

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 633 1Seventh Street, Suite 1300 Denver, Colorado 80202	
<b>[Mother] AND [Father], in the interest of [Student],</b> Complainants,  vs.  <b>CHEYENNE MOUNTAIN SCHOOL DISTRICT 12,</b> Respondent.	▲ <b>COURT USE ONLY</b> ▲
	<b>CASE NUMBER:</b>  <b>EA 2013-0007</b>
<b>DECISION</b>	

Complainants (Parents) allege that Cheyenne Mountain School District 12 (School District) denied their son, [Student], a free appropriate public education in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482.<sup>1</sup> A due process hearing, convened in accordance with 20 U.S.C. § 1415(f) and its implementing regulation 34 CFR § 300.511, was held before Administrative Law Judge (ALJ) Robert Spencer at the School District’s offices at 1775 LaCledde Street, Colorado Springs, Colorado on June 20, 21, 27, and 28, 2013. Theresa L. Sidebotham, Esq., Telios Law PLLC, represented the Parents. W. Kelly Dude, Esq., Anderson, Dude & Lebel, PC, represented the School District.

### Case Summary

#### *The Requirement of FAPE*

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and revise an Individual Education Plan (IEP) calculated to meet the eligible student’s specific educational needs. 20 U.S.C. § 1414(d). A school district satisfies the requirement for FAPE when, through the IEP, it provides a disabled student with a “basic floor of opportunity” that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). The school district is not required to maximize the potential of the handicapped child, but must provide “some educational benefit.” *Id.* at 199-200. Although that benefit must be more than *de minimus*, *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726-27 (10th Cir. 1996), “some progress” toward the student’s educational goals is all the IDEA requires. *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1154 (10th Cir. 2008), *cert. denied*. However, where a school district has failed to develop an IEP for an eligible child, there can be no FAPE. *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 766-67 (6th Cir. 2001); *W.B. v. Bd. Of*

<sup>1</sup> The complaint was signed only by [Student]’s mother; however, all parties agreed that [Student]’s father should be included in the caption as a complainant.

*Trustees*, 960 F.2d 1479, 1485 (9th Cir. 1992); *Dep't of Educ. v. Cari Rae S.*, 158 F.Supp.2d 1190, 1196 (D. Hawaii 2001).

### *Child Find*

Key to a school district's ability to provide FAPE is its obligation to identify, locate, and evaluate disabled children who are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 CFR § 300.111. This obligation, known as Child Find, extends to any child age 3 to 21 suspected of being a child with a disability, and regardless of the severity of the disability is in need of special education, even though the child may be advancing from grade to grade. *Id.*

Either the school district or the parents may request an initial evaluation. 20 U.S.C. § 1414(a)(1)(B); 34 CFR § 300.301(b). If a school district requests the evaluation, it must provide the parents with prior written notice of the proposed evaluation and request the parents' consent. 20 U.S.C. §§ 1414(a)(1)(D) and 1414(b)(1); 34 CFR §§ 300.300(a) and 300.503.

If a child's parents request an evaluation, the school district must either grant that request or provide the parents with prior written notice explaining, among other things, the reason for the denial; as well as notice of the procedural safeguards available to the parents, including the right to challenge the school district's denial at a due process hearing. 20 U.S.C. §§ 1415(c)(1)(B) and (d); 34 CFR §§ 300.503(a)(2) and 504.

### *The Allegations*

[Student] is a [age] year-old male who has just completed his [grade level] year at [High School].

Parents allege that [Student] is disabled and in need of special education (SPED). They allege that in April 2008, when [Student] was in [grade], they made a written request to the School District for a SPED evaluation of [Student] but that the request was ignored. They also contend that, over the years, they made additional verbal requests for special educational assistance for [Student], which have not been granted. As a result of the School District's failure to grant the request for evaluation and its failure to otherwise identify [Student] as a child requiring special education, [Student] has suffered poor academic performance. Furthermore, due to his poor academic performance, [Student] has lost the opportunity to participate in extracurricular activities, most notably to play baseball with his high school's [team]. Parents allege that the School District's violation of its Child Find obligations has denied [Student] FAPE. As a remedy, Parents seek the appointment of an independent consultant to formulate a remedial plan, including compensatory education and implementation of measures necessary to restore [Student]'s academic eligibility to play extracurricular baseball.

The School District denies that it violated its Child Find responsibilities, or failed to provide FAPE. It denies that Parents ever requested a special education evaluation, in April 2008 or at any other time. In fact, the School District asserts that it asked

Parents to consent to an evaluation in March 2008, but Parents refused the request. Though [Student] has struggled academically, the School District contends it had no obligation to continue seeking Parents' consent for evaluation, and had no new information sufficient to trigger any obligation to renew its request. Instead, the School District developed response to intervention (RTI) plans to assist [Student] academically and later offered [Student] a 504 Rehabilitation Plan to accommodate his disability after it learned he had been diagnosed with ADHD. It was not until December 2012, when Parents became concerned about [Student]'s academic ineligibility to play baseball, that Parents became strident about needing assistance. At that time, the School District offered the possibility of a special education evaluation. That evaluation was completed in April 2013 and identified [Student] as suffering a specific learning disability in math, which required special education services. An IEP has been developed; however, Parents filed this complaint and removed [Student] from the School District before the plan could be finalized.

In addition to its defense on the merits, the School District contends that, to the extent Parents' complaint dates back to events occurring in 2008, the complaint is time-barred by the two-year filing deadline. 20 U.S.C. § 1415(f)(3); 34 CFR § 300.507(a)(2) and 300.511(e). Parents respond that the complaint is not time-barred because the School District failed to provide Parents with the procedural safeguards notice that was required when it failed to grant Parents' request for evaluation in 2008. Under certain circumstances, a school district's failure to provide required notice may provide an exception to the filing deadline. 20 U.S.C. § 1415(f)(3); 34 CFR § 300.511(f).

For reasons explained below, the ALJ concludes that Parents declined the School District's request for evaluation in March 2008 and have not met their burden of proving they requested a SPED evaluation in April of 2008. Nevertheless, the School District subsequently failed to meet its Child Find obligation by failing to renew the request for evaluation after a substantial body of data suggested that a SPED evaluation was still necessary.

## **Findings of Fact**

### *Complainant*

1. [Student] is a [age] year-old male who has just completed his [grade level] year at [High School] in Colorado Springs, Colorado.
2. [Student] is the youngest [ ] in his family. [ ]
3. For purposes of confidentiality, [Student]'s parents will be referred to herein as [Father] and [Mother]. [ ]
4. [Student] and his parents live in Colorado Springs, Colorado, within the School District's catchment area.
5. [Student] enrolled in the Cheyenne Mountain School District as a third-grader at [Elementary] in August [year], and remained enrolled in the School District until Parents filed the current complaint.

