

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.

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

ODR No. 01491-1011 KE

DUE PROCESS HEARING DECISION CLOSED HEARING

NAME OF CHILD: [redacted] DOB: [redacted]

HEARING OFFICER: Brian Jason Ford, Esquire

HEARING DATES First Session: October 21, 2010 Second Session: November 3, 2010

RECORD CLOSED December 6, 2010

DATE OF DECISION December 21, 2010

Parties to the Hearing:
Parent[s]

SCHOOL DISTRICT OF PHILADELPHIA
440 N. Broad Street
Philadelphia, PA 19130

Representatives:
DAVID BERNEY, ESQUIRE
8 Penn Center
1628 JFK Blvd., Suite 1000
Philadelphia, PA 19103
JUDITH BASKIN, ESQUIRE
Assistant General Counsel
School District of Philadelphia
440 N. Broad Street
Philadelphia, PA 19130

Introduction and Procedural History

On August 25, 2010, (Student) and [Student's] mother (Parent) requested a due process hearing against the School District of Philadelphia (District) by submitting a Due Process Notice and Complaint (Complaint) to the District and the Pennsylvania Office for Dispute Resolution (ODR).¹ The Complaint raises claims under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, as amended 2004, (IDEA) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (Section 504). It is not disputed that the District is the

¹ Except for the caption in the copy of this decision sent directly to the parties, references to the Student's name and gender have been omitted to protect the Student's privacy.

Student's local educational agency (LEA) for purposes of the IDEA and Section 504.

In the Complaint, the Parent alleges several violations against the District. In sum, the Parent claims that the District was too slow to offer special education and related services to the Student; that the process by which such services were offered is substantively flawed; that the end result of that process is an individualized education plan (IEP) that failed to provide a free appropriate public education (FAPE) to the Student; and that the District failed to properly implement the IEP, despite its flaws. To remedy these alleged denials, the Parent demands compensatory education for the period of time that the Student was denied a FAPE; an appropriate IEP; and declaratory relief that the Student's rights have been violated.²

The District did not file a response to the Complaint. Nevertheless, the District claims that it acted appropriately and in conformity with applicable laws at all times and that the Student received FAPE. At the same time, the District concedes that, at a certain point, the Student's IEP called for transportation, and that transportation was not always provided, but that this was an accommodation for the *Parent*, not the Student. N.T. at 46, 49.

Issues

- 1 Did the District commit a “child find” violation by failing to timely identify the Student as a student in need of special education?
- 2 Did the District violate the Student's and/or the Parent's rights in the development of the Student's IEPs?
- 3 Were the IEPs offered by the District appropriate?
- 4 Were the IEPs offered by the District properly implemented?

Parent's Exhibit 9 and Other Multiple-Document Exhibits

Before facts are found, an explanation of Parent's Exhibit 9 (P-9) must be made.³ P-9 is one of several exhibits offered by the Parents that contain multiple documents. The presentation of documents at P-9, and the corresponding testimony regarding P-9 are both frustrating and concerning. According to procedures set forth at the start of the hearing, when an exhibit was referenced for the first time by a witness under oath, the exhibit was considered to be moved into evidence unless the non-moving party objected to the exhibit and the objection was sustained.⁴ Exhibit P-9, in its entirety, was moved into evidence using this procedure. *See* N.T. at 330-333.

² In the Complaint – and throughout the hearing – the Parent also claimed that the District withheld or is withholding the Student's educational records. The Complainant explicitly seeks an order for the production of all of the Student's educational records.

During this hearing, it became clear that the Parent's suspicions in this regard were well-founded. However, I issued a pre-hearing order for the production of the Student's records and I believe that the District's attorney made a good faith effort to comply with that order (at times despite an apparent lack of cooperation from and/or coordination with her client).

Consequently, the issue of records production is moot. It should also be noted that the Parents explicitly reserved the right to seek damages and fees in a court of appropriate jurisdiction, acknowledging that I have no authority to grant such relief.

³ All exhibits were presented by the Parent, and were marked as P-# for Parent's Exhibit #.

⁴ This is the common procedure in special education due process hearings.

Exhibit P-9 is not a single document. To the credit of its counsel, the District attempted to highlight this during the hearing. Even so, both the District and the Hearing Officer created a record that P-9 contained two documents. *See e.g.* N.T. at 217. That record is incorrect, and the Parent's attorney made no attempt to correct the misconception.⁵ Upon carefully reading P-9 in the process of drafting this Decision, the Hearing Officer realized that the exhibit actually contains *eight* separate documents, some of which are not in chronological order (both within the Parent's evidence binder and within the exhibit itself). All of the documents in P-9 were drafted by employees of the Children's Crisis Treatment Center (CCTC). CCTC provides both in-school and home/community based behavioral services to students in the District. CCTC works, in part, from within some of the District's buildings but is not affiliated with the District itself.

Comparing the documents within P-9 to the transcript, it is apparent that the witnesses who testified about P-9 clearly did not understand that different pages in the exhibit were parts of different documents drafted between December of 2008 and September of 2010. At best, the witnesses incorrectly understood that P-9 was made of only two documents. In this case, counsel for both parties certainly referenced specific page numbers when asking questions. In doing so, the exhibits were stripped of context and the witnesses might not have been aware that they were discussing different documents drafted at different points in time all within the same exhibit. Given the witnesses false impressions, the weight of testimony concerning P-9 is considerably diminished.

Similarly, as a result of the way that witnesses were questioned about P-9, it is not possible to say with certainty which document within P-9 witnesses were referencing in their responses. Although the witnesses were asked specific questions about specific pages (if not specific words) within P-9, the exhibit in its entirety was placed before the witnesses in a three ring binder during examination. When asked questions about P-9, the witnesses skimmed through the entire document. This physical, nonverbal motion is clearly recalled by the Hearing Officer, but is not reflected in the transcript. The witnesses consideration of P-9 in its entirety when answering questions makes it virtually impossible to determine which individual documents within P-9 were actually referenced. Despite this, the entire exhibit was moved into evidence under the established procedures.

It must be noted that presenting multiple documents as a single exhibit is permissible in special education due process hearings. Documents such as long email chains and cumulative notes are frequently presented this way. It is possible to create a clear record while using multiple document exhibits. In fact, testimony regarding other multiple document exhibits in this hearing was clear – which makes the ambiguities concerning P-9 all the more concerning.

To rectify this problem, the Hearing Officer has used his discretion and best judgment to determine whether each of the within P-9 should be considered in the final disposition of this case. As set forth in detail herein, documents that were clearly referenced by witnesses are considered, as are documents that clearly were drafted with input and participation by District employees. Documents that were not clearly referenced or are not reliable for one reason or another were not considered. In some cases, these categories overlap (e.g. a document that clearly incorporates input from the District, but was not clearly referenced in the transcript). The Hearing Officer's use of such documents in deciding this case was, admittedly, a 'tough call.' In the discussion below,

⁵ It is reasonable to assume that P-9 was prepared by the Parent's attorney. It was introduced by the Parent, though counsel.

all of the documents within P-9 are described with an explanation as to how they were used in this decision. A considerable portion of this Decision is taken up by these descriptions, which are necessary to explain how P-9 was and was not used. More careful exhibit preparation would have resulted in a more concise, straightforward Decision.

