically successful and behaviorally regulated. They noted that the Student was only occasionally inattentive when the Student was not interested in the class topic. See, e.g. NT 538-539, 625-628; P-14.
95. After the October 2018 IEP team meeting, the District issued a NOREP. While the NOREP could have been more clearly worded, the NOREP gave notice to the Parent that the District was refusing the evaluations requested by the Parent via counsel. The Parent never returned the NOREP. S-19.
96. No substantive changes were made to the Student's IEP goals or SDI following the October 2018 IEP team meeting. S-18.
97. On March 28, 2019 the District sent an invitation to an IEP meeting scheduled for May 8, 2019. The Parent responded via email the next day to say that the Parent would attend, but did not return the invitation form after multiple attempts by the District to obtain that form from the Parent. P-8.
98. The Parent requested, and the District agreed to fund, an independent educational evaluation (IEE). A private neuropsychologist evaluated the Student on April 12 and May 1, 2019. P-9.
99. On May 8, 2019, the IEP team, including the Student, convened as scheduled. After 15 minutes of waiting, the team called the Parent. The Parent stated that the Parent would not attend the meeting. S-20; P-8; NT 630. As a result, on May 8, 2019, the District canceled the meeting and sent the Parent an invitation to the Student's annual IEP meeting, scheduled for May 13, 2019. P-8.
100. On May 13, 2019, the Student's annual IEP meeting convened as scheduled with the Student and Parent in attendance. P-8.
101. By the May 2019 IEP team meeting, the Student's grades had declined. At the time of the meeting, the Student had five C's, one B, one D, and one F. P-8, pg.16.

102. During the May 2019 IEP team meeting, the IEP team discussed removing the Student from weighted honors classes. By this point in time, teachers described a lack of effort in those classes. The team agreed that the Student would complete the 11th grade honors U.S. History class but would not take honors classes in 12th grade.
103. At the May 2019 IEP team meeting, the District issued a new, annual IEP (May 2019 IEP). The new IEP removed the study skills goal and split the attendance goal into two goals. The first goal called for the Student to arrive at school on time and report to first period with 95% of the time. To achieve this goal during the 2018-19 school year, the Student could arrive late to first period not more than two times in the 37 remaining days of school. S-22.
104. The Student's baseline for the first goal was measured by the Student's latenesses to first period during the school year to date. The Student was late 20 days out of 143 days for a baseline of 86%. S-22.
105. The second attendance goal called for the Student to report to all eight class periods with 100% accuracy. At that time, there were 296 class periods remaining in the 2018-19 school year. S-22
106. The Student's baseline was measured by the number of classes that the Student attended out of the total number of classes that the Student could have attended during the 2018-19 school year to date. The Student attended 1115 of 1144 classes for a baseline of 98%.
107. After the meeting, the Student and Teacher A worked together to make a plan to improve the Student's grades.
108. The SDIs in the May 2019 IEP were substantively similar to those in the prior IEP with one substantial difference. The May 2019 IEP explicitly contemplated the Student's use of the Academic Success Center (ASC). S-22
109. More specifically, the Student could request to go to the ASC for four purposes: extended time for tests and quizzes, teacher check-ins, study skills and self-advocacy support, and academic task completion. S-22.
110. The Student's time in the ASC was not scheduled. Rather, the Student could request to go to the ASC at any time. S-22.

111. The IEP noted the Student's prior refusal to participate in the ASC. S-22.
112. The SDI in the May 2019 IEP further explained that teacher check-ins were for the purpose of alleviating stress, defusing frustration, and positive reinforcement. S-22.
113. On May 15, 2019, the District proposed the May 2019 IEP via a NOREP. P-8.
114. In May 2019, due to out of school events the Student was hospitalized at a children's mental health facility for two weeks. NT 21-219.
115. On May 28, 2019, while the Student was in the hospital, the private neuropsychologist issued an IEE. P-9.
116. The IEE identified the Student as having ADHD combined type, a reading comprehension disorder, and Oppositional Defiant Disorder. These diagnoses were made using IDC-10-CM diagnostic criteria as opposed to the criteria drafted into the IDEA. P-9.
117. The IEE was based, in part, on an incomplete review of the Student's records. P-9. The private neuropsychologist did not request records from the District. NT 455-456.
118. The IEE was based, in part, on a teacher's completion of student rating forms. The teacher that the private neuropsychologist asked to complete those forms repeatedly expressed concerns and a lack of comfort in completing the forms. Those concerns were not noted in the IEE. P-9, NT 461-462, 895-897.
119. Neither the teacher's ratings nor the Student's self-ratings are consistent with inattentive or hyperactive-impulsive ADHD. P-9.
120. The private neuropsychologist obtained no information from Teacher A., the Student's only special education teacher. P-9.
121. The IEE was based, in part, on a classroom observation. The private neuropsychologist observed the student in a classroom with a 14:1 student/teacher ratio. The Student did not engage in disruptive behaviors. P-9.

