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

FINAL DECISION AND ORDER

Student's Name: J.C.

Date of Birth: [redacted]

ODR No. 14638-1314KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Phillip A. Drumheiser, Esq. P.O. Box 890 Carlisle, PA 17013
Cumberland Valley School District 6746 Carlisle Pike Mechanicsburg, PA 17050	Mark. W. Walz, Esq. Sweet Stevens Katz & Williams, LLP 331 E. Butler Ave. New Britain, PA 18601

Dates of Hearing: 08/07/2014, 10/08/2014, 12/12/2014

Record Closed: 01/16/2015

Date of Decision: 02/03/2015

Hearing Officer: Brian Jason Ford

Introduction

This matter concerns the educational rights of J.C. (Student), who until recently was a student in the Cumberland Valley School District (District). The hearing was requested by the Student's Parents (Parents). The Parents claim that the District violated the Student's rights under both the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4.

More specifically, the Parents claim that the District violated its Child Find obligation by failing to determine whether the Student was a child with a disability. The Parents argue that the Student should have been evaluated, and that the District should have concluded that the Student was IDEA-eligible. Thereafter, the Parents argue that the Student should have received special education pursuant to an individualized education plan (IEP). The Parents further claim that the District discriminated against the Student on the basis of his disability in violation of Section 504. The Parents claim that the District violated the Student's rights vis-à-vis disciplinary proceedings. The Parents also claim that the District did not properly comply with records requests.

The District denies all of these claims. Although the District agrees that the Student is protected by Section 504, the District disputes that the Student is IDEA-eligible. The District claims that its Child Find and disciplinary procedures were legally compliant, and that it did not discriminate against the Student in any way.

Issues[1]

1. Did the District violate its Child Find duties by failing to identify the Student?

2. Did the District violate its duty to provide a free appropriate public education (FAPE) to the Student?

3. Did the District discriminate against the Student in violation of Section 504?

4. Did the District violate any of the Student's rights through disciplinary actions?

5. Did the District violate the Student or Parents' right to access student records?

As remedies, the Parents demand compensatory education running from January 29, 2012 through the present[2] and funding for an independent educational evaluation (IEE).

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[1] The parties parse and phrase these issues differently. For example, the Parents break the discipline issue into three distinct issues (unlawful restraint, violation of the right to a manifestation determination, and improprieties in the disciplinary proceedings). I have grouped sub-issues for simplicity.

[2] The Parents claim that the Student is owed compensatory education on an ongoing basis, but the Parents also claim that the District is no longer the Student's LEA.

Findings of Fact

All evidence was carefully considered, even if it is not explicitly referenced in these findings of fact.

1. The Student has been diagnosed with Crohn's disease since 2004.[3] (P-20).

2. The District has had constructive notice that the Student has Crohn's disease since October 25, 2007. (P-20).

3. In 9th grade (2012-13 school year), the Student accrued 14.53 total absences. (S-10). Some of those absences were excused, but the Student was not present for instruction on those days regardless of whether the absence was lawful.

4. In 9th grade, the Student passed all academic classes with a 74.5172 GPA. (S-9).

5. The District received a note from the Student's physician dated July 24, 2013. That note explained that the Student needed bathroom accommodations. (S-5).

6. An altercation between the Student and District personnel occurred on January 17, 2014. Portions of that altercation were recorded by the District's security cameras, and that recording was entered into evidence.

7. The video recordings do not reveal how the altercation started. Based on credible testimony, I find that the Student and the Student's friends attempted to leave campus in violation of school rules. That group was confronted by one of the District's Traffic Controllers. Upon that confrontation, the Student's friends fled. The Student either did not flee, or was unable to flee. Regardless, the Traffic Controller walked the Student back into school.

8. Once the Student was back in school, based on both the video recordings and credible testimony, I find that the Student became noncompliant and uncooperative with District personnel. Although District personnel attempted to direct the Student into the school's office, the Student would not comply. Several times, the Student attempted to walk away from District personnel, and several times District personnel attempted to block the Student's path.

9. Most of the District personnel who were involved in the January 17 incident were not trained in safe crisis management. Throughout the incident, there was occasional, brief physical contact between the District personnel and the Student. At times, District personnel placed their hands on the Student's wrists or shoulders. At other times, District personnel tightly grouped around the Student to keep the Student from walking away. These interventions were not effective.