6. Prior to moving to Colorado Springs, [Student] had been enrolled in Pueblo School District 60 in Pueblo, Colorado.

7. [Student] has had no significant disciplinary problems at home or at school. The issues in this case are related solely to his academic performance.

#### *Educational History in Pueblo*

8. The record provides little detail about [Student]'s academic performance while in the Pueblo School District, except for the fact that in 2001, while in preschool, he was evaluated to determine if he had a disability that required special education. The evaluation disclosed a substantial discrepancy between [Student]'s performance and that of other children his age, and he scored below the 7<sup>th</sup> percentile in auditory processing. He therefore qualified as a child with a disability eligible for early childhood special education and related services. Exhibit 32.

9. [Mother] signed a written consent for both the evaluation, and for [Student] to receive special education services. Exhibit 32.

10. The record discloses no other evidence regarding [Student]'s academic performance in Pueblo, except for [Mother]'s testimony that he was not visibly struggling, academically.

#### *Third and Fourth Grade at [Elementary]*

11. When [Student] moved to Colorado Springs, he entered the third grade at [Elementary School]. At the time, Parents did not advise the School District that [Student] was evaluated and found eligible for special education while in preschool in Pueblo.

12. The record discloses little specific evidence of [Student]'s academic performance in the third and fourth grades; apart from the fact that he was on an Individual Literacy Plan (ILP) that provided extra help in reading through the HOSTS (Helping One Student to Succeed) program. The HOSTS program is a one-on-one mentoring program designed to improve a student's language arts skills.

13. [Mother] testified that apart from reading, [Student] had no other "visible" issues. However, a summary of his fourth grade year indicates that he also had "significant difficulty" with math-facts and "had not responded to intervention." Exhibits 17 and 21.

#### *Fifth Grade (2007/2008 School Year) Request and Refusal for SPED Evaluation*

14. [Student] came to the attention of the elementary school's Intervention Support Team (IST) in the fall of 2007, upon concerns that [Student] was struggling in writing and mathematics. Exhibit 12.

15. Members of the IST included the school principal ([School Principal]), a representative of the School District; the school special education teacher; the student's

classroom teacher; and the IST's data recorder.

16. IST records indicate that by September 2007, [Student] had been placed on an intervention plan that included accommodations such as small group study, peer tutoring, modified assignments, and preferential seating.<sup>2</sup> [Student] was also continued in HOSTS, as well as a reading program referred to as "SRA."<sup>3</sup> Exhibit 12, p. 1.

17. Initiatives that a school takes to identify and assist students who are struggling academically are generically referred to as "response to intervention," or RTI. RTI is a process of intervention within the general education program, and is not a substitute for, and does not satisfy, a school district's Child Find obligation.

18. RTI is a three-tiered system that encompasses the entire student body. Tier one is the level at which approximately 80 to 90 percent of students perform. Students needing some extra help are in tier two, which comprises approximately 5 to 15 percent of the student body. Tier three is the most intensive level, focused upon the 1 to 5 percent of students with intensive or chronic needs. Exhibit 30. For the most part, [Student] was considered to be at the tier two to three level.

19. By October 2007, [Student] had shown little to no academic improvement in his reading fluency, and also continued to struggle in math and writing. Exhibit 12, pp. 1-2. According to the IST data recorder, [IST data recorder], the IST was "very concerned" about [Student]'s lack of progress.

20. In November and December 2007, [Student]'s performance improved; although, even with RTI, he was still "struggling academically." Exhibit 12, p. 5.

21. The IST's responsibility includes Child Find obligations. Consistent with those obligations, the IST agreed, in February 2008, that [Student] needed to be evaluated for special education eligibility. Exhibit 12, p. 6.

22. Having concluded that [Student] might need special education, the IST (on behalf of School District) was obligated by the IDEA to send Parents prior written notice of its intent to perform a SPED evaluation, and to request the Parents' permission for that evaluation. The IST was also obligated to provide Parents with a written explanation of their procedural safeguards under the IDEA.

23. The parties disagree whether the IST complied with this obligation. Parents deny that they were given prior written notice, an evaluation consent form, or a written explanation of their procedural rights. Parents point out that the School District was obligated to maintain copies of such records, but that no such records were produced by the School District at the hearing.

24. Nonetheless, substantial evidence exists to show that Parents were given the required documents, but refused to consent to the requested evaluation.

---

<sup>2</sup> Preferential seating generally amounted to placing [Student] in a seat toward the front of the classroom to minimize distractions and allow for better observation by his teacher.

<sup>3</sup> SRA (also incorrectly identified in the record as "SAR") is most likely a reference to a reading mastery program developed by the McGraw Hill Company. A description of the program is found at the National Center for Education Statistics website, <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=WWCirelrm06>.

a. Exhibit 12 is the record of the IST meetings prepared by [IST data recorder]. The record of the March 6, 2008 meeting states that “Parents were given a permission form for a SPED evaluation.” Exhibit 12, p. 6. Exhibit 31 is an example of the consent form that, according to the edition date in the lower right hand corner of the document, was in use as of January 2008 and therefore was most likely the format used. The form combines both the required prior written notice as well as boxes for the parents to indicate whether or not they consent to the evaluation. The form also indicates that, for initial evaluations, a copy of the Notice of Procedural Safeguards has been given to the parents.

b. On March 20, 2008, two weeks after the IST record indicates Parents were given the consent form, Parents signed a letter addressed to members of the IST titled “Permission for Initial Evaluation.” Exhibit 13. In this letter, Parents state that they are “revoking any consent given in the past as cooperation to go forward with a formal evaluation at this time.” Parents also refer to their rights contained in the “Explanation of Procedural Safeguards.”

c. On April 3, 2008, the IST met again, and the meeting record reflects that “Parents refused further testing.” Exhibit 12, p. 7.

d. Parents’ refusal to consent to a SPED evaluation is consistent with Parents’ concern that [Student] not be “singled out” in a way that might subject him to ridicule by his peers. This concern appears in the March 20<sup>th</sup> letter, where Parents refer to their desire to “preserve [[Student]’s] dignity and confidentiality.” It is also reflected in the IST records, which indicate that [Mother] was “concerned about classroom pull out,” and had previously told [Student]’s third grade teacher that she did not want [Student] to receive “services for an IEP.” Exhibit 12, pp. 1 and 3. This aversion to identifying [Student] as a child needing special education is also consistent with the fact that although [Student] was evaluated for special education and placed on an IEP during preschool in Pueblo, Parents did not disclose this fact to the School District when they enrolled [Student] at [Elementary].