The Family's Advocate

The family worked with an advocate, particularly around the time of the Student's initial enrollment. The advocate testified. N.T. at 525-574. The Parent argues that the advocate worked in a representative capacity and spoke with the District on her behalf. Parent claims that a document was sent to the district saying that the advocate was her representative, but that document was not presented during this hearing. The District acknowledges that it communicated with the advocate, and those communications contain the type of student-specific information that is protected by student privacy laws. The District argues, however, that it did not receive documentation indicating that the advocate served as the Parent's representative (in the legal sense) and, therefore, was not obliged to act upon various requests made by the advocate.

I find that the advocate's communications with the District have no substantive impact on the final disposition of this case. The advocate's communications are about a transportation issue that is the subject of a stipulation, and the Student's disabilities – which the District knew or should have known about regardless of the advocate's correspondences. The Parent claims that the advocate requested an IEP for the Student in November of 2008. Email between the advocate and the District in November of 2008 is easily construed as an IEP request. *See* P-37. For reasons set forth below, the ultimate outcome of this case would be the same even if there was clear evidence that the Parent requested an IEP herself at the same time.

Findings of Fact

THE 2008-2009 SCHOOL YEAR AND THE SUMMER OF 2009

The Student enrolled in the District for kindergarten on October 23, 2008. P-3, page 2. The Student had no formal education, such as pre-school or head start, prior to enrollment in the District. P-3, page 4.

Between November 5 and November 21, 2008, the Student did not receive bus transportation. N.T. at 73.

The Student was also diagnosed with ADHD on November 21, 2008 by a medical doctor from Temple University. P-6. The record contains no information as to whether the document at P-6 was shared with the District. Nevertheless, given the documentation at P-7 and the corresponding testimony about P-7, the Hearing Officer finds that the information contained in P-6 was shared with the District on November 21, 2008.

Notes written by the Student's guidance counselor on November 21, 2008 describe the Student as having ADHD, OCD and a "chemical imbalance," and say that the Student is receiving therapy from NHS. *See* P-7, page 1, N.T. at 639. These notes were taken during a conversation that the guidance counselor had with the Parent, and reflect both the Guidance Counselor's first-hand knowledge of the Student and information shared by the Parent. N.T. at 641. The document describes an in-school behavioral incident during which the Student, "cried, screamed, bit, spat, slapped, stomped [Student's] feet repeatedly, scratched [and was] totally uncontrollable, defiant [and] yelling." This incident was reported to the guidance counselor by the Student's teachers. N.T. at 642. These same notes indicate that the Student cannot stay still and that the Parent believes the

Student needs medication and made an appointment “for medication” on December 8, 2008. The document goes on to say that the appointment was canceled.

Parent testified, credibly, that the incident described in P-7 occurred on the first or second day of school, and that the physical aggression described in P-7 was directed towards a security guard. N.T. at 68. This would have been the first or second day of the Student's actual enrollment on October 23 or 24, 2008. The Student did not attend school earlier due to incomplete vaccinations. N.T. at 135.

On November 23, 2008, an Northwestern Human Services (NHS) out-patient therapist wrote a letter “to the Teachers and School of” the Student. P-5. The purpose of that letter was to verify that the Student had a diagnosis of ADHD. The letter itself does not indicate a recipient address, or whether it was actually sent. Parent recalls receiving the letter. N.T. at 57. She also recalls giving a copy of the letter to either the Student's “teacher or vice principal.” N.T. at 66. The author of the letter did not testify, nor did the vice-principal. The Student's teacher (as of the date of the letter) did testify, but was not asked about the letter. As such, the Parent did not prove that a copy of the letter was presented to the District. The District's receipt of P-5, however, is immaterial because the District had acknowledged the Student's diagnosis two days before P-5 was drafted.

Notes written by the Guidance Counselor on December 2, 2008 (also contained in P-7, and immediately following the notes of November 21, 2008) report that the Student had “not yet returned to school” but that “medication was started Thurs. 12/4/08.” [sic] P-7, page 2. The notes do not indicate how long the Student had been out of school on December 2, 2008, but do say that the “[b]us did not pick [the Student] up today.” *Id.*

The notes from December 2, 2008 at P-7 are consistent with the Parent's testimony that the Student was excluded from school after the behavioral incident on the October 23 or 24, 2008 until such time as the Student started receiving “medication and therapy.” [CITE]. Given the consistency between the Parent's recollection of the exclusion, the notes and P-7, and comments in P-8 indicating that the Student had returned to school for a long enough period for the kindergarten teacher to form an opinion about the Student's post-return behaviors by December 15, 2008, the Hearing Officer finds that the Student was excluded between October 23, 2008 and December 3, 2008.

On December 15, 2008, CCTC, School Based Behavioral Health (SBBH) Program completed an Assessment Summary Form. P-8. The form was completed by a Licensed Social Worker who did not testify, but who was serving the Student as a clinician at the time of the report. *Id.* The report lists the reason for referral as, “Constant behavioral problems at school and at home.” *Id.* The Teacher Concerns section of the form says that the Student's teacher at that time “reported that [the Student's] behavior has been so out of control that [Student] was not allowed back into school unless [Student] was evaluated for behavioral health services.” *Id.* The form goes on to describe the teacher's concerns as follows:

Prior to being medicated, [the Student] would leave the classroom on a daily basis, throw objects in [Student's] classroom, and distract other children from learning. [The teacher] reported that it was nearly impossible to teach [the Student] and the other children in the classroom when [the Student] was in attendance. [The Student] recently received medication and [the Student's]

teacher noted that [the Student's] behavior has changed as a result of being medicated. [The Student] is now able to sit and learn in the classroom.”

Id. The form goes on to note that the Student no longer exhibited behavioral problems in school – both according to observation and teacher reports – but that the Student continued to exhibit severe behavioral problems at home. *Id.* Nevertheless, the form lists three in-school behaviors to be addressed in the classroom: 1) poor social interaction/verbal aggression toward peers, 2) destructive behaviors towards property and 3) disruptive/inattentive behaviors. *Id.* at page 2. The form concludes that the Student will require services from SBBH to develop pro-social skills, avoid verbal and physical aggression, succeed academically. *Id.* at page 3.

