

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

Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name: EW

Date of Birth: [redacted]

ODR No. 15392-1415KE

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Abington School District
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Dates of Hearing: 10/15/2014, 12/03/2014, 12/04/2014, 01/16/2015,
01/20/2014, 01/29/2015, 02/24/2015, 03/02/2015

Record Closed: 03/25/2015

Date of Decision: 04/13/2015

Hearing Officer: Brian Jason Ford

Introduction

Petitioners (Father) and (Mother), collectively “Parents,” requested this special education due process hearing against respondent Abington School District (District) on behalf of their child, (Student).¹

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), 34 C.F.R. Part 104.4. Both parties agree that the Student, who has an anxiety disorder, is a “student with a disability” as defined by the IDEA. The Parents claim that the District denied the Student a free appropriate public education (FAPE) in a number of ways. Specifically, the Parents claim that the District failed to timely identify the Student as a student with a disability, and that the District failed to provide appropriate programming for the Student after the Student was identified. The Parents further claim that evaluations conducted by the District were not appropriate, and they seek reimbursement for evaluations that they obtained. Finally, the Parents have enrolled the Student in a private school, and seek tuition reimbursement.

Issues and Remedies

1. Did the District violate the IDEA’s Child Find rules by failing to identify the Student as a student with a disability prior to May of 2013?
2. Did the District violate its obligation to provide a FAPE to the Student from September 15, 2012 through the end of the 2013-14 school year?
3. If the District violated the Child Find rules or failed to provide a FAPE, is the Student owed compensatory education, and if so, how much?
4. Are the Parents owed tuition reimbursement for the 2014-15 school year?
5. Are the Parents owed reimbursement for an Independent Educational Evaluation (IEE)?

Findings of Fact²

Background and Prior Education

1. It is not disputed that the District is the Student’s local educational agency (LEA) currently and for all times pertinent to this decision.
2. At the time of this decision, the Student is a mid-teenaged high school student.

¹ The Student’s name and other identifying characteristics are omitted to the greatest extent possible.

² In making these findings of fact, the entirety of the record was reviewed, including *all* documentary evidence. Although each document was carefully read and considered, not all documents are specifically cited herein. Rather, as noted in the findings, some facts are based on my consideration of the record in its entirety. It is also noteworthy that both parties submitted proposed findings of fact. These submissions were optional, with the condition that the proposed findings must be clear and straightforward, if submitted at all. Counsel for both parties are highly commended for their adherence to my directions in this regard.

3. The Student has attended the District's schools since 3rd grade.
4. The District operates several elementary schools, a junior high school, and a senior high school. The junior high school includes grades 7 through 9. The senior high school includes grades 10 through 12. *NT, passim*.
5. When the Student was in 4th grade (2008-09 school year), the Parents and teachers emailed back and forth regarding the Student's academic performance, difficulty completing assignments, and the Student's emotional wellbeing. (P-45).
6. In May of 2009, the Student drew a disturbing picture in class. The picture may have been an expression of suicidal ideation. This, and the correspondence between the Parents and teachers, prompted the District to conduct a psychiatric consultation by the District's psychiatrist with parental consent. (P-41).
7. The psychiatric consultation resulted in a report of May 22, 2009. (P-41). In the report, the District's psychiatrist noted that the Student perceived self as having no friends, was frustrated by social situations, felt powerless, and "seems to have a lot of social anxiety." *Id*. Moreover, the report states that the Student "feels at times that life is not worth living because [Student] gets so frustrated." *Id*.
8. The psychiatric report was distributed to the Student's teachers, but no further action was taken specifically in regard to the IDEA or Section 504 at that time.
9. The Student was taunted by peers at least once during 5th grade (2009-10 school year) resulting in Student eloping from campus. (NT 522,523,540,541).
10. The Parents hired a Math tutor for the Student in 6th grade (2010-11 school year). (NT 905).
11. The Student participated in band during 4th, 5th, and 6th grades. Although the Student played several instruments, the Student choose to play [redacted instrument] because the Student perceived the [redacted instrument] to be in a less visible section of the band. (NT 952-953).
12. The Student had trouble completing homework and long-term assignments in 4th, 5th, and 6th grades. The Parents frequently corresponded back and forth with the Student's teachers by email regarding the Student's difficulty with assignments. (P-45).

2011-12 School Year - 7th Grade

13. The Student was a 7th grader in the 2011-12 school year. As a 7th grader, the Student transitioned from elementary school to the District's junior high school at the start of the 2011-12 school year. *NT, passim*.
14. The Student continued to play [redacted instrument] in the band during 7th grade. (NT 952-953).
15. As was the case since 4th grade, the Parents communicated with the Student's teachers during 7th grade about the Student's academic performance and assignment completion. (P-45).

16. The emails during 7th grade reveal that the Parents were concerned about the Student's academic progress, assignment completion and general disorganization.³ The emails in the record of this case do not discuss any concerns regarding the Student's emotional state or wellbeing. (P-45).
17. During the 2011-12 school year, the Parents did not contact the District regarding the Student's anxiety. (NT 601-602; 608)
18. During the 2011-12 school year, no concerns about the Student's anxiety were raised internally by the District, but the Student's guidance counselor was aware that the Student did not consistently complete homework. (NT 467; S-2).
19. During the 2011-12 school year, the District had a process in place by which teachers could report concerns about any Student's emotional wellbeing to either the guidance counselors or to the District's psychologist. The Student's teachers did not initiate this process for the Student during 7th grade. (NT 820-821).
20. The Parents testified that the Student was frequently bullied during 7th grade, and that they alerted the Vice Principal about the bullying. (NT 915-196). No documentation supporting this claim was presented, but I find the testimony to be credible. Consequently, I find that the Student *perceived* that Student was bullied during the 2011-12 school year. I make no finding as to whether the Student was actually bullied during this time.
21. In order to avoid social contact, the Student started running home at the end of the school day, sometimes taking alternative, unsafe routes. (NT 915-916). The record does not reveal exactly when this behavior started. Regardless, I find the Parents' testimony creditable to support a finding that this behavior occurred.
22. Academically, the Student's grades were consistent in some courses and fluctuated over the school year in others (particularly in Science and Pre-Algebra). (S-2) The fluctuation was primarily the result of homework and assignment completion. The Student's final grades, all of which were passing, were as follows:
 - a. English: C
 - b. Social Studies: B
 - c. Pre-Algebra: C
 - d. Science: C
 - e. PE and Health: A
 - f. Art: A
 - g. Computer Literacy: C
 - h. Reading: C
 - i. Band: A

2012-13 School Year - 8th Grade

23. The Student was not able to participate in band in 8th grade because Student's academic grades were too low. (NT 952-953).

