

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: T. T.
Date of Birth: [redacted]
Date of Hearing: 2/27/2015
CLOSED HEARING
ODR File No. 15632-14-15-KE

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
Khepera Charter School
926 W. Sedgley Avenue
Philadelphia, PA 19132

Date Record Closed:
Date of Decision:

Hearing Officer:

Representative:

Parent Attorney
Kevin Golembiewski Esq.
Law Office of David J. Berney
1628 JFK Boulevard, Suite 1000
Philadelphia, PA 19103
413-272-8278

David Berney Esq.
8 Penn Center
1628 JFK Boulevard, Suite 1000
Philadelphia, PA 19103
215-564-1030

LEA Attorney
Robert Miller Esq.
1613 Spruce Street
Philadelphia, PA 19103
215-768-4521

March 11, 2015
March 21, 2015

William Culleton Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is thought to be an eligible child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 *et seq.* (IDEA), and an individual with a disability protected by the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). Student currently is enrolled in a charter school (School) in the elementary grades.

Student's custodial guardian and great aunt (Parent) asserts that the School failed to fulfill its "child find" obligations under both the IDEA and section 504, from the first day of school in the 2013-2014 school year until the date of the hearing in this matter. Parent asserts that the School failed to provide a timely, appropriate educational evaluation pursuant to Parent's request, inappropriately failed to identify Student, and failed to offer or provide Student with an Individualized Education Program (IEP). Parent requests both compensatory and prospective relief.

The School, despite an appearance by its attorney in this matter, failed to appear by counsel at the hearing to enter a defense. It also failed to provide five day notice as required by the IDEA, 34 C.F.R. §300.512(a)(3). After hearing argument of counsel for Parent, I proceeded with the hearing, in order to protect the imminent interests of the Student, including the alleged need for prospective relief. Subsequently, I offered counsel for the School an opportunity to provide argument as to why I should hear evidence from the School; however, despite receiving my

¹ Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

message offering that opportunity, the School's counsel did not make any offer of proof or argument as to why I should permit the School to offer evidence.

The hearing was completed in one session. I conclude that the School failed to comply with its child find obligations under the IDEA and section 504 with regard to Student, as a result of which Student was deprived of a FAPE. I order the School to provide compensatory education to Student, to issue an Evaluation Report, and to convene an IEP meeting to provide Student with an IEP.

ISSUES

1. Did the School inappropriately fail to identify Student as a child with a disability, and thus fail to comply with its Child Find obligations under the IDEA and/or section 504, during the relevant period from the first day of school in the 2013-2014 school year until such time as the School should offer an appropriate IEP to Student?
2. Did the School inappropriately fail to provide a free appropriate public education (FAPE) to Student during the relevant period, contrary to its obligations under the IDEA and/or section 504?
3. Should the hearing officer order the School to provide Student with compensatory education on account of all or any part of the relevant period pursuant to the IDEA and/or section 504?
4. Should the hearing officer order the School to issue an Evaluation Report, to convene an IEP team meeting or meeting to formulate a section 504 Service Agreement, to consider Student's educational needs and to formulate an appropriate IEP and/or section 504 Service Agreement for Student?

FINDINGS OF FACT

1. Student is enrolled in the School at the elementary grade level and has been enrolled in the School since kindergarten. (NT 50; P 2-5, 10-12, 15, 26, 33.)
2. Student has a history of diagnosis with Attention Deficit Hyperactivity Disorder (ADHD). (P 6, 8, 29, 31, 33.)