In contrast to the form at P-8, the Student's teacher at that time testified that she did not recall the Student tearing up the classroom, but did describe the Student as being very upset and emotional. N.T. at 282. To the best of the kindergarten teacher's recollection, the Student began coming to school in November of 2008 – but she was unsure of the Student's start date. The guidance counselor's notes at P7 indicate that the Student had not returned to school as of December 2, 2008. Regardless, at first, “had difficulty” coming into the classroom N.T. 299. However, the teacher testified that she was able to build a rapport with the Student, and the Student “came in willingly” thereafter. Even so, the teacher was concerned about the Student’s lack of skills and referred the Student for a Comprehensive Student Assistance Process (CASAP) evaluation “to make sure that there [were] supports in place.” N.T. at 299. Specifically, the teacher viewed the CSAP evaluation as the first step in a process that would yield services from CCTC and tutoring. *See* N.T. at 300. Evidence indicates that the Student's first CSAP referral was on January 12, 2009. P-12

CCTC completed a Comprehensive Biopsychosocial Evaluation of the Student on December 17, 2008. The report of that evaluation, P-9, pages 1-8, was completed by a Pennsylvania Licensed Psychologist. The author of the report did not testify, but there is absolutely nothing in the record to call the accuracy or authenticity of the report into question. Moreover, the report relies, in part, upon information supplied by witnesses who did testify (the Parent and the Student's kindergarten teacher). Neither witness contradicted the report in any substantive or meaningful way. The record is not clear about whether or when the District received the report. However, the SBBH Program Coordinator (a CCTC employee who worked in the Student's school building) participated in the report. The Parent's testimony regarding interaction between herself, the Program Coordinator, teachers and school administrators was candid and credible. N.T. at 68-69, 161-162, 165. According to that testimony, the Program Coordinator worked in the Student's school building and attended meetings with the Parent and school personnel during the 2008-2009 school year. It is difficult to imagine that the District was oblivious to the report, but there is a dearth of testimony indicating when or if the District actually received the it.

The evaluator observed the Student briefly in [Student’s] classroom and in the hallway to the office where an interview was conducted. During the interview, in response to a request, the Student said, “I don't know how to write my name!” P-9 at 3. The evaluator instructed the Student to draw a picture, and while the Student was drawing the Student, “became very involved in the task and... began to ignore the the evaluator's questions.” In this state, the student was unable to say [Student’s] birth day; [Student’s] home telephone number or address; the city or state that [Student] lives in; the current month, date year or day of the week; and “gave very poor responses when asked pragmatic social questions about what to do in emergency situations that suggested an impulsive style.” P-9 at page 4. The evaluation does not say whether these responses were the result of a lack of knowledge, a misunderstanding of the questions, an inability to answer the questions, and/or a total focus on the task of drawing.

The evaluator also considered a Caregiver-Teacher Report Form (C-TRF), which is a behavior rating scale, that was completed by the Student's kindergarten teacher on November 28, 2008. On the C-TRF, the teacher's ratings placed the Student in the clinically significant range (90th percentile) for Total Problems, Internalizing and Externalizing. Indicators for emotional reactivity, anxiety/depression, attention problems and aggressive behavior syndromes were all in the 93rd to 97th percentile. This indicated "problems suggestive of anxiety or depression, attention problems..., especially problems in social relationships, attention problems, rule-breaking behavior, and problems of an aggressive nature." P-9 at page 6. The teacher also reported that the Student, "frequently attempts to elope from the classroom." *Id.*

Ultimately, the Comprehensive Biopsychosocial Evaluation lists several problems: physical aggression, elopement, irritability, hyperactivity, poor social skills, disruptive behavior, non-compliance, temper outbursts, oppositional, impassivity, and off-task behaviors. P-9 at page 7. The Student was diagnosed with ADHD Combined Type and Mood Disorder NOS. *Id.* The evaluator recommended placement in the SBBH program "in order to develop and implement a comprehensive behavioral program within the school," as well as other interventions to provide services in the Student's home and community.

The Hearing Officer finds that that the District was on notice of the information contained in the report of December 17, 2008, P-9 pages 1-8, at the time the report was generated, even if the District did not have actual possession of the report itself. The Student's teachers and CCTC employees stationed in the Student's building supplied information for the report, as well as the Parent, who was in communication with the District around the same time. Further, the Student began receiving school-based services from CCTC in December of 2008. P-9 at 19. Surely, the District must have knowledge of the behavioral services students receive within the walls of its own buildings – especially students who are known to have IDEA-qualifying disabilities. *See* P-7.

On January 12, 2009, the District prepared a CSAP Pre-Meeting Checklist. P-12, 1-5. Consistent with the teacher's kindergarten teacher's testimony, the reasons for the Student's referral to CSAP were that the Student "entered school later in the year. No previous school experience. Does not know alphabet. Needs to work on writing name." *C/f* P-12, 1; N.T. at 300. The Checklist also clearly indicates that the District knew the Student was receiving services from CCTC and "shows anger by 'shutting down'". P12, 1. Academically, the Student was reported to have emergent reading skills and below basic math skills. *Id.* To address these concerns, the Checklist describes a number of regular education interventions that the Student's teacher would implement, and set a 14 day timeline for progress monitoring. P-12 at 2-3. No documentary evidence was presented to indicate if those interventions were used or that progress was monitored.

On February 18, 2009, the District prepared another CSAP Pre-Meeting Checklist. P-12 at 6-19. This time, the reason for the referral was to address the Student's 23 absences. P-12 at 7. Again, regular education interventions were described, this time with a 30 day timeline for progress monitoring. Again, no documentary evidence was presented to indicate if those interventions were used or that progress was monitored.

On May 15, 2009, either the Student's kindergarten teacher or a reading teacher administered the DIBELS to the Student. N.T. at 290-292; P-13 at 4-5. DIBELS is a diagnostic reading skills test that measures phonemic awareness. N.T. at 291. The Student's overall performance was reported as follows: "Score Group: Intensive – Needs Substantial Intervention. Benchmark Level: Intensive – Needs Substantial Intervention." P-13 at 5.

An SBBHS Interagency Team Meeting was convened on May 18, 2009. P-10; N.T. at 91, 93-95, 143 144. During this meeting, the Student's teacher recommended that the Student repeat kindergarten. It was also suggested that the Student attend a District-run summer program. That program was rejected because it did not include transportation. The record does not specify whether transportation was offered. With the District's summer program off the table, the team considered summer camp. The Case Manager on the team said that she would "inquire about getting a TSS worker for the Student to assist with [Student's] behaviors during summer camp." P-10. The Parent testified that a TSS was not provided and this is the reason why the Student did not attend camp in the summer of 2009. *See* N.T. at 96.

Based on the foregoing, the Hearing Officer finds that the District concluded that the Student required educational services in the summer of 2009 to build basic kindergarten skills, but that the Student did not receive services in the summer of 2009.

On June 10, 2009, the Assistant Principal of the Student's school completed a Behavioral Health Emergency Form. P-16. This document provides information about who contact in the event of a behavioral emergency, and advised the Parent to "seek further professional attention immediately." P16 at 2. The form referred the Parent to the "[redacted]" and provided an address. At that time, the reasons for the referral (listed by the Assistant Principal) were "1. Violent tantrums lasting more than one hour. 2. Attacking children and adults – danger to others. 3. Property destruction, inability to de-escalate, danger to self." *Id.*

The Student's grades for the 2008-2009 school year are reported at P-13 at 7-9 and P-14 at 3-6. The Student's teacher at that time testified that she entered those grades and that the reported grades are accurate. *See* N.T. at 291-292. At the end of the 2008-2009 school year, the Student's grades reflect satisfactory progress in all areas of pre-reading listening behaviors and pre-reading speaking behaviors. In re-reading concepts of print, the Student needed improvement in identifying upper and lower case letters and matching letters to sounds, but made satisfactory progress in the other assessed areas in that category. The Student's instructional reading level and DRA Level were both rated at "B," which is the expected level of a student in December of his or her kindergarten year. The kindergarten teacher reported that the Student was at a basic level in "stages of writing," mathematics, science and social studies.⁶ The Student was marked as proficient in performing arts, physically education and health education – all at the kindergarten level.

