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: S.T.

Date of Birth: [redacted]

ODR No. 01351-1011 KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Drew Christian, Esquire 801 Monroe Avenue Scranton, PA 18510
Lakeland School District 1593 Lakeland Drive Jermyn, PA 18433-9801	Angela J. Evans, Esquire Sweet, Stevens, Katz & Williams, LLP 331East Butler Avenue New Britain, PA 18901
Dates of Hearing:	September 13, 2010; October 6, 2010
Record Closed:	October 25, 2010
Date of Decision:	November 8, 2010
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an early teen-aged, ninth grade student, who at all relevant times resided within the Lakeland School District (District)[1]. (NT 8-10 to 18, 9-9 to 18.) The Student is identified with Specific Learning Disability under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 9-5 to 6.) Parent requests due process, alleging a Child Find violation for failure to timely evaluate and identify the Student, and the denial of a Free Appropriate Public Education (FAPE), during the 2008-2009 and 2009-2010 school years, which is the relevant period for purposes of this decision. The District asserts that the Parent failed to place it on notice of the Student's disability for most of the relevant period and obstructed its efforts to convene an IEP meeting; it further asserts that it offered a FAPE when finally able to do so in May 2010.

The hearing was conducted and concluded in two sessions and the record closed upon receipt of written summations by counsel.

ISSUES

1. Did the District inappropriately fail to identify the Student as a child with a disability under either the IDEA or the Rehabilitation Act of 1973, section 504, 29 U.S.C. §794 (section 504), thus failing to fulfill its child find obligation under either of those laws?

2. Did the District fail to provide the Student with a free appropriate public education during the 2008-2009 and 2009-2010 school years?

3. Should the hearing officer award compensatory education to the Student for all or any part of the 2008-2009 and 2009-2010 school years?

[1] The Student withdrew from the District prior to the 2010 – 2011 school year. (NT 16-7 to 8.)

4. Should the hearing officer order the District to reimburse Parent for the independent educational evaluation dated April 13, 2010?

FINDINGS OF FACT

1. Prior to the 2008-2009 school year, the Student's school performance was passing, with a range of grades from A to D. During the 2008-2009 school year, the Student failed all of Student's major academic subjects and finished with an overall grade point average of 57. The District was aware of this and gave notice of intent to retain the Student in seventh grade. (NT 26-20 to 33-4; P-1, 2, 17 p. 5.)

2. The District's school psychologist was aware at the end of the 2008-2009 school year that the Student was receiving counseling from a behavioral health agency, and that it was likely the result of a medical diagnosis of mental or emotional disorder. (NT 112-9 to 114-12.)

3. During the 2008-2009 school year, the Student violated the student code of conduct on numerous occasions, mostly for insubordination and failure to complete assignments, and received numerous detentions in consequence. (S-2.)

4. The Student was promoted at Parent's request. In the summer of 2009, the Parent told the Student's principal that the Student had threatened to jump in front of a truck if Student were retained in seventh grade. (NT 67-6 to 17, 170-1 to 171-6.)

5. During the 2009-2010 school year, the Student received detentions for a number of violations of the school code of conduct, but fewer than in the previous school year. (S-2.)

6. During the 2008-2009 and 2009-2010 school years, the Student missed an uncharacteristic number of school days or was tardy. Many of these absences were unexcused; some were due to chronic tonsillitis or emotional disorder. Student underwent a tonsillectomy in April 2010. (P-17 p. 2, S-3, S-16.)

7. On October 16, 2009, the Parent requested that the District evaluate the Student for attention deficit hyperactivity disorder (ADHD), and on October 28, 2009, the Parent signed the Permission to Evaluate. (P-3, 4.)

8. The Student was hospitalized for Mood Disorder, NOS in November 2009. The Parent did not reveal this event to District personnel, nor did he inform District personnel that the Student was suffering from an emotional illness. (NT 61-24 to 63-6; P-7.)

9. On December 11, 2009, the Parent met with District personnel, and pending the results of the District's evaluation, which was ongoing at the time, the District and

Parent agreed to a series of actions designed to support the Student in Student's participation in school. (P-5.)

10. The Student continued to be in danger of failing major academic subjects throughout the 2009-2010 school year. (NT 26-20 to 33-4; P-15, 21, S-8 p. 8 to 9, S-14.)

