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: A.W.

Date of Birth: [redacted]

ODR No. 13543-12-13-AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Jennifer Lukach Bradley, Esquire McAndrews Law Offices 30 Cassatt Avenue Berwyn, PA 19312
Middletown Area School District 55 West Water Street Middletown, PA 17057-1448	David F. Conn, Esquire Sweet, Stevens, Katz & Williams LLP 331 East Butler Avenue New Britain, PA 18901
Dates of Hearings:	April 17, 2013; May 2, 2013; May 13, 2013
Record Closed:	May 31, 2013
Date of Decision:	June 15, 2013
Hearing Officer:	William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in the title page of this decision (Student) was a resident of the school district named in the title page of this decision (District) at all times relevant to this decision. (NT 8-9.) The Student's Parents, named on the title page of this decision (Parents)[1], request compensatory education for Student. Parents assert that the District failed to identify Student as a child with a disability as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (IDEA), and therefore denied Student a free appropriate public education under the IDEA, from the first day of school in the 2010-2011 school year until February 26, 2013, when Parents removed Student from the District. Parents also assert derivative claims, and claims of discrimination for failure to provide appropriate evaluation and parental participation under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). The District denies these allegations.

The hearing was concluded in three sessions, and the record closed upon receipt of written summations. I conclude that the District did not fail to comply with its child find obligations or to provide Student with a FAPE during the period of time that is relevant to this decision.

ISSUES

1. Did the District inappropriately fail to identify Student as a child with a disability, and thus fail to comply with its Child Find obligations under the IDEA and section 504, during the relevant period from the first day of school in the 2010-2011 school year until February 26, 2013?

[1] Although both Parents requested due process, Student's Mother engaged in all of the record interactions with the District. Therefore, I will refer to her as Parent - in the singular - in this decision.

2. Did the District inappropriately fail to provide a free appropriate public education (FAPE) in the least restrictive environment to Student during the relevant period, contrary to its obligations under the IDEA and section 504?

3. Should the hearing officer order the District to provide Student with compensatory education for all or any part of the relevant period pursuant to the IDEA and section 504?

FINDINGS OF FACT

History Prior to Relevant Period- District Notice of Student's Diagnoses and Treatments

1. When student was in third grade (2006 – 2007 school year), District personnel recommended that Parent have Student evaluated through a behavioral health services provider. A private evaluator that year diagnosed Student with social phobia and generalized anxiety disorder. (NT 41; S 20.)

2. Since third grade, Student has been in therapy for anxiety. (NT 42; P 4.)

3. District officials were aware by February 2007 that Student was diagnosed with generalized anxiety disorder, separation anxiety disorder and social phobia, and was receiving psychological therapy when Student was in the third and fourth grades. (NT 48-50, 55-57, 62; P 4, 5.)

4. District officials were aware that Student was exhibiting school avoidance behaviors while at home, and that these behaviors were causing some of Student's truancy. (NT 55-57; P 5, 12.)

5. In January 2008, Student was hospitalized due to ongoing anxiety and symptoms of anxiety. District officials were aware of this at the time. (NT 54 – 62; P 7.)

6. While in fourth grade, Student did not struggle academically. (NT 59.)

7. The District offered to evaluate Student in April 2008, and Parent provided consent on June 14, 2008. (P 8.)

8. In July 2008, District personnel recommended that Parent accept a section 504 service agreement for Student instead of an IEP. Parent agreed and in August 2008 a section 504 service agreement was put in place for the beginning of Student's fifth grade year, the 2008 – 2009 school year. The plan utilized some of the suggestions of Student's therapist. (NT 71; P 9.)

9. In September 2008, the District provided an evaluation report, finding that the Student was not a child with a disability as defined by the IDEA. The report recommended maintaining the section 504 service agreement, as well as continued observation to determine whether additional supports were specially designed instruction should become necessary. (P 12.)

10. On November 5, 2008, Parent withdrew Student from the District and enrolled Student in a cyber charter school (School). (NT 76; P 13.)

11. Student remained in the School for the remainder of the 2008 – 2009 and the entirety of the 2009 – 2010 school years. These years encompass Student's fifth and sixth grades. (NT 76 – 79.)

Seventh Grade

12. During the summer of 2010, Parent contacted the District to inquire about Student returning to the District for seventh grade. (NT 78 – 80.)