The Student's attendance for the 2008-2009 school year is reported at P-14 at 1. This document indicates that the Student was absent for a total of 31 days, 25 of which were excused. However, the document also indicates that there were 175 days of school in the same period of time and the Student was present for 118 of those days. The Student's days absent plus [Student's] days present should equal the total number of days in the marking period, but they do not. The Student's teacher at that time was unable to account for the difference. *See* N.T.

⁶ The final mark in social studies represents a decline from the prior trimester, in which the Student scored "proficient."

at 295-298. As such, the Document at P-14 is not an accurate indication of the student's absenteeism. An accurate record of the Student's absences is found P-25, discussed *infra*.

On July 21, 2009, the Parent requested “a comprehensive multidisciplinary evaluation to assess [the Student's] educational needs.” P-17. This document was drafted by the Parent's attorney. N.T. at 98. Although there were some concerns presented on the records regarding the actual transmission of the evaluation request and the District's receipt of it, the District did receive the request on or about the time it was drafted. This finding is based on the fact that the District drafted a Permission to Evaluate – Consent Form (PTE) for the Student on July 29, 2010. P-18 at 4.

The PTE of July 29, 2010 is stamped “Proposed” on each page. P-18 at 4-8. Nevertheless, it was signed by the Parent on October 15, 2009 and received by the District on October 19, 2009. The PTE, therefore, will be discussed with the events of the 2009-2010 school year.

On August 13, 2009, CCTC completed a Comprehensive Biopsychosocial Re-Evaluation (CBR) for Community Based Behavioral Health Services. P-9, pages 9-17.⁷ The purpose of the evaluation was to determine whether the Student “would continue to benefit from [Behavioral Health Rehabilitation Services] BHRS.” P-9 at 9. At the time of the evaluation, the student “reportedly continues to exhibit behavior problems at school and at home including inattentive, aggressive, withdrawn, anxious, moody, oppositional/defiant, and rule-breaking behaviors.”

To complete the CBR of August 13, 2009, the evaluator interviewed the Student with the Parent, [Student's] Behavior Specialist Consultant (BSC)⁸, and [Student's] CCTC case manager. *Id* at 10. Reference is made to a Functional Behavior Assessment (FBA) completed in the Student's home in June of 2009, but that FBA was not presented during this hearing. The CBR also relies upon a Child Behavioral Checklist (CBC) completed by the Parent in August of 2009, and the prior Comprehensive Biopsychosocial Evaluation of December 17, 2008. Other than the CBC and interview, no new evaluations were completed and no new information was solicited from District personnel. At the time, the evaluator understood that the Student “apparently never had any type of psychological or standardized testing.” P-9 at page 13.

As indicated in the title of the CBR of August 13, 2009, BHRS therapies are home and community based. This was the case for the Student. *See* P-9, page 10. As such, the purpose of the CBR was to determine the Student's continued need for services in [Student's] home and community. This CBR, therefore, does not speak definitively to the Student's needs in school. Despite this, the CBR reports an in-school observation from the BSC. The BSC did not testify, his credentials and qualifications are unknown – as are the circumstances of the observation (time of day, location in school, typicality of the day and other factors). Moreover, the BSC's observation conflicts with the testimony of the Student's teacher during the same period of time. *See* N.T. at 454-459. The teacher was candid that the Student may have exhibited the observed behaviors in the cafeteria, but not in her classroom. Given the forthright nature of the teacher's testimony, its conflict with the BSC's observations, and the lack of information about the BSC's observation, no weight is assigned to the report of the BSC's observations at P-9, page 10.

What is important to the instant matter is that the CBR of August 13, 2009 maintains the diagnosis of

⁷ The authors of the CBRs in P-9 did not testify. ⁸ The record does not specify when the Student began to receive services from the BSC or, more importantly, what services the BSC provided and where the BSC provided those services. *See* N.T. at 176, 452-454, 462

ADHD combined type, does away with the Mood Disorder diagnosis, adds a diagnosis of Oppositional Defiant Disorder and a rule-out diagnosis of Obsessive-Compulsive Disorder. P-9, page 15. The report recommends that the Student continue therapy and medication through NHS, continue the SBBH program at school and continue to receive BHRS in the home and community. *Id* at 15-16.

Again, there is no clear indication in the record as to when (or if) the District received the CBR of August 13, 2009. Still the Hearing Officer finds that the District, minimally, knew or should have known that the Student was participating in the SBBH program in school for the period of time considered by the report.

THE 2009-2010 SCHOOL YEAR AND THE SUMMER OF 2010

The Student started the 2009-2010 school year in kindergarten but was quickly moved to a first grade classroom. The Student was approved for bus transportation on October 15, 2009. *See* P-34.

On October 19, 2009, the District received a signed copy of the PTE of July 29, 2009. P-18 at 4-8. Through this document, the District proposed to assess the Student's psychological functioning, academic achievement in literacy and math, and the Student's "behavioral performance/socialemotional functioning." *Id* at 4.

On November 2, 2009, the District prepared another CSAP Pre-Meeting Checklist for the Student. This was the Student's third referral to CSAP overall, but [Student's] first for the 2009-2010 school year. The sole reason for the referral was "attendance." P-12 at 11. At that point, the Student had "more than 8 absences." *Id*. This CSAP again notes that the Student's math level is "blow basic" and lists the Student's reading level at "DRA Level =" (nothing is written after the equals sign). This Checklist proposed no interventions other than contact with the Parent to address the Student's attendance, but sets a 95% attendance rate as a goal with a 30 day progress monitoring timeline. P-12 at 11-12, 14. No documentary evidence was presented to indicate if those interventions were used or that progress was monitored.

On November 5, 2009, the District issued a PTE identical to the PTE of July 29, 2009. This document is not marked "Proposed" and is not signed by the District or the Parent. It is not clear why this document was generated, or if it was issued.

On November 20, 2009, the District completed a Psychological Evaluation of the Student. P-19. The purpose of the evaluation was to determine if the Student "may have an educational disability and requires special education services to meet [Student's] educational needs." P-19 at 1. For this evaluation, the evaluator's practicum student complied and summarized prior evaluations for the evaluator. The prior evaluations considered in the report were a Medical/Developmental History Form completed by the Parent; the Behavioral Health Emergency Form of June 10, 2009; a Staff Input Form completed by the Student's kindergarten teacher on October 21, 2009; CCTC's CBR of August 13, 2009; and a Biopsychosocial Assessment conducted by NHS on July 20, 2009.⁹ The evaluation also lists the CSAP regular education interventions that the Student received during the 2008-2009 school year with greater clarity than the CSAP forms themselves. Specifically, the Student had received guided reading three times per week and had worked with a reading tutor.