3. Student's mother lost custody of Student due to alleged emotional disorder and drug use, resulting in an inability to care for Student. Student's mother lives across the street from Student and interacts with Student, Student's great aunt (Parent) and other family members. Student's Parent has primary custody. Parent reports that Student's mother verbally abused Student repeatedly when Student was younger. (NT 46-47; P 6, 29, 37.)
4. Student's father [died when Student was young]. Subsequently, Student was hospitalized for approximately 3 weeks, and then went home to live with Parent. (NT 47-48; P 6, 29.)
5. Student has a history by Parent's report of diagnosis with Attention Deficit Hyperactivity Disorder (ADHD) at age three. A local medical center diagnosed Student with ADHD and Oppositional Defiant Disorder (ODD) at age 8, in April 2011. By September 2011, Student was receiving medication for ADHD, as well as weekly individual psychotherapy. Student continues to receive both medication and individual psychotherapy for these conditions. (NT 49-50; P 6, 7, 9, 29, 31, 33.)
6. Since as early as first grade, Student has failed frequently to turn in homework assignments. Student also has a history of significant absences due to a chronic and serious asthma condition, which has required hospitalization in the past. (P 3, 4, 5, 29, 36.)
7. Since as early as second-grade, Student's teachers have reported behaviors including throwing tantrums in the classroom, spending up to one half hour in the nurse's office calming down, altercations with peers, disrespectful behavior towards teachers, and throwing [items] in the classroom. In second grade, Student and Parent also reported suicidal ideation, assaultive behaviors and fire setting behavior at home. (P 6, 15, 31.)
8. When Student was in third grade, at the beginning of the year in September 2011, Parent sent two letters to the School, notifying the School that Student was diagnosed with ADHD. Parent also notified the School that Student was taking a medication for attention deficit, by disclosure in the Student's confidential health information form. (NT 51-56; P 7, 8, 9, 31.)
9. The School did not seek permission to evaluate Student at any time during Student's third grade or fourth grade years. (NT 58; P 12.)
10. Beginning with behavioral incidents in August 2013 and the first few days of September 2013, Student's inappropriate behavior escalated both in frequency and intensity during Student's fifth grade year. Student threw items on the school bus in August, refused to stay in Student's seat during classes, defiantly walked out of the classroom, and assaulted other students. Student was "written up" over fifteen times, for instances of defiance and disrespect for teachers, as well as threats to physically strike or attack other students. (NT 58-65; P 6, 7, 12, 13, 16, 17, 31.)
11. At a meeting on February 18, 2014 with School personnel, including the School principal, Parent reported that Parent was in the process of obtaining a Therapeutic Support Staff (TSS) worker. Parent submitted another letter from the local behavior health service

documenting Student's diagnosis of ADHD. At this meeting, Parent explicitly requested testing for an IEP or section 504 service agreement. (P 12.)

12. The School did not request Parent to sign a Permission to Evaluate within 10 days of Parent's request in February 2014. The School never asked Parent to sign a Permission to Evaluate. (NT 69-70.)
13. The School responded to Student's behavior in 2013 and 2014 by repeatedly suspending Student from school, at least four times, either with in-school suspensions or with removal from school altogether. In April 2014, the School notified Student and Parent that Student was placed on probation with risk for expulsion. (P 7, 12, 13, 16, 17, 31.)
14. By May 2014, Student's behavior was believed to be "totally out of control". (P 6, 7, 12, 13, 16, 17, 31.)
15. Parent was under the impression that the School was preparing a section 504 service agreement. (P 6.)
16. Prior to May 22, 2014, the School retained a consultant who indicated qualification as a Pennsylvania certified school psychologist, to prepare an evaluation report. (P 33.)
17. On May 22, 2014, the consultant conducted a psychoeducational assessment consisting of a standardized cognitive test, a standardized achievement test, behavioral observations, an informal clinical interview, interviews with teachers, staff of the School and Parent, and administering a behavior inventory known to address issues of attention deficit and comorbid diagnoses. (P 33.)
18. Although Student was promoted from fifth to sixth grade, Student's grades indicated under-performance during fifth-grade. Teachers noted that Student's behavior contributed to Student's underachievement in view of Student's ability. Benchmark testing predicted that Student's PSSA scores would be lower than the scores that Student had achieved in previous grades, and Student's PSSA scores for fifth grade did indicate regression. (NT 65-68; P 14, 15, 29, 31, 39, 46.)
19. Beginning in September 2014, Student's behavior continued to escalate in both frequency and intensity. Student was suspended repeatedly in September, and suspended in October, November, and December. Student's behavior included fighting with peers, insubordination, defacing property, leaving class, disruption of class, skipping class, throwing [items], and threatening harm to others. (NT 72-77; P 27, 28.)
20. The School prepared an evaluation report dated October 6, 2014, based upon the consultant school psychologist's May 2014 assessment. (P 33.)
21. The psychologist reported observing Student placing Student's head on the desk during class; writing on Student's hand with a pen; and demonstrating poor attention and focus