122. The private neuropsychologist solicited information from the Parent, but the Parent did not respond to the private neuropsychologist's requests for information. P-9.
123. Consistent with observations from multiple teachers, the private neuropsychologist concluded that the Student's work product was highly variable depending on the Student's motivation. The private neuropsychologist also agreed that the Student was not motivated to complete the IEE testing, doing only the minimum required. Further, despite ultimately concluding that the Student had ADHD, the private neuropsychologist administered 10 separate assessments on the same day. Nevertheless, the private neuropsychologist concluded that the IEE testing yielded valid results. P-9; NT 411-418.
124. Consistent with the prior conclusions of the IEP team, the private neuropsychologist concluded that there were no signs of a speech or language disorder, and that a speech evaluation was not warranted. See P-9. Despite this, during a June IEP revision meeting, the Parent and District agreed to complete a speech evaluation within 60 days of the start of the 2019-20 school year. See P-11.
125. While developing the IEE, the private neuropsychologist was unaware of significant, traumatic events in the Student's home life and upbringing. See, e.g. 457-458.
126. After the Student's hospitalization, the District modified the Student's curriculum and limited assignments to those required for completing 11th grade. The District invited the Student to school at alternative times to complete work missed during the hospitalization. NT 221.
127. After the District received the IEE and the Student returned to school, the District invited the Parent to another IEP meeting team on June 11, 2019. P-25.
128. After the invitation was sent but before the IEP team convened, the Parent came to the school and demanded to take the Student home. In response, the Student sought out Teacher A. and told Teacher A that the Parent would hurt the Student if the Student went home with the Parent. The Student reported that the Parent was physically and emotionally abusive. The Student understood that Teacher A. was a mandatory reporter and was obligated to act on these statements. See NT 648.

129. As required, Teacher A. contacted various District personnel and school security. When these individuals came together, the Student stated, "I will [redacted] if that's what I have to say to not go home." Ultimately, the Student left school with the resource officer and did not return for a few weeks. NT 649-650.
130. An IEP revision meeting convened on June 11, 2019. The Parent attended the meeting, but the Student did not. The Student had run away from the Parent's home at that time. NT 650. The purpose of the meeting was to discuss the IEE and plan for the start of the 2019-20 school year.
131. At the meeting, the District presented a revised IEP (the June 2019 IEP) that was intended to start at the beginning of the 2019-20 school year. P-11.
132. While the District (and every teacher who has ever had the Student as a student) disagreed that the Student has reading comprehension issues, the District added a reading comprehension goal to the June 2019 IEP in response to the IEE. The goal required the Student to demonstrate reading comprehension skills at a minimum of 80% on the 12th grade level. The Student's baseline was baseline was an average of 74.4% on assessments at the 11th grade level. S-25, NT *passim*.
133. The District also added self-regulation goals to the June 2019 IEP. S-25.
134. The June 2019 IEP contained additional SDIs, including teacher directed cuing to remain on-task; positive and frequent reinforcement for task completion; written and verbal directions; school stress; management multi-modality instruction in all regular education and special education classes; and providing skeletal outlines and/or guided notes. S-25.
135. The SDIs offered in the May 2019 IEP through the ASC (a program about which the private neuropsychologist knew nothing) and June 2019 IEP were consistent with the IEE's recommendations. S-24.
136. The team indicated that the "exhibits behaviors that impedes Student's learning or that of others" on the "Special Considerations" portion of the June 2019 IEP. As required, the IEP team developed a Positive Behavior Support Plan (PBSP). S-25.