³ The emails do not explicitly reference disorganization, but include several discussions about the Student misplacing work, having difficulty moving work between home and school, losing track of longer term assignments and the like. (P-45)

24. During the 2012-13 school year, the Parents continued to correspond with the Student's teachers by email. Their correspondences during the 2012-13 school year were somewhat more frequent than in prior years. (P-17).
25. During the 2012-13 school year, the Parents and Student experienced the loss of the Student's grandfather and great-uncle (the Student's grandfather's brother). See, e.g. P-17.
26. It is not clear if the Parents' testimony concerning the Student running home relates only to 7th grade, or whether that behavior continued in 8th grade and beyond. Regardless of whether that particular behavior continued, the Parents' credibly testified that the Student almost always came home exhausted, covered in perspiration, and needing rest. See, e.g. NT 912, 932.
27. During the 2012-13 school year, the Student's teachers brought concerns about the Student's academic performance and work completion to the attention of the Student's guidance counselor (Guidance Counselor). The teachers reported that the Student would sometimes fall asleep in class. When confronted by teachers about sleeping in class, the Student reported that Student stayed up too late playing video games. See, e.g. NT at 340-346.⁴
28. This prompted the Guidance Counselor to meet with the Student, starting in November of 2012. The Student did not express any concerns about anxiety to the Guidance Counselor before May of 2013. (NT 460, 463- 464, 468-469).
29. The Parents met with the Student's teachers and Guidance Counselor on March 7, 2013. There is some ambiguity as to whether the District or the Parents requested the meeting. The Student also attended the meeting. (S-4).
30. During the March 7, 2013 meeting, the attendees discussed the Student's academic standing to the date of the meeting. The Parents raised concerns regarding the Student's disorganization and homework completion. (S-4).
31. The Parents did not raise concerns about the Student's anxiety or emotional wellbeing during the meeting because the Student was present. The Parents believed that raising these issues in front of the Student would embarrass Student and damage their relationship. (NT 923-925, 1000-1001).
32. The Student began receiving private psychotherapy from a licensed psychologist in April of 2013. The Student's intake appointment with the private psychologist was on April 8, 2013. (P-8).
33. In April of 2013, the Guidance Counselor sent a letter to the Parents stating that the Student was in danger of failing English and Math, and that failing either of these classes would result in the Student not being promoted to 9th grade. (P-34). The letter also stated that the District charged a rate of \$182.00 per summer class.

⁴ Both Parents credibly testified that the Student has no video games at home, and that Student likely made up this story just to be able to give an answer to Student's teachers. Be that as it may, I am persuaded that this is what the Student told the teachers when confronted.

34. On May 10, 2013, the private psychologist contacted the Guidance Counselor by email at the Parents' request. The private psychologist reported at "this time, the working diagnosis is social anxiety disorder." (P-8).
35. Upon receipt of that information, the Guidance Counselor scheduled a meeting with the Parents and the District's psychologist. That meeting convened on May 13, 2013. (S-7).
36. During that meeting, the Parents shared that the Student's sleep patterns had changed, that the Student was very self conscious, and that the Student was paranoid about other students talking about Student. The Parents described the Student as anxious and exhibiting avoidant behavior. The persistent difficulty with homework completion and the deaths in the Student's family were also noted. (S-7)
37. During the May 13, 2013 meeting, the District identified the Student as a protected handicapped student under Section 504 based on the information from the private psychologist, and proposed implementation of a Section 504 Service Agreement. (S-8).
38. The Parents provided consent to move forward under Section 504 during the May 13, 2013 meeting. (S-8).
39. Either during the May 13, 2013 meeting or shortly thereafter⁵, the District completed a "Section 504/ADA Student Eligibility Form." (S-9). Based on information shared during the meeting, the Student's grades (which were reported on the form), and the private psychologist's email, the following accommodations were recommended on the form:
 - a. Chunking of work
 - b. Extended time for testing
 - c. No penalty for lack of verbal participation in class
 - d. Permission to leave class 2 minutes early to avoid crowds in the hallway (if Student wants to)
 - e. Teachers to check for understanding
 - f. Learning Center for help in Math
 - g. Instant pass to Guidance
 - h. Teachers to communicate with parent re timelines for projects
 - i. Communication/collaboration between school team and outpatient mental health providers.
40. The Eligibility Form is not a Section 504 Service agreement. However, the Guidance Counselor sent an email to the Student's teachers on May 13 explaining that the Student was suffering from great anxiety, and asking the teachers to implement the recommendations from the Eligibility Form immediately. (S-62 at 14).
41. On May 23, 2013, the District issued a Permission to Evaluate - Consent Form (PTE) with other forms and assessments for the Parents to complete. (S-10, S-11).
42. On May 28, 2013, the District drafted a Section 504 Service Agreement (504 Agreement) for the Student. (P-15). The 504 Agreement included the same accommodations listed on the Eligibility Form. *Id.*

⁵ The form at S-9 is not dated or signed.

43. The Parent signed and dated the PTE on June 1, 2013. The District received the PTE form back from the Parents on June 10, 2013. (P-13).
44. The Parents also returned the other documents that the District sent with the PTE, specifically a Background/Developmental History Form, a Family Information Form, a Medical History Form, and the Parent Scales of the BASC-2.⁶ (P-12).
45. The forms returned with the PTE indicate essentially the same information communicated to the District during the May 13, 2013 meeting. (P-12).
46. On July 12, 2013, the District redrafted the 504 Agreement, changing only the implementation dates. (P-18). The Parent signed and approved the 504 Agreement on August 16, 2013, and the District received it back on August 22, 2013. *Id.*
47. Although all of the accommodations in the 504 Agreement had started informally on May 13, 2013, the 504 Agreement was to run from September 3, 2013 (the start of the 2013-14 school year) through June 16, 2013. (P-18).
48. During the 2012-13 school year, the Student had 9.5 excused absences, 5 unexcused absences, and was tardy by period on 31 occasions. (S-2).
49. The Student's 8th grade PSSA scores were Proficient (1450) in Reading and Basic (1258) in Math. (S-26).
50. As with the prior school year, the Student's grades fluctuated somewhat over the course of the school year. (S-2). The Student's final grades for the 2012-13 school year were as follows (a D is the minimum passing grade):
 - a. English: D
 - b. Social Studies: C
 - c. Pre-Algebra Part 2: E (failing grade)
 - d. Science: D
 - e. Physical Education: A
 - f. General Music: A
 - g. Exploring Tech: A
 - h. Reading: C
 - i. Spanish: C

Summer 2013

51. In June of 2013, the District sent a letter to the Parents confirming that the Student failed Pre-Algebra Part 2, and would have to take and pass a summer math class in order to be promoted to 9th grade at the start of the 2013-14 school year. (P-14). The letter noted that the cost of the course was \$185.00. *Id.*

⁶ There is some dispute as to when the Parents received and returned the PTE. I am persuaded that the District first issued the PTE on May 23, 2013 and received the form back from the Parents on June 10, 2013. The Parent's signature on the Developmental History Form is dated May 19, 2013 – after the meeting in which the Student was identified but before the PTE was issued. This, and testimony, yield the conclusion that some of the forms accompanying the PTE were given to the Parents during the meeting on May 13, 2013.