- compared to peers. The psychologist concluded that Student's inability to remain on task and focus affected adversely the Student's ability to produce a classroom project. (P 33.)
22. The psychologist found that Student was able to focus and perform for an extended time in a one-to-one setting during testing. (P 33.)
 23. The psychologist reported that Student's fifth grade teacher's responses on the behavior inventory indicated significantly elevated problematic behavior, with inattentive, impulsive, defiant and aggressive behaviors that seriously affected Student's schoolwork and social relationships with peers. (P 33.)
 24. The psychologist recommended chunking of assignments; extended time for all activities and assessments in mathematics; periodic breaks; a behavioral management program; assignment of Student to a "carrel" to do classwork; and use of a timer for class activities. (P 33.)
 25. The psychologist found that Student was significantly behind grade level in mathematics. (P 33.)
 26. The psychologist found that Student was exhibiting very significantly elevated levels of hyperactive and/or impulsive behaviors, peer relationship problems, inattention, conduct disorder behavior problems, and oppositional/defiant behaviors. The psychologist found that these behaviors seriously affected Student's schoolwork. (P 33.)
 27. The psychologist concluded - and the School's Evaluation Report determined - that Student was not a child with a disability eligible for special education. The psychologist recommended that the Student was eligible for a section 504 service agreement. (P 33.)
 28. On November 13, 2014, Student [was physically aggressive toward objects], resulting in Student going to the hospital. Student also made [verbal] threats [redacted]. The School suspended Student with intent to expel. (NT 78; P 28, 44.)
 29. Prior to November 20, 2014, the School became aware that Parent had retained an attorney. (P 20.)
 30. Student was reinstated in school on November 24, 2014. (P 20.)
 31. On November 25, 2014, Student's behavior became erratic and uncontrollable. Student [engaged in physical behaviors] with the obvious intent of having a telephone call made to Student's Parent so that Student could be brought home. Student pounded on a classroom door and disrupted the class, yelling through the door. Student reported being "Hype". A school official reporting the incident suggested that Student was experiencing "some type of serious chemical imbalance and a near breakdown." (P 18.)
 32. On November 25, 2014, the School invited Parent to a meeting to discuss "504 plan and resolution meeting". (P 19.)