137. The IEP team removed the class attendance goal. Despite the period of hospitalization and the time that the Student had run away, the Student was no longer skipping individual classes on the days that the Student attended school. The focus shifted to daily, general, school attendance. NT 579-580; P-11.
138. The IEP team also added direct and explicit instruction in test taking strategies, note taking strategies, organization and impulse control strategies to be provided daily for 42 minutes. P-11.
139. During the IEP team meeting, the Parent stated a desire for the Student to attend another school. The District took the position that it could program for the Student in its high school. The District prompted the Parent to share more information during the meeting, but the Parent stated that the Parent only attended to express a desire to change the Student's placement. At that point, the Parent refused to sign documents and left the meeting. NT 668-670; S-26.
140. The Student finished the 2018-19 school year with Cs in Business Law, English III, Spanish II, and Video Production II; and Ds in Wellness III, Honors U.S. History II, Algebra II, and Chemistry. S-27.
141. The Student's teachers do not believe that the Student's grades are indicative of the Student's abilities but rather reflect the Student's turbulent home life, time out of school during hospitalization and running away, and inconsistent attendance. *See, e.g.* NT 888.
142. The District issued the June 2019 IEP to the Parent with a NOREP following the IEP team meeting. The Parent did not sign the NOREP. S-26.
143. At the end of the 2018-19 school year, the Student received a three-day suspension for fighting at school. The Student and Teacher A. developed a plan for the Student to make up work upon the Student's return. The Student ultimately did not comply with that plan. NT 636-643.
144. On July 29, 2019, the Parent requested this due process hearing.

2019-20 Year – 12th Grade

145. Prior to the start of the 2019-2020 school year, the Student ran away again and enrolled in School District 3 as a "homeless" student and "an unaccompanied minor." The Student then stopped going to school and

eventually returned to the Parent's home. The Parent then re-enrolled the Student, and the Student returned to school roughly a month after the start of the school year on September 23, 2019. NT 235, 671-672.

146. From September 23, 2019 onward, the Student's attendance in school and in class after coming to school was nearly perfect up until the first session of this due process hearing. NT 672-673.
147. At the start of 12th grade, the Student was into Teacher A.'s ASC class. NT 584-585.
148. The Student skipped the ASC class once, left the ASC once and did not return, and left the room without permission once. NT 585. Teacher A. informed the Parent of these incidents.
149. In November 2019, the Student lost a District-issued Chromebook. Teachers inquired about this when they noticed that the Student was not bringing the Chromebook to class. Ultimately, the District issued a second Chromebook to the Student. 689-690.
150. After the hearing started, the Student became convinced that Teacher A. shared information about this due process hearing with others. That information is absolutely false. I find that it is more likely than not that the Student came to this impression based on the Parent's false impression of Teacher A.'s involvement in these proceedings, and the Parent's sharing that false impression with the Student. Regardless there is no dispute between the parties that the Student's once positive relationship with Teacher A. fell apart after this hearing started. *Passim*.
151. The Student refused to participate in ASC with Teacher A. after this hearing started. Less than a month after that change, the District convened a meeting to determine if changing from Teacher A. to a new ASC teacher would benefit the Student. NT 585-586.
152. After the Parent canceled two such meetings at the last minute, the District convened a meeting with the Student and Parent on January 23, 2019. During the meeting, the Student asked to be placed in a study hall instead of ASC. The Student also reported that the Student's relationship with the guidance counselor had also soured, and that the Student would refuse to meet with the guidance counselor. NT 587-588, 682-683.