25. Parents testified that the March 20, 2008 letter was not a response to the IST’s request for initial SPED evaluation, but was instead a reference to an “Intervention Support” consent form they signed in February 2008, which gave their permission for the IST to “observe, interview, and assess my child.” Exhibit A. This form was only a general consent for the IST to be involved with their son, and was not a SPED evaluation consent form. They point out that their reference in the March 20<sup>th</sup> letter to “revoking” consent, rather than “refusing” consent, proves that they were referring to Exhibit A (the February consent form), and not to the IST’s request for an initial evaluation. They contend that their intent was simply to put any further work with the IST temporarily on hold while [Mother] was out of town [ ].

26. This explanation is not credible. Parents’ March 20<sup>th</sup> letter very specifically refers to an “Initial Evaluation,” and unequivocally states that Parents do not want to go forward with “a formal evaluation” at this time. These words cannot

reasonably be interpreted as a reference to Exhibit A, which is only a general consent to “observe, interview, and assess” [Student] and does not contain the word “evaluation.” Rather, the March 20<sup>th</sup> letter can only be construed as a specific reference to the IST’s request for initial evaluation that Parents received two weeks before. Furthermore, the reference to the “Explanation of Procedural Safeguards” in the March 20<sup>th</sup> letter is convincing evidence that Parents were referring to the Notice of Procedural Safeguards which accompanied the consent for initial evaluation, and not to Exhibit A, which makes no reference to procedural safeguards.

27. Thus, though the evidence is in dispute, the ALJ finds it more likely than not that Parents were given the required prior written notice, consent for initial evaluation, and notice of procedural safeguards required by the IDEA, but that they refused to consent to the requested SPED evaluation.

28. Also in dispute is whether Parents, despite refusing to consent to evaluation in March 2008, subsequently made their own request for a SPED evaluation.

29. Exhibit C is a letter, dated April 7, 2008, signed by [Mother] and addressed to the elementary school principal, [Elementary School Principal]. The letter reads:

This letter will serve as written request to move forward with a formal IEP evaluation to assess my son’s qualification and needs for an Individual Education Plan.

As we discussed, I certainly do hope this request will be adhered to in confidence, and that confidentiality will be maintained to preserve [[Student]’s] rights throughout the process and going forward with his education and a formal plan.

We discussed his needs over spring break and I feel a formal evaluation should continue. Please let me know how soon it can begin and if I will need to sign any other authorization. I look forward to meeting with the “team” as we continue through the process.

30. [Mother] testified that she gave this letter to a staff member in the elementary school office, but never heard from [Elementary School Principal] or anyone else about scheduling a SPED evaluation.

31. [Father] testified that, during a parent-teacher conference in the fall of 2008, he handed a copy of the letter to [Student]’s science teacher, [Science Teacher], who in turn gave it to the principal, [Elementary School Principal].

32. The School District does not have this letter in its files. Parents contend that it has been lost. The School District contends that they never received it.

33. Both [Science Teacher] and [Elementary School Principal] testified that they have no recollection of ever having received this letter.

34. Because [Elementary School Principal] was the school principal and head of the school IST, she was the senior person within the school responsible for complying with the School District’s Child Find obligations. A parent letter requesting

evaluation would have been important to her, and she would have brought the letter to the IST's attention had she received it. Yet, the IST records contain no mention of the letter.

35. [IST Data Recorder], the IST data recorder, did not recall ever seeing this letter.

36. Furthermore, the evidence is convincing that at no time did Parents follow up on their letter by contacting [Elementary School Principal], any member of the IST, or any other School District employee to see what had happened to their request for SPED evaluation.<sup>4</sup>

37. Though the evidence is in conflict, the preponderance of the credible evidence is not sufficient to prove that Parents ever delivered the April 7, 2008 letter to the School District.

38. As will be discussed below, there is ample evidence that over the ensuing years Parents did raise concern with School District teachers and administrative staff about [Student]'s poor academic progress generally, and specifically how his academic performance would affect his eligibility to play sports. However, the evidence does not prove that Parents ever specifically asked for a SPED evaluation, either verbally or in writing.

*Sixth Grade (2008/2009 School Year)  
A Good Year*

39. In sixth grade, [Student] continued to have some academic difficulty and continued to receive RTI accommodations such as small group instruction, extended time to complete assignments, and preferential seating. Frequent absences from school were also noted and discussed with Parents. Nevertheless, by the end of the school year, the IST noted that [Student]'s "classroom performance and standardized measures reflect steady grade level performance." The IST believed that [Student] was maintaining grade level expectations and no longer needed interventions. He was therefore placed on a monitoring status with no active RTI. Exhibit 14.

40. [Mother] also thought it was an "upbeat year."

*Seventh Grade (2009/2010)  
Academic Problems Return*

41. By all accounts, [Student] did poorly in his seventh grade year. He started the year with failing grades in both science and world geography, although over the course of the first semester he brought those grades up to a D and C, respectively.

---

<sup>4</sup> Two witnesses, [Mother]'s friend and neighbor, [Friend], and a teacher, [Teacher], testified that [Mother] previously complained to them that the school ignored her request to test [Student] when he was in junior high. Neither witness, however, was present when any such request was made and therefore their evidence is of limited probative value. Moreover, the fact that [Mother] referred only to a request for testing made when [Student] was in junior high, and not in elementary school, undercuts Parents' claim that they asked for a SPED evaluation in April 2008.

42. A cognitive abilities test administered at the beginning of the school year placed [Student]'s overall cognitive ability in the 19<sup>th</sup> percentile for his age and 24<sup>th</sup> percentile for his grade. Exhibit Q.

43. [Student]'s academic performance was adversely affected by the transition from elementary to junior high school, where he had to deal with a bigger school, more teachers, a wider variety of classes, and organizational challenges such as maintaining class binders and a school locker.

44. [Student]'s teachers noted that he was hyperactive and inattentive in class, did not complete or correct his work, did not follow directions, and was unable to work independently. Exhibit 15. He also continued to have excessive absences. Exhibit S.

45. The school responded to [Student]'s difficulties by reinstating RTI, and implemented interventions such special help in organizing [Student]'s binders and locker, placement in an Organizational Skills class, offers of extra help, and extended time for final examinations. Exhibit 15.

46. Despite these interventions, [Mother] felt the School District's responses were inadequate and, in November 2009, she complained to the School District Superintendent that her requests for "Parent involvement and support for our son" were being ignored.<sup>5</sup> Exhibit D. The Superintendent responded that, after investigating her complaint, he "was pleased to learn of the support and interventions" that had already been implemented, but promised that RTI support would "be even greater" in the future. Exhibit E.