⁹ The Medical/Developmental History Form completed by the Parent and the Staff Input Form are not part of the record of this case.

The Psychological Evaluation includes a section titled “data from structured behavioral tools.” This includes an analysis of the rating scales completed for the prior CCTC CBRs and presents the results new standardized assessments completed for the evaluation. The new assessment included a Reynolds Intellectual Assessment Scale (RIAS); a Berry-Buktenica Developmental Test of Visual-Motor Integration (Berry-VMI); and a Wechsler Individual Achievement Test, second edition (WIAT-II). P-19 at 4. The evaluator, a PhD level school psychologist, administered these assessments and interviewed the Student.

Upon consideration of the assessment data and the Student's records, the evaluator found significant deficits in the Student's academic performance as compared to [Student's] abilities. P-19 at 8. However, the evaluator hypothesized that these deficits could be a result of the Student's attendance issues and behavioral difficulties. *Id.* For this reason, the evaluator felt that it was premature to conclude that the Student had a specific learning disability. *Id.* However, based on the Student's diagnoses, impulsivity, attention issues, and behaviors that have “interfered with appropriate functioning,” the evaluator concluded that the Student qualified for special education under the category of Other Health Impairment. *Id.* The evaluation goes on to list over four pages of recommended special education interventions targeting, *inter alia*, attendance, school readiness, social skills, reading skills, math skills, and executive functioning. *Id.* at 8-12.

The District completed yet another CSAP Pre-Meeting Checklist on December 15, 2009. P-12 at 15. This was the fourth referral overall, and the second of the 2009-2010 school year. The reason for referral was “poor attendance,” as the Student had been absent 27 times that year. *Id.* At this point, the Student was reading at “Level A”¹⁰ and [Student's] math skills were still “blow basic.” *Id.* As with all of the prior CSAP Checklists, regular education interventions were proposed with a timeline for progress monitoring – and no documentation to evidence follow-up was presented.

The Psychological Evaluation of November 20, 2009 (P-19) was not used, directly, in the subsequent development of the Student's IEP. Rather, the Psychological Evaluation was incorporated into an Evaluation Report (ER). *See* P-20. The date of the report is listed as March 4, 2010 and the date that the report was given to the Parent is listed as December 16, 2009. *Id.* at 1. Witness were not able to explain this discrepancy but, based on the sequence of the Psychological Evaluation and the ultimate generation of the Student's IEP, the Hearing Officer finds that the report was given to the Parent on December 16, 2009, as indicated. *See* N.T. at 228-229.

The ER relies exclusively on the Psychological Evaluation and concludes that the Student has a disability and is in need of specially designed instruction, and therefore is eligible for special education. P-20 at 10. The ER includes the recommendations contained in the Psychological Evaluation. P-20, N.T. at 230.

CCTC completed a second CBR (in a somewhat different format than the first) on December 29, 2009. P-9, pages 18-24. As with the first CBR, the primary function of the CBR of December 29, 2009 was to determine the Student's need for continued home and community based interventions. However, this CBR included an Achenbach Teacher Report Form completed by the Student's classroom teacher in October of 2009. The actual form completed by the teacher is not included in the report, but the CBR says:

¹⁰ Nothing in the report itself indicates what “Level A” means. Testimony reveals that this is the lowest kindergarten reading level. *See* N.T. at 161-162.

[The Student's] teacher rated [the Student's] performance in one subject at far below grade level, one subject at somewhat below grade level, and two subjects at grade level. The teacher rated [the Student] as working hard about average, behaving much less appropriately, learning about average, and somewhat less happy compared to typical students of the same age. ...

P-9, page 19. The CBR of December 29, 2009 does not indicate which subjects the Student was below grade level. The report goes on to say that the teacher rated the Student's Academic Performance and Total Adaptive Functioning scores both in the borderline clinical range. P-9 at 21. The CBR also notes that the Parent completed an updated Child Behavioral Checklist in November of 2009, rating the Student's school performance as below average in all subjects. *Id.* Despite completing this checklist and submitting to another interview, the evaluator described the Parent as "relatively uninformative." *Id.* at 20. The evaluator also noted the total lack of formal assessments of the Student to date. *Id.*

The CBR of December 29, 2009 recommends a higher level of home and community support, as prior BHRS interventions were not effective. The CBR also recommends continuation of the SBBH program in school, without commenting on the effectiveness of that program.

Like the prior CCTC reports, the CBR of December 29, 2009 contains in-school observations by the Student's BSC. These observations are discounted for the same reasons that they were discounted in the CBR of August 13, 2009. Also, as with the prior report, there is no clear indication in the record as to when (or if) the District received the CBR of December 29, 2009. Still Hearing Officer finds that the District knew or should have known that the Student was participating in the SBBH program in school for the period of time considered by the report. Further, the Hearing Officer finds that the District knew the information reported by the Student's teacher as reflected in the CBR of December 29, 2009.

An IEP Team Meeting for the Student convened on January of 2010. The documents making up the Student's IEP are confusing because they are replete with inaccurate dates. The IEP itself indicates that the Team Meeting convened on January 27, 2010. P-22 at 1. At the same time, the IEP itself appears to have been created on March 5, 2010. *Id.* at 2. None of the various signatures on the IEP are dated. A NOREP for the IEP was sent by the Assistant Principal on March 5, 2010, and approved by the Parent the same day. P-23 at 2, 3. None of the witnesses satisfactory addressed these discrepancies. Consequently, I find that the IEP was developed on January 27, 2010 but was not issued to the Parent with a NOREP until March 5, 2010.

The IEP itself does not include the vast majority of recommendations in the Psychological Evaluation and ER, despite the fact that the evaluator felt that the Student would benefit from recommendations, and the recommendations were derived from an extensive and careful evaluation. The evaluator himself did not directly participate in the drafting of the Student's IEP and did not attend the IEP Team Meeting. N.T. at 233.

The IEP indicates that the the Student's behaviors impede the Student's learning or that of others in the school setting. P-22 at 7. The statement in the IEP concerning the Student's Present Levels of Academic Achievement and Functional Performance do not incorporate the findings in the ER, but many of those findings appear in the Student's goals. *C/f* P-22 at 8 with P-22 at 15. The IEP does not include a behavior support plan.

The IEP contains five goals. Two goals are directed towards reading. P-22 at 15, 17. Two goals are directed towards writing. P-22 at 19, 21. One goal targets the Student's behavior. P-22 at 23. While each of these goals could have been drafted with greater precision, all are measurable, objective and flow directly from the Student's assessed needs. Immediately following each goal is a list of "Modifications and SDI" that, ostensibly, will enable the Student to achieve each goal. For each goal, the list contains program modifications (e.g. extended time on tests) but not specially designed instruction. The IEP, as a whole, does not specify what SDIs the Student was supposed to receive, if any.

The IEP indicates that the Student was found to be ineligible for ESY serves in the summer of 2010. P22 at 26. According to the IEP, the Student also had no need for "general" program modifications or specially designed instruction, but did require "curb to curb pick-up and delivery" in order to "access" a free appropriate public education. P-22 at 25.

CCTC completed a third CBR was on April 16, 2010 and signed it (electronically) on April 29, 2010. P-9, pages 25-32. As with the first two CBRs, the purpose of the third CBR was to determine if the Student continued to need home and community interventions. However, this CBR contains updated and reliable information concerning the Student's presentation in school. In the section of the report titled "Reason for Re-Evaluation and Current Functioning," the CBR says:

[The Student] has continued to receive SBBH Services at [Student's] school where [Student] had made behavioral progress this school year until the past few weeks, when [Student] had to be physically restrained twice during tantrums, and [Student's] Parent was called to school to remove [Student] because [Student] was punching and kicking staff.

P-9 at 25. This information was reported by the Student's SBBH Clinician (who provided services to the Student in school). The report also includes information provided by the same SBBH Program Coordinator who participated in the original CCTC evaluation of December 17, 2008; a progress report of April 2010 from the Student's SBBH Clinician; a Psychiatric/Biopsychosocial evaluation of December 2009.¹¹ The report contains teacher input from April of 2010 and an updated Achenbach Teacher Report Form from March 2010. P-9 at 25-26. This CBR incorporates information from the IEP regarding the Student's levels in reading, math and behavior, and notes that the then-current teacher rated the Student as "working somewhat harder, behaving somewhat *more* appropriately, learning somewhat less and slightly less happy compared to typical students of the same age." P-9 at 26, *emphasis added*.

The author of the CBR assumed that the Student "had some type of assessment" to determine [Student's] eligibility for special education, but no such testing was available for the completion of the CBR. P-9 at 28.

The Student's teacher rated the Student in the clinical range below the tenth percentile for Academic Performance on the Achenbach Teacher Report Form from March 2010. On the same form, the teacher rated the Student's Total Problems and Externalizing scores in the borderline clinical range, although

¹¹ The Psychiatric/Biopsychosocial evaluation of December 2009 and the CBR of December 29, 2009 are different documents. The former was not introduced in this hearing.

Attention Problems were in the normal range. The teacher reported that the student was “often attacking others.” P-9 at 28.

When interviewed for the CBR of April 16, 2010, the Student's social comprehension, insight and judgment appeared to be at least average, as was [Student's] abstract/analytical thinking ability. The Student's receptive and expressive language skills were normal, but the Student's fund of information and academic/achievement skills were somewhat to significantly below average. All of the foregoing appears to be based on the observations of an evaluator who did not testify – observations formed during a structured interview, not formal testing.

The CBR of April 16, 2010 recommends that the Student should “continue receiving services in the SBBH Services Program at [Student's] school due to [Student's] infrequent but extremely dangerous episodes of aggressive/assaultive and acting out behavior with tantrums where [Student] is a threat to staff. SBBH Services are necessary in order to decrease [Student's] angry, irritable, impulsive, oppositional/defiant, aggressive/assaultive and oppositional behavior with tantrums.” P-9 at 30. At least some of the basis for that recommendation comes from observations by the Student's BSC, which are discounted for the same reasons that they were discounted in the two prior CBRs. However, the Hearing Officer finds that the District knew or should have known the contents of this report, given the involvement of District employees and CCTC employees who worked with the Student in school. At this point, with an IEP in place, the District should have known of the Student's behavioral needs as reported by those providing services within its own building. Even if the District disagrees with the CBR of April 16, 2010, the District knew or should have known about its contents.

Another document, also contained within P-9, begins on page 33 and ends on page 39 of that exhibit. This document, dated April 29, 2010, is titled School Based Services Treatment Plan at the top of each page. The document is incomplete, starting on page 4 of 10. *See* P-9, page 33. Also, there is no reference to the Document in the testimony.¹² Consequently, the document will not be considered in this decision. Page 40 of P-9 is a signature page to the document starting at page 33 of P-9. The document at page 40 of P-9 clearly indicates that the Parent approved the treatment plan of April 29, 2010. Based on this, and the fact that school-based services are referenced in all of the CBRs, I find that a school based behavioral treatment plan existed as of April 29, 2010 and that the Parent approved it.

2010-2011 SCHOOL YEAR

Shortly before the start of the 2010-2011 school year, on August 23, 2010, CCTC drafted a BHRS Treatment Plan. P-9 at 41. The contents of the treatment plan are barely legible in the Hearing Officer's copy of P-9. Even so, the plan lists three goals in the School Report section and specifies interventions for teachers as well as a plan for de-escalation. *See* P-9, 45-49. This document is not signed, electronically or otherwise, and was not referenced in the transcript.¹³ Consequently, it will not be considered.

Progress Monitoring completed on September 17, 2010 indicates that the student had not achieved the goals of the IEP that was approved on March 5, 2010. *See* P-24. Given the short amount of time that the IEP had been in place (which spanned the summer of 2010).

¹² It is remarkably difficult to match testimony in this case to the individual documents that make up P-9, and the weight of all such testimony is diminished for that reason.

¹³ *See* footnote 5.

The Student did not receive the transportation called for in the IEP at the start of the 2010-2011 school year, but this problem was quickly corrected. *See* P-27.

CCTC drafted a fourth CBR between August 5 and September 21, 2010. P-9, 52-58. The “service date” of the report is August 5, 2010; the report was signed electronically on August 19, 2010, and each page of the report is dated September 21, 2010. *Id.* The Hearing Officer's copy of this report is even less legible than the BHRS Treatment Plan at P-9, 41. The document's inconsistent date, its illegibility, and a lack of clear reference to this CBR in the transcript, taint its probative value. This CBR will not be considered.

The Parent retained the services of an independent, Ph.D. level school psychologist to evaluate the Student. The resulting report was completed on October 7, 2010. P-30. This report is not, in fact, an independent educational evaluation. Rather, it is a review and critique of the Student's educational records. The Student was not evaluated, neither the Student nor the Parent were interviewed and nobody from the District was contacted. Through testimony, it was revealed that this critique was drafted at the request of the Parent's attorney. N.T. at 735. As such, the critique is little more than an effort at 'Monday morning quarterbacking.' Moreover, the legal sufficiency of the education that the Student received, as indicated in the Student's educational records, is the purview of the Hearing Officer. For these reasons, the document at P-30 is credited with no weight whatsoever.

Through a series of pre-hearing motions and motions on the record, the District attempted to exclude exhibit P-30. In resolving these motions, the Hearing Officer issued an interim order indicating that the critique could be admitted, but that it would be given the weight that it is worth. *See* HO-2. In an obvious response to this, the Parent immediately had the independent psychologist complete some educational testing for the Student. This testing was completed on October 25 and 26, 2010. P-36, P37. Although the overall circumstances cast doubt upon this testing, there is no reason to doubt the accuracy of the WIAT-III results reported at P-36. Nevertheless, the independent psychologist did not draft a report of her evaluation that could be used by the District, and considered her testing to be part of an “incomplete” evaluation. N.T. at 763-764. Therefore, the independent testing at P-35 and P-36 is given no weight.

TRANSPORTATION AND ATTENDANCE

The Student's transportation and attendance have been a pervasive issues. The District argues that, prior to the development of the Student's IEP, busing was provided as an accommodation to the Parent. This argument is undercut by statements in the IEP that door-to-door transportation is required for the Student to access [Student's] education. The District admits that it was sometimes slow to start transportation at the beginnings of the school years in question. It is also conceivable that the Student's bus simply did not come on some occasions. If accurate, day-by-day records of the Student's transportation exist, they were not presented in this hearing.

At the same time, the Student's chronic absenteeism is also apparent. Several CSAPs were initiated to address the Student's attendance issues – apparently with little success. The Parent, however, did not substantiate her argument that the majority of the Student's absences are attributable to transportation failure and medical appointments. The Student's attendance report (P-25) indicates that the Student had 32 unexcused absences in the 2008-2009 school year between October 27, 2008 and June 22, 2009; 36 unexcused absences in the 2009-2010 school year between September 16, 2009 and June 16, 2010 and five unexcused absences in the 2010-2011 school year between September 7 and September 15, 2010. P-25 was printed on September 16, 2010. Nothing in the testimony suggests that the the records at P-25 are inaccurate. *See, e.g.* N.T. at 366-372.

Any absences during the Student's exclusion between October 23 and December 3, 2008 are excused for purposes of implementing this Decision.

The Student's absenteeism surely had a negative effect on the Student's educational progress. Even so, the absenteeism in no way alters the Student's right to FAPE under the IDEA and Section 504. At the same time, the District cannot be held liable for failing to offer FAPE to the Student on days that the Student was unlawfully absent.

Discussion and Conclusions of Law

THE BURDEN OF PROOF

The Parent requested this hearing and, therefore, bears the burden of persuasion. She must prove the violations she alleges by a preponderance of evidence. If the evidence rests in equipoise (i.e., that it is equal on both sides) the Parent will not have met her burden. *See* L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006); *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

With the exception of claims regarding the summer of 2010, the Parent has proved her case by preponderant evidence.

CHILD FIND

The IDEA imposes a 'child find' obligation on LEAs. To satisfy this obligation, school districts must identify, locate and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. School districts have a reasonable time to satisfy the child find obligation after they have notice that a student is exhibiting behavior that is likely to indicate a disability. *W.B. v. Matula*, 67 F.3d 484, 500-501 (3d Cir. 1995), abrogated on other grounds by *A.W. v. Jersey City Public Schools*, 486 F.3d 791 (3d Cir. 2007). Knowledge that a student has a disability is not required to trigger a school district's child find obligations. After all, the purpose of child find is to identify students with disabilities so that they can receive appropriate services. This is why child find obligations are triggered when a district is on notice of a student's behaviors and/or academic progress. Section 504 established a similar duty. 34 C.F.R. §104.32(a). *Ridgewood Board of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999).

In this case, the Student had a serious, dangerous behavioral incident on October 23 or 24, 2008. The incident was so severe that the Student was excluded from kindergarten until such time as behavioral services were secured from a third party. The inappropriateness of its response notwithstanding, the District argues that the incident was due – in large part – to the Student's lack of prior educational experiences. If so, the District's reaction to the incident suggests that the Student had rather extraordinary transition needs. This alone would have been sufficient to place the District on notice the Student may have a disability.

This is not to say that the District should have immediately initiated a special education evaluation. It would have been appropriate for the District to increase the level of regular education support for the Student, especially because lack of prior exposure to education may undercut special education eligibility determinations when reading and math needs are in play. *See* 22 Pa Code § 14.125(4). However, the District should have used its CSAP process to both increase the Student's regular education supports and track the effectiveness of regular education interventions. Rather than use this process, the District excluded the student.

The CSAPs that were completed for the Student indicate that services are typically put in place for about 30 days before their effectiveness is assessed. Had the District acted appropriately, the CSAP process would have ended on or about November 24, 2008. The record indicates that the CSAP process that targeted the Student's behaviors were ineffective. Consequently, the District should have taken action to satisfy its child find obligations no later than November 25, 2008. Moreover, by that time, the District had knowledge of the Student's ADHD diagnosis, and there was an abundance of evidence suggesting that the Student required behavioral supports in school. It was inappropriate for the District to rely exclusively on CCTC to meet the student's behavioral needs without making any effort to conduct its own evaluation.

Had the District acted to satisfy its child find obligations, it should have completed an evaluation in conformity with 20 U.S.C. § 1414(a)(1)(C), which sets a 60 day evaluation timeline. Therefore, the evaluation should have been completed no later than January 23, 2009. As importantly, the evaluation should have used “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information” about the Student. 20 U.S.C. § 1414(b)(2)(A). This should have revealed the Student's deficits in reading and math. It would have been fair for the District to ascribe those deficits to a lack of prior instruction, but the testing should have established benchmarks (using sources more reliable than curricular assessments) to track the Student's progress in math and reading. This was never done. The District's Psychological Evaluation of November 20, 2009 contains only speculation as to whether the Student has a specific learning disability. It is impossible to say if the District's evaluator would have reached a more definitive conclusion if the District had established benchmarks ten months prior.¹⁴

For these reasons, the District violated its child find obligations. The District should have initiated a special education evaluation no later than November 25, 2008. That evaluation should have been completed no later than January 23, 2009. In this case, the District's evaluation was completed on December 16, 2009 – nearly a year late. When evaluations were completed, the District quickly agreed that the Student must have an IEP. Under applicable timelines, the Parent should have had 10 school days to review the ER before an IEP meeting. The District would then have had another 10 days after the meeting to implement the IEP. 22 Pa Code § 14.131. Consequently, the Student should have had an IEP in place no later than February 12, 2009. An IEP was not offered until March 5, 2010. That IEP offered a supplemental level of special education services, meaning that the Student would receive at least 1.4 hours of special education during [Student's] 6.65 hour day. However, for reasons described herein, the IEP itself is inappropriate. As explained below, the IEP should have provided no less than three hours per school day of special education services. Consequently, the Student will be awarded three (3) hours of compensatory education for each school day between February 12, 2009 and March 5, 2010,

¹⁴ Had the District evaluated the Student in January of 2008, a reevaluation would not have been necessary until January of 2011 unless the District or the Parent requested an evaluation sooner. *See* 20 U.S.C. § 1414(a)(2).

excluding days that the Student was unlawfully absent but including days that the Student was not provided transportation.

IEP DEVELOPMENT

The Parent argues that the IEP development process was substantively flawed once it actually started. More specifically, the Parent claims that the District violated 34 CFR § 300.321 by failing to include a regular education teacher and an individual who can interpret test results on the Student's IEP Team. The Parent argues that the Psychologist who completed the District's evaluation could have filled the latter roll, and that a better IEP would have been drafted with his participation. Even if the Parent is correct that the IEP Team was incomplete, the alleged substantive violation goes to the IEP itself. The remedy that the Student is owed for the District's offer of an inappropriate IEP is proper compensation for the deficiencies in the formation of the IEP Team as well.

The gap between the the completion of the ER and the completion of the IEP itself (via the NOREP) is also a substantive violation of IDEA timelines. This delay overlaps with the District's child find violation, and the remedy awarded for that violation is proper compensation for the this period of time. Said simply, the child find violation runs from February 12, 2009 through March 5, 2010. The gap between the completion of the ER and the transmission of the NOREP runs from December 16, 2009 through March 5, 2010. Both of these violations resulted in a denial of the Student's right to a FAPE. The Student is entitled to compensation for this denial, but not to double compensation because the denial arose from two contemporaneous violations.

IEP APPROPRIATENESS / INDEPENDENT FBA

To be appropriate, an IEP must be reasonably calculated to provide FAPE. That is, an IEP must be reasonably calculated to confer a meaningful educational benefit (that is, an opportunity for significant learning – a benefit that is more than trivial or *de minimis*) in light of a student's educational potential. *See* Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004), *quoting* Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009); Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009); Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999).

As a part of the FAPE obligation, a IEP must provide individualized instruction and services designed to meet the student's unique needs. *See* Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993).

Under this standard, the IEP offered to the Student was not appropriate. The IEP identified the Student's behavioral needs and set a target for behavioral improvement. The IEP does not specify what special education services the Student will receive that will enable the Student to attain the behavioral goals. The same is true for all of the goals listed in the Student's IEP. It is not enough for the IEP to identify present performance and future aspirations. The IEP must give some indication as to how the Student is supposed to reach the goals. Listing generic, un-individualize program modifications falls short of this standard – specially designed instruction is needed.

Moreover, through its evaluation, the District determined that the Student is entitled to an IEP. By definition, this means that the Student both has a qualifying disability and requires special education and related services. 34 C.F.R. § 300.8. Under the IDEA, “the term 'special education' means *specially designed instruction*, at no cost to parents, to meet the unique needs of a child with a disability...” 20 U.S.C. § 1401(29) (*emphasis added*).

An IEP that does not specify what specially designed instruction a student will receive is inappropriate *per se*.

Given the Student's behavioral needs, and the contrasting reports of the Student's behaviors from school personnel (i.e. classroom teachers indicate that the Student's behaviors are easily controlled while reports from assistant principals indicate ongoing tantrums) a functional behavior analysis (FBA) must be completed by appropriately qualified individuals so that a behavior support plan can be drafted and incorporated into the Student's IEP. The Parent has requested an independent FBA for this purpose. On the one hand, the Parent is not disputing the appropriateness of a district-conducted FBA – which is usually a necessary prerequisite to a district-funded independent evaluation. *See* 34 C.F.R. § 300.502(b). On the other hand, the District has noted the Student's ongoing behavior problems, either in its own documents or when providing input to third parties, since the Student's first or second day of school. Regular education interventions, implemented too late, failed. But there has been some documented progress towards the Student's behavioral goals. Those goals may be a good starting point but, given the totality of the circumstances, it is equitable to award an independent FBA to the Parent.

Based on the considerable evidence concerning the Student's needs, the hours of regular education interventions that the Student received through the CSAP process, the ineffectiveness of those interventions, and the minimal progress that the Student made once the IEP was in place, the Student's IEP should have provided at least three (3) hours of special education interventions per day. This is not to say that the Student should have been placed in a special education classroom for three hours per day. Special education is a service, not a location.

The Student is entitled to three (3) hours of compensatory education for each school day after March 5, 2010, excluding days that the Student was unlawfully absent but including days that the Student was not provided transportation. This award will continue to accrue until such time as the District offers an appropriate IEP for the Student.

IEP IMPLEMENTATION

The Student has already been awarded three hours of compensatory education for each school day after February 12, 2009, accruing until the District offers an appropriate IEP, excluding days that the Student was unlawfully absent *but including days that the Student was not provided transportation*. The Student is not entitled to an additional award for any failure on the District's part to implement an IEP that was inappropriate in the first place. The award is structured so that the Student will not “lose” compensatory education on days that a lack of transportation resulted in both an absence and an IEP implementation failure.

ESY

Testimony and evidence reveal that the District (or at least the Student's teacher) felt that the Student required instruction in the summer of 2009. The Student's teacher would have been a member of the Student's IEP team and should have contributed this insight as the team considered the Student's need for ESY programming. Given the Student's late start in school, and the teacher's concerns, the Student would have qualified for ESY under the standard set forth at 22 Pa. Code § 14.132(a)(2)(iv), which looks to progress, not regression or recoupment.

It is equally clear that the District had a specific summer program in mind for the Student in the summer of 2009, and that the Student would have attended that program but for the lack of transportation. Transportation is, of course, a related service as per IDEA definitions at 20 U.S.C. § 1401. If the Student required ESY services, it was the District's obligation to provide related services to enable the Student's access. Similar requirements are found in Section 504.

The Student should have received ESY services in the summer of 2009, but did not. The Student will be awarded an additional 90 hours of compensatory education for this failure, representing three hours of compensatory education per day for what would have been a six week summer program.

There is very little in the record to support the Parent's claim that the Student was entitled to ESY in the summer of 2010. *See* N.T. at 110. What little testimony there is does not amount to preponderant evidence, and so the Parent did not prove that the Student is entitled to compensatory education for a lack of services in the summer of 2010.

ORDER

Wherefore, it is hereby ORDERD that:

- 1 The District violated its child find obligations by failing to timely identify and evaluate the Student; and
- 2 After evaluating the Student, the District offered an inappropriate IEP; and
- 3 As a result of the foregoing violations, and for reasons set forth in the foregoing Decision, the Student is awarded three (3) hours of compensatory education for each day that school was in session from February 12, 2009 through the date of this Order; and
- 4 The Student is awarded an additional 90 hours of compensatory education resulting from the District's failure to provide ESY services in the summer of 2009.
- 5 The foregoing compensatory education award shall continue to accrue until such time as the District offers an appropriate IEP to the Student; and
- 6 The District shall fund an independent FBA for the Student, which shall include an in-school observation of the Student by the evaluator. The Student's IEP Team shall consider the results of the independent FBA when making programmatic decisions for the Student; and
- 7 The Parent shall make every reasonable effort to promptly schedule the independent FBA and attend all meetings (either in person or by telephone) that are part of the process by which the Student's IEP will be revised consistent with this Order; and
- 8 The compensatory education awarded herein shall take the form of appropriate developmental,

remedial or enriching instruction or other educational services. Compensatory education may occur after school, on weekends and/or during the summer months, when convenient for the student and the Parent, and may be utilized after the Student attains 21 years of age. Compensatory education must be in addition to services that necessary to an appropriate IEP and may not be used to supplant the IEP. The hourly cost for compensatory education shall not exceed the hourly cost of salaries and fringe benefits for qualified professionals providing similar services at the rates commonly paid by the District.

DATED: December 21, 2010

SIGNED: /s/ Brian Jason Ford BRIAN JASON FORD Hearing
Officer