52. The Student took Pre-Algebra Part 2 in the summer of 2013, earned a C, and was promoted to 9th grade at the start of the 2013-14 school year. See, e.g. P-34 at 1 (listing "PRE ALG PRT2 SS" with a final grade of "C").

2013-14 School Year - 9th Grade

53. The Student started the 2013-14 school year as a 9th grader under the 504 Agreement of July 12, 2013. The PTE returned to the District on July 10, 2013 was still pending.

54. One of the District's school psychologists evaluated the Student at the start of 9th grade. The evaluation culminated with an Evaluation Report (ER) of October 14, 2013. (S-26).

55. Information from the Parents, derived from the forms sent with the PTE (including the Parent scale of the BASC-2) was incorporated into the ER. (S-26).

56. The ER includes an informal survey of the Student's behaviors completed by teachers, and a formal observation of the Student in school. The observation was conducted by a substitute guidance counselor (not the guidance counselor who had worked with the Student and Parents previously). (S-26).

57. The report of the formal observation, though qualitative in nature, indicates that the Student socially engaged with peers, but was fatigued in class. (S-26).

58. The teacher recommendations in the ER are substantively identical to the accommodations in the 504 Agreement. (S-26).

59. The ER notes the diagnosis from the private psychologist, but overstates the private psychologist's role in developing the 504 Agreement. (S-26 at 3).

60. The evaluation included standardized cognitive and achievement testing, and the ER reports the results of those tests. (S-26).

61. Regarding the Student's cognitive ability, the Student's Global Intellectual Ability (GIA) was measured at a 96, which is average as compared to same-aged peers, on the WJ-III Cog NU, a well regarded, normative assessment of cognitive ability. (S-26).

62. The GIA is a function of several index scores, all of which were also in the average range except for Verbal Ability, which was in the high average range. (S-26).

63. The index scores, in turn, are based on several sub test scores. All of the student's sub test scores were in the average range except for Verbal Comprehension, which was in the high average range, and Visual Auditory Learning, which were in the low average range. (S-26).

64. The student's academic achievement was measured using the WJ-III Ach NU, a well regarded, normative assessment of cognitive ability. The WJ-III Ach NU is co-normed with the WJ-III Cog NU, so that the results of both tests can be compared. (S-26, NT 175-176).

65. The Student's Broad Reading and Written Expression skills were both tested in the High Average range as compared to same-aged peers. The Student's Broad Math skills were tested in the Average range as compared to same-aged peers. (S-26).

66. The ER notes the Student's prior performance on PSSAs, prior grades, and reports the Student's 9th grade grades at the time of the ER (less than two months into the school year). The grades were:
1. English: B
 - b. World History: B
 - c. Algebra I: D
 - d. "Mathematics Plus": A
 - e. Biology: D
 - f. Physical Education: B
 - g. Health: A
 - h. Art: A
 - i. Spanish II: D
67. The ER notes that the Student's then-current grades were significantly reduced by homework completion. For Algebra and English the grades were reduced by 55% and 50% respectively. For Biology, the grade was reduced by 25%. (S-26).
68. The Student's social and emotional functioning were also assessed, and the results were reported in the ER. (S-26).
69. The BASC-2 was completed by the Parent, Student, and two teachers. (S-26).
70. As rated by the Parent on the BASC-2, the Student showed a clinically significant level of behaviors related to Anxiety, Depression, Internalizing Problems, Atypicality, and Withdrawal. Adaptability and Activities of Daily Living were in the At Risk Range. The Parent reported that the Student often easily cries, is sad, and seems lonely. (S-26)
71. As rated by teachers on the BASC-2, the Student showed a clinically significant level of behaviors related to Attitude Towards School, indicating that the Student "almost always" thinks school is boring and wants to quit school. All other ratings by teacher were within normal limits. (S-23).
72. The Student rated self on the BASC-2. The Student self-reported within the At Risk range for School Problems, Sense of Inadequacy, Attention Problems and Self-Reliance. All other scores were within normal limits. (S-26).
73. The ER concluded that the Student does not have a disability and, therefore, is not eligible for special education. (S-26 at 8). This was indicated by a checkbox. Another checkbox for students who have a disability but do not need specially designed instruction (SDI) and, therefore, do not qualify for special education, was not checked. *Id.*
74. The ER recommends continuation of the 504 Agreement. (S-26)
75. The ER explicitly notes that the Student was diagnosed with an anxiety disorder. (See, e.g. S-26 at 10).
76. As with prior years, there was frequent email communication between the Parents and teachers regarding the Student's academic performance. (P-35).
77. On January 7, 2014, the substitute guidance counselor contacted the Parents by email, noting that the Student's grades were "slipping" and that the Student seemed "a bit

depressed.” (P-35 at 9). In the same email, the substitute guidance counselor acknowledged that the District had a release to speak with the private psychologist. *Id.*

