

**DELAWARE DEPARTMENT OF EDUCATION**  
**SPECIAL EDUCATION DUE PROCESS HEARING PANEL**

(“Student”)  
Petitioner

v.

DE DP 16-01

CAMPUS COMMUNITY SCHOOL  
Respondent

**OPINION AND ORDER OF THE DUE PROCESS HEARING PANEL**

Date of Petitioner’s Application: JULY 31, 2015

Original Hearing Date: October 14 and 16, 2015

Date of Hearing: October 14 and 16, 2015

Submitted: October 23, 2015

Decided: November 6, 2015

For Petitioner:	Lauren O’Connell Mahler, Esq.
For Respondent:	Allison J. McCowan, Esq.
Panel:	Laraine A. Ryan, Esq. Dr. Vicki McGinley Mr. John Werner

## **SUMMARY OF HEARING DISPUTE**

The parties dispute whether:

1. The Statute of Limitations is cause to dismiss the case;
2. CCS met its Child Find Obligations to timely identify and evaluate Student;
3. The March 28, 2012 Evaluation Summary Report was sufficiently comprehensive to identify Student's special education and related special services needs;
4. The Section 504 Plan was adequate to meet Student's needs for meaningful educational progress;
5. CCS provided an appropriate placement in the Least Restrictive Environment;
6. The IEP was adequate to meet Student's needs for meaningful educational progress;
7. CCS provided sufficient Homebound Instruction during a long absence due to Pertussis.

Parents request CCS be required to offer full days of compensatory education from the start of the 2011 school year through September 24, 2014.

### **STATEMENT OF RESPONDENT'S POSITION AND MAJOR POINTS PRESENTED**

Respondent Campus Community School ("CCS") takes the position that CCS did all it could to assist Student. CCS followed the law and accepted all doctor's notes. CCS involved and worked with Parents. CCS evaluated Student in the 4<sup>th</sup> grade and implemented a 504 Plan. The 504 was reviewed and modified at the end of 4<sup>th</sup> grade and implemented throughout 5<sup>th</sup> grade and 6<sup>th</sup> grade. During a long absence at the beginning of 6<sup>th</sup> grade, CCS provided Homebound Instruction. CCS created and began to implement an IEP toward the end of 6<sup>th</sup> grade, but Parents removed Student from CCS. CCS asserted that Parents lacked in follow-

through and that CCS could not control or force Parents to do their part at home, or force Parents to get Student to school every day.

Student's absences were explained in doctor's notes, which CCS took at their word. Student did not display any behavior that would require the School to do a Functional Behavior Assessment. Student's absences were excused.

### **STATEMENT OF PETITIONER'S POSITION AND MAJOR POINTS PRESENTED**

Petitioner's position is that CCS did not provide the Education required under the IDEA. Parents were diligent in trying to get help for Student. CCS did not adequately review the Capitol School District records for Student for Student's first 3 grades. These records raised many red flags about Student. For the first 6 months, CCS did not offer any support, though student was frequently absent, frequently left the classroom, struggled academically and struggled with organization and focus, and had trouble making friends.

CCS did not identify student's absences and behaviors as indicators of a need for help, but threatened Parents with truancy charges. Student is medically fragile, suffering from illnesses with several diagnoses. When CCS finally evaluated Student, it did not do comprehensive testing. CCS did not evaluate Student in all possible areas of disability. It did not recognize a reading deficit and evaluate and create an IEP, when Student was clearly eligible. It was also known at that point that Student has ADD, executive function difficulties, sensory difficulties and cognitive deficits in processing and memory. School proceeded with an inadequate 504 plan.

CSS did not use proper testing nor account for a dramatic increase in absences for the 5<sup>th</sup> grade, in which absences more than doubled.

When Student developed Pertussis in the Summer/Fall of 2013, CCS created a 2-month delay before providing homebound instruction.

Parents requested an independent evaluation. The Evaluator found the memory and processing deficits, the executive functioning deficits, and the resulting difficulties organizing, planning and managing Student's study. The evaluation found a learning disability in reading, which cannot be addressed by a 504 plan. The Evaluator also confirmed the ADHD.

Parent asked for support, but finally hired a tutor. CSS finally developed in IEP in the spring of 2014, but that IEP was still insufficient. It did not account for Student's 233 absences over 3 school years (excused, due to illness).

Parents argue that CCS's failures throughout the three years of Student's attendance resulted in Student being behind in several domains.

Petitioner requests relief: a finding of failure to provide a free and appropriate public education (FAPE) throughout the 3 years at CCS; failure of Child Find duties; and award of full days of compensatory education from October 2011 through September 24, 2014; inclusive of ESY for the summers of 2012, 2013 and 2014; in an amount equal to the educational deprivation for CCS's failure to appropriately address Student's educational needs (in the form of a monetary fund maintained by an independent trustee for the educational needs of Student to be used at anytime until Student's 21<sup>st</sup> birthday); and payment of Parent's reasonable attorney's fees and costs.

### **FINDINGS OF FACT**

Student entered Campus Community School in 2011 for the 2011-12 School year as a 4<sup>th</sup> grader. Student continued there as a 5<sup>th</sup> grader for the 2012-13 school year. Student was considered a student there for the 2013-14 school year as a 6<sup>th</sup> grader, though Student had along

absence at the beginning of the year. A tutor homeschooled the Student in the summer of 2014 and throughout the 7<sup>th</sup> grade 2014-2015 school year, continuing to the present time.

#### General Education Teacher

While Student was in the 4<sup>th</sup> grade and 5<sup>th</sup> grades, Student was in the General Education Teacher's multi-grade classroom for 4<sup>th</sup> and 5<sup>th</sup> grades. The General Education Teacher did not look at Student's records from the Capitol School District. The GET took some time to get to know the Student. The GET was trained to look for anything unusual. There is an adjustment period at the school at any rate, because it does not use a traditional teaching style. New students need to be observed for a time of whether they are adjusting to School's group instruction format.

The General Education Teacher testified that Student was extremely shy. They worked on bringing Student out of Student's shell. Student was very helpful. Student made some great friendships. Student did struggle academically and "tended to avoid." In the 5<sup>th</sup> grade, the GET found that Student had friends and was doing better socially, so they focused more on the academic issues.

The GET tutored Student after school on some occasions. This was to help Student learn to reflect on Student's reading. Student had a hard time getting Student's ideas on paper.

The GET was in constant contact with Mother. They would discuss Student's health and what could be done in the classroom to help Student.

The GET noticed Student's medical issues. Student visited the bathroom frequently and had gastrointestinal issues. This made it difficult for Student, in that Student was missing big chunks but had to produce the same quality of work as the rest of the students. In addition, a lot of the work was group work, which required self-direction in the students.

Student had trouble keeping up with the work. However, the 4<sup>th</sup> grade is a transition years, and it is typical for students to struggle with keeping up with the work.

Student had an optic issue and the GET responded with the use of overlays for reading.

In addition, the School's environment is different from that of a public school. It is a "workshop" environment, and as such, class attendance is very important. The school does not use textbooks, making it harder to make up absences. In-class discussions are a big part of the process at the School.

Student got low but passing grades (CCS 22, Student's 4<sup>th</sup> grade report card). The grades are read from a high of 4 down for the Concept/Skill sections, and from a high of 5 down for the persistence, self-direction and reflection sections.

The GET filled out CCS 12, dated January 19, 2012. It was a form called "Instructional Support Team Request for Consultation." Concerns were noted to be Academic and Other (Health). GET wrote that Student struggled throughout the school year in all subject areas. Even when Student is in school, Student needs to go to the bathroom or get a drink frequently. Therefore, Student is missing a lot of instruction time. When working with Student, Student appears "not there" and has a hard time recalling information and applying to task." The Implemented Interventions are overlays, which did not always help, manipulatives and multiplication charts, which sometimes help, but sometimes the manipulatives are more distracting than helpful. Audio books are used to help with reading.

Regarding Parent Contact, the GET wrote that GET and parents were in constant contact and that Mother had shown equal concern and desire to find some answers, and had been supportive in finding audio books and working with Student at home.

CCS 12 triggered to School to set a meeting. On January 25, 2012, the Instructional Support Team meeting was held. CCS 16 is the minutes of that meeting. The meeting notes summarize Student's struggles and the interventions to date. The School received permission for an evaluation.

The School Psychologist performed the evaluation. (CCS 17). This evaluation determined that the Student was: in Reading, average in comprehension and low average in oral reading fluency; in Written Expression, average in spelling skills and low average in Essay Composition, average in sentence composition and low average in sentence building. In Math, Student was low average in numerical operations and average in math problem solving. The Evaluation recommends: speech/language evaluation, noting that identification as learning disabled would be premature without it, further investigation into emotional concerns and discussion of impact of health issues, review of health restrictions and their impact on class attendance, and an update on ADHD treatment.

CCS 27, dated March 28, 2012, is a summary of the Evaluation. It is meant to be in parent-friendly language. It concluded that Student did not meet the eligibility criteria to receive special education and related services in the categories of Learning Disability and Speech and/or Language Impairment. The category of "Other Health Impairment" was not considered.

However, School made a Section 504 Referral (CCS 28) signed by SET on April 5, 2012. The reason for the referral was: diagnosis of ADHD, and difficulty in classroom with focus/attention to directions/instruction.

There was a meeting to draft the 504 plan. Parents did not attend the meeting.

The 504 plan (CCS 32) of April 18, 2012 made accommodations for ADHD and scotopic sensitivity: preferential seating during small/large group instruction, small group instruction to

re-teach concepts/skills; earplugs/headphones/listening to music, privacy shields during independent work time, overlays when reading for an extended time, DCAS accommodations, having Student repeat directions, and pairing of verbal information with written instructions/examples.

Student tried to use these accommodations. She would forget to use the overlays, so Mother obtained colored glasses. Student would forget to use these, too. The GET reminded student as often as GET could.

When it was time to review the 504 plan in April 2013, the Parents did not make that meeting either. There are time deadlines for having the meeting, so if a number of attempts to schedule meeting with Parents don't work out, the School has to go forward with the meeting, even if it is not ideal to have one without parents.

The GET believed that in 5<sup>th</sup> grade, Student became happier and made more friends. Student earned passing grades. Student was not at the top of the class, but not at the bottom of it, either. There was nothing to indicate that Student needed to be evaluated for an IEP. The GET noticed that Student was absent a lot, and the GET reached out to Father to ask if Student was still coming to School. Absences are a major factor in success at school.

There was a great deal of communication between the GET and Mother. The GET was not familiar with P2, part of Student's earlier records, an Initial Evaluation regarding Occupational Therapy on student from December 18, 2009, when Student would have been in 2<sup>nd</sup> grade. This report recommended interventions for Student: Therapeutic Activity, Visual Motor Activities, Self Care Tasks, and Sensory Processing Tasks. GET was not familiar with P8, an Instructional Support Team Referral dated September 23, 2011, indicating that School was informed of IST from previous school. P13, the School Psychologist's Evaluation, did not



include cognitive testing. It did not consider the eligibility criteria for Other Health Impairment disability category. The GET was not aware of that.

The Student continued to have many, scattered, excused absences due to medical issues. Student has 11 diagnoses. A simple cold will affect 5 of them and make them worse. Different medications for different conditions may counteract each other. When Student is hit with an illness, it hits hard and causes Student to miss more days than a typical student would. P37, a Student Attendance report, reports Student's attendance from September 6, 2011 to June 5, 2014.

P22 is a core report for MAP, which tracks progress, as a one-day snapshot. The bottom line is Student's progress. The GET testified that the School had stopped using these tests, because they were inconsistent. The one-day snapshot could be affected by a stomachache that day, for example. Even so, the GET believes the graph showed Student had made some progress.

CCS 35 is Student's report card. School operates by the trimester. The grades for each trimester are not averaged for a school year.

The 504 plan was reviewed at the end of Student's 5<sup>th</sup> grade school year. (P21). The new plan for that year was much the same, but left out the use of overlays and music because Student was not using those accommodations. This was because it differentiated Student too much in class. Other students wondered why they could not listen to music in class. The privacy screen set Student aside from the class.

#### Special Education Teacher

The Special Education Teacher testified that SET started working with Student when Student first came to CCS at the beginning of 4<sup>th</sup> grade. The SET entered classrooms and helped students at certain times of day. For Student, that time was during math. Other times, the

SET took a small group into the hallway, where it was quieter, to help them. SET would take the manipulatives or whatever else they needed. SET then read the questions to Student, explained how to solve the problem, modeled it with Student and then had Student follow through.

The SET got involved in IST meetings if a student was not making progress. SET did not work with Student daily. SET did notice that Student was often in the bathroom, noting that Student had a water bottle with Student. SET observed that the frequency of the bathroom trips harmed Student in that Student would leave and return from the bathroom, but then there was not enough time for Student to regroup and concentrate on the material before class was over. Student was willing to learn and the SET never had any problems with Student.

The GET communicated GET's concerns to the SET, via CCS 12, the Request for Consultation with Instructional Support Team. SET then sent CCS 9, an email to Mother to set up a meeting. The email, dated January 8, 2012, set up a meeting for January 25, 2012. It was sent to the GET and two other people and to Mother.

The SET did not have anything to do with the evaluation, as it was performed by the School Psychologist. The SET reviewed CCS 17 (School Psychologist Evaluation) – it recommends a speech and language evaluation to “review health restrictions and their impact on class attendance.”

The speech and language evaluation, CCS 24, concluded that Student did not require speech and language therapy. Struggles and weakness alone are not enough for an IEP.

Next was the 504 Plan meeting. After two to three attempts to contact a parent are unsuccessful, the meeting goes ahead without the parents.

The SET composed the 504 plan, using recommendations of the rest of the team. It is not clear whether or not parents were at these meetings. However, it is possible to have these

meetings without parents. The conclusions of the meetings will be sent home and the parents can ask any questions they may have. The SET does not recall Parents having any problems with missing meetings or with the documents sent to them from the meetings.

The 504 plan was implemented. The SET was not much involved in the implementation and does not recall working with student during this time. This SET did not work with Student in the 5<sup>th</sup> grade.

However, it is difficult to implement a 504 plan if the student is not in school. The SET was aware that Student was missing a lot of school.

A Functional Behavior Plan is for extreme behavior, noncompliance and not following rules. It was not necessary for the Student, who never exhibited a behavioral issue.

The SET was not aware of Child Find duties of a school, becoming more aware of them in the last year.