33. On December 11, 2014, Student left the classroom without permission after being reprimanded. Student returned screaming and picked up [an object] and threw it in the direction of another student. The School suspended Student for five days. (P 28.)
34. On December 15, 2014, School officials informed Parent that Student would be subjected to a petition for involuntary civil commitment and sent to a crisis unit for evaluation and treatment, "if this behavior escalates". (NT 79-80; P 21.)
35. In December 2014, and prior to December 19, 2014, the School provided a copy of the October 2014 Evaluation Report to Parent. This occurred about ten months after the Parent had requested an evaluation. (NT 71.)
36. On December 19, 2014, the School convened a multi-disciplinary meeting to discuss Student's eligibility for special education and to discuss the School's evaluation report. The multidisciplinary team, including the principal of the School, raised questions about the appropriateness of the evaluation report. The team agreed that Student was struggling in school, and that a second evaluation was needed in order to determine eligibility under the IDEA. The School agreed to fund an Independent Educational Evaluation (IEE). (NT 80-83; P 31.)
37. The IEE was conducted in January and February 2015. The independent evaluator's curriculum vitae indicates that the evaluator has a doctorate in clinical developmental psychology, both Pennsylvania licensure and a Pennsylvania certification as a school psychologist, and extensive experience, both as a public school psychologist and as a private clinical psychologist with emphasis in the area of child psychology. The evaluator's curriculum vitae also indicated teaching experience and published articles in psychology. (NT 84; P 29, 30.)
38. The IEE recommended identification under the IDEA categories of Other Health Impairment (due to ADHD and ODD) and Specific Learning Disability in reading comprehension, with a weakness requiring remediation in mathematics. (P 29.)
39. The IEE recommended weekly counseling; four to five school periods per week of direct and explicit instruction in reading comprehension strategies; a positive behavior support plan; in-school suspensions for all infractions to avoid what the evaluator hypothesized as the School's inadvertent reinforcement of Student's problem behaviors; scheduled frequent short breaks; fidgets; preferential seating; small classes or small learning groups; hands on activities and learning opportunities; chunking of assignments; specially designed material and provision of formulas during mathematics activities; use of visual support for instruction and directions; graphic organizers for writing; direct teaching of memory strategies; daily checks of assignment book, faded; praise and other reinforcement for on task behavior and effort; and daily schedules. (P 29.)

40. The School's counselor conducted a Functional Behavioral Assessment (FBA) in January 2015. The FBA consisted of three observations of Student and interviews with teachers, as well as review of school records. (P 22.)
41. The School offered a behavior support plan on January 18, 2015. (P 23.)
42. Antecedent strategies included weekly counseling services to focus on anger management, development of pro-social skills, and self-regulation. The plan also called for teachers to deliver instruction at a quicker pace, provide more frequent feedback and reinforcement for appropriate behaviors, provide Student with a "sensory toolbox", and provide close proximity control as needed through the assigned behavioral support specialist. (P 23.)
43. The plan called for teaching Student replacement behaviors, including de-escalation techniques and appropriate communication skills. (P 23.)
44. The plan called for reinforcers including verbal praise, access to preferred activities and privileges, public recognition of positive behavior, and positive reports to Parent. The plan also called for consequences in the form of planned ignoring and immediate corrective feedback. Consequences also included immediate removal from peers and/or environment, as well as requesting Parent's immediate presence, emergency therapy sessions at Student's medical center provider, and referral to crisis response for "risk assessment". (P 23.)
45. The plan also called for use of a planner organizer, use of visual schedule, use of a timer for assignments, a "sleep chart", use of a stress ball or other fidget, sensory breaks, and contacting Parent if inattentiveness persists for long intervals. (P 23.)
46. On February 6, 2015, Student was suspended for leaving school grounds without permission. (P 24.)
47. The School has not offered either a section 504 Service Agreement or an IEP for Student. (NT 71, 80, 85, 87.)
48. The School has not fully implemented its behavior support plan. (NT 87; P 24, 25, 29, 31.)
49. Student is tested as functioning well below grade level in reading comprehension, mathematics and writing. (NT 86-88; P 29, 31.)

DISCUSSION

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward (introducing evidence first) and the burden of persuasion. Of these, the more essential

consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer). In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence² that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipose”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In this matter, the Parent requested due process and the burden of proof is allocated to the Parent. The Parent bears the burden of persuasion that the School failed to meet its child find duty and failed to provide Student with a FAPE. If the Parent fails to produce a preponderance of evidence in support of her claim, or if the evidence is in “equipose”, then the Parent cannot prevail under the IDEA.

CHILD FIND UNDER THE IDEA

Under the IDEA Child Find requirement, the School has a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability under the

² A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

statut[e]." 20 U.S.C. § 1412(a)(3)(A); see P.P. ex rel. Michael P. V. West Chester Area School Dist., 585 F.3d 727 (3d Cir. 2009); Taylor v. Altoona Area Sch. Dist., 737 F. Supp.2d 474, 484 (W.D. Pa. 2010). An evaluation must be sufficiently comprehensive to address all of the child's suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6). Failure to conduct a sufficiently comprehensive evaluation is a violation of the School's child find obligations. D.K. v. Abington Sch. Dist., 696 F.3d 233, 250 (3d Cir. 2009)(a poorly designed and ineffective evaluation does not satisfy child find obligations).