[3] Various documents in this case spell Crohn's disease differently. I take notice of the correct spelling and use that spelling here.

10. Ultimately, the January 17 incident ended when the Student was physically restrained and then taken into the school office. Shortly thereafter, District personnel called the Parents and the police. The Parents came to school and removed the Student.[4]

11. After the January 17 incident, the District initiated disciplinary proceedings and also filed disorderly conduct charges against the Student. (P-3).

12. When the District initiated its disciplinary proceedings, it did not consider the Student to be IDEA-eligible or a "thought to be exceptional" student for IDEA purposes. It pursued discipline as it would for any non-disabled student.

13. As the District's disciplinary process progressed, a School Board Disciplinary Committee filed a recommendation to the full School Board that the Student should be expelled.[5]

14. While the disciplinary proceedings progressed, the Student continued to attend the District as a regular education student.

15. At some point (the record does not reveal exactly when), the Parents began to argue that the Student was protected by the IDEA and that the pending discipline was a violation of the Student's rights. In response, the District stayed the disciplinary proceedings in order to conduct an evaluation for IDEA eligibility.

16. The Student's physician drafted another note dated January 27, 2014, documenting the Student's treatment for Crohn's disease since March of 2005, and requested accommodations. (S-12). Specifically, the note describes the symptoms of Crohn's in general, and recommends "liberal" bathroom use for long periods. The note also says that the Student may miss school both for flareups and routine medicine infusions. Finally, the note suggests the need for a Section 504 Service agreement.

17. On February 21, 2014, the District sought consent to evaluate the Student to determine eligibility for a Section 504 Service Agreement. (S-13).

18. The District issued a Section 504 Evaluation Report with recommended accommodations dated March 10, 2014. (S-16). Specifically, the report recommends

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[4] There is evidence to suggest that the District personnel believed that the Student was under the influence of drugs at the time of the incident. The Student was *not* searched, and drug charges were not filed. The Parents claim that allegations of drug use were improperly presented to the School Board as part of the disciplinary process. I will address that particular claim in the discussion below, but I decline to make any findings of fact regarding the Student's alleged drug use or the District's perceptions - correct or not - about the same.

[5] Here again the Parents argue that the expulsion recommendation was predicated in large part upon the District's determination that the Student was under the influence of drugs. As previously noted, I make no findings concerning that issue. The fact that the District perceived the Student to be under the influence of drugs does, however, add some context to the expulsion recommendation.

unlimited bathroom breaks, a hall pass to get to and from the bathroom, permission to carry and consume food and water throughout the day, and seating to get into and out of class should the need arise. *Id*. The report also recognizes the Student's excessive absences at that point, and explains the need to provide documentation when absences are related to Crohn's. *Id.*

19. The District issued a Section 504 Service Agreement the same day, substantively incorporating the recommendations in the report. (S-17). The Parents approved the Service Agreement on March 27, 2014.

20. In addition to the Section 504 Service Agreement, the District developed and implemented an Individual Healthcare Plan (IHP) dated March 12, 2014. The IHP provided many of the same accommodations as in the 504 Agreement. (S-18).

21. In both the Section 504 Service Agreement and in the IHP, the District expressed concerns and recommended strategies regarding the Student's social development and wellbeing. Particular concerns with the Student's peer group and interactions were noted.

22. In a report dated March 28, 2014, one of the District's School Psychologists suggested that the Student should participate in a drug/alcohol evaluation and participate in the Student Assistance Program. (P-12).

23. On March 25, 2014, the District sought consent to conduct a psychiatric evaluation of the Student. This was in response to information from the Parents suggesting depression, and the Student's non-compliant behaviors in school. The Parents denied this request on April 1, 2014. The Parents stated that they would pursue their own psychiatric evaluation and would share that with the District if it was "accurate and complete." (S-20). No such evaluation was ever provided to the District.

24. On March 27, 2014, the Student's doctor sent two notes to the District. Together, these notes indicate that the Student could participate in a half-day vocational program and recommended homebound instruction for the other half of the day. The doctor listed the symptoms of Crohn's disease without saying anything about the Student's specific presentation. The note does not say anything about the Student's then-current ability to attend school - saying only that the Student "would benefit greatly from homebound instruction." (S-21).

25. On April 17, 2014, the District sought but did not receive consent to speak with the Student's doctor. (S-24). The request was repeated on May 1, 2014 to no avail. (S-29).