13. Student returned to the District for seventh grade. Neither the Parent nor the School notified the Middle School principal of the existence of a current section 504 plan for Student. Parent asked the principal to review Student's previous records, so that the principal would be aware of Student's history of truancy. (NT 79 – 81, 294-297; S 25.)

14. During the first half of Student's seventh grade year, Student was absent approximately 15 days with a doctor's excuse or a Parent excuse. These excuses did not identify generalized anxiety or school phobia. (NT 197 – 200, 271; S 1.)

15. Although Student was passing most subjects in the first half of seventh grade, Student experienced difficulty with the language arts/reading class and failed that class in the first two quarters of the school year. Student passed all courses for seventh grade, but did receive a failing grade in social studies during the fourth quarter of that year. Student's academic performance did not indicate a lack of meaningful educational progress. (NT 81 – 90, 244-247, 271; S 1, 2, 4; P 15.)

16. In January or February 2011, Student's anxieties began to increase, and Student began to exhibit school avoidance behaviors at home. Student's lateness and absences increased. (NT 83 – 90; S 1, 2.)

17. Student did not display any behaviors of concern in seventh grade until the second half of the 2010-2011 school year, when on March 15, 2011, Student was suspended for three days out of school for refusing to give school officials a cell phone that Parent had given to Student to provide Student with a sense of emotional security while at school. The

suspension was for the defiant behavior, not for having the cell phone. (NT 86, 271; P16.)

18. Teachers noted absenteeism during the second half of the seventh grade school year that raised teachers' concerns regarding Student's grades. However, Student showed improved work and academic achievement in the last quarter of the year and passed all courses. (P 25 p. 1; S 2.)

Eighth Grade

19. From the beginning of Student's eighth grade year (2011 – 2012 school year), Student exhibited a high level of anxiety, including separation anxiety, social anxiety, and generalized anxiety, including fears with regard to becoming ill. Student's absences increased significantly. (NT 97 – 98; P 17.)

20. Between October 2011 and February 2012, student received three-day suspensions on four occasions and detention on one occasion, for defiant and uncooperative behavior. Suspensions were all out of school, rather than in school, due to District policy. (NT 101 – 102, 118 – 120; P 19.)

21. In October 2011, one or more of Student's teachers provided Student with extra time to complete class assignments and homework assignments. On or about October 12, 2011, Parent met with representatives of the District to discuss Student's absenteeism, behavior difficulties, and academics. At that meeting, District representatives suggested that a new section 504 service agreement be provided to Student. (NT 106 – 107; S 9.)

22. The District did not provide a comprehensive educational evaluation prior to offering a section 504 service agreement. (NT 110, 264; P 11.)

23. In October 2011, Student was suspended twice for disrespect and for defiant behavior. (P-19.)

24. Student's grades for the first quarter of eighth grade were failures or "D" grades in all subjects. These grades were available by November 1, 2011. (NT 104; P 17.)

25. On November 2, 2012, the District reassigned Student to a different mathematics classroom due to Student's disruptive behaviors. (P 25.)

26. Parent spoke to the District's superintendent and assistant superintendent and informed them that Student had anxieties. Parent requested a section 504 service agreement. The superintendent suggested having Student evaluated for psychiatric concerns. This suggestion was repeated in a subsequent telephone call. Parent declined the suggested

evaluation. The District considered a psychiatric evaluation to be an important component of any educational evaluation to be conducted. (NT 246-256; P 25 p. 10, 11.)

27. On November 4, 2011, the District offered a section 504 service agreement to Parent; Parent approved this agreement on November 8, 2011. On November 22, 2011, the District revised the agreement and Parent approved the revision on the same date. Accommodations included taking breaks from the classroom setting, extra time, chunking assignments and preferential seating. (NT 108 – 110; S 5, 6.)

28. The chapter 15 service agreement, as revised, did not significantly reduce the Student's school phobias and anxiety. Not all large group activities were accommodated, and Student was required to take PSSA testing in the cafeteria with students from multiple classes. (NT 130 – 131.)

29. Student's absences continued at a high rate, and Parent did not comply with a District direction to provide medical excuses only through a medical doctor's note. Thus, many absences for psychological therapy conducted by a non-physician were recorded as unexcused, leading to citations of Parent for violations of state compulsory attendance laws. (P 18; S 11 p. 1.)

30. In December 2011, the District filed a private criminal complaint against Parent for Student's absenteeism. It cancelled the hearing and held the complaint in abeyance in January 2012, when Parent agreed to the recommended psychiatric evaluation. (NT 254-256; P-18; S-8.)

31. Parent requested an IEP on or about January 17, 2012. (NT 135 – 136; P 25, S 8.)

32. Parent signed a consent to evaluate for the psychiatric evaluation on January 24, 2012. (S 7.)

33. Student indicated a desire to go to a local county technical school. Parent made this known to District personnel. Student was unable to enroll in that program because of Student's poor attendance, and because District personnel submitted a negative reference. (NT 110 – 112, 120 – 126; S 10, P 20, 25.)

34. In January 2012, the District arranged to have Student evaluated by a psychiatrist. The psychiatrist saw Student on February 9, 2012. The psychiatrist diagnosed Student with Oppositional Defiant Disorder, and with Generalized Anxiety Disorder provisionally. The psychiatrist recommended that Student be identified as a child with a disability under the IDEA, with a classification of Emotional Disturbance, and an IEP with placement in itinerant emotional support at the minimum. The psychiatrist also recommended a gradual return to full-time school attendance, with breaks from the classroom as needed,

behavioral consequences for disruptive behavior, and truancy charges if the gradual plan is not followed. A change in medication was suggested and the psychiatrist endorsed continued outpatient therapy with Student's current therapist. (NT 142 – 143; S 7, 13.)

35. One February 22, 2012, the District requested permission to conduct a comprehensive educational evaluation. Parent consented to such evaluation on February 26, 2012. (NT 143 – 144; S 12.)

36. Shortly after receiving the psychiatrist's recommendation, Parent began sending Student to the middle school for half days, based upon those recommendations. (NT 149 – 152.)

37. In January and February 2012, the middle school principal disciplined Student for violations of the school disciplinary code. (NT 155 – 159; P 19.)

38. In February 2012, the District notified Parent that Student's grades continued to place Student in danger of failure for the school year. (P 17.)

39. On or about March 29, 2012, Parent placed Student in a District cyber school program connected with the District middle school that Student had been attending. This program was computer-based, and all learning occurred in Student's home. There was no contact with school staff. (NT 146 – 164; S 18.)

40. Student was scheduled to be evaluated by the District school psychologist on two different dates in April and May 2012, but Student refused to come to school for those evaluations. Parent interpreted this behavior has being based on Student's fear of participating in any school activity on school premises. (NT 147; S 17.)

41. Student attended the District cyber school program from March 2012 through the second quarter of Student's ninth grade year (the 2012 – 2013 school year). (NT 161 – 167; S 16.)

42. While Student attended the District cyber school program, the District did not implement Student's section 504 service agreement. (NT 163.)

43. Student did well in the District cyber school program, attaining good grades. (S 15.)

Ninth Grade

44. Parents and the District agreed to an independent educational evaluation of Student, and this was conducted in August and September 2012. While the evaluator obtained substantial information from Parent, including medical history, behavioral health history, educational history and behavior inventories, the District did not pay for a conference between Parent and the independent evaluator for purposes of explaining the findings,

nor did the evaluator participate in the subsequent meeting of the multidisciplinary team with Parent, in which the independent evaluation was discussed. (NT 169 – 170; S 20.)

45. The independent educational evaluation report was issued in the beginning of Student's ninth grade year, in September 2012. The evaluator found that Student does not have a learning disability, nor does Student experience clinically significant difficulties with attention or executive functioning. The evaluator concluded that Student experiences some difficulties with attention and hyperactivity due to anxiety and depression. The evaluator concluded that Student's noncompliance and defiance behaviors were dysfunctional strategies for coping with anxiety through avoidance of anxiety provoking demands. The evaluator also hypothesized that difficulty with complex auditory and expressive language processing may have contributed to Student's anxiety and social difficulties. Therefore, the evaluator diagnosed anxiety disorder, not otherwise specified; depressive disorder, not otherwise specified; and rule out mixed expressive/receptive developmental language disorder. (S 20.)

46. The evaluator recommended continued medical treatment, psychotherapy, family therapy, speech and language evaluation, identification under the IDEA as a child with emotional disorder, a reentry plan to the high school, itinerant emotional support and behavioral strategies for dealing with Student's avoidance behaviors. (S 20.)

47. Prior to the independent educational evaluation report, the District had not recommended a speech and language evaluation. (NT 173 – 176.)