Charter schools have a clear obligation to evaluate any child enrolled with them who is reasonably suspected to be in need of specially designed instruction. 22 Pa. Code §711.21. Their obligation includes having clear policies and procedures to ensure that all children in need of such services are evaluated and to inform parents of all enrolled children that the charter school will evaluate when appropriate. Ibid.

CHILD FIND UNDER SECTION 504

The Rehabilitation Act of 1973, section 504, provides:

No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

29 U.S.C. §794. Federal regulations implement this prohibition in educational agencies receiving federal financial assistance.³ 34 C.F.R. §104 et seq. These regulations require educational agencies to provide a FAPE to qualified handicapped children, but that obligation is defined differently than under the IDEA. Educational agencies must provide "regular or special education

³ I take administrative notice that the School receives federal financial assistance within the meaning of section 504, because it is bound by the IDEA, which is a federal funding statute.

and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy” the procedural requirements of the Act. 34 C.F.R. §104.33.

Educational agencies are obligated to “[u]ndertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education” 34 C.F.R. §104.32(a). Thus, section 504 imposes a “child find” obligation on agencies that includes the obligation to evaluate children within their jurisdiction appropriately to determine whether or not they are qualified handicapped persons. The School must evaluate “any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 C.F.R. §104.35(a).

THE SCHOOL FAILED TO MEET ITS “CHILD FIND” OBLIGATIONS

I conclude that the School failed to perform its "child find" obligations with regard to Student, under both the IDEA and section 504. The evidence is preponderant that the School was reasonably on notice that Student was suspected to have a disability and failed – still fails – to provide appropriate accommodations and specially designed instruction in order to provide Student with access to its curriculum.

The School was on notice that Student had a disability as early as September 2011, when Parent sent both a doctor’s note and a message requesting that staff be aware of Student’s disability; in addition, Parent disclosed in a School health information form that Student was receiving “Focalin”, a medication for ADHD. I conclude that this evidence, coupled with Parent’s

credible testimony that she sent these documents to the School, is preponderant and proves that the School was on notice that Student had a disability cognizable under either the IDEA or section 504 or both.

The doctor's note disclosed that Student was diagnosed with ADHD and was being treated with medication. Parent sent it to the School.

The message requested distribution of a fact sheet describing the symptoms of ADHD and noting other disorders that frequently accompany ADHD, such as "conduct disorder", anxiety disorder, depressive disorder and bipolar disorder. Parent asked the principal to distribute this two page message to the School's teacher assigned to the Student, the School counselor and the School nurse. The note in the record raises an inference that this message and the note conveying it were part of a larger conversation.

The record is preponderant that Parent's messages to the School, discussed above, occurred in a context of Student's severe misbehavior in the School in both the second and third grades. In April 2011, Parent described to her child's physician that Student was disrespectful, fought with peers, and had tantrums, including throwing [items] in the classroom. Student "could not keep [Student's] mouth closed" in class, talked back and disrupted the class. Student would leave Student's seat and leave the classroom without permission. The School had assigned a security guard (a relative of Student) at times to address Student's behaviors in class. Student had been disciplined. Student stated to the doctor that Student did not have a good relationship with peers at school, and got into altercations with them. Student reported being bullied and being stabbed in the neck with a pencil. Parent testified credibly that these problems were constant throughout Student's tenure at the School, and that nothing was done about them.

I conclude that this evidence proves by a preponderance of the evidence that the School

was on notice as early as September 2011, in the beginning of Student's third grade year, that Student had disabilities that required intervention, including evaluation, accommodations and specially designed instruction. By September 2011, the combination of Student's behavior in school and the Parent's disclosure of Student's disabilities were sufficient "red flag" evidence to the School that Student was reasonably suspected to have a disability that interfered with Student's academic, behavioral and social learning, and therefore with access to the School's curriculum.