26. From April of 2014 through the end of the 2013-14 school year, the District attempted to provide homebound instruction to the Student. During this time, the Student was either not at home or refused to participate. (S-27).

27. The District Psychologist evaluated the Student for IDEA eligibility. The District issued an evaluation report (ER) dated May 8, 2014. The evaluation included a

review of the Student's records, teacher input, parent input, and standardized testing including the WISC-IV (an intelligence test), Woodcock Johnson III Test of Achievement, Key Math – 3 Diagnostic Assessment, Comprehensive Trail-Making Test (a test of executive functioning), Conner's Continuous Performance Test (an ADHD test), BRIEF, Reynolds Adolescent Depression Scale 2nd Edition, and other tests to assess the Student's emotional wellbeing. (S-31)

28. Based on the results of the testing and the comprehensive review of the Student's records, the District Psychologist concluded that the Student did not have a specific learning disability and was not emotionally disturbed. The District Psychologist noted that there was insufficient evidence to determine eligibility based under the category of Other Health Impairment (OHI), as there was strong evidence that the Student's needs as a result of Crohn's disease could be accommodated though regular education interventions in a Section 504 plan. (S-31)

29. On May 29, 2014, the District issued a Notice of Recommended Educational Placement (NOREP) refusing to identify the Student as IDEA-eligible and continuing the Student's then-current status as a regular education student with a Section 504 Service Agreement. (S-33).

30. In 10th grade, the Student attended school at the District for part of the day, and a vocational program for part of the day. For the part of the day in the District, the Student accrued 53.01 total absences. (S-40). Some of those absences were excused, and others constitute a summation of tardy days. Regardless, the Student was not present for instruction on those days, whether or not the absence was lawful. Based on a 180 day school year, the Student was not present for roughly 30% of instruction during the 2013-14 school year.

31. For the part of the day in the vocational program, the Student was absent for 23 of 74 sessions, missing roughly 31% of instruction. (S-40)

32. The Student's grades declined sharply in 10th grade. The Student failed English 10, Science, Geometry, and the vocational program. (S-39). The Student received an "incomplete" for a Social Studies class taught in the vocational program. *Id*. The Student's only passing grade was a "D" (resulting from a 72%) in Health and Physical Education. (S-39).

33. The Parents obtained a private educational evaluation. In a report dated July 16, 2014,[6] the Private Evaluator concluded that the Student is IDEA-eligible under both the Other Health Impairment (OHI) and Specific Learning Disability (SLD) categories based on a math disability. Those conclusions were based on parent input, a review of records, and many standardized tests including the Woodcock Johnson, WIAT-III, BASC, Conner's, and the Brown ADD Scale. (P-6).

[6] The private evaluation lists several test dates, but indicates that the report was provided to the Parents on July 16, 2014. (P-6 at 31).

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

IDEA Eligibility

The IDEA and its implementing regulations establish a two-part test to determine eligibility. First, a student must have a qualifying disability. Second, by reason thereof, the Student must require specially designed instruction (SDI). *See* 34 C.F.R. § 300.8. Simply having a disability that is explicitly recognized by the IDEA, or a condition that satisfies any of the IDEA's categories of disabilities is insufficient. Rather, the disability must both be present and must be the reason that special education is required.

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

> Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

Compensatory Education

Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool,* 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia,* 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount of what type of compensatory education is needed to put the Student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex*

rel. Daniel W. v. Upper Perkiomen Sch. Dist., 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila*., Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F., Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006)*; *M.L. v. Marple Newtown Sch. Dist.,* ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.,* ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona.* If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

IEE at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency…” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

“If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.” 34 C.F.R. § 300.502(b)(4).

IDEA Disciplinary Protections

The IDEA provides specific protections to eligible students who are facing a change in placement for disciplinary reasons. 20 U.S.C. § 1415(k). *See also* 34 C.F.R. § 300.530(e). Pertinent to this case, the IDEA requires schools to conduct a manifestation determination “within 10 school days of any decision to change the placement of a child

with a disability because of a violation of a code of student conduct…" 20 U.S.C. § 1415(k)(1)(E)(i). At the manifestation determination meeting, members of the IEP team (including the parents) determine whether "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or … if the conduct in question was the direct result of the local educational agency's failure to implement the IEP." If the team answers either of those questions in the affirmative, the behavior is a manifestation of the disability. 20 U.S.C. § 1415(k)(1)(E)(ii).