47. At least part of the Parents' discontent had to do with their understanding that, due to his poor grades, [Student] would not be allowed to play basketball. [Student] was a good athlete and participation in sports was important too him.

48. [Mother] testified that, despite the rocky start to the school year, [Student] did receive better support in the spring semester. Although [Student] continued to experience problems and have excessive absences, he ultimately passed all his seventh grade classes, with mostly Cs. Exhibit S.

49. [Student]'s CSAP (Colorado Student Assessment Program) testing showed that he was only "partially proficient" in mathematics and writing, though he remained "proficient" in reading. Exhibit X, p. 1.

50. At the close of the year, the RTI team recommended that [Student] start eighth grade in lower level "intervention" science and English classes. [Mother], however, feared that putting [Student] into lower level classes would be a "huge disappointment" that might "lower his level of enthusiasm for school." Exhibit F, p. 2. The school therefore agreed to start [Student] in the regular eighth grade curriculum, though Parents agreed to consider moving [Student] into intervention level classes if it

---

<sup>5</sup> In the second page of her letter, [Mother] states "Our son has been on an IEP in your school district in the past, and the request for support was ignored." It is unclear what this statement refers to in that [Student] was never on an IEP in the School District.

became necessary.

*Eighth Grade (2010/2011 School Year)  
Further Deterioration of Academic Performance*

51. At the beginning of eighth grade, [Student] again performed very poorly, academically. His teachers noted that he remained inattentive, lacked focus and motivation in class, and often failed to complete his work or turn in homework assignments. Exhibit 16. According to [Mother], [Student] told her that although he tried to focus in class, he seemed to miss key points and he felt his comprehension was clouded.

52. By mid-November of the first semester, [Student] had failing grades in four classes (math, English, photography, and science) and a D in one other (social studies), with a large number of late, missing, or incomplete assignments. Exhibit 16. This was despite the fact that [Student] had been allowed to move to a lower level math class (from algebra I to math applications) and to drop beginning Spanish.

53. [Student]'s school counselor, [School Counselor], worked extensively with [Student] and [Mother] throughout the year. [School Counselor's] contact notes (Exhibit 24) show that she was involved in one way or another with [Student]'s case on no fewer than 40 days throughout the school year. Nevertheless, despite all her efforts, as well as RTI interventions including preferential seating, opportunities for extra help from teachers, peer tutoring, and extensions of time to complete work and turn in assignments, [Student] continued to perform poorly.

54. Overall, [Student]'s teachers believed that his poor performance was the result of lack of effort, rather than lack of ability.

55. As a result of his failing grades, [Student] was not eligible to play football.

56. In an e-mail to [Student]'s teachers and school administrators dated September 22, 2010, [Mother] shared her intention to take [Student] to his doctor to discuss the possibility that he suffered Attention Deficit Disorder (hereafter, referred to as ADHD, or Attention Deficit Hyperactivity Disorder). Exhibit G.

57. On September 24, 2010, [Mother] met with [Student]'s doctor and, to assess the possibility that [Student] suffered from ADHD, the doctor provided [Mother] with a packet of assessment forms to be completed by Parents and by [Student]'s teachers. Exhibit V. The school RTI team was aware that this assessment was ongoing. Exhibit 16.

58. [Student]'s academic behaviors, such as inattentiveness, disorganization, failure to follow directions, and lack of preparation, are consistent with, though not necessarily diagnostic of, ADHD.

59. On January 12, 2011, [Mother] told [Student]'s school counselor, [School Counselor], that [Student] had been diagnosed with ADHD and had a prescription for medication. [Mother] asked [School Counselor] to keep that information confidential

until Parents made a decision about [Student]’s medication.<sup>6</sup> Exhibit 24, p. 5. On February 7, 2011, [Mother] advised [School Counselor] that [Student] would be starting ADHD medication soon. Exhibit 24, p. 6. On April 1, 2011, [School Counselor] advised [Mother] to let the school nurse know of [Student]’s medications so that the nurse could update his health file. *Id.*

60. Although [Student] was offered the opportunity to meet with his teachers before, during, and after the school day for extra help, he very rarely took advantage of these opportunities. His teachers continued to note that he was inattentive in class, was disorganized, did not complete his homework, and did not follow directions. Exhibit 16.

61. By the end of the school year, [Student] had failed three core academic classes (fall semester English and both fall and spring semester math applications). Exhibit U.

62. [Student]’s CSAP scores remained at the partially proficient level in mathematics and writing, and was also partially proficient in science. Exhibit X, p. 1.

63. Parents were reluctant to retain [Student] in eighth grade and the School District agreed to pass [Student] to ninth grade if he went to summer school to repeat the two classes he failed. Exhibit 24, p. 8.

64. Although the RTI team was aware that the School District had requested a SPED evaluation in 2008, which Parents declined, and that [Student] was continuing to perform poorly despite RTI, it did not renew the request for SPED evaluation.

*Ninth Grade (2011/2012 School Year)  
Adoption of a 504 Plan*

65. In his freshman year, [Student] transitioned to [High School] where, according to [Mother], he was not initially offered any learning accommodations or interventions. On October 28, 2011, [Mother] complained about this oversight to [Dean of Students], the high school’s Dean of Students. Exhibit H.

66. In her e-mail to [Dean of Students], [Mother] alluded to [Student]’s “learning and organizational deficits because of ADHD,” and asked whether a case worker “for students with learning disabilities” would be available to assist [Student]. She also asked if [Student] could be placed in a LEAD (Learning and Education About Disabilities) class that she thought might help her son.<sup>7</sup> [Mother] asked that “drastic measures” be taken to help her son.

67. [Dean of Students] testified that after reviewing the school’s “D&F” report in mid-October of the first semester, the school looked at interventions it could provide [Student]. [Dean of Students] testified she was not aware that [Student] had a learning disability, and, in any event, discounted the possibility that [Student]’s problems were the consequence of a disability because it appeared that the problem was just a lack of motivation. Nonetheless, the school implemented some interventions, including peer

---

<sup>6</sup> [Mother] and [Father] disagreed on whether [Student] should be on medication.

<sup>7</sup> [Student] was not eligible for LEAD because it was not offered to freshman.

tutoring designed to help [Student] with his study habits.

68. Despite the interventions, [Student]’s academic performance remained relatively poor, with Ds in two of his five academic classes at the end of the first semester (economics and pre-physics). Exhibit BB. Although [Student] had a C in English 1, his teacher, [English Teacher], testified that [Student] was still having “tremendous problems” with his writing, which was “consistently in the D range.”

69. [Mother] testified that she was advised by the school to obtain a doctor’s written diagnosis of ADHD. Therefore, in November 2011, she provided the school with a form letter completed and signed by [Student]’s pediatrician that read:

\_\_\_\_\_[[Student]]\_\_\_\_\_ has been diagnosed with \_\_\_\_\_ ADHD \_\_\_\_\_  
and is being treated with (meds delayed, per parents, @ this time.) A  
formal evaluation for an IEP is in order to help this student succeed  
academically.

Exhibit I.

70. After receiving this letter, the School District convened a meeting that included Parents and responsible school officials. The team agreed that, due to his diagnosis of ADHD, [Student] had a substantial disability warranting accommodations under a 504 Plan.<sup>8</sup>

71. A 504 Plan is not a substitute for a SPED evaluation or for the development of an IEP if the child has a disability and is in need of special education. An IEP typically provides a much higher level of service than does a 504 Plan, including direct services on a daily basis.

72. Nevertheless, the School District representatives did not address the possibility of performing a SPED evaluation, or developing an IEP, because they did not feel there was sufficient data to suggest that [Student] needed special education. The School District representatives were not impressed by the recommendation of [Student]’s doctor for a “formal evaluation for an IEP” because they did not believe such a recommendation was within the doctor’s expertise. They also felt that the doctor’s use of a form letter suggested it was a routine, rather than a well-considered, recommendation.

73. The 504 Plan acknowledged that [Student] had difficulty learning and studying due to a diagnosis of ADHD and implemented various accommodations, including a review of the appropriateness of his class placement, access to his teachers’ notes, extended time (time and a half) to take tests, grade checks, peer tutoring, and preferential seating. Exhibit 4, p. 3.

74. On December 6, 2011, Parents signed the 504 Plan indicating their agreement with it. Exhibit 4, p. 5.

75. [Student] generally did not make use of the accommodations offered by

---

<sup>8</sup> This is a reference to section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 701.

the 504 Plan, particularly asking for teachers' notes or taking extra time for tests. Although [Student] was also offered extra help outside of class, he did not take advantage of that opportunity either.

76. Although [Student]'s ninth grade TCAP (Transitional Colorado Assessment Program) scores again placed him in the partially proficient range for writing, his rating in mathematics dropped to unsatisfactory.<sup>9</sup> Exhibit Z, p. 3.

*Tenth Grade (2012/2013 School Year)*

77. [Student] began his sophomore year with a revised 504 Plan in place that offered accommodations similar to those in the previous plan. Exhibit Y.

78. Despite the accommodations of the 504 Plan, [Student] continued to struggle academically and was in danger of failing his fall semester biology class.<sup>10</sup> According to his teacher, [Teacher], [Student] was "more than capable" of doing the work but simply lacked motivation. He did little if any work in class and often either missed class or showed up late. Despite many opportunities to raise his grade by making up late assignments and allowing extra time for tests, [Student] seldom took advantage of these offers. In [Teacher's] words, there was "obviously some kind of disconnect."

79. The School District has a policy that students receiving one or more failing grades in a given semester are ineligible to play sports. This policy presented a crisis for [Student] and his parents when it became apparent that his failing grade in biology might render [Student] ineligible to play baseball during the spring semester.

80. In response to Parents' request for a meeting to address this issue, [Teacher] met with Parents and other school officials on December 21, 2012. Despite Parents' request that [Teacher] offer some opportunity for [Student] to avoid a failing grade, [Teacher] refused. In [Teacher's] opinion, he had given [Student] multiple opportunities over the course of the semester to improve his grade, but [Student] had not taken advantage of those opportunities. His course grade was now so low that nothing could ethically be done to raise it to a passing grade.

81. [Father] was angered by [Teacher's] refusal, and left the meeting.

82. After [Father] left the meeting, the Director of Learning Services and Special Education, [Special Education Director], suggested the possibility that the School District conduct a SPED evaluation of [Student].

83. This was the first time since March 2008 that any employee of the School District mentioned to either parent the possibility of doing a SPED evaluation.

84. At the meeting, [Mother] did not respond to [Special Education Director]'s offer. [Mother] testified that she assumed [Special Education Director] had made the decision to initiate the SPED evaluation process and someone would contact [Mother]

---

<sup>9</sup> CSAP was replaced by TCAP as Colorado's state-wide academic achievement assessment program.

<sup>10</sup>

to set it up. [Special Education Director], on the other hand, believed that she had only discussed the possibility of a SPED evaluation, and was waiting for [Mother] to decide whether to request it. Therefore, no SPED evaluation was initiated during the fall semester.

85. [Student] ended the fall semester with two Ds (algebra 1 and English 2) and an F (biology 1). Exhibit BB.

86. During the second semester, [Student] was failing his algebra class. In a February 6, 2013 e-mail to [Mother], [Student]’s teacher, [Teacher], observed that he is “happy to try any accommodations” to help [Student] through his class, but that, in his opinion, doing so is “like putting a Band-Aid on an amputation.”<sup>11</sup> [Teacher] believed [Student] was “completely weak” in his math skills and modified testing or extra time was not going to help because “he flat doesn’t know how to do” the work. Exhibit L.

87. On February 8, 2013, [Mother] forwarded [Teacher]’s e-mail to [Special Education Director] and expressed her frustration that [Student] would lose his eligibility to play sports despite the existence of a 504 Plan. Exhibit L, p. 2. [Mother] also complained that she has been “asking for testing since elementary school.” Exhibit L, p. 4. [Special Education Director] interpreted this as a request for a SPED evaluation and, on February 11, 2013, asked [Special Education Department Chair], chair of the special education department, to start the SPED evaluation process. Exhibit L, p. 1.

#### *The SPED Evaluation and IEP*

88. [Mother] signed the consent for SPED evaluation on February 12, 2013. Exhibit 31.

89. Thereafter, [Student] was administered a number of standardized tests and evaluations, including the Behavior Rating Inventory of Executive Function (BRIEF), the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), the Grays Oral Reading Test (GORT), and the Woodcock Johnson III Math and Writing Tests (WJ-3).

90. The evaluators also considered [Student]’s academic record, including his TCAP scores and his scores on the School District’s Scantron Reading and Math Assessments.<sup>12</sup>

91. The evaluation report (Exhibit 6) disclosed the following significant findings:

- a. [Student]’s reading skills were in the average range, with grade equivalent at or above the tenth grade.
- b. [Student]’s writing skills were in the average range, with grade

---

<sup>11</sup> [Student] was ultimately allowed to transfer to a lower level pre-algebra class.