11. The Student's counselor was aware from the beginning of the 2009-2010 school year that the Student was failing courses in every quarter, and that the Student had poor motivation and was avoidant of school work during the entire school year. During the 2009-2010 school year, the Student saw the counselor numerous times and far more often than the average student on [the counselor's] case load. The Student's principal specifically referred the Student to the school counselor during a meeting with the Parent in December about the Student's poor performance. (NT 38-4 to 39-3, 40-10 to 44-22, 63-18 to 64-5; P-5.)

12. The school counselor did not observe the Student to be depressed, nor did the Student or Parent reveal depression to the counselor. (NT 49- 2 to 50-14, 62.)

13. In preparation for the evaluation, the District requested but did not receive, the Parent's input. (P-8.)

14. The Parent has serious difficulty with reading. (NT 244-25 to 245-2; P-17 p. 3.)

15. The Student's teachers identified the following concerns: lack of motivation, excessive absences, elopement from class, incomplete homework, failure to turn in assignments or prepare for tests, and lack of concentration in the classroom. (P-8.)

16. The Student's teachers returned rating scales indicating average behavior regarding inattention. (P-8.)

17. The District psychologist administered the Stanford Binet Intelligence Scales – 5 to the Student. The Student's full scale IQ was within the average range, as were scores in verbal and nonverbal IQ. (P-8.)

18. The District psychologist administered the Woodcock-Johnson Tests of Achievement to the Student. The student's scores indicated average achievement except in mathematics. (P-8.)

19. The District evaluation report also considered the results of a group administered cognitive screening instrument, in which the Student scored in the average range, the 4Sight benchmark evaluations, and the seventh grade PSSA test, in which the Student scored Proficient in reading and Basic and Below Basic in mathematics. (P-8.)

20. The District evaluation report also considered an Attention Deficit Disorders Evaluation Scale, as reported by the teachers, on which the Student scored in the average range. (P-8.)

21. The District psychologist administered the Integrated Visual and Auditory Continuous Performance Test, which measures auditory attention and impulse control. The Student was rated as extremely impaired on this test for response control. However, the scores also indicated possible test invalidity due to idiopathic errors during testing. The student's scores on this test were average for attention. (NT 79-13 to 81-15; P-8.)

22. The evaluation utilized a discrepancy analysis for identifying or ruling out Specific Learning Disability. (P-8.)

23. The Evaluation report ruled out ADHD and identified the Student with Specific Learning Disability in the area of mathematics calculation. (P-8.)

24. The District did not evaluate the Student for emotional disturbance. The District's school psychologist did not administer any specific instruments to measure mood or emotional functioning. (P-11, 17 p. 5.)

25. The District's school psychologist administered a self report checklist to the Student, in which the Student reported a need to be moving all the time, difficulty relaxing, feelings of sadness, irritability and restlessness, a lack of confidence and of interest in anything, as well as racing thoughts. Student reported getting angry quickly and having trouble dealing with people. (NT 69-8 to 70-16; P-9 p. 2.)

26. These findings constituted notice to the District's school psychologist to further investigate whether or not the Student suffered from an emotional disturbance. (NT 197-9 to 199-6, 205-3 to 18, 207-20 to 208-6.)

27. These disclosures by the Student to the school psychologist were evidence of possible emotional disturbance that interfered with the Student's cognitive performance and educational achievement. The District's school psychologist concluded that these feelings and experiences led to avoidance of anything that required waiting, careless mistakes, difficulty concentrating, distractibility and loss of personal belongings. The psychologist also concluded that the Student had problems with motivation. (NT 76-5 to 7; P-8 p. 3, P-17 p. 5.)

28. The District's school psychologist did not administer any other instruments to screen for or measure emotional and behavioral functioning, because the psychologist interpreted the data as situation specific to a conflict at home over holiday plans, and because teachers did not report seeing evidence of emotional disturbance. The psychologist did not consider emotional functioning to be within the scope of the evaluation because the parent had not specifically listed it as a disability of concern. (NT 70-16 to 77-22, 80-18 to 81-5.)

29. The District's psychologist was unaware of the Student's history of contact with the mental health system for suicide attempt. (NT 81-16 to 18.)

30. The District's school psychologist was unaware of the interventions that had been put in place for the Student in December 2009. (NT 82-20 to 83-13; P-5.)

31. The Evaluation Report ruled out Emotional Disturbance, noting no observation of inappropriate behavior or difficulty forming or maintaining appropriate social relationships, and no observation of a pervasive mood of depression or unhappiness, fears or physical symptoms. (P-8.)

32. The Evaluation Report recommended accommodations and specially designed instruction addressing the Student's work completion problems and mathematics needs. (P-8.)