153. The Parent did not agree to remove ASC, and so the District assigned the Student to a different ASC class with a different ASC teacher and also assigned the Student to a new guidance counselor. NT 684-685. The District proposed these changes with a NOREP and implemented the changes 10 days later when the Parent did not return the NOREP.
154. Following the change, the Student's participation in ASC improved.
155. The ASC class continued remotely after the District's COVID-19 closure. The District repeatedly attempted to secure the Student's participation in the ASC class, but received no reply. Ultimately, the District learned that the Student lost the second Chromebook. The District then broke strict conformity with its own policy and issued a third Chromebook to the Student.
156. The Parent raises no additional claims in relation to the District's COVID-19 closure. Rather, they allege that the denial of FAPE that started before schools shut down continued into the shutdown.
157. On May 11, 2020, the IEP team reconvened remotely with Parent participating via phone. The Student did not attend. S-41.
158. As of the May 11, 2020 IEP, the Student was on track to graduate and had been accepted to a community college that accepts all students with high school diplomas. S-41.
159. On May 11, 2020, the District issued a NOREP accompanying the IEP. Parent signed the NOREP and rejected the proffered placement/programming. S-43.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must 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). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility

determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). 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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

To the extent that credibility concerns whether the witnesses believed what they said on the stand, I find no issue with any witnesses’ credibility. I observed nothing to signal to the contrary. This does not mean that I assign equal weight to all witnesses. The Parent’s outright refusal to consider facts contrary to her understanding of events that the Parent did not observe diminished the weight of the Parent’s testimony.

To the small extent my findings of fact depend on accepting one witnesses testimony over another’s, I have accorded more weight to some witness based on the witnesses’ testimony and the other evidence presented.

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 its 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

Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a “free appropriate public education” to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be “‘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 each child’s individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court’s first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.” *Id* at 3015.

Before *Endrew*, the Third Circuit interpreted *Rowley* to mean that the “benefits” to the child must be meaningful, and the meaningfulness of the educational benefit must be relative 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). In substance, the holding in *Endrew F.* is no different.

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). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "*de minimus*" benefit. 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). 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).

In *Endrew F.*, 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. Grade-to-grade progression is not an absolute indication of

progress even for an academically strong child, depending on the child's circumstances.

In sum, 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.

Compensatory Education

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

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

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). In *Reid*, the court 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. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or *Reid* method.

The more nuanced *Reid* method 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 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 *Reid* 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) are warranted. Such awards are fitting 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. 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. Full-day compensatory education can also be awarded if that standard is met. 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.

Child Find

The IDEA's Child Find provision requires states to ensure that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated." 20 U.S.C. 1412(a)(3). This provision places upon school districts the "continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009); *see also* 20 U.S.C. § 1412(a)(3). The evaluation of children who are suspected to be learning disabled must take place within a reasonable period of time after the school is on notice of behavior that is likely to reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). The failure of a school district to timely evaluate a child who it should reasonably suspect of having a learning disability constitutes a violation of the IDEA, and a denial of FAPE. 20 U.S.C. § 1400.

Discussion

The Enrollment Process Did Not Diminish the District's Obligations

The District makes much of what the Parent did not share during the enrollment process. The District is correct that, at the time of enrollment,

the Parent knew about the Student's academic and behavioral history, including out-of-school counseling, [redacted], multiple suspensions, and a placement in a therapeutic school. The District is also correct that the Parent did not disclose this information at the time of enrollment. If the District had requested this information, the District would have a strong argument that the Parent's withholding – at a minimum – extended the period of time that the District had to identify the Student and offer a FAPE. However, with the exception of suspensions, the District asked nothing about the Student's special education history or needs during enrollment. The District is blaming the Parent for not answering questions that it never asked. That is not a defense.

More specifically, the Parent lied on the enrollment form when the Parent reported that the Student had not been previously suspended. The form did not ask if the Student was currently suspended or expelled. Under any reasonable reading, the form asks if the Student had ever been suspended or expelled. The Parent withheld information about the Student's prior suspensions when failing to answer the form truthfully. If the District had known that the Student was previously suspended, the District might have had some idea that the Student had behavioral needs before the first day of 2016-17 school year. What the District would have done with that information cannot be known. Even so, the Student's behavioral problems were evident immediately at the start of the 2016-17 school year. In terms of the District's knowledge of the Student's *special education* needs, the Parent's false statement about prior suspensions does not alter the District's obligations under the facts of this case.

The only other part of the enrollment paperwork that may have prompted inquiry into the Student's need for accommodations is a single question about prior receipt of Section 504 accommodations. Section 504 Agreements provide regular education accommodations so that children with disabilities who do not require special education can access the general education curriculum. If the Student had a Section 504 Agreement, the District would only have known that the Student 1) had a disability, 2) required accommodations, and 3) did *not* require special education. More importantly, however, the Parent answered that question truthfully. At the time of enrollment, the Student had not had a Section 504 Agreement.