78. In response, on January 10, 2014, the Parent stated that the family was having difficulty scheduling an appointment with the private psychologist, that the Parents were attempting to educate themselves about anxiety disorders, and were very concerned about the Student’s poor academic performance. (P-35 at 10).
79. Later in January of 2014, the Student’s regular guidance counselor (Guidance Counselor) returned from sabbatical. The Parent contacted the Guidance Counselor in February 2014 to request a meeting. (e.g. NT 499).
80. The District psychologist who had worked with the family previously (not the psychologist who drafted the ER), the Guidance Counselor, and the Parent met on February 25, 2014. (P-23).
81. By the time of the February 25, 2014 meeting, the Student’s grades had declined from what was reported in the ER.
82. During the February 25, 2014 meeting, the Parent explained that the Student does not admit that Student suffers from anxiety, that the Student’s sleep patterns were “off again,” and that the Student was always exhausted after school. (P-23). The Parent also expressed a belief that the Student would benefit from smaller classes and were considering [redacted] Academy (described below). (P-23).
83. During the February 25, 2014 meeting, the Parent and District planned to reevaluate the Student. (P-23)
84. The District issued a PTE-Request form (Request Form) during the February 25, 2014 meeting.⁷ (P-24).
85. The Parent completed the Request Form on the spot, seeking a new evaluation because she was not sure if the “504 is enough because Student is still struggling academically and I don’t want to watch Student drown.” (P-24). The District acknowledged receipt of the Request Form the same day. *Id.*
86. On March 7, 2014, the District issued a PTE-Consent form (2nd PTE), proposing new testing as part of a new evaluation in response to the Request Form. (P-27). Specifically, the District possessed a memory assessment, social emotional assessments, a psychiatric consultation, and a functional behavioral assessment (FBA). *Id.*
87. The Parent signed the 2nd PTE, approving it, on March 17, 2014. The District received the 2nd PTE back with the Parent’s signature on March 24, 2014. (P-27).

⁷ Schools in Pennsylvania use two versions of the PTE form. One is a PTE-Request form. This form is used by Parents to request evaluations in writing, and must be provided to parents when verbal requests are made. The other is a PTE-Consent form. This form is used by schools to obtain consent to evaluate students. In this case, the PTE that the District received back from the Parents on June 10, 2013 was a Consent form. The PTE issued on February 25, 2014 was a Request form.

88. On April 25, 2014, the Parents participated in a psychiatric consultation with the same District psychiatrist who evaluated the Student in elementary school (May 2009). The psychiatrist recommended additional testing for Autism. The District sought parental consent for an Autism evaluation on April 28, 2014, but the Parents did not respond to that request.⁸ (P-28, S-45).
89. The District's second evaluation culminated with an Evaluation Report of May 13, 2014 (2nd ER). (S-45).
90. The 2nd ER includes input from teachers describing the Student's presentation in class. Generally, teachers noted problems with the Student's attendance, assignment completion, and ability to appropriately seek assistance. (S-45).
91. The 2nd ER reports the Student's 9th grade grades, by term (quarters) to date. The Term 4 grades were not final at the time of the 2nd ER. The grades were:
- a. English: B - C - C - C
 - b. World History: B - C - D - E
 - c. Algebra I: D - E - E - F
 - d. "Mathematics Plus": C - B - E - F
 - e. Biology: C - E - D - C
 - f. Physical Education: A - B - A - A
 - g. Health: B - D - C - D
 - h. Art: A - B - C - A
 - i. Spanish II: C - E - D - C
92. The 2nd ER noted that all of the Student's grades were very significantly lowered by the Student's homework completion and grades on assignments. Test scores and class participation were variable in different subjects, and contributed to the Student's poor performance in several cases. (S-45).
93. The 2nd ER re-reported the cognitive and achievement testing results from the prior ER. (S-45).
94. The 2nd ER reported new testing completed in April of 2014. That new testing included an administration of the WRAML-2, a standardized, normative memory test. The Student's General Memory score was in the Average range. Index scores used to derive the General Memory score were split between the Average and Low Average range, with Verbal Memory and Attention/Concentration both in the Average range and Visual Memory and Working Memory both in the Low average range. (S-45).
95. Selected subtests of the WJ-III Cog NU were re-administered in April of 2014 to further assess the Student's memory. Compared to prior testing, these scores improved and no memory issues were revealed. (S-45)
96. The Parent, Student and Teacher scales of the BASC were also re-administered in April of 2014, along with a Social Skills Improvement System (SSIS, another rating scale for

⁸ Testimony throughout this hearing, particularly testimony from the Parents, drew a picture of the Student's social behaviors that are typically (or stereotypically) associated with Autism. The recommendation for further testing notwithstanding, the Student has never been diagnosed with Autism, testing described below concludes that the Student does not have Autism, and both parties agree that the Student is not Autistic.

Parents, Student and Teachers), a Conners 3 (teacher and Student rating scale), an FBA worksheet, review of school records, teacher interview, classroom and lunchroom observations, a clinical interview and a psychiatric consultation. All of these were done to assess the Student's social and emotional functioning, and as part of an FBA. (S-45).

97. Classroom and lunchroom observations were conducted by both a school psychology practicum student and the Guidance counselor. During the classroom observations, the student was distracted, withdrawn, not engaged, and did not participate or attend to class. During lunch, the Student appropriately engaged with peers socially. (S-45).
98. On the BASC-2, the Parent and Teacher ratings differed considerably. On the teacher rating, the Student was At Risk in the area of study skills, but otherwise average. The Parent, in contrast, noted very significant problems with withdrawal, anxiety and depression. (S-45).
99. On the BASC-2, the Student rated self as average. (S-45)
100. On the SSIS, the Parent and Teacher ratings were more in line with each other. The SSIS assesses Social Skills, Problem Behaviors, and Academic Competence. Both Parent and Teacher rated the Student below average in Social Skills, above average in Problem Behaviors. (S-45).
101. On the Conners 3, the Student was assessed to be in the "very elevated" range for inattention and learning problems/executive functioning. Peer relationships were in the "elevated" range. (S-45).
102. The teacher ratings completed as part of the FBA were consistent with the classroom observations. (S-45).
103. The 2nd ER includes a report from the psychiatric consultation. According to the District's psychiatrist, the Student started to exhibit avoidance behaviors as a result of increasing anxiety.⁹ (S-45).
104. The 2nd ER includes input from the Parents from the February 25, 2014 meeting. (S-45).
105. The 2nd ER concludes that the Student qualifies for special education as a student with an emotional disturbance. (S-45).
106. The 2nd ER recommends that the IEP team develop positive strategies to help the Student cope with anxiety, as well as academic strategies to improve the Student's academic performance. (S-45).
107. Starting on May 12, 2014 (the day before the 2nd ER was completed), the Parents had the Student assessed by a private neuropsychologist (Neuropsychologist). (See S-52). Testimony supports that the Parents had been in touch with the Neuropsychologist several months prior, but did not move forward until May of 2014.

⁹ As noted above, after meeting with the Parents and the Student, the psychiatrist was concerned that the Student was exhibiting signs of high-functioning Autism. Although the Parents did not respond to the District's request for more testing, both parties seem to agree that Autism is not the appropriate diagnosis for the Student currently.