<sup>12</sup> Scantron assessments are computer-based tests that automatically adapt questions to the student’s skill level.

equivalent at or above the tenth grade.<sup>13</sup>

c. [Student]'s math skills were significantly below average, with grade equivalent of fifth to sixth grade, depending upon the skill tested.

d. [Student]'s cognitive abilities, as measured by the WISC-IV, varied widely. His scores in verbal comprehension and processing speed were in the high-normative range, with scores of 110 and 109, respectively, on a normative range of 85 to 115.

e. However, his scores in perceptual reasoning and working memory were well below normal, with scores of 84 and 80, respectively.

f. Because of the wide 30-point divergence in cognitive ability scores (80 to 110), it was not possible to assign a score for [Student]'s overall cognitive functioning.

g. The BRIEF provides an assessment of the child's executive functioning based upon evaluations provided by the child's parents, teachers, and the child's self-report. [Student]'s scores in global executive functioning and behavioral regulation were in the normal range. However, [Student]'s "metacognition index," which is an indication of his skills in such things as task initiation, working memory, mental planning, organizing, and self-monitoring, was below normal by Parents' report.

92. School psychologist [School Psychologist], who administered the WISC-IV evaluation, testified that cognitive test scores typically cannot be generalized to the academic setting; however, a deficit in working memory could adversely affect performance in any academic class because of impairment in the ability to store and recall new information.

93. A multidisciplinary IEP team met on April 10, 2013, to consider the results of the evaluation and the other available evidence. Team members included Parents, the school psychologist, the special education chair, the principal, and [Student]'s school counselor.

94. The team agreed that, based upon all the evidence, [Student] suffered from a specific learning disability in the areas of mathematical calculation and problem solving that prevented [Student] from receiving reasonable educational benefit from general education alone. Exhibit 6.

95. The team also developed an IEP to provide [Student] with direct special education services in mathematics.

96. Parents subsequently removed [Student] from the School District and therefore the IEP has not been implemented.

### *Eligibility to Play Baseball*

---

<sup>13</sup> According to the report, it was [Student]'s failure to complete writing assignments, rather than his basic writing skills, that was problematic.

97. An overriding concern by [Student], and Parents, has been [Student]'s academic eligibility to play sports, most recently, baseball.

98. Due to a failing grade, [Student] became ineligible to play baseball on the [team] the spring semester of 2013.

99. [Student] was notified of his ineligibility as he was dressing for the team's first game on, or about, March 13, 2013. As a result of his ineligibility, [Student] could not wear his uniform, could not travel with the team, and could not play in the game.

100. Because of his mediocre skill level, it is not clear that [Student] would have played in the game even if he had been academically eligible.

101. [Student]'s academic ineligibility did not prevent him from continuing to practice with the team; however, he could not wear his uniform, travel with the team during school hours, or play in games while he remained ineligible.

102. Although [Student] was not prevented from continuing to practice with the team, he felt embarrassed by his academic ineligibility and chose to resign from the team.

103. [Student] could regain eligibility in the future by obtaining passing grades in all his courses.

## **Discussion and Conclusions of Law**

### *Burden of Proof*

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion "where it usually falls, upon the party seeking relief." See also *Thompson R2-J Sch. Dist.*, 540 F.3d at 148 ("The burden of proof . . . rests with the party claiming a deficiency in the school district's efforts.") Parents therefore bear the burden of proving that the School District violated its obligations under IDEA and failed to provide [Student] with a free appropriate public education.

### *Issue I: Did the School District Ignore a Request for SPED Evaluation in April 2008?*

The evidence is not sufficient to prove that Parents requested a SPED evaluation in April 2008. Although Parents produced a letter, dated April 7, 2008, which clearly requested such an evaluation, the ALJ is not convinced that this letter was ever delivered to the School District. The letter is not in the School District's files and no School District employee called as a witness ever recalled seeing it. Furthermore, the fact that the letter is not mentioned in the Intervention Support Team (IST) minutes strongly suggests the letter was not delivered to the IST. Because the IST had the responsibility to comply with the School District's Child Find responsibilities, it is unlikely the IST or its individual members would have ignored the letter had it been seen.

There is a rebuttable presumption that public officials properly discharge their statutory duties. *Canyon Crest Villas South v. Bd. of County Comm'rs*, 542 P.2d 395,

396 (Colo. App. 1975); *see also Guiraud v. Nevada Canal Co.*, 79 Colo. 289, 245 P. 485, 487 (1926) (the law presumes that public officers discharge their duties in conformity with the statutes). In the absence of any convincing evidence to the contrary, the ALJ concludes that the IST, its members, and the School District would have noted and addressed Parents' request for a SPED evaluation had such a request been received.

Moreover, the fact that Parents never followed up on the April 7, 2008, request for evaluation creates additional doubt that the letter was delivered. Given their obvious concern for [Student]'s welfare, it is unreasonable to think that they would not have followed up on such a significant request had it been made and ignored.

Furthermore, even if Parents did request a SPED evaluation in April 2008, their complaint that the School District failed to respond to it would be barred by the IDEA's two-year filing limitation. 20 U.S.C. § 1415(f)(3)(C) provides that, unless state law provides for a different period:

A parent . . . shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.

*See also* 34 CFR § 300.507(a)(2) ("The due process complaint must allege a violation that occurred not more than two years before the date the parent . . . knew or should have known about the alleged action that forms the basis of the due process complaint"); and 34 CFR § 300.511(e) ("A parent . . . must request an impartial hearing on their due process complaint within two years of the date the parent . . . knew or should have known about the alleged action that forms the basis of the due process complaint.")

Because Parents had reason to know the basis of their complaint in 2008 but did not file the complaint until 2013, it was filed well beyond the deadline and is untimely.

Parents, however, argue that the untimeliness of their complaint is excused by the fact that the School District did not provide them with the Notice of Procedural Safeguards required by 20 U.S.C. § 1415(d) and 34 CFR § 300.504. Per 20 U.S.C. § 1415(f)(3)(D)(ii),

The timeline . . . shall not apply to a parent if the parent was prevented from requesting the hearing due to . . . (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

*See also* 34 CFR § 300.511(f)(2).

The ALJ rejects this argument because there is no convincing evidence that Parents' failure to file a timely complaint was "due to" lack of awareness of their rights. To the contrary, in the letter of March 20, 2008 refusing the IST's request for an initial evaluation, Parents specifically referred to the Explanation of Procedural Safeguards they had received. Having been provided notice of their right to demand a due process hearing in March 2008, they cannot reasonably claim ignorance of that right in April

2008. *DK v. Abington*, 696 F.3d 233, 246 (3rd Cir. 2012) (If parents were already fully aware of their procedural options, a school district's failure to provide additional notice cannot excuse late filing).

*Issue II: Did the School District Otherwise Fail  
to Meet Its Child Find Responsibilities?*

The School District's Child Find obligation extends beyond simply responding to a parent's request for a SPED evaluation. Per IDEA § 1412(a)(3), school districts have the affirmative obligation to ensure that any child with a disability, regardless of severity, who needs special education and related services is "identified, located, and evaluated." According to 34 CFR § 300.111(c)(1), this obligation extends to all children who are suspected of being a child with a disability and in need of special education, "even though they are advancing from grade to grade."

The threshold for suspicion of a disability is relatively low, and is not whether the child actually qualifies for special education services, but rather whether the child should be referred for evaluation. *Dep't of Educ. v. Cari Rae S.*, 158 F.Supp.2d at 1195. Knowledge of the disability may be inferred from written parental concern, the behavior of performance of the child, teacher concern, or a parental request for evaluation. *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F.Supp.2d 1307, 1310-11 (D. Utah 2002). A school district need not "rush to judgment or immediately evaluate every student exhibiting below-average capabilities," *D.K. v. Abington*, 696 F.3d at 252; however, Child Find requires a school district to identify and evaluate a child "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." *W.B. v. Matula*, 67 F.3d 484, 501 (3rd Cir. 1995).

A school district's failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE. *N.G. v. Dist. of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C. 2008); *Long v. Dist. of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C. 2011). Even though a SPED-eligible student may have received some educational benefit from general education, if the student was not properly identified and evaluated and placed on an IEP, there has necessarily been a denial of FAPE.<sup>14</sup> *Cari Rae S.*, 158 F.Supp.2d at 1196 ("No IEP, no FAPE"); see also *Knable v. Bexley City Sch. Dist.*, 238 F.3d at 766 (6th Cir. 2001) (failure to develop an IEP necessarily resulted in loss of educational opportunity).

If a child is identified through Child Find as being in need of evaluation, the school district must provide the parents with prior written notice and obtain the parents' consent prior to conducting the evaluation. 34 CFR § 300.300(a). If the parents refuse consent, the school district is not obligated to pursue the evaluation and the school district does not violate its Child Find responsibilities if it declines to do so. 34 CFR §§ 300.300(a)(3)(i) and (ii).

A "child with a disability" means a child with mental retardation, hearing

---

<sup>14</sup> This conclusion is discussed, but specifically not decided, by *Garcia v. Bd. of Educ.*, 520 F.3d 1116, 1126-27 (10th Cir. 2008).

impairment, speech or language impairment, visual impairment, serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, specific learning disability, “and who, by reason thereof, needs special education and related services.” 34 CFR § 300.8. The definitions of two of these conditions, “specific learning disability” and “other health impairment,” are relevant to this case.

A “specific learning disability” (SLD) is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. 34 CFR § 300.8(c)(10). Per § 300.309(a), a child has an SLD if the child (1) does not achieve adequately for the child’s age or to meet grade-level standards when provided with appropriate instruction, (2) does not make sufficient progress to meet standards in response to scientific, research-based intervention or exhibits a pattern of strengths or weaknesses relevant to identification of an SLD, and (3) the findings are not due to certain other enumerated causes.<sup>15</sup>

An “other health impairment” means “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that -- (i) Is due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder . . . and; (ii) Adversely affects a child’s educational performance.” 34 CFR § 300.8(c)(9).

The ALJ concludes that the School District initially met its Child Find obligation in March 2008 when it identified [Student] as potentially being a disabled child in need of special education, and properly sought Parents’ consent for evaluation. When Parents refused that consent by letter dated March 20, 2008, the School District was not, at that time, obligated to pursue the matter further.

The question remains, however, whether subsequent events renewed the School District’s obligation to pursue a SPED evaluation. In this regard, the ALJ finds persuasive the testimony of the School District’s Director of Learning Services and Special Education, [Special Education Director], who opined that the Child Find obligation is revived if, after parents have refused consent, a “body of data” gives rise to a renewed suspicion that the child has a disability that requires special education services. This is an eminently sensible position. Having been refused consent, a school district should not be required to continually pester parents with additional requests unless new information is available. If, however, a body of data collected over time shows that a disabled child continues to struggle despite RTI, the school district should not be allowed to stand by while the child fails. See *Kruvant v. Dist. of Columbia*, 44 IDELR 242 (D.D.C. 2005) (“Nothing in the federal regulations . . . limits the District’s obligation to conduct an ‘initial evaluation’ to a single occurrence that

---

<sup>15</sup> Specifically, a visual, hearing or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency. 34 CFR § 300.309(a)(3).

forever fulfills its ‘child find’ obligations as to that child, and, indeed, such an interpretation would be at odds with the child find provision of the Act.”)

Applying this common-sense rule to [Student]’s case, the ALJ concludes that the School District should have renewed its request for SPED evaluation after it became apparent that he was not responding well to RTI. Although [Student] initially appeared to respond to RTI in the sixth grade, his academic performance fell off dramatically in the seventh grade when he began to receive failing grades. Though he was able to raise his grades to a passing score by semester’s end, he was obviously struggling with inadequate organizational skills, inability to concentrate in class, and failure to turn in homework and class assignments on time. In eighth grade, his performance further deteriorated despite RTI, to the point where he was receiving failing grades in multiple classes. Given the School District’s prior identification of [Student] in the fifth grade as being a child who was in need of SPED evaluation, the fact that his academic performance deteriorated again in the seventh and eighth grades and did not improve despite RTI should have alerted School District personnel to the continuing need for a SPED evaluation.

The level of suspicion rose even higher when, in January 2011, after [Student]’s teachers completed evaluations to facilitate an ADHD evaluation by [Student]’s physician, [Mother] advised the school counselor that [Student]’s physician had diagnosed [Student] with ADHD. As noted in 34 CFR § 300.8(c)(9)(i), ADHD is a health problem that qualifies as an IDEA disability if it “adversely affects a child’s educational performance.” Although it was, at that point, certain whether [Student]’s ADHD was the cause of his poor academic performance, it was likely to have been a significant contributing factor that should not have been ignored. Though not diagnostic of ADHD, [Student]’s inattentiveness, inability to focus, failure to complete assignments, and inability to follow instructions were all consistent with ADHD. It was error for the School District to ignore that possibility. *Bd. of Educ. v. Garcia*, 520 F.3d 1116, 1127 (10th Cir. 2008) (“After all, a student’s lack of enthusiasm, at least in some cases, may be related to his or her disability”); see also *Hawaii v. Z.B.*, 52 IDELR 213 (D. Hawaii 2009) (“school district’s attribution of lack of progress to lack of motivation is a fundamental misunderstanding of ADHD.”)

The fact that [Mother] did not initially provide a written ADHD diagnosis from [Student]’s physician does not excuse the School District from its Child Find obligation. A school district may not evade its Child Find responsibility by a parent’s failure to obtain a medical diagnosis. *M.J.C. v. Special Sch. Dist. No. 1*, 58 IDELR 288 (D.Minn. 2012) (“school districts cannot shift their assessment responsibilities to parents.”) In any event, the School District still did not initiate the SPED evaluation process even after [Mother] provided a written diagnosis in November 2011.

The School District’s Child Find obligation was not extinguished by the fact that it placed [Student] on a 504 Plan in December 2011, after having received the physician’s written diagnosis. Where, as here, there was evidence that [Student] had a qualifying disability and was struggling academically despite previous interventions, the School District was obligated to evaluate him for special education, and not rely upon just a 504

Plan. Though a 504 Plan is appropriate in certain circumstances, it is not an adequate substitute for an IEP. *Muller v. Islip*, 145 F.3d 95, 105 (2nd Cir. 1998).

Thus, Parents' refusal to consent to a SPED evaluation in 2008 did not eliminate for all time the School District's Child Find responsibility. The ALJ concludes that [Student]'s poor academic performance in seventh grade and thereafter despite multiple forms of intervention, together with Parents' concerns and the disclosure of the ADHD diagnosis, was an ample body of data to warrant the suspicion that he was a child in need of special education. Thereafter, the School District's failure to re-initiate a request for evaluation until February 2013 was a violation of its Child Find responsibility.

As with the allegation that the School District failed to perform an initial evaluation in 2008, the complaint of a continuing Child Find violation is also subject to the two-year time limitation. Because the complaint was filed April 30, 2013, the period of time for which the violation is actionable extends back to April 30, 2011.

### *Issue III: What Is the Proper Remedy?*

Initially, the ALJ notes that the School District's multidisciplinary IEP team has already developed an IEP. Although, at the time, Parents objected to the IEP because it was allegedly prepared without their input and left out "vital accommodations," the adequacy of that IEP was not raised by the due process complaint and is not a subject of the hearing. Therefore, the ALJ declines to address it. Rather, the issue before the ALJ is what remedies are appropriate for the past denial of FAPE.

At the close of the hearing, Parents asked for three forms of relief: (1) compensatory education sufficient to place [Student] in the position he would have been but for the past denial of FAPE; (2) retention of a consultant to conduct an independent educational evaluation and formulate a remedial plan; and (3) appropriate relief to compensate [Student] for the loss of academic eligibility to play baseball.

The ALJ agrees with Parents that compensatory education is necessary in an effort to place [Student] in the academic position he would have been but for the denial of FAPE since April 2011. Under the IDEA, a court has broad discretion to grant an aggrieved litigant "such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). Appropriate relief is interpreted as equitable and primarily includes compensatory education. *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-18 (3rd Cir. 2009). Compensatory education is designed to replace educational services the eligible child should have received in the first place. *Id.* Hearing officers may award compensatory education in administrative hearings. *Batchelor v. Rose Tree Media Sch. Dist.*, 61 IDELR 22 (E.D. Pa. 2013).

The record before the ALJ, however, is not sufficient to permit the ALJ to determine what the elements of that compensatory education should be. That is a decision best suited to the expertise of the IEP team. The ALJ does not agree with Parents that a consultant or independent educational evaluation is necessarily required to devise a remedial plan of compensatory education. Although the School District did not fulfill its Child Find obligations, the ALJ finds no convincing evidence that the School

District and IEP team cannot be counted upon to meet that obligation now. To the contrary, during the course of the hearing the ALJ heard from many School District teachers and administrative staff who take their special education responsibilities seriously and who appear competent and dedicated to the task. The School District's failure to renew its effort to obtain a SPED evaluation was due, at least in part, by the perception that Parents were primarily focused upon [Student]'s eligibility to play sports and not by his academic performance, that Parents were reluctant to have [Student] "singled out," and by School District personnel's assumption that [Student]'s poor performance was due to lack of motivation rather than a disability. While those factors do not excuse the School District from its Child Find obligation, they do help explain why it failed to meet that obligation.

The ALJ therefore remands this matter to the School District and its IEP team to review [Student]'s academic record and, in consultation with Parents, develop an appropriate plan of compensatory education. The compensatory education plan must consider not only [Student]'s specific learning disability in math, but also his ADHD which may be contributing to his inattention, disorganization, and lack of motivation in class. The plan should address not only [Student]'s weakness in math, but also his failure to perform adequately in other core subjects. The compensatory education plan may include private tutoring if the School District lacks sufficient in-house human resources. *Batchelor v. Rose Tree Media Sch. Dist., supra* (compensatory education may include private tutoring and summer school) (citing *D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 499 (3rd Cir. 2012)). The School District, of course, must bear the expense of the necessary compensatory education. *Miener ex rel. Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986) (compensatory education services requires a school district "to belatedly pay expenses that it should have paid all along" to educate a child.)

Finally, the ALJ makes no order regarding [Student]'s access to extracurricular activities. The IDEA obligates school districts to ensure that children with disabilities have an equal opportunity to participate in extracurricular activities, such as athletic programs. 34 CFR § 300.107. Nothing in the IDEA, however, requires that a school district guarantee that every child be allowed to participate at the same level as every other child. In this case, there is no convincing evidence that [Student] was ever denied access to any school sports program, including baseball, due to his disability. Although his disability may have contributed to his poor academic performance and his poor academic performance resulted in his loss of eligibility to play in games, he was not prohibited from continuing to participate by joining and practicing with the sports teams, and therefore was not denied access to the extracurricular program. Thus, the ALJ finds no violation of FAPE from the fact that [Student] was academically ineligible to play in games, and therefore no remedy is required.

### **Decision**

In summary, the School District denied [Student] FAPE by failing to renew its request for parental consent to evaluation in the two years prior to the filing of the

Parents' IDEA complaint. [Student] is entitled to compensatory education to remedy that failure. The matter is returned to the School District's IEP team to meet in consultation with the parents and devise an appropriate compensatory education plan. That meeting shall occur **no later than 30 days** following service of this decision.

This decision is the final decision of the independent hearing officer, pursuant to 34 CFR §§ 300.514(a) and 515(a). In accordance with 34 CFR § 300.516, either party may challenge this decision in an appropriate court of law, either federal or state.

**Done and Signed**

July 11, 2013

---

ROBERT N. SPENCER  
Administrative Law Judge

Exhibits admitted:

For Parents: exhibits A – BB

For the School District: exhibits 1 – 32