The District argues that the Parent's failure to volunteer information that it did not solicit mitigates any IDEA violation. That argument is contrary to well-established case law. The IDEA places an obligation on the District to identify children who require special education. That obligation is independent of what information parents volunteer. Under different facts, a parent's failure to accurately answer questions about a child's special

education needs could yield a different result. Under the facts of this case, I reject the District's argument that the Parent's failure to answer unasked questions is a mitigating factor.

The District Did Not Violate the Student's Special Education Rights in 9th Grade (2016-17)

The Parent overstates the Student's record of educational and disciplinary issues in the 2016-17 school year. There is no preponderant evidence in the record of this case that the Student's behaviors or academic progress triggered the District's Child Find obligations during 9th grade.

Academically, the Student's grades were all passing and mostly in the B to C range for the first three making periods of 9th grade (except for Biology). Poor performance on final exams brought those grades down. That, and the Student's failing grade in Biology, does not signal a need for a special education evaluation.

The record in this case does not support a finding that the District violated the Student's rights under the IDEA or Section 504 during the 2016-17 school year.

10th Grade – Start Through the May 2018 IEP

The Student started the 10th grade year academically strong. This year, however, the Student's class attendance issue became strikingly clear early on. At the same time, the Student's behavior was noticeably worse. The District did nothing until the Student threatened violence against peers.

Even so, I find no preponderant evidence that the District should have proposed an evaluation sooner than it did. Despite erratic attendance and sporadic behavioral issues, all evidence suggests that the Student was successfully academically and (except for the late arrivals and skips) behaviorally.

The Parent's request for a special education evaluation came roughly contemporaneously with the District's obligation to request the same. The District's suggestion at that time that an evaluation is somehow dependent upon a third party evaluation was inappropriate but, ultimately did not slow the District's ER.

The May 2018 IEP was Inappropriate

After evaluating and determining that the Student was a child with a disability in need of specially designed instruction, the District offered an IEP that included no meaningful specially designed instruction. This is problematic, especially considering that the need for SDI is what separates children with disabilities who require special education from children with disabilities who require regular education accommodations (Section 504). SDI is the special education that enables children to meet their IEP goals. The May 2018 IEP offered only general, vague accommodations that mostly boil down to good teaching, and are untethered from the Student's needs or the IEP's goals.

It appears that some SDI may have been pre-written by the District's IEP software. This does not excuse the District from offering an IEP with SDI that has nothing to do with the Student's needs, or the goals as written. For example, providing extra time on tests and "wait time" for the Student to answer questions in class may have some relationship to the Student's Low Average processing speed score. But there is no evidence at all that the Student would have done better on tests if the Student had more time, or that the Student needed more time in class to formulate answers when called on (the observation and teacher comments suggest the opposite). Similarly, it is not clear what "preferential seating" means in this case, let alone how that would enable or incentive the Student's attendance or help the Student develop study skills. The same is true for "adapted assignments" and extra time on tests and quizzes.

The May 2018 IEP's goals were also inappropriate. The attendance goal, viewed in isolation, could be laudable. Viewed as part of the May 2018 IEP, it is borderline absurd. This goal does not push the Student too far to fast – an identical goal could be fleshed out through short term benchmarks, and the IEP's anticipated duration was one year. Rather, the attendance goal exists within an IEP that provides nothing to enable the Student to break two years of habituated, chronic class tardiness. In the absence of anything designed to get the Student from point A to point B, the goal is inappropriate.

The Study Skills goal is inappropriate for the same reason. There is no preponderant evidence to establish what moving from an 11 to a 12 out of a 16-point rubric over the course of a year means – either in general or for the Student. Assuming that one point of progress over one year is a meaningful improvement does not resolve the issue. There is nothing in the IEP designed to enable the Student to achieve that goal. In the context of the May 2018 IEP, that goal is inappropriate.

District personnel testified that, under the May 2018 IEP, the Student would have access to the ASC. There, the Student would receive assistance in a

class with a low student to teacher ratio. In the ASC, the Student would be able to finish test, quizzes, and assignments, and obtain assistance from teachers. The Student would also learn self-monitoring strategies, organizational strategies and time management skills in the ASC. It is unfortunate, therefore May 2018 makes no mention of the ASC.⁴ I reject the District's argument that the May 2018 IEP contemplates placement in the ASC because that is contrary to the document itself. I also reject the District's argument that an inappropriate special education placement can be made appropriate through education resources that are available but not guaranteed through the IEP. The availability of the ASC outside of the IEP does not compensate for inappropriate goals or lacking SDI within its four corners.

To compensate for this deficiency, and in the absence of better evidence to support a more nuanced calculation, I award one hour of compensatory education for each day that the Student attended school from the issuance of the May 2018 IEP and continuing for the entire time that IEP was in place.

The May 2019 IEP and All IEPs Thereafter Were Appropriate

The May 2018 IEP was replaced by the May 2019 IEP (the October 2019 IEP included no substantive changes). This IEP included a more nuanced approach to the primary cause of the Student's poor academic performance: the Student's attendance.

I agree with every teacher who has educated the Student: The Student is capable of extraordinary things when the Student has an interest in the topic presented in class and when the Student attends class. Getting the Student through the classroom door on time was more than half the battle. The District targeted that need through measurable, objective, baselined IEP goals. Of equal importance, the District drafted the ASC into the IEP as SDI. That was reasonably calculated to enable the Student to meet those goals. The District also properly went through the work of discussing the Student's prior resistance to the ASC *with the Student* during the IEP team meeting. It was correct for the District to acknowledge and foster the Student's buy-in.

The Student's entitlement to compensatory education ends with the District's issuance of the May 2019 IEP.

The June 2019 IEP revisions in response to the IEE do not change the calculus, but not for the reason that the District presents. The District takes aim at the IEE and the private neuropsychologist in a number of ways. The

⁴ NT 355-365, 365-366, 370-371, 574, 582-584.

District argues (correctly) that some of the IEE's conclusions are inconsistent with evaluation data. The District argues that the private neuropsychologist failed to consider important information. These arguments would be stronger were they not undercut by the District's actual response to the IEE. In practice, the District set aside whatever objections it had to the IEE and incorporated nearly all of it into the Student's IEP. This included revisions like a reading comprehension goal that no teacher thought was necessary, but that the District was willing to track anyway. These additions were above the District's FAPE obligation.

The Student's actual academic performance should not be overlooked. It is sad to see a student with such potential start off so well and then academically decline over the course of a school year. The Student passed all 11th grade classes – albeit with low scores – while facing staggering out-of-school problems. In the second half of 11th grade, the Student purposefully reported abuse to a mandatory reporter to avoid going home with the Parent, spent time away from the Parent, and was treated inpatient at a children's psychiatric hospital following an incident at home, and ran away. That the Student was able to maintain passing grades and improve class attendance in the midst of all of that is a testament to the Student's fortitude.

The next IEP revision came in January 2019. Bluntly, it is more likely than not that the Parent poisoned the Student's relationship with Teacher A. The District's response to that situation was professional. To enable the Student to benefit from appropriate SDI, the District changed the Student's class assignment to pair the Student with a new teacher. I find nothing inappropriate in this decision.

The Parent argues that the Student's entitlement to compensatory education continues into the District's COVID-19 closure only because the Student's inappropriate IEP continued into the COVID-19 closure. Immediately above, I find that the IEP in place at the start of the COVID-19 closure was appropriate when it was drafted. No other denial of FAPE is alleged.

ORDER

Now, August 10, 2020, it is hereby **ORDERED** as follows:

1. I award one hour of compensatory education for each day that the Student attended school from the issuance of the May 2018 IEP and continuing until the issuance of the May 2019 IEP.

2. Compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device, purchased at or below prevailing market rates in the District's geographical area. 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 if the Student continues to receive services from the District. Compensatory education shall not be used to purchase vehicles. Compensatory education shall not be used to purchase products or services that are primarily recreational in nature, or products or services that are used by persons other than the Student except for group or family therapies.
3. Any compensatory education unsued by the Student's 25th birthday is forfeited.

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

/s/ Brian Jason Ford
HEARING OFFICER