108. On June 4, 2014, the Neuropsychologist drafted a note to the Parents and the District. The note is titled "Neuropsychological Evaluation" but it is not a complete evaluation. The note is based on a parent intake meeting, a classroom observation on May 19, 2014, and a clinical interview with the Student on May 20, 2014. (P-5).
109. The classroom observation referenced in the June 4, 2014 note was conducted by the Neuropsychologist's associate, a masters level former special education teacher. (NT 699; P-5).
110. The Parents had also completed several rating scales for the Neuropsychologist by the time of the June 4 note (a BRIEF, another BASC-2, an SRS-2, and the ABAS-II). (P-5).
111. Based on the intake, classroom observation, clinical interview and ratings scales, the Neuropsychologist concluded that the Student met criteria for School Phobia, Agoraphobia with Panic Disorder, and Generalized Anxiety Disorder. The Neuropsychologist also recommended a "change in school placement [to] ... a small, nurturing school setting with a high level of structure and classes with low student-to-teacher ratios. Student requires mentoring, study skill instruction, counseling as well as specific instruction in positive coping techniques and anxiety reduction strategies."
112. On June 16, 2014, the Student's IEP team convened for the first time. Both parties were represented by legal counsel at the meeting. The Neuropsychologist participated by phone for a portion of the meeting. (S-47; NT 1127-1129).
113. During the IEP team meeting, the District's personnel generally agreed with the Neuropsychologist's recommendations for a smaller, nurturing setting for the Student. The District believed (and still believes) that the Emotional Support program in the District's high school satisfies that need. *See, e.g.* S-48.
114. The District came to the meeting with a draft IEP. That IEP included the information from the 2nd ER as well as current grades. (S-47).
115. The IEP had two goals. The first goal was that the Student was to "show an improved understanding of algebraic concepts as evidenced by an average of 70% on curriculum based assessments." The baseline for the first goal was 59%. (S-47)
116. The second goal was for the Student to "demonstrate utilization of test taking strategies by averaging 70% or above [on] all assessments in all major subject areas." The baselines for this goal were "Algebra: 51%, Biology: 53%, World History: 81%, English: 88%." (S-47).
117. The IEP included SDIs and modification. Some of those were substantively similar to the accommodations in the 504 agreement (e.g. chunking assignments into smaller pieces). Others were new (instant pass to the bathroom, preferential seating, receipt of study guides in advance of tests, a positive behavior support plan, and a self-monitoring checklist). (S-47).
118. Under the IEP, the Student would take all core subject classes in an Emotional Support setting. (S-47).
119. Under the IEP, the Student would receive one, 48 minute session of social skills instruction per week. (S-47).

120. Under the IEP, the Student would receive one, 20 minute session of counseling per week. (S-47).
121. The level of service that the IEP offered was supplemental emotional support, meaning that the Student would receive special education for more than 20% but less than 80% of the school day. (S-47).
122. The Student was not able to participate in band in 9th grade because academic grades were too low. (NT 952-953).
123. During the 2013-14 school year, the Student had 7.5 excused absences, 9 unexcused absences, and was tardy by period on 12 occasions. (S-2)
124. As with the prior school year, the Student's grades fluctuated somewhat over the course of the school year. (S-2). The Student's final grades for the 2012-13 school year were as follows (a D is the minimum passing grade):
 - a. English: C
 - b. World History: C
 - c. Algebra I: E (failing grade)
 - d. "Mathematics Plus": D
 - e. Biology: D
 - f. Physical Education: A
 - g. Health: C
 - h. Art: B
 - i. Spanish II: D

Summer 2014

125. During the summer of 2014, the Student attended camp at [redacted] Academy.
126. Given the Student's failure in Algebra I, the District offered a computer-based math program, with face-to-face assistance. The Parents accepted that program and the Student completed it, earning credit to advance to 10th grade. (NT 1248-1249).
127. The Parents and Student toured the District's senior high school during the summer of 2014.
128. On August 4, 2014, the Neuropsychologist completed the Neuropsychological Evaluation and issued a report (Neuropsych Report). (S-52).
129. The Neuropsych Report included additional cognitive and achievement testing (a WISC-IV and a WIAT-III). Autism testing was also completed (an ADOS-2).
130. Based on the ADOS-2, the Neuropsychologist was able to conclude that Autism was not an appropriate diagnosis for the Student. (S-52).
131. The cognitive testing was strikingly similar to the District's, finding nearly the same pattern of strengths and weaknesses. (S-52).
132. The Neuropsych Report concludes that the Student should be identified as a student with an Other Health Impairment on the basis of an anxiety disorder, and that the Student

should not be placed in an emotional support placement with other students who have externalizing behaviors. (S-52).

133. Other than a recommendation for direct instruction in study skills and particular recommendations for math instruction, the school-based recommendations in the Neuropsych Report are strikingly similar to what the District recommended and proposed in its IEP (e.g. chunking, counseling, testing accommodations). (S-52).
134. After receiving the Neuropsych Report, the District revised the SDIs in the IEP to allow the Student to re-take any assessment on which Student scores below a 70%; provide direct instruction of organizational skills; and provide the Parents with regular updates. The revisions were made on August 25, 2014. (S-54)
135. On August 26, 2014, the Parents wrote to the District providing notice of their intent to enroll the Student in Academy for the 2014-15 school year. (S-57).
136. On August 4, 2014, the Student began receiving treatment from the [Philadelphia-area hospital's] Child and Adolescent Anxiety Disorder Clinic (Clinic). The Student was diagnosed with Social Phobia and Generalized Anxiety Disorder. The Clinic did not communicate with the District in making these diagnoses. (P-6).

2014-15 School year - 10th Grade

137. 10th grade in the District is the start of senior high school.
138. The District operates an emotional support program within the senior high school.
139. The emotional support classes at the District's high school are designed as replacement courses for general education and college preparation classes. The curriculum is the same in the emotional support classes as it is in general education classes, but the class size is limited to four to six students. (NT 1234-1236)
140. Students in the high school emotional support program have access to, and are monitored by the emotional support teachers, school psychologists, District's psychiatrist and guidance counselors.
141. The Parents enrolled the Student in Academy (Academy) for the 2014-15 school year, and the Student attended Academy for the entirety of the school year (through this decision).
142. Academy is a small, private school for students with academic and/or emotional needs. (NT 1058-1059).
143. Academy current enrollment is 65 students. It is a college prep school and 80% of their students go on to college. 77% of the students who go to college go to 4 year schools, the other 3% go to 2-year colleges and the other 20% seek competitive employment. (NT 1059-1060).
144. Academy is licensed by the Pennsylvania Department of Education as an elementary school (grades 6-8) and high school (grades 9-12). *Id.*
145. Academy employs a full time counselor and two part time psychologists. (NT 1062).