33. On January 2, 2010, the District sent a copy of the Evaluation Report to the Parent. (P-6.)

34. The Parent signed the District evaluation Report as agreeing with the identification of the Student with Specific Learning Disorder in mathematics, but made clear that he disagreed with the ruling out of other disabilities, indicating, "I believe [Student] has disabilities in other areas." (S-21.)

35. The District offered two meeting dates to the parent, beginning on January26, to develop an initial plan for special education services; the Parent asked to postpone the meetings; the meeting eventually occurred on February 17, 2010. (S-6.)

36. On February 17, 2010, the Parent indicated disagreement with the District's evaluation and requested an Independent Educational Evaluation. (P-9.)

37. On February 23, 2010, the District requested a more detailed written statement of disagreement from the Parent, and the Parent provided that on March 1, 2010. At the same time, the Parent requested an IEP meeting to implement the Evaluation Report's recommendations concerning mathematics. (P-10, 11.)

38. At an IEP team meeting on March 23, 2010, the District offered an IEP that added post secondary transition goals and provided testing and mathematics accommodations. There were no goals in mathematics. The IEP did not address needs related to emotional disturbance. (S-8.)

39. On April 20, 2010, the District proposed a placement of itinerant learning support with general education at 90% of the Student's time in school. The Parent accepted this placement. (P-13.)

40. On April 20, 2010, the District requested permission to re-evaluate based upon a review of records of behavioral health treatment. The Parent signed the necessary paperwork to permit review of relevant psychological and medical reports. (P-14.)

41. On April 28, 2010, the Parent forwarded a copy of an independent neuropsychological learning evaluation to the District. (P-16.)

42. The independent evaluator is a psychologist with credentials in both clinical and school psychology, and is qualified to evaluate and make recommendations regarding both clinical and educational needs. The evaluation consisted of a variety of instruments and other data, including both cognitive and achievement tests, as well as neuropsychological tests that elicited data on both ability and achievement, as well as emotional and behavioral functioning. (NT 199-23 to 202-7, 210-11 to 24; P-17.)

43. The evaluation diagnosed the Student with a Mathematics Disorder and Major Depression. It identified significant learning weaknesses in mathematics calculation and mathematics problem solving, thus corroborating the findings of the District evaluator. However, utilizing instruments and background information not elicited by the District's evaluator, the independent evaluator found and diagnosed a Major Depression, which at that point was significantly interfering with the Student's academic performance. The evaluator recommended provision of a functional behavioral assessment and a behavior improvement plan. (NT 192-18 to 193-16, 194-7 to 197-8, 226-10 to 227-7; P-17.)

44. During the 2009-2010 school year, the Student reported being bullied repeatedly while in school, and being assaulted by one of the bullying students in April 2010. (P-16.)

45. The Student failed four major academic subjects as of June 2010. The District indicated an intention to retain the Student for eighth grade, and referred the Parent to a list of private tutors. (NT 26-20 to 33-4; P-15, 21, S-8 p. 8 to 9, S-14.)

46. One to one tutoring could have been provided for mathematics at public expense through the Student's IEP. (NT 145-4 to 147-5; P-21.)

47. Although the Student failed in mathematics in every quarter of the 2009-2010 school year, the Student's final examination grade in mathematics improved to 87 from the mid- term examination mark of 49. (S-14.)

48. The Student achieved passing grades on the curriculum-based assessments for a computer-based mathematics remedial course. (NT 304-4 to 317-12; S-21.)

49. On May 3 and 21, 2010, the District issued a NOREP placing the Student in itinerant learning support with special education services for 10% of the time in school. (S-10.)

50. On May 21, 2010, the District agreed to an IEE at public expense. (P-19.)

51. On May 21, 2010, the District requested permission to re-evaluate the Student with regard to the findings of the Parent's independent evaluator in the area of maladaptive behaviors. On June 1, 2010, the District received the Parent's written consent to re-evaluation. (P-20, S-13.)

52. During the 2009-2010 school year, the Student was absent twenty-three times due to medical reasons. (S-16.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward 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.[2] The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. Thus, the moving party must produce a preponderance of evidence[3] that the District failed to fulfill its legal

[2] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[3] 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. Dispute Resolution Manual §810.

obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

In Weast, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced a preponderance of evidence to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is preponderant (i.e., there is greater evidence) in favor of one party, that party will prevail. Schaffer, above.

Based upon the above rules, the burden of proof, and more specifically the burden of persuasion in this case, rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent's claims, or if the evidence is in "equipoise", the Parent will not prevail.

CHILD FIND

The IDEA and state and federal regulations obligate school districts to 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. This obligation is commonly referred to as "child find". Districts have an ongoing child find obligation and must fulfill that obligation within a reasonable time after the district is placed on notice of behavior that is likely to indicate a disability. W.B. v. Matula, 67 F.3d 484, 500-501 (3d Cir. 1995). Section 504 established a similar duty during the relevant period. 34 C.F.R. §104.32(a). Ridgewood Board of Educ. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999).

The Parent asserts that the District failed to identify the Student's admitted disability of Specific Learning Disability in a timely fashion, and inappropriately failed to identify the Student with Serious Emotional Disturbance, during the relevant period of time. I find that the District was not on notice until the end of the summer of 2009 that the Student was suspected of being a child with a disability, but that the District failed to fulfill this responsibility during the 2009-2010 school year.

During the 2008-2009 school year, the Student's academic failures were a marked deviation from past school performance. (FF 1.) The Student had performed well in school until the beginning of the 2008-2009 school year. Ibid. In that year the Student rather suddenly began to fail in all major academic subjects. Ibid. The Student began to miss school or be tardy on numerous occasions. (FF 6.) The Student began to show uncharacteristic oppositional behavior that resulted in discipline. (FF 3.) District personnel were fully aware of this background of seriously poor school performance. (FF 1 to 4.)

The Student saw a school counselor during this period, and the Parent also communicated with this counselor. (FF 1 to 4.) However, the Parent did not reveal that there were any emotional problems. (FF 2, 8.) Nor was there any evidence to single out mathematics as a problematic subject, since the Student was failing all classes, ostensibly due to missing school. (FF 1.) The Student failed for the year, and the District gave notice that it would retain the Student, pursuant to District policy. (FF 1, 4.) I conclude that the District was not on notice that the Student should be evaluated through most of the Student's seventh grade year, the 2008-2009 school year.

However, evidence began to accumulate that there was something other than poor attendance or more difficult work behind the Student's precipitous decline in performance. In the Spring of 2009, the District's counselor became aware that the Student was seeing a mental health agency for counseling. (FF 2.) I find that this alone was not sufficient to be a red flag, and thus I do not find any impropriety in the District's expressed intention to retain the Student. However, in the summer, the Parent went to a high District official – probably the Principal – and disclosed that the Student had threatened to jump in front of a truck if retained. (FF 4.) I find that such information, considered in context of a precipitous decline in school achievement, missing school and uncharacteristic discipline problems, should have alerted the District that this child was in trouble and that the child should be evaluated for possible disability. Thus, from the first day of the 2009-2010 school year, the District failed to perform its statutory child find duty. Unfortunately, the District continued to fail to appropriately identify all areas of the Student's need throughout that school year.

In making this finding, I carefully considered the weight of the evidence provided by the Parent, who bears the burden of proof, as well as contradictory evidence produced by the District. I find preponderant evidence that the Parent notified the District in the summer of 2009 that the Student had threatened self- harm over the prospect of being retained in seventh grade. (FF 4.) This finding is based upon the Parent's testimony that he begged the principal not to retain the Student due to the alleged threat.

The Parent's assertion is corroborated in part, both circumstantially and directly. Circumstantially, the District has a policy of retaining students when they fail as many major academic courses as did the Student, and it notified the Parent of its intention to do

so in a letter routinely sent to all parents of students who qualify for retention due to failures in major academic courses. (FF 1.) However, it is not debatable that the District, contrary to this policy, and without any explanation in the record except the Parent's testimony, promoted the Student to eighth grade. (FF 4.)

In direct corroboration, a District witness testified that the District had decided to dispense with its policy of retention for failures in major academic subjects, based upon parental request. This implies that the Parent's plea reached District personnel at a high enough level to authorize dispensing with the policy in the Student's case.

I infer that there was communication by the Parent of a rationale for promotion that was extraordinary, in light of the District's policy and the severity of the Student's academic failures in seventh grade. However, neither the circumstances nor the District witness corroborated the exact nature of the rationale communicated to the principal. Thus, I find no direct corroboration for the Parent's testimony that he told the principal of the Student's threat of self harm.

The evidence that the Parent told the principal about the Student's threat rests solely upon the Parent's testimony, and I must make a finding about the Parent's credibility. I find that the Parent is credible, but in some respects unreliable because of his frequent lapses of memory for dates and the identity of persons with whom he dealt. Regarding what the Parent said to get the District to promote the Student, however, I find that the Parent's testimony is both credible and reliable.

The Parent's demeanor was consistent with honesty. His answers were short and there was no effort to embellish or add extraneous facts to justify his answers. His eyes and facial expression were neutral and there was no visual evidence of deviousness. His

answers to questions were problematic because he had a pervasive difficulty with the identity of the District personnel to whom he spoke, and the dates on which even critical events occurred. With respect to what he told the District, I find that these flaws do not vitiate the testimony, especially in the circumstances of partial corroboration.

The essence of the testimony is that the Parent told a school official about the Student's threat to jump in front of a truck if retained. At first, the parent asserted that he had told this to the school counselor. However, his attorney, in a technically non-leading question, but with obvious intent to correct what he thought was a glaring error of memory, asked if Parent had told the principal. Immediately and without hesitation, the Parent corrected his apparent error and asserted that he had told the principal. This is plausible, because a counselor would not have authority to waive the policy of retention, and in fact, the policy was waived for the Student. Considering all of the evidence, including demeanor, I allocate some weight to the Parent's assertion that he told someone in the District that the Student had threatened to harm []self if retained. I conclude that this was a clear red flag under the circumstances, and that the District should have considered at that point that the Student might be suffering from an emotional disturbance.

The District did adduce some testimony that sought to call into question the Parent's veracity. Two witnesses testified that the Parent never told them of the Student's emotional disturbance, even though the Parent had testified that he told more than one person at the District. One witness testified that the Parent explained the Student's frequent absences as due to "illness." Such conflicting evidence would have some weight except for the nature of the "illness" from which the Student was clearly

suffering. From the record, it was not possible to line up a given District witness with a given assertion by the Parent to show a direct contradiction. Thus, I find that it is more likely than not that the Parent was selective in whom he told about the Student's emotional problems, due to fears about the operation of stigma on Student's wellbeing socially, educationally or even in the future. I conclude that the Parent's silence to some District personnel does not indict his veracity.

Moreover, in weighing the evidence, I accorded less weight to the testimony of one District witness, the special education coordinator, whose demeanor conveyed an overt hostility to the Parent and his attorney. Based upon this witness' demeanor, including facial and bodily expression as well as pausing for thought before answering, I conclude that I cannot rely upon this witness' testimony to undercut the Parent's testimony that he disclosed the Student's emotional needs and history to at least some District personnel. Thus, it is impossible from the entirety of the testimony to conclude that there is a direct conflict between the testimony of the Parent that he told someone at the District, and the District witnesses' denials.[4]

The District correctly points out that the Parent did not disclose the Student's suicide attempt even to his own expert witness. This might indeed raise an adverse inference against the parent's veracity, except that the Parent provided written corroboration of a hospitalization for affective disorder in November 2009. (FF 8.) In addition, I give weight to the Parent's expert's diagnosis of major depression, a serious

[4] The District suggests that I take an adverse inference from the fact that the Parent did not call the 2008-2009 counselor as a witness to corroborate the Parent's assertions about his disclosures to the counselor. I might just as well take an adverse inference against the District, especially since, if he was available, the District has some sway over that individual as its employee. I draw no adverse inference, because there could be a number of legitimate reasons militating against calling this individual on either side; hiding the truth is no more likely a reason than any other.

emotional disturbance from the clinical perspective that placed the Student at risk for suicidality during the time (Fall 2009) in which Student is alleged to have made a suicide attempt. (FF 42, 43.) Thus, I find it more likely than not that the Student did make a suicide attempt sufficiently serious to require hospitalization.

As noted, I do not give sufficient weight to Parent's evidence to conclude that the District was on notice of a possible disability during the 2008-2009 school year. The Parent did testify that he told the Student's school counselor during that year about the Student's emotional difficulties and increasingly inappropriate and oppositional behavior at home. (FF 2.) However, as noted above, the parent's recall for persons and dates – even about the central communications that he asserted – reduce the weight to be accorded to his assertions. This is especially the case with regard to disclosures made in 2008-2009. Unlike the assertions he made about disclosures made in the summer of 2009, the testimony about the year before was entirely uncorroborated. Without substantial corroboration, I cannot give the Parent's testimony weight sufficient to show a red flag of notice in 2008-2009. Thus, I do not find a child find violation for that school year.

APPROPRIATENESS OF EVALUATION

The District finally did evaluate the Student, late in the Fall of 2009, while the Student was in eighth grade and again failing all or most major academic subjects. (FF 33.) In October, the Parent requested an evaluation, and by early January, the District produced an evaluation report. (FF 7, 33.) To the extent that the Evaluation Report was delivered beyond the sixty days specified in the law, this was due to the Parent's delays in signing the Permission to Evaluate. (FF 7, 13.) Nevertheless, when the report did

eventuate, it ruled out the possibility of an emotional disorder, and found instead a Specific Learning Disability in mathematics. (FF 20, 22, 23, 30, 31.) Thus, at this point, the District fulfilled its child find duty partially. Unfortunately, it failed in this duty with regard to emotional disorder, through an inappropriate evaluation.

In this matter, the Parent challenges the appropriateness of the District's evaluation of the Student, which was memorialized in the Evaluation Report dated January 2, 2010. (FF 33.) In determining the appropriateness of this evaluation, the hearing officer must apply the legal requirements for evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311.

The IDEA obligates a local educational agency to conduct a "full and individual initial evaluation … ." 20 U.S.C §1414(a)(1)(A). The purpose of assessment tools and materials is to obtain "accurate information on what the child knows and can do academically, developmentally and functionally … ." 20 U.S.C. §1414(b)(3)(A)(ii).

The child must be "assessed in all areas of suspected disability." 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes "social and emotional status … ." 34 C.F.R. §300.304(c)(4). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs … ." 34 C.F.R. §300.304(c)(6).

The January 2010 evaluation failed to address the area of suspected serious emotional disturbance; thus it was not appropriate. (FF 16 to 32.) I find that this was an area of suspected disability within the meaning of the IDEA, because the District had sufficient information constituting red flags that the Student's emotional health was in

question. (FF 1 to 11, 15 to 21, 25 to 31, 44.) As I have found, the District (at a high level of decision making authority) had evidence that the Student had threatened self harm.

This information did not stand alone. The District knew that the Student had failed all major academic courses in seventh grade, and was failing them again in eighth grade. In addition, the District had information that the Student was exhibiting an unusual increase in oppositional, disruptive and self-destructive behavior. The Student was defying school rules, refusing to cooperate with teachers' directions, repeatedly failing to hand in homework, not paying attention in class, cutting classes, missing numerous days, attending numerous detentions, and even getting suspended. (FF 1 to 11, 15, 25 to 27.) All of this behavior pointed to a question of whether or not something was amiss emotionally. Although he called it attention deficit disorder, the Parent in the 2009-2010 school year repeatedly asked the District to intervene, asserting that something was wrong. (FF 7.) Taken together, I conclude that all of these circumstances and events placed the District on notice that the Student needed to be evaluated for emotional disturbance.

However, in the 2009-2010 school year – even after the parent put it on notice during the summer that the Student was suffering from an emotional disturbance, and after promoting the Student despite the most extreme and uncharacteristic failures of Student's seventh grade year - the District did not itself initiate an evaluation. Rather, it waited until the Parent requested an evaluation in writing, received by the District on October 16, 2009. It took almost another three weeks to secure the Permission to

Evaluate. When the District issued its evaluation about sixty days later, there was not even an attempt to evaluate for emotional disturbance. (FF 24 to 32.)

I conclude that this omission was inappropriate, and that the District's failure to address the Student's suspected emotional disturbance vitiates its claim to have provided or attempted to provide a FAPE. Even if the Parent caused delays in the scheduling of IEP meetings as the District claims, these would not have resulted in provision of a FAPE because the underlying ER did not advert to a major disability affecting the Student's academic and functional performance in school. [5]

In support of this conclusion, I give weight to the independent psychological report and the testimony of the evaluator who testified for the Parent. In reviewing the expert's report, I find that it is comprehensive and substantial, utilizing instruments calculated to detect a broad range of functioning difficulties, and following up with testing for more intensive and detailed analysis of areas suspected to be impacting the Student's functioning. (FF 42.) I also find that the report focused upon educational needs; it was not limited to a medical diagnostic model. Ibid. I found the examiner to be highly qualified to address both clinical and educational issues, and by the way the witness testified. Ibid. I find that he had expert knowledge of the difference between the two. Ibid.

The District seeks to impugn both the Parent and the independent expert because the Parent did not disclose the Student's suicide attempt to the expert. I conclude that the expert's ignorance of this event does not impugn the Parent's credibility, but it does count against the weight of his opinion. Despite the expert's ignorance of a critical fact, I

[5] I note that the District's assertion that Parent was uncooperative must be seen in the context that Parent has serious difficulty reading; thus, not all of the failures to communicate pursuant to District request can be attributed to the Parent being lax in his pursuit of proper educational services. (FF 14.)

find that his high expertise, his methodology in testing, and the cogency of his reliance on the record of evidence that was before him, all give sufficient weight to his opinion and diagnosis that I can and do rely upon them. (FF 42, 43.)

FAILURE TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." 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), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. 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). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "de minimis" educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court's interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity" – it is not required to provide the "optimal level of services." Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

I find that the IEP and placement offered by the District were not reasonably calculated to provide meaningful educational benefit, because they did not address the Student's emotional disturbance and resulting behavior. (FF 34 to 41.) Indeed, the resulting IEP in March 2010 offered nothing to address emotional needs or the Student's documented and severe behavioral dysfunction in school. (FF 38.) In fact, it did not

even offer a goal to address the needs recognized by the District with regard to mathematics. Ibid. In short, the District failed to offer a FAPE throughout the 2009-2010 school year. (FF 38 to 41, 45 to 51.) There is no evidence that this failure was due to any delay by the parent; rather it was due to the deficiencies in the ER.

The District points out that the Student showed signs of progress toward the end of the 2009-2010 school year, thus mitigating any claim of a failure to provide a FAPE. (FF 48.) The District placed the Student in a regular education remedial class for mathematics, (FF 48), where the Student achieved improved mathematics test scores, contrasting the mid-term and final semester tests, ibid. While this is certainly not to be ignored, it contrasts with the Student's overall failing grades. (FF 45.) Moreover, the tests were accommodated, and there is no evidence to show how the accommodation was performed with fidelity and without reducing the reliability of grades as a measure of progress.

It is a mystery on this record how participation in the mathematics course could have resulted in an across the board improvement in the final tests in English and other major subjects, as the report card shows. (FF 47.) It is more likely that a different factor – perhaps a belated fear of not graduating, or an improvement in emotional symptoms - resulted in this too late improvement in performance. It is unlikely that the mathematics class was the predominant factor. At any rate, the Student failed four major academic courses for the year. (FF 45.) Improved examination scores simply do not outweigh the evidence of overall failure to provide a FAPE. Indeed, I note that the remedial mathematics teacher, when asked to characterize the degree of progress represented by

these grades, was unwilling to acknowledge more than "some" progress. This response reduces the weight of the evidence of late-year improvement in mathematics.

SECTION 504

Generally, section 504 protects students with disabilities from discrimination in access to and equal opportunity to benefit from educational services from kindergarten through twelfth grade. 29 U.S.C. §794 ; 34 C.F.R. §104.4. To establish discrimination under Section 504, a student or parent must prove that (1) he or she is disabled or has a handicap as defined by Section 504; (2) he or she is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he or she was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of his or her disability. 29 U.S.C. §794; 34 C.F.R. §104.4; Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

Section 504 defines an "individual with a disability" to include a student who has: 1) a physical or mental impairment that substantially limits one or more major life activities of such individual; 2) has a record of such impairment; or 3) is being regarded as having such an impairment. 29 U.S.C. §705(20), 42 U.S.C. §12102; 34 C.F.R. §104.3(j). The applicable regulations define "being regarded as having such an impairment" to require agency action on the basis of a perception that the individual has a disability. 34 C.F.R. §104.3(j)(2)(iv).

The Commonwealth of Pennsylvania protects the student's right to be free from discrimination on the basis of handicap or disability, through Chapter 15 of the

Pennsylvania Code, part of the regulations implementing the educational statutes of the Commonwealth. 22 Pa. Code Chapter 15. A "protected handicapped student" under these regulations is entitled to those related aids, services or accommodations which are needed to afford that student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities, without cost to the student or his or her family. Chapter 15 by its terms is intended to implement students' rights under section 504, and it does not expand or limit those rights. 22 Pa. Code §15.11(c).

In the instant case, the only evidence addressing the claim of discrimination - exclusion from participation in, denial of the benefits of, or discrimination at the school on the basis of handicap – was the evidence discussed above that the District failed to provide a FAPE to the Student. The facts of record to not make out any claim above and beyond the IDEA claim – or different in nature from the IDEA claim. Thus, I do not engage in a separate section 504 analysis. Nevertheless, the District's failure to comply with the requirements of the IDEA with regard to Child Find, evaluation and provision of a FAPE all constitute a violation of section 504. Ridgewood Board of Educ. v. N.E., 172 F.3d at 253 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484, 500-501 (3d Cir. 1995); see, H.G. v. Audubon Bd. Of Educ., 2006 WL 1675072 at *4 (3d Cir. 2006).

COMPENSATORY EDUCATION

I will order the District to provide compensatory education to the Student. However, compensatory education is an equitable remedy, and I must balance the equities in determining the amount of relief. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir.