When the behavior is a manifestation of the disability, the IEP team must conduct a functional behavioral assessment and then either develop or revise the student's behavioral intervention plan (BIP). Moreover, the student must be returned to the placement that the student attended prior to the removal, unless the parents and school agree that the change in placement is necessary for the new or revised BIP. *See* 20 U.S.C. § 1415(k)(1)(F).

Section 504 / Chapter 15

"Eligibility" under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504. Section 504 protects only "handicapped persons," and the question of whether a student is a handicapped person calls for an inquiry into how that term is defined. The definition is provided in the Section 504 regulations at 34 CFR § 104.3(j)(1): "Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."

The test is somewhat more defined under Chapter 15. Chapter 15 defines a "protected handicapped student" as a student who:

1. Is of an age at which public education is offered in that school district; and

2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and

3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

If a student is a handicapped person, Section 504 prevents school districts from discriminating on the basis of disability by denying the student participation in, or the benefit of, regular education. *See* 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from *regular* education.

Chapter 15 also defines a service agreement as a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student."

After providing these definitions, Chapter 15 explains what schools must do for protected handicapped students at 22 Pa Code § 15.3:

> a "school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the 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."

From this point, Chapter 15 goes on to list a number of rules describing what must happen when a schools or parents initiate evaluations to determine if students are protected handicapped students.

After evaluations, Chapter 15 goes into more detail about service agreements. In doing so, Chapter 15 first sets out rules for what must happen when parents and schools are in agreement at 22 Pa Code § 15.7(a):

> If the parents and the school district agree as to what related aids, services or accommodations should or should no longer be provided to the protected handicapped student, the district and parents shall enter into or modify a service agreement. The service agreement shall be written and executed by a representative of the school district and one or both parents. Oral agreements may not be relied upon. The agreement shall set forth the specific related aids, services or accommodations the student shall receive, or if an agreement is being modified, the modified services the student shall receive. The agreement shall also specify the date the services shall begin, the date the services shall be discontinued, and, when appropriate, the procedures to be followed in the event of a medical emergency.

When parents and schools cannot reach an agreement, a number of dispute resolution options are available, including formal due process hearings. 22 Pa Code §§ 15.7(b), 15.8(d).

Discussion

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence, and, accordingly, rendering a decision incorporating findings of fact, discussion, and conclusions of law. Hearing

officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution* (Quakertown Community School District), 88 A.3d 256, 266 (Pa. Commw. 2014).

In general, I find no issue with the credibility of the witnesses who testified in this matter with the exception of the Student's father. The Student's father was overtly evasive and needlessly defensive during the District's cross-examination. His reluctance or outright refusal to answer even basic questions, in conjunction with his physical demeanor during cross-examination, all harmed the Student's father's credibility. The Student's father's claims of near complete naiveté in regard to his rights after having litigated other due process proceedings also weighs against credibility.

Despite all of this, for reasons explained below, nothing in this case hinges on a credibility determination. I found no facts in this matter solely on the basis of any of the witnesses' testimony. More importantly, in many instances, I make assumptions for purposes of legal analysis that examine the Parents' claims as if they had substantiated the facts that they allege.

IDEA Eligibility

A threshold issue in most of the claims presented in this case is whether the Student is IDEA-eligible. If the Student is not IDEA-eligible, the Student had no right to a FAPE under the IDEA, and was not entitled to the IDEA's special disciplinary protections. It is the Parents' burden to establish that the Student is IDEA-eligible.

Although there is no explicit mention of Crohn's disease in the IDEA, I am persuaded that Crohn's disease satisfies the definition of Other Health Impairment (OHI). OHI is defined in the IDEA's implementing regulations at 34 CFR § 300.8(c)(9) as follows:

> Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that--
>
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
>
> (ii) Adversely affects a child's educational performance.

As an inflammatory bowel disease, fatigue is a common symptom of Crohn's. In this case, the Student's doctor sent notes twice to indicate that the Student should be

accommodated because the Student would likely need frequent, long bathroom breaks. Regardless of whether those breaks were actually taken, the Student had limited vitality due to a chronic health problem.