The SET testified that there are indicators of a child perhaps needing a special education, such as not progressing in spite of interventions. Other factors would be poor grades, problem behaviors, difficulty paying attention and focusing, lack of social skills and friends, poor performance on standardized testing, still struggling after interventions, and medical diagnoses. A lot of absences can be an indicator.

The School Psychologist's report and the GET's observations did not raise any suspicions of Other Health Impairment to the SET. The SET did not recall why the team did not consider the Other Health Impairment category, though Student came to the School already diagnosed with ADHD.

Sixth Grade Teacher

The 6<sup>th</sup> grade teacher, also qualified in Special Education, testified that SGT reviewed Student's file at the beginning of the 2013 school year, 6<sup>th</sup> grade for Student. The SGT was familiar with Student's 504 plan. SGT did not meet student, as student was absent due to Pertussis. The SGT was aware, via email from Father, that Student had Pertussis and that absences were an issue. The SGT talked to the Director of the Special Services Department as the absence continued. The SGT and Student's other teachers provided the work and assignments to Student's home. The SGT was not told SGT had to do anything else.

The work came back to SGT at a rate of about 50%. There was a long delay between sending it out to Student and getting it back. The SGT was in contact with the Homebound Teacher. The Homebound Teacher told the SGT that the Student was struggling to complete the assignments.

When Student returned to school in January, 2014, the SGT transitioned Student back into class and tried to catch Student up. Student was pleasant, cooperative and willing to learn. That class had 10 students, and Student got along with them. Student participated in the class activities. Student did not ever tell SGT that Student could not do the work or was not willing to. The SGT felt that the Student was working with SGT and that Student had confidence.

The Student had missed the Fall DCAS. At the Spring DCAS, Parents did not want Student to take the test. Student took it later with the Director of Special Services.

Family requested an Independent Evaluation. CCS 63 is the Evaluation, completed by a Learning Disabilities Specialist on May 8, 2014. Page 8-9 of CCS 63 contains the LDS's 18 recommendations. LDS also concludes, on page 8: that Student is exhibiting ADHD, combined type, significant processing problems in short-term and working memory, an executive function disorder and a learning disability in reading.

CCS 69 is an IEP, dated May 27, 2014. The SGT and the Director of Special Services wrote it. It created a placement in a regular setting, including pull-out related services and team classrooms. There were to be accommodations for Statewide Assessments. It contains goals for reading comprehension, and focus and attention.

### Homebound Teacher

The Homebound Teacher testified that the School's Curriculum Instructor contacted HBT about Student in late September, 2013. HBT's job was to make sure that Student had the materials, that the materials were explained to Student, and that Student not fall behind in the 6<sup>th</sup> grade curriculum. However, the HBT did not do math. The HBT did English/Language Arts, Social Studies, and Health. The HBT met with the teachers who would have been Student's teachers had Student not been absent.

The HBT found Student pleasant, compliant, and receptive, but with confidence issues. The Student did not ask questions. The HBT tried to encourage Student to ask questions.

The HBT stayed in contact with each teacher with whom Student had a class. The HBT's notes (CCS 52) show some issues with work completion. HBT was not aware that Student had any learning disabilities, but knew to differentiate with Student, making sure instructions were clear, giving reasonable deadlines, allowing resubmissions and re-teaching if necessary.

The HBT provided instruction and then left work for Student to do. HBT would go to the house in the morning and explain what work needed to be done and ask Student if Student had questions or needed anything else explained. Then when HBT returned, they could go over the work. Student tried to do it all, but Student did not have good work habits for a 6<sup>th</sup> grader.

Student enjoyed reading and writing a memoir. Student is more geared toward the humanities, and is creative.

Student did not demonstrate behavioral problems. There was some passive aggressive avoidance of doing the work Student was struggling with. The HBT thought Student should do more independent work. The HBT also thought Student, having lack of practice in study habits, needed to start getting back to school at least part time.

There was a question of whether Student received the required 5 hours per week of Homebound Instruction. CCS 52 shows 12.25 hours over the period from October 29 to December 16. This is an 8 week period. This falls short of 40 hours considerably. The HBT teacher explained this had to do with the holidays (This would only include Thanksgiving and presumably 3 hours would be due for that week, leaving 37 hours for the period in question). It also had to do with rescheduling for times when either party or parents were not available. Furthermore, the instruction did not begin until October 29, leaving most of the month of October without instruction for Student.

#### Tutor

Parents hired a tutor who began working with Student on April 1, 2014 and continues to tutor Student up to the present. During the summer, Tutor taught Student for at least 2 hours per week at first, increasing to 4 hours per week, then to 9-11 hours per week as the school year began and through the 7<sup>th</sup> grade school year. At the present time, the 8<sup>th</sup> grade school year, Tutor teaches Student 5 hours per week. Tutor teaches student all subjects, focusing on reading and math.

Tutor assessed Student at the beginning and found that Student had gaps in several areas academically. Student did not know how to multiply or divide, and did so in Student's own way,

which took a great deal more time, and was lacking deep levels of comprehension. It would take Student 4 minutes to do what could be done in 30 seconds. Tutor had to take Student back several grade levels to fill in the gaps. Student was missing foundational strategies that had caused Student to come to a standstill. Student was capable of progress, but did not have what Student needed in order to make progress. The gaps were of material missing from as early as 2<sup>nd</sup> grade, and included material from 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grade as well. Student's absences widened these gaps.

In reading, Student would lose Student's place reading from line to line. When given something to track Student's place, Student became too focused on keeping Student's place to get much comprehension out of what Student read. Students develop strategies over time to help with reading comprehension, and Student had missed out on that. Tutor therefore went back to material from earlier grades to fill in the gaps and help Student with reading comprehension. Tutor and Student went over emergent reader strategies.

Tutor testified that the reading issues spilled over and affected Student in Science and Social Studies.

Tutor found Student to be a pleaser, funny, and insecure about learning. At first, it was hard for Student to ask for help. It took Tutor awhile to create a safe place for Student not to be embarrassed to ask for help.

Student lacked study skills and could not study independently. It was necessary to write down for Student what Student had to do, and to break things down into steps. Student needs explicit directions. Student became nervous and did not know what to do without these. Tutor also avoided the terms "quiz" or "test" in favor of "assessment" because the first two words

make Student nervous. Student did not know how to study for an assessment. Tutor and Student would make up note cards together.

Tutor created a system of “interactive notebooks” to help Student to access prior knowledge, which had been a problem for Student. These interactive notebooks helped Student. Student would put things in Student’s own words and draw pictures. To start a lesson, Student needs to look at the interactive notebook and warm up by accessing the prior knowledge.

Student is a visual learner and is not good with auditory instructions. If a multi-step task is communicated to Student only audibly, Student cannot remember past the first step. It was important to break down the steps and put them on note cards, so that Student could complete the first step and then turn to the next card for the next step.

When reading, it was hard for Student to make pictures in Student’s mind of what Student was reading. Graphic novels helped. Student and teacher then developed a system where student made Student’s own pictures of what Student read, or a timeline. Student needs frequent breaks when reading, to stop and summarize what Student had read.

Student had no strategy for dealing with the spelling of words Student did not know. The only way Student dealt with that was to write them down phonetically.

Student has a hard time with organization. A blank page will confuse and overwhelm Student. Organizing a lot of research for a project is also overwhelming. Student needs a skeleton outline to get started. Student needs “wait time,” - a chance to process what is being asked of Student and form a plan on how Student is going to attach the assignment.

Student pushes through on Student’s own, trying to figure something out, rather than asking for help. It took Tutor some time to get Student to tell Tutor that Student did not understand something and why. But now, Student is comfortable asking for help.



Tutor observed helps student's health issues affected Student's learning. Student is distracted by sensitivities to temperature. It was hard for student to get Student's mind off being cold or hot and to start work. The solution was to dress in layers. Background noises distract Student, who has a hard time tuning them out. If clothes are bothering Student, for example, by causing itching, Student has to change clothes.

When Student gets a cold, it causes Student more problems than typically and Student gets hit hard when Student does get an illness, more than for usual for the illness. Therefore, Tutor would take hand sanitizer for Student on any Field Trips they took, and make sure Student washed Student's hands, to lower the chances of Student catching an illness.

With Tutor, Student has made progress. Student's mind works in a unique way. Student is creative and artistic. If Student feels safe and supported and has accommodations, Student does very well. While at first Student was very hesitant to take risks, Student is now able to.

Tutor found Mother to be a very involved parent. Most parents would only consult with Tutor for a few minutes at the end of tutoring sessions. However, Mother consults with Tutor frequently, seeking to be able to supplement Student's learning in what ways she can. If Student is too sick for a session, Mother makes it a priority to make sure the session is rescheduled. Since Student gets sick more than average, this happens often. Mother and Tutor have arranged for lessons by Skype or email. Email assignments are returned to Tutor so Tutor can grade them.

Parents have set up a classroom in their house. On some occasions, Student goes to the Tutor's house.

Tutor was in communication by email with some of the teachers at CCS. At some point, Tutor knew of the IEP but does not recall the evaluation process. Comparing Tutor's methods with the IEP, Tutor agreed that Tutor also, as in the IEP, made checklists of homework, added

visual aid to verbal instructions. There was a difference in that the IEP called for small group instruction, whereas Student and Tutor did one on one instruction.

### Mother

Mother testified that Student had 11 medical diagnoses. Student had been a failure-to-thrive baby, and could not eat solid food until age 5. Coughing and vomiting due to the cough often affected Student. A cold affects 5 of the diagnoses, making a cold a harder prospect for student than for most people. A respiratory illness affects Student with wheezing, and the Student needs inhalers and sometimes oxygen. Coughing causes vomiting, which in turn slows down eating.

Student attended 2<sup>nd</sup> and 3<sup>rd</sup> grade in the Capitol School District. Student struggled with reading. And RTI reading program did not help. For 4<sup>th</sup> grade, Parents moved student to CCS. CCS had smaller classes and Mother felt positive. CCS had Student's records from Capitol School District. Looking back, Mother said the only thing she might have done differently was push more, as that seemed to be needed to get CCS to help Student. Student still struggled, however. The GET tried to help, but did not have school support. The GET referred Student, concerned that Student's reading and organization were not up to potential.

Student had trouble concentrating during testing. Student could be distracted by a phone ringing down the hall or another student tapping a pencil.

Mother believed Student should be getting OT, but that Student was not getting it, but also that the GET was trying to help and willing to do anything to help.

The GET had Student use headphones or a visual block. Mother felt GET was "trying to help my [child]." Mother did not know about IEPs, etc. Mother did do the same things at home to help Student." Student was considered for O.T. Mother thought Student qualified for O.T. but

Student did not seem to receive it. Mother was concerned. Student did poorly on the DCAS and the STAR. Student was getting low grades.

Though Student's absences were excused and due to illness, CCS sent warning Letters regarding attendance to parents. (CCS 6, 7 and 8 and P9).

Mother gave School permission to evaluate Student on January 19, 2012. Testing was completed. Mother considered the document (CCS 13). Mother signed it. It was as if "you were speaking French to me. I said, yes, help my [child]," and with that frame of mind, Mother signed the document.

At a meeting, Mother learned of the 504 plan. She heard that Student was "too smart for an IEP." Mother felt confident that the School professionals were correct and that the 504 plan was good and that Student was getting what Student needed.

There was a question of whether Student was dyslexic. Doctor at AI DuPont Hospital had mentioned it to Mother in the summer before 4<sup>th</sup> grade. Evaluator considered this, but concluded that Student was not dyslexic. Mother had gone to seminars herself in the summer before 4<sup>th</sup> grade, in order to learn to help Student. Student had a tutor that summer.

However, Student continued to do poorly, even after implementation of the 504 plan. Mother did not ask for an IEP, because she had learned that Student was "too smart" for an IEP, and thus it did not occur to her to ask for one. One problem with the 504 plan was that it segregated Student out from the class. The rest of the class could not use headphones (listening to music on an ipod), so Student wouldn't either. The privacy shield was also uncomfortable for Student. At first, these accommodations seemed to be a good idea, but over time, they made Student uncomfortable, drawing attention to Student and making Student the different student in the classroom. Student did use the overlays, which had less of such an effect.

The GET told Mother that Student was not using Student's ipod/headphones or the other accommodations. The plan was "not working for (Student)." Mother wondered what to do next. She even considered getting ipods for the rest of the class.

In spite of this, everyone still tried to implement the 504 plan, going into 5<sup>th</sup> grade. Student absences increased in the 5<sup>th</sup> grade. These absences were excused. On occasions where there was no doctor's note, one could have been obtained. Mother had to go into school to write up absence notes, and life was very busy, with the Family adopting infant twins.

Mother did not know of the existence of Homebound Instruction. No one at school suggested it as a result of the many absences.

In July 2013, Student developed symptoms of a cold, with a cough and runny nose. Student used Student's as-needed medications, such as a nebulizer. By the end of July, the condition grew worse and Mother took Student to the doctor. In the second week of August, Mother took Student to the doctor again. Student needed treatment for vomiting, and the medications for vomiting counteracted the medications to help with Student's respiratory problems.

On August 30, 2013, Mother took Student to the doctor again. Mother had suggested that it was possible that Student could be in Pertussis. The doctor said not to worry about that, as Pertussis has not been seen in decades. In the parking lot leaving the doctor's office, Student vomited. Mother took Student to AI DuPont Hospital.

At AI DuPont, doctors ordered full respiratory testing, and diagnosed Pertussis.

Student's next three months were difficult. Student was in bed for 3 months, using oxygen. Student lost weight, unable to eat. Student was scared and depressed.

Mother warned the school, since Pertussis is contagious. From then, Mother was in constant contact with the school to get work for Student to do in Student's absence due to Pertussis. Student wanted to go to school. But Student was not cleared by doctor's note until January 15, 2014. On none of the days that Student missed from August 2013 was Student healthy enough to go to school.

P24 has, in addition to Student's diagnosis of Pertussis, general indicators that Pertussis can last up to 8 weeks. However, Student's prior diagnoses mean that general information does not apply to Student. Five of Student's pre-existing diagnoses were respiratory in nature. Student's Pertussis resulted in 11 phone calls to Student's doctor, 6 visits to the doctor, and 4 visits to AI DuPont Emergency Room.

During the absence, School did not do anything except send work home for student. School did not express curiosity as to why Student was absent so long. No homebound teacher was offered, no partial-day program was suggested, no meetings convened, no offers to do lessons or attend class by Skype, and once Student returned, no transition plan was created. Mother did not know Homebound existed. When Mother informed School that Parents had hired a tutor, School did not offer any supplemental tutoring. Mother did not know these things could be offered, and would have accepted them if offered.

Finally Mother learned of the possibility of Homebound Instruction; and that to obtain that form of instruction, Mother needed a doctor's note. Mother obtained CCS 50 and faxed it to School two or three times. School claims it received it on October 9, 2013. Mother testified that she had faxed it to School on September 26.

The next step was for the School to approve the Homebound instruction. The entire process took some time, as the first Homebound session for Student did not occur until October 29, 2013.

It was understood that Student should receive a certain number of hours of Homebound instruction per week, and that it was not equal to the number of hours in a regular school day. As the weeks went on, Mother had to obtain updated notes from the doctor to continue with it.

There was a great deal of homework involved in the Homebound Instruction. It took Student hours to complete it. It was a lot of work for Student, and Student struggled. At the time, Student's uncle lived with the Family, and he helped Student with the assignments. Mother recalls Student having trouble finishing all of the work, and that Mother exchanged emails regarding this problem with the Curriculum Instructor.

There were no grades for Student during the Homebound period. Mother felt she was left to teach the Student the material.

Mother wrote a long email to (Student Services Director), in which Mother described Student's problems. This was a stressful time for the Family, with the adoption of the twins, and Mother had to reschedule some meetings. Mother told School about the twins.

Student returned to 6<sup>th</sup> grade on January 15, 2014.

Mother learned that the Math Teacher teaching Student was not a certified teacher (P34). Students could leave math class when they were finished with an assignment. Student was always the last to leave, since the method Student created for Student to do multiplication and division took longer than the methods Student was supposed to have been taught. But because Student did get the answers correct, the uncertified math teacher was unable to realize that

Student was not learning. It turned out that this Math teacher was a long-term substitute for a previous Math teacher who left the School.

Mother knew that Student was struggling, and requested a meeting.

And Independent Evaluation was then completed. The evaluation's recommendations allowed School to conclude that Student did need an IEP.

Mother received a blue packet from School at an IEP meeting on May 27, 2014. Up until that date, Mother trusted the School's employees and thought they were helping Student. They had impressive degrees. They were kind to Mother and Student. However, none of them realized that Student could not multiply or divide. Mother in her testimony did not wish to blame them and emphasized that Student liked them. Mother had not known a family had educational rights until she saw this blue packet and read the material therein.

Mother did not want Student to take the DCAS test. When accommodations were added, Mother allowed Student to take it. With these, Student did better on the DCAS.

Mother informed School that a tutor had been hired for Student. Tutor began teaching Student on April 1, 2014. Mother testified that she hired Tutor because Student was so far behind Student needed one on one instruction to catch up. Part of her reason for this conclusion was a consultation with the Evaluator. Mother believed that going back to school would cause Student to only fall further behind. Student missed Student's school friends, so Mother kept Student up with them via emails and games and events at the Family's house.

The Tutor continued teaching Student through the Summer of 2014 and on into Student's 7<sup>th</sup> grade year.

Mother testified that Student is damaged from the experience, and knows that Student is not where Student is supposed to be academically.

Student's absences are recorded in CCS 3 (4<sup>th</sup> Grade), CCS 36 (5<sup>th</sup> Grade), and CCS 46 (6<sup>th</sup> Grade) and P37

### **MAJOR POINTS OF LAW RELATED TO THE CASE**

The School District must prove, by a preponderance of the evidence, that it has provided the student with a free and appropriate public education. If the Due Process Hearing Panel cannot determine that it was more likely than not that the School District provided the student with a free and appropriate public education, it must decide in favor of the Petitioner. *Kruelle v. Newcastle County Board of Education*, 642 F.2d 687, 692 (3<sup>rd</sup> Cir. 1981); 20 USC § 1415(e)(2).

#### **1. Statute of Limitations**

Two subsections of 20 U.S.C. § 1415 guide the limitations period for IDEA claims. Section 20 U.S.C. § 1415(f)(3)(C) provides that "[a] parent or agency 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." Section 1415(b)(6)(B), on the other hand, provides "[a]n opportunity for any party to present a complaint ... which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. § 1415(b)(6)(B). *Jana K. v Annville-Cleona School District*, 2014 WL 4092389 (M.D. Pa. August 18, 2014)

#### **2. Child Find Obligations**

Every school district and charter school has the duty to identify and evaluate children who are suspected of having a qualifying disability under the IDEA. *Anders v. Indian River School District*, 2007 WL 1574452 at \*11 (Del. Fam. Ct.; Jan. 19, 2007), 34 C.F.R. Sections



104.33 and 300.111; 20 U.S.C 1412(a)(3)(A) and (B). Pursuant to its Child Find duty, CCS is required “establish and implement ongoing evaluation procedures . . . to identify, locate and evaluate all children . . . regardless of the severity of their disability, and who are in need of special education and related services” including “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.” 14 DE Admin. Code § 923.11.

The school has a reasonable time after it is put on notice of a child’s behavior that the child is likely to have a disability. *Anders, Ibid.* “In deciding whether or not a district has satisfied its child find duty, the key inquiry is whether or not the district had reason to suspect that a child qualifies for services under the IDEA. Once the surrounding circumstances create such a suspicion, the child find duty is triggered and the district must evaluate the child in a timely fashion.” *Anders, Ibid* at \*6.

Various indicators can give an LEA reason to suspect that a child has a disability. E.g., *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995) (school district had to evaluate within reasonable time of learning of student’s behavior difficulties, ADHD, and history of speech therapy) (abrogated on other grounds by *A.W. v. Jersey City Public Schools*); *M.M. v. New York City Dept. of Educ.*, 26 F.Supp.3d 249 (S.D.N.Y. 2014) (student’s absences as a result of anxiety and depression triggered eligibility); *Jana K. v. Annville-Cleona School Dist.*, 39 F.Supp.3d 584 (M.D. Pa. 2014) (poor peer relationships, misperception of certain events, frequent trips to nurse, depressed mood gave school district reason to suspect that child had a disability, triggering Child Find obligation to evaluate).

The School must “provide special services that are reasonably calculated to provide disabled children with meaningful educational benefits.” *Coale v. State Dept. of Education*, 162 F. Supp. 2d 316, 319 (D. Del. 2001). A Student’s accommodation plan “need not be designed to

maximize the potential of a disabled student,” but instead should be reasonably calculated to provide a student with a FAPE. *Coale*, 162 F. Supp. 316, at 324-5.

The substantive law governing a violation of Section 504 of the Rehabilitation Act is functionally identical to that applied in the context of a claim under IDEA, which entitles every student to a “free and appropriate education.” 20 U.S.C. 1415(b)(6)(A); *D.K. v. Abington School District*, 696 F.3d 233, 253 n.8 (3<sup>rd</sup> Cir.;2013).

### 3. Sufficiency of Evaluation

An evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs.” 14 DE Admin Code 925.4.8. School must “use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child, including information provided by the parent.” 14 DE Admin Code 925.4.2. An evaluation must comprehensively evaluate all areas of need.

An FBA is for the purpose of determining why a student engages in behaviors that impede learning. *A.C. ex rel M.C. v. Bd. Of Educ. Of The Chappaqua Central Sch. Distr.*, 553 F.3d 165, 169 (2d Cir.; 2009). Not every disruptive behavior requires an FBA. *Ibid.* Delaware does not clarify what an FBA entails, only referring to in generally in 14 DE Admin Code § 926.30.0. Other states have defined an FBA as an “assessment process for gathering information regarding the target behavior, its antecedents and consequences, controlling variables, the student's strengths, and the communicative and functional intent of the behavior, for use in developing behavioral interventions.” 23 Ill. Admin. Code § 226.75; 511 Ind. Admin. Code 7–32–10.

### 4. Adequacy of 504 Plan

The IDEA and Delaware law define a “child with a disability” as a Student meeting one of several conditions. 14 DE Admin Code 922.3.0. A “Specific Learning Disability” is a disorder in which 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. 14 DE Admin Code 922.3.0. “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 is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome, and adversely affects a child’s educational performance. 14 DE Admin Code 922.3.0. The eligibility criteria for Other Health Impairment in 14 DE Admin Code 925.6.14 require documentation from “a qualified physician that a child has a chronic or acute health problem.” The Section also requires, for a finding of Other Health Impairment, that the school team determine that the child exhibits 6 or more symptoms of inattention or 6 or more symptoms of hyperactivity impulsivity. These symptoms must have persisted for at least six months and to a degree that is maladaptive and inconsistent with the child’s developmental level, and some of the symptoms must have been present before the child was 7 years old. *Id.* The school team must determine that there is a clear pattern that is consistently manifested across a variety of people, tasks and settings, and that persists across a significant period of time. *Id.* Additionally, the school team must find that there is “[c]lear evidence of clinically significant impairment in social, academic or occupational functioning.” *Id.* Finally, the school team must rule out that the child’s symptoms were occurring exclusively during the course of, or could be better accounted for by, pervasive developmental disorder, schizophrenia, another psychotic disorder, or another mental disorder. *Id.*

##### 5. Appropriate Placement in Least Restrictive Environment

“Each public agency shall ensure that to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled. 14 DE Admin. Code 923.14.2. The law required that School “ensure a continuum of alternative placements [be] available to meet the needs of children with disabilities for special education and related services.” 14 DE Admin Code 923.15.1. “Education placement options shall include . . . Homebound and Hospital . . . [which includes children with disabilities placed in and receiving special education and related services in hospital programs or homebound programs.” 14 De Admin Code 925.27.1.6.

#### 6. Adequacy of the IEP of May 2014

Adequacy of an Individualized Education Plan must be determined with regard to the circumstances existing at the time it was written. *Fuhrman v. East Hanover Board of Education*, 993 F.2d 1031 (3<sup>rd</sup> Cir. 1993). The School must “provide special services that are reasonably calculated to provide disabled children with meaningful educational benefits.” *Coale v. State Dept. of Education*, 162 F. Supp. 2d 316, 319 (D. Del. 2001). A Student’s accommodation plan “need not be designed to maximize the potential of a disabled student,” but instead should be reasonably calculated to provide a student with a FAPE. *Coale*, 162 F. Supp. 316, at 324-5.

#### 7. Adequacy of Homebound Instruction

An IEP team may place a student on home instruction if it determines that the student cannot receive an educational benefit in a less restrictive setting. *See* 34 CFR 300.115 (b)(1) (requiring districts to make available a continuum of educational placements that includes "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions"). A district also may provide temporary homebound services if a student is unable to attend school due to a short-term illness or injury. Home instruction may be necessary for a student with a disability who is unable to attend school for medical or psychological reasons. *See, e.g., New Jersey Dep't of Educ. Complaint Investigation C2012-4341*, 59 IDELR 294 (N.J. Super. Ct. App.

Div. 2012)

#### 8. Compensatory Education

The goal of compensatory education is to place disabled students in the same position they would have occupied but for the school district's violations of IDEA. *Reid ex rel Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C., Cir. 3/25/05). Compensatory education is an equitable remedy calling for a flexible approach rather than a rigid hour per hour formula. *Bachelor ex rel Bachelor v. Rose Tree Media Sch. Dist.*, 61 IDELR 22 (ED Penna 3/28/13). Compensatory education should place the student in the position the student would have been in but for the district violation. *DK by Stephen K and Lisa K v. Abington Sch Dist*, 696 F.3d 233, 59 IDELR 271 (3d Cir. 10/11/12).

A disabled student's right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education.” *DK*, *ibid*, citing, *P.P.*, 585 F.3d at 739 (quoting *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 272 (3d Cir. 2007)). When a school fails to correct a situation in which a disabled student “is not receiving more than a *de minimis* educational benefit,” the “child is entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem.” *DK, Ibid*, citing *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 391–92 (3d Cir. 1996).

#### **STATEMENT OF PANEL'S DECISION IN CLEAR AND CONCISE LANGUAGE**

1. The Statute of Limitations does not bar the due process complaint in this case. The knew or should have known date is May 27, 2014.
2. CCS did not meet its Child Find Obligations to timely identify and evaluate Student;
3. The March 28, 2012 Evaluation Summary Report was insufficiently comprehensive to identify Student's special education and related special services needs;

4. The Section 504 Plan was not adequate to meet Student's needs for meaningful educational progress;
5. CCS did not provide appropriate placement in the Least Restrictive Environment; CCS overlooked the amount of in-home instruction Student would need due to illness/absences;
6. The IEP was not adequate to meet Student's needs for meaningful educational progress; it failed to consider the amount of home instruction Student would need due to absences and illnesses and was limited to in-school services.
7. CCS failed to provide sufficient Homebound Instruction during a long absence due to Pertussis.

#### **DISCUSSION OF PANEL'S RATIONALE, IF NOT PREVIOUSLY MENTIONED**

### **1. Statute of Limitations**

The Statute of Limitations runs from the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. School asserts that Family has the burden of proof that they requested a due process hearing "within two years of the date that the parent . . . knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. 1415(f)(3)(C). School asserts that the Family knew or should have known of the basis of the July 2015 due process complaint at the time the Family requested testing from CCS – January 2012.

The Statute of Limitations does not bar the due process complaint in this case. Throughout the 4<sup>th</sup> and 5<sup>th</sup> grade, Mother was working with the School to assist Student, and had no reason to believe the School was not doing all it could. A request for testing does not show knowledge that the Student is not being provided a FAPE. In *Jana K. by Tim K. v. Annville*

*Cleona Sch. Dist.*, 63 IDELR 278 (M.D. Pa. 2014), a parent’s failure to inform the school of a diagnosis of depression was not enough to invoke the start of the Statute of Limitations. Rather, the Statute began when the parent received an initial evaluation report finding the student eligible for special education due to Emotional Disturbance. “Jana's father is not trained in special education, psychology, or the IDEA, and therefore should not be deemed qualified to have known that the issues addressed in the report [psychologist’s report of depression] should have triggered the District's Child Find obligations.” The court also said: “The court will, however, accept Plaintiffs' proposed KOSHK date of February 24, 2012. The Hearing Officer found credible Jana's father's testimony that, prior to receiving the evaluation from CCA, he did not know that students who have emotional disturbances, but no disciplinary issues, could qualify for special education services.”

Mother testified at the hearing that she thought the 504 plan was inadequate in 2012, because Student “continued to do poorly.” Mother also testified that she had been told Student was “too smart for an IEP,” making it less clear that Mother should have known in 2012 that Student might need an IEP. Mother’s testimony was that she did not know until she received information in a “blue packet” around the time of the IEP meetings in May 2014, and when Mother received an Independent Educational Evaluation.

## **2. Child Find Obligations to timely identify and evaluate Student.**

CCS argues that it began the process within five months, making the call for an IST meeting in January, 2012. CCS argues the school needed this time to gain understanding of Student and how Student did in the new system of the school. 4<sup>th</sup> grade is a transition year, and so many students may struggle to finish their work.

Family argues that CCS received the public school district's records of the Student's first three years (CCS 1 and P2, P3, P4, and P5) and that these records were enough to show that Student should have been evaluated. These records showed that the previous district had begun to evaluate Student. They contained a plan to conduct a reading comprehension assessment, referral for OT evaluation, an initial evaluation-occupational therapy report from the Jungle Gym. The Jungle Gym report indicates a problem list of decreased visual motor skills, decreased sensory processing skills and decreased self care skills. It recommends OT once per week for 30 minutes for 12 week. Student had received RTI and assessments showed Student was below grade level.

District meeting minutes from Student's 2nd grade year show parent's shared a diagnosis of Attention Deficit Disorder ("ADD"), and discussed symptoms of ADD and noted Student's health problems. These minutes indicate that Student was working below grade level, did not read fluently, was not persisting with tasks, was rushing, and was distracted, only played with one other student, had difficulty following rules and routines, needed extra explanations, had missed 15 days of school, and was in danger of not being promoted to the next grade.

Student's application to attend CCS, in November 2010, (P6) indicated to CCS that Student was receiving daily reading intervention and had sensory integration disorder, which "interfere[d] with Student's processing" and for which Student was receiving therapy. A second application made on January 11, 2011 stated that Student was receiving extra help after school in reading and was working with a reading specialist, and that further evaluation of Student's reading difficulties had been recommended. On a student health survey, CCS received information regarding Student's medical needs including Asthma, severe headaches, and chronic bowel problems; evaluation for vision difficulties on August 1, 2011 and a prescription for glasses while reading due to scotopic sensitivity.



CCS argues it needed the 6 months in which it did not evaluate Student to get to know Student and determine how Student would do in CCS's different environment (different from that of public schools). However, a consideration of the records coming from the previous would have made this period unnecessary – it was already clear that Student had several issues and no indication that the new environment could possibly do away with all of these issues of itself.

Shortly after enrollment, on September 23, 2011, there is an IST referral for Student, made to the Special Services Dept. of CCS, showing the prior District already had made an IST referral. (P8). Mysteriously, this did not result in any meetings. Yet it notes that Student reads well below grade level and had numerous absences.

The GET had not reviewed the records from the previous district and did not know about Child Find duties. The SET did not review the records and did not know about Child Find duties. It is reasonable to expect that an incoming Student's records be reviewed. The records did show that Student had issues with attention, absences, and reading. With those records, it should not have taken until January to start thinking about a plan for Student, especially as Student's issues began to show in the classroom and with the SET, who testified as to the warning signs to be looked for, which were showing up in Student.

School was aware of Student's frequent absences as of December 2, 2011, when it sent a warning letter to Parents about attendance policy, with a follow up on January 3, 2012, with a sterner warning, as there were more absences. Since most of the absences were excused, and it was known that Student had many health issues, sending these letters was inappropriate. Instead, the absences should have triggered a Child Find Duty for Other Health Impairment.

Having the records from the previous school, being aware enough to request an IST meeting on September 23, 2011, and being aware of the illnesses and absences issue, School should have evaluated Student by late September, 2011.

### **3. The March 28, 2012 Evaluation Summary Report's sufficiency**

The parties dispute whether March 28, 2012 Evaluation Summary Report was sufficiently comprehensive to identify Student's special education and related special services needs; CCS asserts that the evaluation resulting in the March 28, 2012 report was sufficient to determine what Student's plan should be. The Parents were in agreement with CCS' proceedings during the time period of the evaluation.

The Family argues that the school psychologist's testing was inadequate. It did not include cognitive testing, even though the GET had mentioned Student's difficulties recalling information and need for directions to be broken down and repeated. The evaluation did not examine Student's memory or processing abilities. It did not test OT or sensory needs. These needs were identified in the public district's school records and in the application Parents made for Student to attend the School. An Occupational Therapist from outside the School was even in attendance at the January 25, 2012 IST meeting. Student's sensory needs were discussed at the meeting; however, School did not update the OT or sensory testing, and did not incorporate the Jungle Gym OT report into its findings.

Family argues that a Functional Behavior Assessment was needed, and that is was indicated by "behavior" of frequently missing class due to absences, frequently leaving class to go to the bathroom or get drinks, off-task behavior, and failing to complete assignments. GET had noted behaviors of Somatization, Internalizing Problems, School Problems, Learning Problems, and Atypicality. The Family also had contributed information regarding Student's behavioral issues, and Student contributed information from a self-evaluation. A Functional Behavior Assessment was not warranted, School argues. Student was not a problem child, but rather was intelligent, helpful, cooperative and very pleasant. Turning in assignments late and missing school due to illness are not disruptive behaviors.

The Family argues that the school psychologist also failed to administer comprehensive academic achievement testing. Specifically, CCS's evaluator gave only 7 of the 16 subtests of the WIAT-III, and failed to administer the following tests: Listening Comprehension, Early Reading Skills, Alphabet Writing Fluency, Word Reading, Pseudoword Decoding, Oral Expression, Math Fluency – Addition, Math Fluency – Subtraction, and Math Fluency – Multiplication. Had these tests been administered, School would have known that Student could not multiply. Family argues that the Speech-Language Evaluation conducted only informal observations of Student, did not assess Student's expressive language skills, and no audiologist to test auditory processing skills in spite of a finding that there were gaps in those skills.

Though School did not conduct a comprehensive evaluation, it still had enough information to determine that Student needed an IEP, in that it could have found Student had a learning disability and/or Other Health Impairment. On April 17, 2012, School received a doctor's diagnosis of ADD, as required in 14 DE Admin Code 925.6.14. CCS records and testimony contain the other requirements of that section. Student exhibited at least 6 of the symptoms of ADD therein over the required time period: failing to give close attention, difficulty sustaining attention, does not seem to listen when spoken to directly, does not follow through on instructions (where not due to oppositional behavior), failure to finish schoolwork, difficulty organizing, reluctant to engage in tasks requiring sustained mental activity, and easily distracted by extraneous stimuli. The records contained 2 comments that Student had a "short attention span," was "easily off task," "appears not there," "when directions are given [Student's] eyes glaze over," "when working one on one [Student] appears unfocused and 'not there'," "does not complete daily assignments," "struggles academically with directions," "doesn't have enough time to finish assignments," "has a hard time completing work," and two references to Student being "disorganized." One note suggests avoidance: "going to the bathroom and drinks a lot –

could it be avoidance?” while another suggests the same: “she tended to avoid, because it was difficult for Student. There are two references to Student being “easily distracted” and one to “inability to focus.” It is also recorded that Student “has a hard time recalling information and . . . needs directions given individually.” Thus, of the systems listed in the Admin Code, there is evidence of 1. difficulty sustaining attention; 2. Does not seem to listen when spoken to directly (“not there”) 3. Failure to finish schoolwork, 4. Difficulty organizing, 5. Reluctance to engage in tasks requiring sustained mental activity and 6. Easily distracted by extraneous stimuli.

The previous school district’s records, parents’ observations, and the School’s observations throughout the 4<sup>th</sup> grade show that the symptoms persisted over 6 months.

A Functional Behavior Assessment is not warranted in this case. Student’s behavior was good – Student had learning disabilities and health impairment rather than behavioral problems.

The March 28, 2012 Evaluation was inadequate for not considering the route of “Other Health Impairment.” A child with as many illnesses and absences as Student had would be an obvious candidate for that category. Had the School considered that category, it could have easily concluded that Student needed more help than a 504 plan, which CSS asserts cannot be implemented well if Student is not in school. School might also have realized that the ADD factors in the Delaware Admin Code were also present.

#### **4. Adequacy of the Section 504 Plan**

School argues that the Family agreed to the Section 504 Plan that School provided. The Section 504 Plan was adequate to meet Student’s needs for meaningful educational progress. Family argues that School had enough information to determine Student was in need of an IEP while Student was in 4<sup>th</sup> grade. School had reason to suspect that Student might need an IEP upon consideration of the prior District’s records on Student. These records already contained an ADD diagnosis.

In making the March, 2012 decision that Student did not need an IEP, the team did not consider the Other Health Impairment Category.

On April 11, 2013, (at the end of 5<sup>th</sup> grade), in spite of increased absences in the 5<sup>th</sup> grade, the team still did not consider Other Health Impairment, and only reviewed and amended the 504 plan, in fact reducing it by taking out the elements that Student had not used because it singled Student out in the classroom.

The 504 plan did not address Student's frequent illnesses and absences.

## **5. Whether CCS provided an appropriate placement in the Least Restrictive Environment**

School argues that the general classroom is the LRE, up until the IEP of May 2014, where small group instruction was included as part of it. Parents argue that in the continuum of placements, more home based instruction should have been included.

Student's frequent illnesses and absences should have shown that some combination of the regular classroom and at home instruction were appropriate for Student. That would necessarily involve one on one instruction. Student cannot benefit from small group instruction any more than regular classroom instruction when Student is not in school due to illness.

## **6. Whether the IEP was adequate to meet Student's needs for meaningful educational progress**

School argues that the IEP would have met Student's needs and that it did not have a chance to implement it. Family argues that the IEP would not have been sufficient. The Family hired a tutor. The Tutor testified that there were gaps in Student's Education, going back as far as the 2<sup>nd</sup> grade and including the grades Student was at CSS. CSS has no mention of this and had not become aware of it in the time Student was there. Therefore, it is unlikely that Student

would have benefitted from the IEP, as it did not include any plan for getting Student up to grade level or fill in the gaps. School argues that Tutor was not in Student's life until April, 2014 and therefore did not observe 4<sup>th</sup> and 5<sup>th</sup> grade years. Tutor was not at CCS and so did not know of what services CCS was providing. School asserts that Tutor used accommodations similar to what was in the IEP: a distraction-free area and pairing visual cues with verbal directions.

Tutor did not have to observe Student for all of Student's education before Tutor met Student, as Tutor testified that Tutor did evaluations and was able to discover the gaps in Student's education, and that these gaps were what was holding Student back. While the accommodations regarding distraction-free area and pairing of visual cues were there, they had also been part of the 504 plan. During the implementation of the 504 plan, the Student developed gaps in Student's education also. This does not augur well for the IEP, which contained little that was new. What was new was the small group instruction. However, it is known that Student misses a lot of school due to illness. The IEP does not address that problem and provide for support where Student is out of school with an illness.

## **7. Sufficiency of Homebound Instruction**

CCS 52 shows 12.25 hours over the period from October 29 to December 16. This is an 8 week period. This falls short of 40 hours considerably. The HBT teacher explained this had to do with the holidays (This would only include Thanksgiving and presumably 3 hours would be due for that week, leaving 37 hours for the period in question).

CCS asserts it provided sufficient Homebound Instruction during a long absence due to Pertussis. CCS argues that it set Homebound Instruction as expeditiously as possible, relying on the time it took to get the required doctor's note and have it faxed to the School.

CSS contacted the HBT early in October, but the instruction did not begin until very late in October, and then there were not enough hours given. It is not credible that unrecorded hours were given. Student received on 12.25 hours over a time period where a 5-hour per week requirement would have meant Student should have had 37 hours. Clearly, Student did not receive the required Homebound Instruction.

School argues that Family provided only one doctor's certification for Homebound Instruction. A student is eligible for Homebound only if the student provides the school with certification from a licensed physician that a medical condition will prevent the student from attending school for at least ten school days. 14 Del. Admin. C. 930. School argues that it received the first and only request for Homebound for Student on October 1, 2013. For a sixth grade student, a school must provide a minimum of 5 hours of homebound instruction per week. Ibid. Though the Homebound Teacher's records show only 12.25 hours provided in the time period of Oct. 1 to Dec. 25, School asserts that the HBT testified that HBT provided 5 hours per week, and did not document all of the time.

School argues that the Family did not support Student's Homebound Instruction and that the School could not force Student to do the work. Inability to complete the work is part of Student's disability, not a mere refusal to do the work. Student's uncle and Parents helped Student and in fact informed HBT that Student was having trouble keeping up with the work. There is no good explanation for the almost month's delay in beginning the Homebound Instruction. The HBT was first contacted at the end of September, and the doctor's notes received as early as October. Given CSS record keeping deficits, it is credible that CCS received but did not process the earliest alleged receipt of the doctor's note. CCS was already aware of

the illness as Mother warned them due to its contagious nature. CCS was already aware that Student suffered from frequent illnesses.

### **ORDER OF THE PANEL**

Compensatory Education is ordered: From May 27, 2012 (2 years before the KOSHK date). The amount awarded is the total of: 257.75 hours of is awarded for the period May 27, 2012 to April 1, 2014. These hours are calculated as follows: for missed homebound hours during the long absence, 37 hours required less 12.25 hours provided equals 24.75 hours. For 233 absences during the three years of Student's attendance at CSS, one hour per day of absence. This award is at the rate of \$75 per hour. CCS is ordered to pay it within 30 days, or the Department of Education will be requested to withhold funding until evidence of the payment is submitted to the to the DOE.

The IEP must be reviewed and contain provision for future absences due to illness. In home teaching or internet based solutions may be considered.

CCS is ordered to do remedial education in Child Find for their staff and to verify it to the Department of Education.

The panel finds CCS record keeping inadequate; the panel orders DOE oversight of CCS record keeping for a period of time until DOE believes CCS record keeping to be adequate.

CCS should give out more information to parents regarding procedural safeguards and educational rights of children – CCS can host meetings or give out information to parents of incoming students.

### **NOTICE OF APPEAL RIGHTS**



Any party aggrieved by the decision of the hearing panel may file a civil action in the Family Court. Such proceeding shall be initiated by the filing of a complaint within 90 days of the date of the decision. 14 *Del. C.* § 3142(a).

DATED: November 6, 2015

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Laraine A. Ryan, Panel Chairperson

DATED: November 6, 2015

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Dr. Vicki McGinley, Educator

DATED: November 6, 2015

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Mr. John Werner, Layperson