I have considered Student's report cards for third and fourth grades, which seem to be contrary evidence. These report cards do not mention Student's behavioral issues, except that in fourth grade, they note behavioral improvement. I note that these report cards notify Parent that Student is promoted to the next grade level; therefore, highly negative notes about behavior would be inconsistent with the decision to promote Student. I also note that there is not a section for behavior as such, as is found in most grade school report cards. Weighing this evidence against the above discussed evidence establishing reason to suspect an IDEA or section 504 disability, I conclude that the evidence of suspected disability is preponderant, notwithstanding the report cards.

As the School was on notice and obligated to evaluate Student two years before the relevant period, which begins in September 2013, I conclude that the School failed to perform its child find obligation during the entire relevant period. The School failed to evaluate Student from September 2011, when the "red flag" was raised, to December 2014, when the School finally provided the Parent with an evaluation report. I conclude further that the evaluation report was insufficient to satisfy the School's child find obligation, because it was insufficient to permit the School or the Parent to reach a conclusion as to Student's eligibility for special education or to understand the Student's educational needs. I further conclude that the School continues to fail to fulfill its child

find obligation, because it has not provided an evaluation report, even after receiving the IEE for which it paid.

From the first day of school in the 2013-2014 school year, Student's fifth grade year, the evidence is preponderant that the School failed to evaluate Student. In spite of the "red flag" already flying as of September 2011, Student began the year in regular education without an IEP or section 504 Service Agreement. Despite a dramatic escalation in Student's behaviors, the School still took no action to address Student's disabilities. By February 2014, Parent had met with School officials, and no one had suggested an evaluation, based upon the record before me. On February 18, 2014, Parent herself orally requested an evaluation for both IDEA and section 504 eligibility. The only intervention at that point was that the Parent was herself trying to get someone to sit with Student in class, a TSS worker who would be provided by the behavioral health system, not the School. No evaluation was forthcoming after this meeting; the School did not even provide a Request for Permission to Evaluate form to Parent within ten days, as required by Pennsylvania regulation. 22 Pa. Code §711.24(c). I conclude that the School's inaction during Student's fifth grade year, described above, violated its child find obligation.

Nevertheless, on May 22, 2014, the School's consultant school psychologist conducted a psychoeducational assessment of Student, without any evidence of written permission as required by law, 22 Pa. Code §711.24(c). The report was not produced during that school year. In addition, the report was not provided within 60 days of request. While there was no written request, and thus the 60 day time frame, 22 Pa. Code §711.24(b), technically did not apply, the evidence is preponderant that this was due to the School's failure to inform Parent of the available services and how to request them, contrary to the regulation for charter schools, 22 Pa. Code §711.21(b)(1), and due to the School's failure to provide the written request form within ten days, 22 Pa. Code

§711.24(c). Thus, for the entire school year, the School failed to perform its child find obligation to Student under the IDEA, state regulations, and section 504.

From the beginning of Student's sixth grade year, Student's behaviors continued with alarming frequency and intensity, yet the School did not produce an Evaluation Report until December. When this evaluation report was received, the evidence is preponderant that it was inappropriate. The School subsequently paid for an IEE, which became available sometime after February 3, 2015. The School never performed its legal obligation to issue an evaluation report once it received that report. Thus, to the day of hearing in this matter, the evidence is preponderant that the School failed to perform its child find duties by failing to provide an appropriate evaluation report for Student.

I weigh the evidence in concluding that the December 2014 evaluation report was inappropriate. There are two salient facts. First, the report itself is incongruous, and it does not even address, much less explain, the obvious incongruity of its findings and conclusion. Second, the record shows that the multidisciplinary team, including the School's principal, rejected the psychologist's conclusions and decided to spend more money on an IEE because the psychologist's report was insufficient to reach a conclusion.

The report itself is incongruous. It notes that Student has both ADHD and ODD. The psychologist's findings support those diagnoses. The psychologist reports observing Student's inattentiveness in the classroom. The evaluation report notes teacher reports that Student's attention issues and defiance issues have seriously impeded Student's progress in school. The evaluation report adopts these reports as findings to the same effect. Yet, with this evidence, the evaluation report concludes that the Student is not eligible under the IDEA. It does admit eligibility under section 504.

The School did convene a meeting to review this Evaluation Report. This group decided that the report was not adequate to determine eligibility, so the School agreed to pay for an IEE. Parent testified that her impression was that the group found the report to be inappropriate. While I do not rely upon this impression, I conclude that the very act of seeking an IEE shows that even the School thought that the report was inappropriate. Therefore, the report, provided in December, 2014, did not rise to the level of compliance with the School's child find obligation.

I also weigh the fact that the IEE contradicted most of the scores reported in the School's evaluation report, and contradicted the report's conclusion, instead recommending IDEA eligibility and specially designed instruction, including smaller class sizes, explicit teaching of social skills, emotional regulation skills, replacement behaviors, and academic skills. The psychologist who authored the report is formidably credentialed and experienced in school psychology. The report itself is comprehensive. The assessments are carefully designed. The report explains all facets of the psychologist's conclusions. The recommendations are aimed at addressing Student's inattentiveness, impulsivity, defiance, social skill deficits and behavioral dysregulation. The report has every indicium of reliability; its contradiction of the School's evaluation report profoundly undermines the weight that I assign to that report, and further shows that it was inappropriate.

The School did perform an FBA, shortly before the hearing in this matter. It also issued a behavior support plan. All of this was produced by the School's counselor, credentialed as a licensed social worker. Neither the record nor the FBA itself raise an inference that the behavioral assessment or support plan are reasonably calculated to make a FAPE available to Student. Therefore, I give this belated School intervention little weight in determining whether or not the School complied with its child find obligation.

In sum, I conclude that the School failed to evaluate Student appropriately during the entire relevant period. Neither its consultant's psychoeducational assessment nor its in-house FBA and behavior support plan cured this procedural defect. To date, there is no evidence of an evaluation report, IEP or Service Agreement. Thus, the School has failed to comply with its child find obligation.

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). Courts in this circuit have held that a protracted failure to evaluate and to offer an IEP to a student reasonably suspected of having a disability may deny that student a FAPE. A.W. v. Middletown Area Sch. Dist., 2015 U.S. Dist. LEXIS 9774, 41-43 (M.D. Pa. Jan. 28, 2015); Jana K. v. Annville-Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. August 18, 2014).

In this matter, I conclude that the multiple procedural violations discussed above constituted substantive violations as well, because they denied Student a FAPE for the two years from the first day of school in 2013 to the date of the hearing. Because the record shows an ongoing violation, I will order the School to provide Student with compensatory education for that period, and until the School provides an appropriate program and placement to Student.

The record is more than preponderant that the Student's behavior escalated from the first day of the 2013-2014 school year, and continued at an almost daily rate of behavioral incidents until the day of the hearing. Student was "written up" numerous times. Student was suspended at least four times in fifth grade and more than once in sixth grade. Parent frequently was required to

take Student home before the end of the school day. Student spent much time in the hallways or in separate rooms at the School's building, due to losing control of Student's behavior. Student's social relationships suffered as a result of Student's behavior.

The record is preponderant that the Student fell behind Student's grade level peers in reading comprehension, mathematics and writing. Student will need remedial instruction to fill in gaps in Student's learning, and direct instruction to learn skills never learned during the time in which Student's behavior and inattentiveness interfered with Student's learning. Thus, the School's failure to evaluate Student when Student was reasonably suspected to have a disability and to need specially designed instruction and accommodations caused the School to fail to provide such services when they were needed. I conclude that this constituted a substantive deprivation of a FAPE.

In the Third Circuit, it is common to order a local education agency to make up services which it should have provided on an hour-by-hour basis; however, there is support also for a "make whole" approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010). In this matter, I conclude that the equitable approach is an hour-for-hour calculation. Here, the Student's attention and behavioral difficulties were so profound that they virtually negated Student's presence and made Student essentially unavailable for education, even while present at the School. I conclude, based upon a preponderance of the evidence, that Student's behaviors and inattention, and Student's inability to organize Student's time or studies, effectively undermined Student's entire educational day. Therefore, I will order the School to provide Student with full days of compensatory education.

The record indicates that Student was absent for many days in the two years of the relevant period; however, I conclude that this should not reduce the School's obligation to provide Student

with compensatory education. Much of Student's absenteeism was due to Student's serious asthma problem, a physical disability which, to the extent that it interfered with Student's learning, would itself qualify Student as a disabled person, eligible for special education services. Moreover, to the extent that Student's absenteeism was due to Student's troubled two years at the School, and the depression and discouragement that were part of Student's syndrome of diagnoses, the School is responsible as discussed above. Therefore, I will not reduce the compensatory education due to Student by the number of days on which Student was absent during the relevant period.

Parent requests that any order for compensatory education be ordered "tuition permissible". I note that nothing in my order below precludes the parties from reducing the ordered services to a fund and allocating that fund as Parent sees fit.

PROSPECTIVE RELIEF

As the hearing ended without any evidence that the School was complying with its child find obligation, I will enter an order for prospective relief.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this case, only Parent testified, and I found Parent to be credible and reliable. Parent's demeanor and way of responding to questions supported this finding. In addition, Parent's testimony was corroborated by the written record in almost every respect.

CONCLUSION

In conclusion, I find that the School violated its child find obligations during the entirety of the two years that are relevant to this matter. I order compensatory education and prospective relief.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The School inappropriately failed to identify the above captioned Student both as a child with a disability under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and as an individual with a disability protected by the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). The School thus failed to comply with its Child Find obligations under the IDEA and under section 504, during the relevant period from the first day of school in the 2013-2014 school year until the date of hearing in this matter.
2. The School inappropriately failed to provide a free appropriate public education (FAPE) to Student during the relevant period, contrary to its obligations under the IDEA and section 504.
3. The School shall provide compensatory education to Student in the amount of one full school day of compensatory education for every day during the regular school year on which the School was open for educating children, from the first day of school in the 2013-2014 school year, until the day on which the School offers to Student an appropriate Individualized Educational Program (IEP).
4. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education as set forth above. Services in the amount set forth above may occur after school hours, on weekends, or during summer months when convenient for Student or the above captioned Parent. Services may include, but are not limited to, professional counseling, vocational training at a secondary level of curriculum, and remedial courses, as appropriate.
5. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.
6. The cost of any ordered service may be limited to the current average market rate in Pennsylvania for privately retained professionals qualified to provide such service.

7. Nothing in this Order shall be construed to preclude the parties from reducing the ordered services to a fund to be utilized for the above stated purposes at the sole discretion of the Parent.
8. Within ten calendar days of the date of this Order, the School shall produce an Evaluation Report, comprehensive and appropriate as required by the IDEA, section 504 and the relevant Pennsylvania regulations. The Evaluation Report shall address all of the findings and recommendations of the Independent Educational Evaluation completed on February 3, 2015 and marked Exhibit 29 in this matter; the Evaluation Report shall also address all findings and recommendations set forth in the report dated February 5, 2015 and marked Exhibit 31 in this matter.
9. Within forty calendar days of the date of this Order, the School shall convene a meeting of Student's IEP team, appropriately constituted pursuant to the IDEA; this team shall consider the Evaluation Report and take whatever action it deems necessary to ensure that the School will offer an appropriate IEP for Student within fifty days of the date of this Order.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

March 21, 2015