146. Academy generally maintains a 6:1 student to teacher ratio, but some classes go up to 12 students. (NT 1067).
147. The Student receives academic and therapeutic programs at Academy and is progressing in both. (NT 1080-1081, 1096-1097)

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 *Shore 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

The IDEA statute and regulations require school districts 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. §300.311(a), (c)(1).

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

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

Compensatory Education

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

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

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was 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 student] 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 of 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.

IEE at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

“If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.” 34 C.F.R. § 300.502(b)(4).

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three-part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the “*Burlington-Carter*” test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

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.

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

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

1. Is of an age at which public education is offered in that school district; and
2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program; and
3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

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

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

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

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

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

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

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

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

Discussion

Child Find

Child Find involves an inquiry into what the District did with the information that it had regarding the identification of the Student. The District first sought the Parents' consent to evaluate the Student for special education eligibility with the issuance of the PTE on May 23, 2013. The controlling question for Child Find, therefore, is whether the District had reason to suspect that the Student may have a disability prior to May 23, 2013.

During the entirety of the 2011-12 school year (7th grade), nothing on the record indicates any concerns by teachers about the Student's emotional wellbeing or academic performance. I am persuaded that the Parents did not raise concerns about the Student's emotional wellbeing during 7th grade. This is not to say that the Parents were not concerned. Quite the contrary. Especially in regard to the Student's running home from school, the Parents were rightly worried. My inquiry, however, concerns what the District knew or had reason to know, and there is no preponderant evidence that this sort of information was ever communicated to the District during 7th grade. The Student's year-end grades were passing, mostly in the C range. This was the same year that the Student transitioned from elementary school to the District's high school. In short, nothing suggests that the District should have sought to evaluate the Student in 7th grade.

During the 2012-13 school year (8th grade), the Student's grades declined, and the Student started to exhibit concerning behaviors in school (inattentiveness, sleeping in class). Assignment and homework completion also became an unambiguous problem. In response, the Student's teachers involved the Guidance Counselor, who started meeting with the Student in November of 2012. Although the Student did not explicitly mention problems with anxiety during these meetings, the District had actual notice of the teacher's concerns, the Student's academic difficulties, and the Student's behavioral presentation from November 2012 onward.

The record has scant information about what happened between November of 2012 and March of 2013. Regardless, it is clear that whatever informal assistance the Student received from the

Guidance Counselor was insufficient to rectify the Student's academic problems (homework and assignment completion in particular). This resulted in the conference on March 7, 2013, which focused exclusively on the Student's academic needs.

The next significant action in terms of Child Find came on May 10, 2013, when the Parents informed the District that the Student was diagnosed with an anxiety disorder. By this point, the Parents had already received notice from the District that the Student was in danger of failing.

After receiving information about the Student's diagnosis, the District acted very quickly both to put accommodations in place under Section 504 and to start the IDEA evaluation process. Again, for Child Find, the inquiry is not whether the 504 accommodations were sufficient or whether the first ER reached the correct conclusion. Rather, the question is whether the District should have taken these actions faster.

There is no evidence to indicate that the District should have initiated an evaluation prior to November of 2012, when the Guidance Counselor started working with the Student. From that time through May 10, 2013, the District's informal interventions were ineffective. Essentially, the District worked with the Student and Parents for six months to no avail, and then only proposed an evaluation when learning of the Student's diagnosis. Even if the Student's emotional wellbeing was completely off the radar, this is too much time for a school to actively watch a passing student become a failing student without undertaking a serious and systematic investigation as to why. For this reason, I find that the District violated the Student's Child Find rights from November 1, 2012 through May 10, 2013. During this time, the Student should have received the accommodations first provided in the 504 Agreement. With no better evidence, I conclude that this is tantamount to an hour per day of compensatory education for each day that the Student attended school. From this, I will subtract the amount of time that the District should have reasonably taken to conclude that an evaluation was necessary. Given the concerns raised by the teachers, and the fact that District personnel was working closely with the Parents and Student, I find that a month would have been reasonable. Consequently, I award one hour of compensatory education for each day that the Student attended school from December 1, 2012 to May 10, 2013.

FAPE Violation

The Parents argue that the District violated the Student's right to a FAPE from September 15, 2012 through the end of the 2013-14 school year. I have already determined that the District had no reason to evaluate the Student for IDEA eligibility before December of 2012, and have already compensated the Student for the District's Child Find violation from December of 2012 through May 10, 2013.

Unlike the Child Find analysis, the FAPE analysis looks to the appropriateness of what the District offered, not simply when the District acted. However, it simplifies the analysis to consider distinct periods of time.

May 10, 2013 to October 13, 2013

The District first learned of the Student's diagnosis of an anxiety disorder on May 10, 2013. By May 23, a PTE was issued. The District received consent to evaluate on June 10, 2013 and the evaluation was complete on October 13, 2013. Given the IDEA's evaluation timelines (and how those timelines work in the summer when school is not in session), the evaluation was timely.

The Student has been compensated for the District's failure to offer the evaluation sooner, but once the District received parental consent to evaluate, the timelines were kept. The District could not have proposed an IEP before the evaluation was completed, even if it had found the Student eligible. Therefore, the Student's right to a FAPE was not violated while the initial evaluation was pending. The Student's rights were not violated between May 10 and October 13, 2013, and no compensatory education will be awarded for this period of time.

October 13, 2013 to February 25, 2014 - IDEA Analysis

On October 13, 2013, the District issued the first ER concluding that the Student was not IDEA-eligible. Parents and District personnel next met on February 25, 2014 and decided to reevaluate the Student. What occurred during the interim is concerning.

The initial ER itself has some flaws. Notably, the ER includes many references to the Student's anxiety disorder, but concludes that the Student does not have a disability. It is possible to conclude that a student with an anxiety disorder does not fit into one of the IDEA's disability categories as a result of the student's particular presentation, but the ER does not reach this conclusion. Given the ease with which an anxiety disorder could, by definition, satisfy a number of the IDEA's disability categories, the conclusion that the Student does not have a disability was either unnecessarily confusing, wrong, or both.

Concluding that a Student has a qualifying disability, however, is only the first step in an eligibility determination. A student with a qualifying disability who does not require SDI is not IDEA-eligible. In this case, the evaluator considered all available information, conducted appropriate assessments, and concluded that the Student did not require SDI – but rather the services in the 504 Agreement were sufficient. This determination proved incorrect over time, but the inquiry is whether the determination was correct when it was made.

At the time of the ER, the Student's grades were declining but passing, and cognitive and achievement testing revealed no significant concerns. At the same time, there was a discrepancy between the Parents' ratings on social/emotional measures and ratings from teachers. This, combined with the Student's presentation in school could reasonably yield the conclusion that the Student presented differently at home and in school. This is not to say that the Student exhibited no concerning behaviors in school. Rather, while the Student could be inattentive in class, the behaviors were not different from typical, same-aged peers in a significant way. All of this suggests that the ER correctly concluded that the Student was not eligible at that time.

I am persuaded that the District's initial evaluation, though imperfect, satisfied all IDEA requirements and its ultimate conclusion was correct at the time it was made. This does not, however, release the District of its obligations to reevaluate the Student if the reasonable conclusions in the initial ER are ultimately incorrect. That is exactly what happened in this case.

From October 13 through February 25, the Student attended school under the 504 Agreement. This proved ineffective, as the Student's anxiety in school increased and grades continued to decline. The Student was now failing three classes and doing poorly in others. The Student's anxiety symptoms at home had gotten worse and (if the 2nd ER and psychiatric consultation are any indication) the same was true in school but to a much less significant degree.

Given the foregoing, the question becomes whether the District knew or had reason to know that another evaluation was required before February 25, 2014. Importantly, during this time, the

Student was not identified as IDEA eligible. Section 504 accommodations are regular education accommodations. Quite literally, any failure to act on the District's part between October 13, 2013 and February 25, 2014 is a Child Find violation. In essence, during these four months (which included the winter recess), did the District have reason to know that the Student should be evaluated again?¹⁰

Candidly, this question is very difficult to answer. A comprehensive, appropriate evaluation had just been completed, the Student was found ineligible, and an agreed-to 504 plan was in place. At the same time, the District could not have been oblivious to the Student's declining academic performance in school. While the Student's anxiety symptoms were not on display in school as much as they were at home or in the community, the District was aware of the diagnosis.

In sum, between October 13, 2013 and February 25, 2014, there was no dramatic, red flag raising event that should have triggered a new evaluation. Rather, during this time, evidence slowly accumulated that the 504 Agreement was not effective, indicating that the conclusions in the ER may be wrong. The analogy to the frog in the kettle is unpleasant but apt. Even so, the absence of any definitive red flag event, the completeness of the first ER, and the relatively short passage of time between the ER and the meeting on February 25, 2014 (roughly four months with the winter break in the middle), compel me to conclude that the District did not commit a second Child Find violation between October 13, 2013 and February 25, 2014. The Student's rights were not violated under the IDEA during this time.

October 13, 2013 to February 25, 2014 - Section 504 Analysis

The analysis under the IDEA between October 13, 2013 and February 25, 2014 yields no violation, but that is not dispositive of the claims under Section 504. During this period, the Student was not IDEA-eligible but was a protected handicapped student. While the District was trying to determine IDEA eligibility, it complied with the IDEA's requirements for a thought-to-be exceptional student. By satisfying its obligations under the IDEA, the District also satisfied its obligations under Section 504, thereby shielding itself from a concurrent Section 504 claim. However, that protection ended on October 13, 2013, when the District affirmatively concluded that the student was not IDEA-eligible but was a protected handicapped student. Consequently, it was the District's obligation to put services in place that would enable the Student to access the curriculum and "obtain the benefits of the school program." 22 Pa Code § 15.3.

The evidence preponderantly demonstrates that the Student did not obtain the benefits of the school program while the 504 Agreement was in place. It is important to recognize that all of the accommodations in the 504 Agreement were in place before the 504 Agreement was formalized, starting on May 13, 2013. See FF #40. Between the end of the 2012-13 school year, through the first half of the 2013-14 school year and through February of 2014, the Student's grades declined.¹¹ I am cognizant of the fact that academic grades are not always a good

¹⁰ Throughout this decision, I have tried to avoid the term "reevaluation," which is a term of art under the IDEA applying to evaluations of students who have been identified as IDEA-eligible. When a Student is evaluated, found ineligible, and then evaluated again, the second evaluation is just that: a second evaluation – and an initial evaluation for IDEA purpose. In substance, this matters little for the instant case, but some caution regarding proper use of terms of art is warranted.

¹¹ A passing C in Math during the summer of 2012 is one of the rare exceptions where the Student's grades momentarily improved. Otherwise, the overall trend is downward, even if the slope is not steep.

indicator of a student's access to the curriculum, but I cannot find any way in which the Student benefited from the 504 Agreement in the record of this matter. Based on the District's testing and recommendations: 1) the Student's ability to learn was average, 2) the Student required accommodations to access and benefit from the school program and 3) from the time that accommodations were put into place, the Student continued to decline academically and emotionally. As such, the Parents have established that the Student did not receive appropriate accommodations under Section 504.

To remedy the foregoing violation, the Student is awarded two hours of compensatory education for each day that the Student attended school from October 13, 2013 through February 25, 2014.

February 25, 2014 to Start of 2014-15 School Year

From February 25 through May 13, 2014, the Student was a thought-to-be eligible student with an evaluation pending. From May 13, 2014 onward, the Student was IDEA-eligible as per the District's 2nd ER. As a result, after February 24, 2014, compliance with the IDEA also demonstrates compliance with Section 504.

Between February 24 and May 13, 2014, the District sought parental consent and evaluated the Student in accordance to the IDEA's timelines. The time spent evaluating the Student was not a violation of the Student's rights, and no compensatory education will be awarded for this period.

The Student was found to be eligible on May 13, 2014 with the issuance of the 2nd ER. It is difficult to discern the Parents' particular quarrels with the 2nd ER, other than their overall claim that the District should have found the Student eligible sooner than it did (an argument addressed above). In substance, the 2nd ER is thorough and comprehensive – even more so than the original ER. The District describes the information that it obtained about the Student for the 2nd ER as dramatically different than what it obtained during the first ER. This is something of an overstatement, but comparing the Student at two points in time during the course of Student's decline produced different results. The differences in the Parent and Student ratings in the BASC-2 between the initial ER and 2nd ER showed the most significant decline, but there were declines across the board. Fortunately, the Student's intellectual ability remained intact.

By the time of the 2nd ER, the District recognized a definite connection between the Student's anxiety symptoms and academic performance. It was less clear that the same symptoms were impacting upon the Student's ability to socialize in school.¹² Regardless, the District acknowledged that the Student's anxiety manifested in school, and recognized their obligations to address the same.

The appropriateness of the 2nd ER is further supported by the Parents' Neuropsych Report. That report and the 2nd ER are strikingly similar in their findings and recommendations. The District properly points to the Neuropsych Report as prime evidence that the 2nd ER was both comprehensive and accurate. Moreover, the Neuropsych Report was presented on August 4, 2014. By August 25, 2014, the District revised the SDIs in the IEP to include recommendations from the Neuropsych Report. The ultimate appropriateness of that IEP is a significant factor in

¹² Here, I weigh the observations of the Student's socialization against the Parents' testimony that the Student could "fake" appropriate social interactions, but that doing so required extreme effort and was exhausting.

the tuition reimbursement analysis below, as it was intended to drive programming during the 2014-15 school year.

Based on all of the foregoing, I find no violation of the IDEA between February 25, 2014 and the start of the 2014-15 school year.

IEE Reimbursement

The standard for IEE reimbursement is not met in this case. As described above, reimbursement for an IEE fundamentally requires a predicate disagreement with the District's evaluation. There is no evidence preponderantly establishing any parental disagreement with the initial ER anywhere near the time it was drafted. The neuropsychological testing then started before the 2nd ER was completed, establishing that the Neuropsychological Evaluation is not the result of any disagreement with the 2nd ER. Further, discounting the lack of a prerequisite disagreement, both the initial ER and the 2nd ER were appropriate, as described above.

Tuition Reimbursement

The three-part *Burlington-Carter* test for tuition reimbursement is described in detail above. The first part of that test is to determine the appropriateness of the District's offer, which is the August 25, 2014 IEP. It is the Parents' burden to prove the inappropriateness of that offer by preponderant evidence.

In their closing argument, the Parents describe the District's final offer as a "belated step in the right direction," but one that ultimately fails to address the Student's anxiety and phobia. Indeed, neither of the IEP's goals *directly* relate to the Student's anxiety. Bluntly, the IEP goals are not good. In the most literal way, they are measurable, objective and baselined. But that misses the point. The Student's anxiety, characterized by the District as an Emotional Disturbance, is the reason why the Student needs special education. One would expect, therefore, some goal targeting the Student's anxiety in school itself – or some symptom thereof – if for no other reason than doing so will enable the District to track the Student's progress as the Student's anxiety decreases.

However, as noted, I must find that the goals are measurable, objective and baselined. To the extent that the Student's poor academic performance is best thought of as a symptom of the Student's anxiety, there is a connection. More importantly, comparing the program recommendations in the Parents' Neuropsych to the SDIs offered in the August 25, 2014 IEP, one is hard pressed to find significant discrepancies or omissions. In substance, the District is fundamentally offering the same special education as recommended by the Parents' Neuropsychologist.

The Neuropsychologist concluded that the Student should be categorized as a student with an Other Health Impairment (OHI) as opposed to an Emotional Disturbance. I am persuaded that this recommendation was made for the purpose of avoiding an Emotional Support placement. The Neuropsychologist was concerned that Emotional Support placements often include students with significant externalizing behaviors. I agree wholeheartedly that such a placement would be inappropriate for the Student. I do not find, however, that the Emotional Support program in the District's high school is the type of program feared by the Neuropsychologist and the Parents. The record establishes that the Neuropsychologist has no specific knowledge of

the District's Emotional Support program at the high school. In fact, the record as a whole clearly indicates that the Student's presentation at the time of the August 25, 2014 IEP was entirely typical of children in the high school Emotional Support program. It is also worth noting that, with the exception of Intellectual Disability, a student's disability classification is not a factor in the student's substantive or procedural rights. It is axiomatic, the student's needs, and not the student's diagnosis or category, drive the student's program and placement.

While there is broad agreement between the District and the Parents' Neuropsychologist concerning the Student's programmatic needs, the same is not true concerning placement. Although "program" and "placement" are sometimes used interchangeably, for clarity I will use the term "program" to describe what services the Student receives and "placement" to describe the environment in which the services are rendered. The parties' dispute over placement is the crux of the tuition reimbursement analysis. Both the Parents and their Neuropsychologist believe that the Student cannot meaningfully benefit from the District's offered program from within the District's offered placement. From the Parents' perspective, no matter how small and nurturing the Emotional Support program, the Student will still have to go to school within the District's large high school. The Parents also have every reason to be frustrated by the District's lackluster response to their child's progressive decline. While these factors are important, I cannot conclude that the Student is incapable of making meaningful progress within the District's high school Emotional Support program. No matter how strongly the Parents believe to the contrary, I cannot accept that belief as proof. Neither the Parents, nor their Neuropsychologist, rebutted the District's testimony concerning the nature of the high school Emotional Support program, or the Student's anticipated fit within that program.

In sum, the District's offered IEP includes the services and supports that are reasonably calculated to enable the Student to derive a meaningful benefit from Student's education. While the IEP's goals are flawed, those flaws are not fatal. Although the Parents have serious misgivings about the offered placement, I find that the program and placement offered in the IEP were both appropriate at the time they were offered. Consequently, the first part of the *Burlington-Carter* test is not satisfied, tuition reimbursement is not awarded, and the other parts of the test are not considered.

Dicta

I appreciate the emotional toll this hearing has taken on the Parents. It is plainly obvious that the Parents deeply love and care for the Student. They are commended for their efforts in educating themselves about the Student's condition, and for zealously advocating on the Student's behalf. Further, in every correspondence and interaction with the District, the Parents have been polite and courteous, even in the face of legitimate frustration. Although the Parents will be disappointed by some aspects of this decision, I am confident that the Parents will continue their zealous but courteous advocacy.

ORDER

Now, April 13, 2015, it is hereby **ORDERED** as follows:

1. The District committed a Child Find violation as described above in the accompanying decision. To remedy this violation, the Student is awarded one hour of compensatory education for each day that the Student attended school from December 1, 2012 to May 10, 2013.

2. The District violated the Student's rights under Section 504 and Chapter 15 as described above in the accompanying decision. To remedy this violation, the Student is awarded two hours of compensatory education for each day that the Student attended school from October 13, 2013 through February 25, 2014.
3. 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, or via dual enrollment or equitable participation should the Student remain in private school, to assure meaningful educational progress.
4. All other claims and demands, including those related to reimbursement for independent evaluations and tuition reimbursement are denied.

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

/s/ Brian Jason Ford
HEARING OFFICER