The definition of OHI also seems to incorporate the second part of the IDEA's eligibility test. OHI is recognized only if the disabling condition "adversely affects a child's educational performance." *Id*. I view this as indistinguishable from the need for special education and related services. As such, proving the existence of an OHI does not automatically prove the need for special education. In this case, the Parents must prove that the Student required special education by reason of the Crohn's disease.

Nothing in the record of these proceedings establishes that the Student required special education or related services by reason of the Crohn's disease. The Student was diagnosed in 2004. Subsequent to that diagnosis, the Student performed well in school with no accommodations. The Parents not only conceded but affirmatively argue that the Student performed well in school, earning good grades and PSSA test scores from 1st through 5th grades. PSSA scores through 8th grade are not remarkable but for a "below basic" science score in 8th grade. Math scores were proficient to advanced throughout and reading scores were all in the basic to proficient range.

In 9th grade (2012-13 school year), the Student passed all academic classes with a cumulative 74.5 GPA (the Student failed a physical education class). The Student earned those grades even with 14.5 absences for the year. This indicates strong performance under the circumstances without accommodations.

In 10th grade (2013-14 school year), the Student's grades declined dramatically. This corresponded with a very significant increase in absences. I have no doubt that these two factors are closely connected. It is not at all surprising that after missing 30% of instruction, the Student's grades plummeted. I cannot assume, however, that the Student's absences were the result of Crohn's disease. That is for the Parents to prove, and they have not satisfied their burden in this regard. Prior to March 28, 2014, the Student's doctors sent notes saying that the Student needed only unrestricted access to the bathroom in order to attend school.

Not until the end of the 2013-14 school year did the Student's doctor send notes referencing homebound instruction. Prior to that point, all notes from doctors suggest that the Student is able to attend school with accommodations. To the extent that the notes (particularly S-12) suggest that the Student may miss some school, they certainly do not imply or excuse the Student's chronic absenteeism. Even the notes suggesting the need for homebound instruction suggest that the Student is able to attend the vocational program of which the Student missed 31%. Further, these notes are based on symptoms that the Student (or any person with Crohn's) may exhibit. They include no specific information about the Student and are devoid of context. In sum, an eleventh hour, spartan note from a doctor referencing homebound instruction does not explain away the huge number of prior absences that resulted in poor academic performance. Even when viewing the evidence in the light most favorable to the Parents, prior to the

doctor's note suggesting the need for homebound instruction, nothing in the record links the Student's chronic absenteeism to Crohn's disease. Surely, at least *some* absences are attributable to Crohn's. But the record as a whole does not link the Student's performance to Crohn's. This missing connection is what would warrant a determination that the Student required special education as a result of an OHI.[7]

In addition to the foregoing, I find no procedural flaw in the District's own evaluation. The conclusion in that evaluation that the Student is not IDEA-eligible is well-supported by the evaluation itself. In contrast, the Parents' private evaluation included much testing but offered conclusory results. The strongest example of this is the conclusion that the Student has a math disability, prompting the Evaluator to conclude that the Student qualifies at a student with a specific learning disability. It is impossible to square that conclusion with the Student's strong performance in math over many school years.

Further, some evidence suggests that the Student had social and emotional struggles in 10th grade and likely prior. There is insufficient evidence to make an eligibility determination on that basis, and the Parents do not advance that position.

The evidence presented in this hearing does not establish that the Student required special education as a result of Crohn's disease at all during the 2012-13 school year. The evidence presented does not link the Student's poor performance in the 2013-14 school year to Crohn's disease. In this absence of evidence, I cannot conclude that the Student satisfied the IDEA's two-part eligibility test for any period of time pertinent to these proceedings.

IDEA Claims

As the Parents have not proven that the Student was IDEA-eligible, I will not consider whether the District violated the Student's right to a FAPE, claims for compensatory education, alleged Child Find violation[8] or demand for an IEE. All of those claims are predicated on the Student's eligibility. However, the fact that the Student is not eligible does not preclude the possibility that the Student was a "thought to be eligible" Student when the District went through its disciplinary process.

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[7] There is some evidence to suggest that the Student's academic performance was adversely affected by the Student's social and emotional state. Again, the Parents do not claim that the Student has an emotional disturbance and refused to consent to the District's efforts to obtain information that could shed light on this issue.

[8] In general, LEAs are required to locate and identify children with disabilities. As I have found that the Student is not a student with a disability for IDEA purposes, the Student had no right to be found and has no standing to bring a Child Find claim.