1990). Compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. Id.

In the present matter, the District was sufficiently on notice that the Student was suspected of being a child with a disability by the first day of school in the 2009-2010 school year. I accord a reasonable period for rectification of sixty days. Compensatory education will be ordered beginning on the sixty-first day of the 2009-2010 school year and will be provided for every school day in that year. Given the pervasive nature of the Student's school failure in that year, full school days will be awarded, to be measured by the number of hours in the official school day as defined by the District.

I further reduce the award because there was evidence that the Student had chronic tonsillitis during the school year, culminating in a tonsillectomy in April, and that the Student was at one point hospitalized due to a suicide attempt. All of these medical episodes reduced the number of days that the Student was in school and available to receive educational services. I reduce the award on account of these factors by twenty-three days.

The record is unclear as to how many days the Student lost due to tonsillitis, or due to Student's hospitalization after the suicide attempt. However, the record shows a loss of twenty-three days due to illness, including a tonsillectomy in April, and six days excused tardy or early dismissal due to illness. (FF 52.) I will deduct twenty three days

from the award of compensatory education, because the Student was unavailable for education on those days, and it would be inequitable to hold the District accountable for providing a FAPE for those days. However, I will not deduct the excused late or early dismissals, because the Student was available for education during those days, at least partially, and ordinarily would have had an opportunity to make up work. In sum, on equitable grounds, I deduct twenty three days from the compensatory education award.

INDEPENDENT EDUCATIONAL EVALUATION

When a parent disagrees with the evaluation provided by the school district, the Parent may request an independent educational evaluation at public expense. 20 U.S.C. §1415(a); 34 C.F.R. §300.502(b). Here, on February 17, 2010, the Parent wrote a letter to the District indicating disagreement with the Evaluation report issued in January 2010, and requested an independent educational evaluation at public expense. (FF 36.) Under these circumstances, the District was obligated to either pay for the requested independent evaluation or file a due process request to defend the appropriateness of its evaluation. Instead, the District sent a letter six days later, asking the parent to specify further his disagreement with the District's evaluation, and indicating consideration of the Parent's request, but not either agreement to the IEE, or disagreement and an intention to go to due process. (FF 37.)

The District was permitted to ask for more detail, but it was not permitted to condition payment for the independent evaluation on further specification. 34 C.F.R. §300.502(b)(4). I find that the District's letter of February 23 was inappropriate, because it tended to leave an impression with an unsophisticated parent that the District was

within its rights to condition its funding of an IEE upon a satisfactory explanation of parental disagreement.

In addition, the District was not entitled to unreasonably delay the independent evaluation by requesting further information. Ibid. I find that the District did just that, because, ultimately and apparently belatedly, the District did not agree to fund an independent evaluation until May 2010, months after the Parent's request and weeks after the parent presented the report of his independent evaluator, retained at his own expense, to the District. (FF 40, 41, 50.)

In these two respects, the District violated the IDEA requirement that it provide an independent educational evaluation at public expense without unreasonable delay upon receipt of the Parent's disagreement with the District evaluation and request for an independent evaluation – or file for due process. Consequently, the District will be required to reimburse the Parent for the cost of the independent evaluation.

CONCLUSION

For the reasons set forth above, I find that the District failed to provide a FAPE during the 2009-2010 school year. Furthermore, the District failed to evaluate the Student appropriately in January 2010. Last, I find that the District failed to respond appropriately to the Parent's request for an independent educational evaluation in the 2009-2010 school year, and inappropriately failed to take into account the findings of the independent evaluator whom the Parent retained at his own expense. Therefore I will direct the District to provide compensatory education, and to reimburse the Parent for the cost of the independent educational evaluation.

ORDER

1. The District inappropriately failed to identify the Student as a child with a disability, and failed to evaluate the Student appropriately, thus failing to fulfill its child find obligation during the entire 2009-2010 school year.

2. The District failed to provide the Student with a free appropriate public education during the 2009-2010 school year.

3. The District is hereby ordered to pay for compensatory education to the Student in the amount of one full school day for every day on which school was in session during the period beginning on the sixty-first school day of the 2009-2010 school year, to and including the last school day of that school year, minus twenty-three school days.

4. The compensatory education ordered 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 family, and may be utilized after the Student attains 21 years of age. Compensatory education must be in addition to the then-current 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.

5. The District will reimburse Parent for the cost of the independent educational evaluation dated April 13, 2010.

William F. Culleton, Jr. Esq.

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

November 8, 2010