48. In December 2012, the IEP team, with Parent participating, produced an IEP, which the District offered. The IEP recognized Student's identification as a child with a disability under the IDEA in the category of emotional disturbance. It placed Student in itinerant emotional support, with up to 60 minutes per six-day cycle of emotional support services, and inclusion in all general education classes. It provided goals addressing communication, school participation and self-regulation needs. Modifications and specially designed instruction included positive behavior support plan, processing time, preferential seating, refraining from calling on Student except as a volunteer, permitted breaks from class, direct instruction in coping and self-regulation skills, study hall time and positive reinforcement. (NT 173; S 21, 23.)

49. On December 13 and 14, 2012, the District speech and language pathologist tested Student. Subsequently a report was provided to Parent recommending speech and language related services. The IEP team revised the IEP to incorporate this recommendation on December 21, 2012. Student was classified with an additional disability, speech and language disability; speech and language support was offered in the IEP for 30 minutes per week. (NT 174 – 176; S 23, 24.)

50. In January 2013, the District revised the IEP to reflect that Student would attend the local county technical school. (S 23.)

51. Parent approved the IEP and revisions offered in December 2012 and January 2013. (S 22, 24.)

52. On February 26, 2013, Parents moved out of the District. The new school district discovered that Student had gaps in Student's pre-algebra mathematics concepts. The new school district concluded that these gaps were due to both gaps in the cyber mathematics curriculum offered by the District, as well as Student's attendance problems. The new district issued an IEP to address these gaps through specially designed instruction, consisting of targeted instruction and tutoring of math concepts. (NT 9, 183 – 184; P 24; S 18.)

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] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[3] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)[4]

[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.

[4] Although Parent brings this matter under both the IDEA and section 504, I see no reason to deviate from this analysis under section 504. The Supreme Court's analysis in Schaffer was based upon basic principles in the

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

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents' claim, or if the evidence is in "equipoise", the Parents cannot prevail under either the IDEA or section 504.

CHILD FIND UNDER THE IDEA

Under the IDEA Child Find requirement, the District has a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability under the statut[e]." 20 U.S.C. § 1412(a)(3)(A); see P.P. ex rel. Michael P. V. West Chester Area School Dist., 585 F.3d 727 (3d Cir. 2009); Taylor v. Altoona Area Sch. Dist., 737 F. Supp.2d 474, 484 (W.D. Pa. 2010). Even if parents do not cooperate fully with district efforts to identify a student, it is still the responsibility of the school to identify those children who are in need of the IDEA'S protections. Taylor, 737 above at 484.

An evaluation must be sufficiently comprehensive to address all of the child's suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6). Failure to conduct a sufficiently comprehensive evaluation is a violation of the District's child find obligations. D.K.

---

common law and in administrative law. Moreover, the Third Circuit Court of Appeals has recognized that the two statutes are unusually similar with regard to the rights that they protect, and that at least one procedural requirement of the IDEA should be applied in section 504 cases. P.P. v. West Chester Area School District, 585 F.3d 727, 736 (3d Cir. 2009)(applying the IDEA statutory limitation of actions to section 504 cases). I conclude that the same reasoning applies with regard to the burden of proof, and allocate that burden to Parents.

v. Abington Sch. Dist., 696 F.3d 233, 250 (3d Cir. 2009)(a poorly designed and ineffective evaluation does not satisfy child find obligations).

CHILD FIND UNDER SECTION 504

The Rehabilitation Act of 1973, section 504, provides:

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

29 U.S.C. §794. Federal regulations implement this prohibition in school districts receiving federal financial assistance.[5] 34 C.F.R. §104 et seq. These regulations require school districts to provide a FAPE to qualified handicapped children, but that obligation is defined differently than under the IDEA. Districts must provide "regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy" the procedural requirements of the Act. 34 C.F.R. §104.33.

Districts are obligated to "[u]ndertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education … ." Thus, section 504 imposes a "child find" obligation on school districts analogous to that which they shoulder under the IDEA. 34 C.F.R. §104.32(a). This includes the obligation to evaluate children within their jurisdiction appropriately to determine whether or not they are qualified handicapped persons. The District must evaluate "any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect

[5] I take administrative notice that the District receives federal financial assistance within the meaning of section 504, because the District is bound by the IDEA, which is a federal funding statute. The District has not denied this criterion of section 504 applicability.

to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 C.F.R. §104.35(a).

DISCUSSION OF FINDINGS AND CONCLUSIONS

Seventh Grade

I conclude that the District did not fail to perform its child find obligations during Student's seventh grade year. Student returned to the District's middle school after completing about two years at a cyber charter school (School). Nothing occurred during the ensuing year to place the District or its personnel at the middle school on notice that Student might be in need of either section 504 accommodations or special education interventions.

In short, the evidence is preponderant that there was no "red flag" requiring the District to evaluate Student or provide special supports during that year. The District was not notified that Student had a current section 504 plan, nor was there any indication that the Student had a disability that was interfering with Student's ability to learn in seventh grade. There is no documentary evidence of the existence of a section 504 service agreement at the time of Student's return to the District. Student's grades were passing and above in seventh grade; although there were periods of time in which Student's grades declined to "F" in one or two subjects, Student was able to bring those marks up at the end of the year. Student's behavior was acceptable, with the exception of a single incident of disrespectful behavior resulting in discipline, for which Student was suspended[6]. Student was absent far more often than average

[6] The middle school principal recalled one other incident of defiance, not resulting in discipline; however, he rated Student's negative behaviors below average, and saw no indication of possible emotional disturbance. (NT 298-300.)

for Student's peers, to an extent that reasonable concern could be raised. However, there was no indication of substantial deprivation of educational benefit.

Parent testified that Student had a section 504 service agreement while at the School, and that Parent notified the District of this when Student returned to the District for seventh grade. The District's credible witnesses denied receiving any such notice. Moreover, upon cross examination, Parent was unable to recall any specifics as to when Parent gave notice of a section 504 service agreement. Parent was unable to specify the contents of any such section 504 service agreement, except to vaguely describe some accommodations provided by the School for social interactions with peers. Moreover, the record is devoid of any documentary evidence of the existence of such a service agreement, or its conveyance to the District. The District's witnesses corroborated each other with regard to the issue of receipt of notice of the existence of a section 504 service agreement at the School. All testified that they did not receive such notice.

Weighing the evidence, I conclude that the Parent has failed to produce a preponderance of the evidence for the assertions that Student had a section 504 service agreement at the School. Parent also failed to prove by a preponderance of the evidence that the District was notified about such an agreement.

Contrary to Parents' arguments, it matters little that the District received no notice of the Student being exited from section 504 accommodations. On this record, there was no factual basis upon which it could have or should have concluded that there was a service plan in this case. Since the School is legally its own LEA, it alone was responsible for either implementing the service agreement that Student brought from the District in 2008, or properly exiting Student. It was not the District's responsibility to investigate or police this procedural responsibility of a

separate LEA. Since no one brought a current service agreement to its attention, it was not put on any notice with regard to section 504.

Parent asserts that the District was on notice that Student had a disability that could interfere with learning, when Student returned to the District after attending the School. Parent introduced evidence by way of background from previous years in which Student had attended school in the District, showing that the District was aware of Student's diagnoses and treatment for generalized anxiety and school phobia. Parent further testified that Parent requested at least one District professional to review Student's previous school records so that the District would be aware of this history from the beginning of Student's seventh grade year. Parent was unable to recall the date or approximate date of any meeting or telephone conversation in which Parent told District staff that Student's absences or tardies were caused by either anxiety or phobia. Parent was unable to recall how many such meetings or communications had occurred during seventh grade.

Against this evidence, I must weigh District documentary evidence indicating that there was no evidence of a disability interfering with educational benefit. Student's absences for the first half of seventh grade were not attributed to generalized anxiety or school phobia. Rather, attendance records indicate that various excuses were provided to the District, including family outings, and doctor notes of unspecified medical causes for absences. When specifically asked, Parent was unable to recall what explicit medical excuses were given in the doctors' notes excusing these absences. I find by a preponderance of the evidence that middle school officials were not placed on notice of any educational deficit caused by prior diagnoses and treatment during Student's seventh grade year.

Student's history over two years prior to Student's return to the District, alone, did not constitute a "red flag". There was no evidence in the record to show that middle school officials should have inferred that Student's psychological conditions in 2008 continued into 2010 and 2011. There was no such indication during the entire school year. Student's academics and behavior were not problematic, the single disciplinary incident of disrespectful behavior in March notwithstanding. Although Student amassed a high total of absences, this alone did not raise a warning of disability, because Parent provided a variety of excuses for Student's absences. I conclude that, on this record, Student's prior history did not place the District on notice of any need to evaluate or provide special supports.

Eighth Grade

In contrast with Student's seventh grade year, "red flags" appeared within weeks of the beginning of Student's eighth grade year. Student was absent more frequently. Student became repeatedly disruptive in classes and defiant toward school professionals and administrators, resulting in a number of suspensions. By the end of the first quarter, Student was failing or receiving "D" grades in all courses. I conclude that Student's first quarter grades, in conjunction with Student's history of legally recognized disability, increased absences and escalating behavioral problems, placed the District clearly on notice that intervention was needed. The grades were available in November, 2011, according to the testimony.

Before November, the District and the Parent had been communicating about how to intervene. The parties met in October and discussed strategies including comprehensive educational evaluation, psychiatric evaluation and providing a section 504 service agreement. On November 4, 2011, the District re-assigned Student to another mathematics classroom, to

address some of Student's behaviors. On November 4, the District offered Student a new section 504 service agreement. As early as October, the District had offered to pay for a psychiatric evaluation, but Parent at first did not respond to repeated requests, and then at a subsequent meeting, declined the offer, despite the District's belief in its importance for any evaluation under either the IDEA or section 504, to determine whether Student's behavior was caused by anxiety, phobia or some other function.

I conclude that Parent's testimony regarding eighth grade was somewhat embellished. Parent described a District that was uninvolved and passive, and that did not take action when red flags appeared. This depiction is contradicted by the record and by other credible witnesses to such an extent that it reflects on the accuracy of Parent's account of many of the specific events discussed here. This reduces the persuasive weight that I assign to Parent's assertions of fact.

On this record, then, I conclude that when red flags became apparent by November 1, 2011, the District responded reasonably. It proposed an evaluation directed to the very disability that Student had been diagnosed with in the past, and implemented interim interventions in the form of reassignment and a section 504 service agreement. I find that it was prepared to conduct a comprehensive evaluation for IDEA and section 504 purposes, but Parent blocked the central piece of any such evaluation for suspected emotional disorder: the psychiatric evaluation. Under these circumstances, I do not find that the District failed in its child find obligations from the beginning of the school year until February 22, 2012, by which time the psychiatric evaluation report had been received.

Parent points out that the two-step procedure that the District employed to complete an evaluation was unnecessarily lengthy[7]. Until February 22, 2012, no Permission to Evaluate was issued for the psychological evaluation and the full battery of evaluative strategies that is called for in an educational evaluation. The testimony revealed that there was no reason why the bulk of the evaluation had to wait until after receipt of the psychiatric evaluation. If the PTE had been issued by November 1, 2011 (by which time the red flags were apparent to all), and if the Parent had signed the consent form immediately, the bulk of the evaluation could have been completed within sixty days, or by December 30, at the earliest. While the final report would necessarily have been delayed until receipt of the psychiatric report (due to the Parent's resistance and delay), a final evaluation report could have been provided by February 22, the day on which the PTE for the full evaluation was issued to Parent. An IEP could have been finalized by March 24, 2012. Thus, from March 24, 2012 until the end of the eighth grade school year, Student did not receive needed educational supports and services because the District chose an unnecessary two - step process in conducting its evaluation.

I will not order compensatory education for this period of time, however, because the Parent removed Student from the brick and mortar middle school on March 29, 2012, and enrolled Student in a District-run cyber school, with instruction occurring at home. Thus, it cannot be concluded that the District's two- step procedure caused any deprivation of benefits to the Student, because the Parent would have deprived Student of the fruits of a faster evaluation by removing Student from the District's building at about the same time that the IEP would have been ready.

[7] Parent argues that the District focused solely on absenteeism, which was admittedly a serious concern in light of the District's mandatory attendance obligations. However, on the record as a whole, I conclude that the District did not lose focus on its child find obligations while struggling with Student's absenteeism; it tried to address both simultaneously. Parents have failed to provide a preponderance of the evidence to the contrary.

I decline to order compensatory education for this period of time for another reason. Compensatory education is an equitable remedy, and here I find that it would be inequitable to order compensation because of the District's two - step procedure for evaluation. Parent delayed the central piece of the evaluation for weeks. The record shows preponderantly that Student's absenteeism was to some extent volitional: there were excuses for hunting and family trips, and expert reports concluded that much of Student's dysfunctional behavior, including absenteeism, was for secondary gain – to escape unwanted demands – not necessarily always because Student was paralyzed by anxiety. Thus, to some extent, the family prevented Student from obtaining the full benefit of the educational services offered by the District at the middle school. There is no reason to believe that, if the IEP had been in place in March, Student would have been present every day to take advantage of it.

Similarly, I do not accept Parent's argument that the District deprived Student of a FAPE through a violation of section 504 - instituting a service agreement before conducting a full evaluation. Accepting Parent's reading of the section 504 regulations, the record here shows that, by November 1, 2011, Parent wanted the section 504 service agreement. Parent wanted immediate intervention, and the District chose to intervene through the service agreement. Thus, even if this was a violation of the section 504 regulations, the Parent waived any right to complain about it, and I can find no substantive denial of a FAPE because of it.

Parent introduced evidence with regard to a number of disciplinary events that occurred during eighth grade, arguing that the District, by levying suspensions, denied a FAPE to Student. Parent pointed out that Student's defiant and inappropriate behavior was a manifestation of Student's medical disability, but was treated as volitional and punished. Since the Student was by November thought to be a child with a disability, the District should have conducted a

manifestation determination. 34 C.F.R. §300.534. Moreover, Parent argues, District personnel, by suspending Student out of school, exacerbated Student's avoidant behavior by reinforcing it.

I do not accept Parent's argument that the District's disciplinary actions constituted a denial of a free appropriate public education within the meaning of either the IDEA or section 504, because there is no evidence that these actions, all of which were of short duration, had any substantial causative effect on Student's lack of progress in eighth grade. Many other factors, including absenteeism and inappropriate behavior, exerted a much greater effect upon Student's educational achievement.

Parent also argues that one or more District teaching staff deprived Student of a FAPE by making harsh comments to Student with regard to Student's absenteeism and withdrawal behaviors in class. In light of the entire record, I conclude that this evidence of teacher remarks is insufficient – even when combined with all of the evidence – to prove denial of a FAPE. Parent could point to at most two specific remarks of this nature. Parent's understanding of one of these events was not based on personal knowledge, but was taken directly from Student's oral report. Even if both of these remarks were made, I do not find them to be the primary contributing factor to Student's anxiety, phobias or absenteeism.

The Parents made much of the District's use of truancy proceedings apparently to leverage a consent for psychiatric evaluation from Parent, who had previously declined such an evaluation. I do not find that this is probative of the material facts in this matter, and I offer no conclusion as to this transaction between the parties. There is no evidence to show any substantial causal effect on Student's anxieties and subsequent absences from the District's school buildings.

I also do not concur that the District denied a FAPE by stopping the back – to – school transition plan recommended by the psychiatric report. Parent accused the principal of terminating the arrangement, by which Student was attending half days, and picking up work from teachers to complete at home. The principal denied terminating the arrangement. As explained above, I give less weight to Parent's depiction of District actions; thus, Parent's testimony does not constitute a preponderance of the evidence in the face of a credible denial.

Ninth Grade

Parents seem to assert that FAPE was denied because Parent placed Student in the District's cyber alternative. At least with regard to mathematics, Parents argue that the cyber curriculum of the District, to which Parent resorted during Student's ninth grade year, left Student with gaps in knowledge and concepts that required specially designed instruction in the subsequent year in order to bring Student up to a level with Student's peers in that subject, and Parent blames the District for forcing Parent into enrolling Student in the cyber alternative. Moreover, Parent argues that the cyber alternative deprived Student of the least restrictive environment for learning.

I find no record basis from which to reach such conclusions. Student's gaps in mathematics knowledge could as easily come from absenteeism as from deficiencies in the District's cyber curriculum. Moreover, the District did not place Student in the cyber alternative: Parent did this unilaterally. Thus, Parents have not shown by a preponderance of the evidence that the District deprived Student of a FAPE in Student's ninth grade year.

CONCLUSION

I conclude that the District did not fail to comply with its child find obligations, except to the extent that it failed to issue a PTE for a comprehensive educational evaluation until after receipt of the psychiatric report. I conclude that this did not deprive Student of a FAPE. I decline to order the District to provide compensatory education to Student. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District complied with its Child Find obligations under the IDEA and section 504, during the relevant period from the first day of school in the 2010-2011 school year until February 26, 2013, except to the extent that it failed to issue a PTE for a comprehensive educational evaluation until after receipt of the psychiatric report.

2. The District did not fail to provide a free appropriate public education (FAPE) in the least restrictive environment to Student during the relevant period.

3. The hearing officer does not order the District to provide Student with compensatory education for all or any part of the relevant period.

William F. Culleton, Jr. Esq.

_____

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

June 15, 2013