Regarding the discipline, as explained to counsel during a colloquy, my role is not to determine whether the District made the correct disciplinary decision. So much was made of the video of the January 17, 2014 event to such little effect. For purposes of these proceedings, it does not even matter whether the Student did or did not breach the District's code of conduct. Similarly, it does not matter if the District chose to expel the Student as a result of unsubstantiated accusations of drug use. The only issue over which I have any jurisdiction is the question of whether the Student's rights under 20 U.S.C. § 1415(k) were violated.[9] As applied to this case, if the Student was "thought to be exceptional," the only thing that § 1415(k) requires is a manifestation determination within 10 school days of any decision to change the Student's placement.

For purposes of analysis, I will assume that the Student *was* "thought to be exceptional" at the time of the discipline. Even with this assumption, the disciplinary process never reached the point of a change in the Student's placement. The Student was not excluded from school while the disciplinary process moved forward, and the Student left the District before any discipline was imposed. As such, the predicate decision to change the Student's placement never occurred, and so 20 U.S.C. § 1415(k) was never triggered. The Parents' IDEA claims concerning discipline are denied on this basis.

Section 504 Claims

There is no dispute that the Student is protected by Section 504. The District had knowledge of the Student's Crohn's disease well before the period of time in question in this hearing. Crohn's disease certainly "substantially limits one or more major life activities." Under federal regulations, the Student was protected from disability-based discrimination at all times. Under Pennsylvania regulations, however, the Student was not entitled to a written service agreement until the disability substantially limited or prohibited participation in or access to an aspect of the school program. In this case, the District put a Service Agreement in place long before the Student's doctor indicated that the Student may have trouble attending school.

At the time that the agreement was drafted, the only information available to the District suggested that the Student would need long and frequent bathroom breaks. The Service Agreement provided appropriate accommodations based on that information.[10] When information from the doctor changed to suggest that the Student would benefit from homebound instruction, the District complied even if the Student was not cooperative. In sum, I find no substantive or procedural flaw in the District's response to the information it received from the Student's doctors. The accommodations that the District offered and implemented in response to the Student's Crohn's disease were appropriate.

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[9] I also have authority under the IDEA's federal and state implementing regulations, which are not pertinent here. Pennsylvania's regulation is 22 Pa Code § 14.143.

[10] The Service Agreement and IHP actually went further to address the Student's emotional well-being. Again, neither party argues that the Student has any particular rights or entitlements following from a mental or social disability.

Regardless of the appropriateness of the Service Agreement, the Parents argue that the Student was subject to disability-based discrimination. Specifically, they point to the fact that the Student was the only student punished as a result of the January 17, 2014 incident. District personnel testified with remarkable candor that it is true that the Student was the only one punished. The other children simply got away before they were identified. The fact that the Student was caught but that others got away does not suggest discrimination. These circumstances do not indicate any sort of connection between the Student's disability and the District's actions.

The Parents also argue that the District inappropriately restrained the Student and the District sent false or misleading information to the School Board as part of the disciplinary process. Assuming that these things happened, no evidence draws any connection between these events and the Student's disability.[11] Bluntly, even if I were to find that the District mistreated the Student (and I do not), that fact alone does not evidence disability-based discrimination. Nothing in the record evidences disability-based discrimination. The Parent's Section 504 claims are denied on this basis.

Access to Records

The Parent's right to access records has been made an issue throughout these proceedings, particularly in regard to the video of the January 17, 2014 incident. That issue has been resolved by order of December 17, 2014. Consequently, the issue is dismissed as moot.

An order consistent with the above follows.

[11] The Student's father alleged that the video of the incident showed District personnel restraining the Student and throwing the Student to the ground. When the video was played at the hearing, and did not show these things, the Student's father claimed that the video was edited. There is no evidence of this.

ORDER

Now, February 3, 2015, it is hereby **ORDERED** as follows:

1. For the period of time in question, the Student was not a child with a disability for IDEA purposes, and so the Student was not entitled to the substantive rights or procedural protections of the IDEA.

2. The District did not discriminate against the Student in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4.

3. The District did not violate the Student's rights as a thought to be eligible student through its disciplinary process.

4. The Student is not entitled to compensatory education.

5. The Student is not entitled to an IEE at the District's expense.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER