

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

ODR No. 15455-1415AS

Child's Name: T.R.

Date of Birth: [redacted]

Dates of Hearing: 1/7/15, 1/28/15, 2/2/15, 2/11/15

OPEN HEARING

Parties to the Hearing:

Parents

Parent[s]

Representative:

Parent Attorney

None

School District

Upper Darby

4611 Bond Avenue

Drexel Hill, PA 19063

School District Attorney

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Date Record Closed:

March 6, 2015

Date of Decision:

March 23, 2015

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student resides with Parent in the School District's geographic boundaries, but has been enrolled in a cyber charter school since the beginning of the 2013/2014 school year. Student previously attended a District elementary school, with a Chapter 15/§504 Service Plan to address symptoms of Attention Deficit/Hyperactivity Disorder (ADHD) from 2nd grade through the middle of 4th grade. During the fall of 4th grade, the District evaluated Student at Parent's request, concluded that Student is IDEA eligible, and developed an IEP to replace the Service Agreement. After the IEP was completed, Parent became increasingly unhappy with the District's response to her concerns about Student's behaviors and academic progress in math and writing. After the fifth of nine IEP meetings held between January and June 2013, Parent requested an independent educational evaluation (IEE) that the District ultimately agreed to fund.

A year after Student left the District to enroll in the cyber charter school, Parent filed a due process complaint alleging several IDEA and §504 violations that she alleged resulted in a denial of FAPE from 2nd grade through the time the charter school developed a new IEP for Student. After receiving the results of the IEE, which Parent did not obtain until the summer after Student's first year in the charter school, Parent requested and was granted leave to amend the complaint to add a claim for current and prospective remedial relief in addition to the compensatory education requested in the original complaint.

The due process hearing was held in four sessions from early January to mid-February 2015. After submission of written closing arguments by both parties on the agreed date, this matter is ready for a final decision. For the reasons explained below, as well as in rulings issued during the due process hearing, Parent's claims are denied.

ISSUES

1. Did the School District fail to provide a free, appropriate public education (FAPE) to Student based upon:
 - a. The District's failure to timely evaluate Student for IDEA eligibility, resulting in a violation of the District's "child-find" obligation, and/or
 - b. The District's failure to develop and implement appropriate §504 Service Plans and IEPs for Student; and/or
 - c. The District's denial of full participation by Parent in the IEP process and in selecting a program and placement for Student?
2. Should Parent be permitted to seek relief beginning with the 2010/2011 school year, or are Parent's claims limited to the 2012/2013 school year and forward?
3. Is Student entitled to compensatory education for a denial of FAPE by the District, and if so, for what period, in what form and in what amount?
4. Should the District be required to fund a private placement for Student at a school selected unilaterally by Parent from the present school year until Student's high school graduation as an appropriate additional or alternative equitable remedy for the District's alleged denial of FAPE during the time Student was enrolled in a District placement?

FINDINGS OF FACT

1. Student, [a pre-teenaged] child born [redacted], is a resident of the School District and is eligible for special education services, but is presently enrolled in a cyber charter school, not in the School District. (Stipulation, N.T. pp. 16, 17)
2. In accordance with federal and state standards, Student was identified by the District as IDEA eligible in the primary disability category of Other Health Impairment (OHI), with a specific learning disability (SLD) in written expression identified as a secondary disability category 34 C.F.R. §300.8(a)(1), (c)(9), (10); 22 Pa. Code §14.102 (2)(ii). (S-22 p. 20)

February 2011 (2nd Grade)—December 2012 (4th Grade)

3. Parent first requested an evaluation of Student to determine eligibility for special education services on February 7, 2011 citing signs of inattention, hyperactivity and impulsivity that had emerged during the school year. (N.T. p. 117; S-1)
4. The District school psychologist who was assigned to Student's elementary school at that time contacted Parent to discuss her concerns and explain the Student Support Team (SST) process. (N.T. pp. 117, 118, 220; S-2)

5. Ordinarily, when a teacher or parent suggested that a child may be eligible for special education, the child's teacher completed a referral form to begin a review of the child's medical, academic and behavioral records at an SST team meeting that included the school principal, the lead teacher, the teacher who referred the child, the school psychologist and any support staff who worked with the child in order to develop an understanding of the child's strengths and needs in the school setting. (N.T. pp. 118, 119; S-2)
6. In connection with her evaluation request, Parent provided the school psychologist with an undated letter from a pediatric medical practice relating to her request for an appointment to discuss ADD. The letter listed a number of documents that Parent needed to provide to the medical practice prior to such a discussion with a doctor, including a request to the child's school district for an evaluation and Connors Rating Scale questionnaires, designed to identify ADD/ADHD symptoms, to be completed by the child's teacher and parent. (N.T. p. 221; S-3)
7. Parent sent her completed Connors questionnaire, dated February 4, 2011 to the District. Student's teacher also completed a Connors questionnaire, dated February 3, 2011 but the record did not disclose whether that form was provided to the District before the due process hearing. (N.T. pp. 119, 120; P-1 pp. 1, 2, S-3 pp. 1, 2)
8. Student's teacher completed the SST referral form in early March 2011, in which she noted Student's inability to remain seated, irrational response to redirection, and her concerns about Student's writing, notably a lack of time and effort devoted to writing tasks. The teacher identified no other academic concerns on the SST referral form, and noted that Student had recently been moved to the most advanced reading program for 2nd grade. (N.T. p. 223; S-4, S-5)
9. The teacher also provided academic assessment results, which the school psychologist summarized in a report dated March 23, 2011. Although there was some variability in the test scores that were reported, the school psychologist concluded that in reading/language arts, Student was generally performing in the average range, except for writing. (N.T. pp. 166, 170, 223, 224; S-5)
10. Based upon the teacher's comments about Student rushing through writing tasks, and the school psychologist's knowledge that Parent was in the process of obtaining a medical evaluation for ADHD, she believed that Student's difficulties with writing more likely reflected ADHD symptoms than skill deficits. (N.T. pp. 163—165, 184; S-4 p. 3)
11. In math, Student was performing just below the average range based on assessments given in the fall of 2nd grade. (N.T. pp. 171, 172; S-5)
12. Although the SST team took into account all of the information available, it focused primarily on the attention and behavior concerns that the 2nd grade teacher had identified

in determining whether Student's progress and functioning suggested the need for a comprehensive special education evaluation. (N.T. pp. 155, 156)

13. By letter dated March 24, 2011 the school psychologist reported the results of the SST process to Parent, attaching a copy of her summary of the teacher's SST referral form. The SST did not recommend an evaluation at that time, but the letter noted that Parent should notify the District if the pediatrician diagnosed Student with ADHD, so the District could create a Chapter 15 Service Agreement for Student. (N.T. pp. 173—175, 225; S-6 pp. 1, 2)
14. The school psychologist also attached a NOREP refusing the psycho-educational evaluation, as well as a procedural safeguards notice, noting in the letter that the procedural safeguards explained how Parent could challenge the District's decision not to evaluate Student. (N.T. pp. 175, 176, 225, 226; S-6)
15. The pediatric practice provided the District with a note dated April 14, 2011 stating that Student had been diagnosed with ADHD and that medication had been prescribed. (N.T. p. 176; S-7)
16. Parent, the school psychologist, the school social worker and Student's teacher met on April 26, 2011 to complete a Chapter 15 Service Agreement Eligibility Form and discuss a Chapter 15/§504 Service Agreement. (N.T. pp. 177—180, 228, 229; S-8)
17. An initial Service Agreement, which Parent approved on May 9, 2011 provided 12 accommodations/strategies to increase Student's attention, focus and organization, including prompts, cues, preferential seating, repetition of directions, check-ins, homework supervision, a set of textbooks to keep at home, teaching organization strategies, organizational support and movement breaks/assistance in recognizing the need for breaks. Parent also received a Chapter 15 procedural safeguards notice. (N.T. pp. 182—184, 249, 250; S-9)
18. Parent raised no questions or concerns about the Service Agreement or Student's academic functioning/performance during the 3rd grade school year (2011/2012). Commenting on 3rd grade in the fall of 4th grade, Parent again expressed no concerns about Student's academic performance and general school functioning, and noted that for 3rd grade, the Service Agreement appeared to resolve the behavioral issues that had concerned Parent during 2nd grade. Parent also noted that Student had continued to show signs of disorganization, distractibility and forgetfulness and impulsivity, and continued to have difficulty independently initiating and completing homework. (N.T. pp. 235, 236, 957, 958; S-13 p. 6)
19. Based upon review of Student's 3rd grade academic progress reports, the District school psychologist concluded that the Service Agreement had worked for Student in 3rd grade, despite scores in the basic and below basic range in some reading math and writing component skills at the end of the school year. Student's PSSA scores for 3rd grade were

in the proficient range for both reading and math, the only two areas assessed. (N.T. pp. 188, 189, 233, 234, 248; S-22 p. 10, S-53 pp. 5, 6)

20. On October 10, 2012 (4th grade) the Chapter 15 Service Agreement was revised by adding a check-in for all classes to assure that Student had all necessary materials, and by eliminating a reduced homework provision and daily “Attention Book” ratings of Student’s focus, attention and organization. (S-9 pp. 3, 4, S-10 pp. 3, 4)
21. Early in 4th grade, a problem developed between Student and the math teacher, resulting in several disciplinary referrals for significant out of control and disrespectful behaviors. (N.T. pp. 69, 70, 253, 254, 262—265, 567—570, 963—968;S-14, S-56 pp. 14, 15)
22. In November 2012, after a serious behavior incident near the end of October, the Service Agreement was revised again to add another means for checking that Student had all materials need to complete homework and for Parent to check it, as well as a specific provision for teacher reassurance and encouragement, a provision for consequences imposed for negative behavior to be applied after school rather than during recess and for the school social worker to provide Student’s teachers with ADHD information. (NT. pp. 564, 565; S-16);
23. By December 2012, after another behavior incident with the math teacher, the District concluded that the relationship between Student and the math teacher was unlikely to improve and granted Parent’s request to reassign Student to a different math teacher beginning after the winter break. (N.T. pp. 569—573; S-18, S-S-20, S-21)

IDEA Evaluation/ Initial IEP

24. In mid-October 2012, Parent again requested an evaluation to determine whether Student was eligible for special education services, noting that the effects of Student’s ADHD, specifically executive functioning deficits, were “beginning to negatively impact [Student’s] school performance, learning and behavior.” (N.T. pp. 205, 956, 960; P-24, S-11 p. 1)
25. The District issued a Permission to Evaluate form (PTE) which Parent signed and returned, consenting to the evaluation. Parent also provided extensive written input detailing her concerns. Parent also asked specific questions about the assessments the school psychologist planned to use and why those particular measures were chosen, to which the school psychologist responded with explanations. (N.T. pp. 213, 236, 241—243; P-24, S-13 pp. 1—3, S-17)
26. The school psychologist incorporated much of Parent’s written input into the beginning of the evaluation report (ER), and attached Parent’s entire submission as an appendix to the ER. Parent described a dramatic negative change in Student’s attitude toward school beginning in 4th grade, noting that Student expressed increasing difficulties with attention and focus, resulting in growing frustration. (N.T. pp. 213, 251, 255, 273; S-13 pp. 5-11, S-22 pp. 1—3, 32—39)

27. Parent discussed with the school psychologist her difficulties managing Student's behaviors at home after the school day ended. Parent noted that Student's ADHD medication wore off by 3:00 p.m., leading the school psychologist to conclude that Student presented very differently at school than at home, due at least in part, to the effects of medication. Although Parent noted an increased number of explosive outbursts in 4th grade, Student had received three disciplinary referrals by the time the evaluation began. (10/19, 10/23, 10/23). By the time the ER was completed, Student had received two additional referrals (11/2, 12/14). All disciplinary issues to that point involved Student's first math teacher. (N.T. pp. 255, 256, 259, 260, 561, 562, 569; S-14 p. 2, S-22 pp. 3, 5, 21)
28. In addition to Parent's input, the evaluation included teacher observations, curriculum – based assessments, standardized assessments of intellectual ability and academic achievement, rating scales completed by Parent and two teachers to assess social/emotional/behavioral functioning and executive functioning, a formal classroom observation by the school psychologist focused on Student's behaviors, a functional behavioral assessment (FBA) directed toward off-task and disorganized classroom behaviors and an occupational therapy (OT) evaluation. The OT evaluation was added to the PTE later to address Parent's concerns about Student's handwriting and difficulties with written expression. (N.T. pp. 237, 238, 240, 241, 267; S-22)
29. The assessment of intellectual ability (WISC-IV) placed Student solidly in the average range, with a full scale IQ (FSIQ) of 99 (47th percentile). On the four component index scores, Student was in the average range with respect to verbal comprehension (VCI/104, 61st percentile), perceptual reasoning (PRI/98, 45th percentile) and processing speed (PSI/109, 73rd percentile). Working memory emerged as a relative weakness, with a low average score of 86 (18th percentile). The District school psychologist noted that the WMI score was consistent with Student's ADHD diagnosis. (N.T. pp.; S-22 pp. 12, 19, 27)
30. The standardized academic achievement assessment (KTEA-II) placed Student in the average range compared to same age peers with respect to the Reading, Math and Writing Composite Scores, as well as the subtests included in each composite score. (N.T. pp. 267, 268; S-22 pp. 13, 14, 19, 27)
31. On classroom-based fall benchmark assessments, Student's reading/language arts scores were variable, with DIBELS scores falling in the average range for all reading skills assessed. The most recent "Storytown" benchmark assessment available at the time of the evaluation (Theme 2) placed Student in the basic or below basic range for the reading skills assessed, except for one score in the advanced range (robust vocabulary). Language arts overall was in the basic range and writing was below basic. (N.T. pp. 268, 269; S-22 pp. 9, 10, 19)

32. Parent's and each teacher's ratings on the BASC-II identified some behavioral symptoms and adaptive skills in the "at risk" and "clinically significant" ranges: Parent: 3 "at risk" and 3 "clinically significant" scores; Teacher 1: 6 "at risk" 0 "clinically significant" scores; Teacher 2: 1 "at risk" and 1 "clinically significant" score. There was no overlap with respect to which behavioral symptoms and adaptive skills were rated either "at risk" or "clinically significant." (S-22 pp. 14—16, 21, 28—30)
33. The BRIEF scores from the same raters were more consistent. Parent and both teachers' ratings were in the elevated range for the Working Memory and the Global Executive Composite indices. Parent's ratings were in the elevated range for all but one of the indices; Teacher 1 ratings were elevated on four indices; Teacher 2 ratings were elevated on 3 indices. (S-22 pp. 17, 18, 31)
34. The OT evaluation was completed by the occupational therapist contracted to provide OT evaluations and services to District students. The results of assessments of visual-motor integration and visual perception in the below average to low average range led to a recommendation for OT services to improve Student's writing skills. (N.T. pp. 466—470; S-22 pp.11, 12)
35. The school psychologist concluded that Student's difficulties in the school setting arose from executive functioning deficits, particularly working memory and emotional self-regulation, as well as impulsivity and disorganization associated with the ADHD diagnosis. The school psychologist further concluded that Student was IDEA eligible, with OHI as the primary disability category. (S-22 pp. 21, 22)
36. In considering whether to identify a secondary disability category, the school psychologist took into account the results of the OT evaluation, Student's classroom performance in writing, and her knowledge that children diagnosed with ADHD often have increasing difficulty with writing as they get older due to the number and complexity of the component skills and increased academic demands. Based on those factors, the school psychologist identified a specific learning disability in writing as Student's secondary disability category, despite the absence of a discrepancy between Student's average ability and average performance on the standardized assessments. Although Student did not strictly meet the criteria for a specific learning disability in written expression, the school psychologist wanted to assure that Student received maximum support to address the academic impact of the primary OHI/ADHD diagnosis. (N.T. pp. 268—271, 321, 322, 324; S-22 pp. 13, 19, 20)
37. The FBA results indicated that the target behaviors assessed (off-task behaviors, disorganization) were relatively infrequent, leading the school psychologist to conclude that Student's behavior needs could be met with the accommodations already included in the Service Agreement, which addressed disorganization, along with the three tiered school-wide behavior plan that would increase interventions if Student's behaviors worsened. At the time an IEP was developed, Student qualified for a Tier 2 behavior support plan based on five disciplinary referrals between mid-October and late December 2012. (N.T. pp. 275—285, 857—862, 913, 915, 917; S-22 p. 20, S-26 p, 18)

38. Student's first IEP, dated January 17, 2013 included goals in the areas of producing printed written work with proper spacing and capitalization and producing properly organized written work using grade-appropriate conventions. (N.T. p. 472; S-26 p. 25)
39. The sixteen items of specially designed instruction (SDI) included attention, organization and behavior supports similar to the accommodations in the Service Plan, along with reduced homework assignments as needed, and specific steps to assist with writing assignments. Student was to be provided with 2 30 minute OT sessions/month as a related service. (N.T. p. 470; S-26 pp. 11, 12)
40. The District recommended placing Student in itinerant learning support for language arts, with all other instruction delivered in the regular education classroom. Parent signed the NOREP approving the placement and services. (N.T. p. 287; S-26 p. 14, S-27)

January—June 2013

41. Between January and April, Parent and District staff members of Student's IEP team met several times at Parent's request to discuss Parent's ongoing concerns about Student's academic progress and/or behaviors. Student's IEP was revised, primarily to update Student's present levels and Parent concerns, on January 25, March 8, March 19, April 10, May 8 and May 13. (N.T. pp. 296, 299, 854,855, 865; S-28, S-29, S-30, S-35, S-38, S-40)
42. In late March 2013, Parent acknowledged significant improvement in Student's behaviors since the IEP was implemented, but after attending a para-educator workshop at the local Intermediate Unit, believed an additional FBA was needed to further address Student's continued impulsivity and lack of self-regulation. (N.T. pp. 290—293; S-31, S-33)
43. Early in April, after reviewing Student's spring benchmark assessments, Parent requested that Student begin receiving special education in math. The District believed that was unnecessary, given Student's progress commensurate with, or above the level of regular education peers in the math class. (N.T. pp. 65, 66, 76—78, 81, 84, 293, 294, 297, 298; S-32, S-33)
44. Although Parent was generally pleased with the change in Student's math class beginning in January 2013, which placed Student with the teacher who was teaching Student's 4th grade language arts class, Parent continued to have concerns about Student's inability to demonstrate math skills at home that Student was reported to have securely in the school setting. (N.T. pp. 43, 46, 53, 975—978, 981, 993; S-29 p. 5, S-30 p. 4)
45. Parent disagreed with permitting Student to use a calculator for computation, although using a calculator was part of the District's policy for all students with respect to math assessments. When Parent worked with Student on homework assignments, she did not allow Student to use a calculator. (N.T. pp. 51,52, 977, 978)

46. When Parent reported problems with Student's math homework, the math teacher reviewed the concepts with Student, who reported that s/he sometimes attempted to avoid completing math homework by stating a lack of understanding. When informed by Parent that Student did not understand or remember how to complete math homework, the teacher could sometimes confirm Student's knowledge of and ability to apply the math concepts. At other times Student, and sometimes the entire class, needed to have material re-taught. Parent acknowledged that Student was able learn math concepts and apply the concepts within a short period. Student had the most difficulty with benchmark assessments that required retrieving information over a long period of time, resulting in basic level performance consistently on those kinds of assessments. (N.T. pp. 49, 53—56, 61, 68, 69, 977—979, 997—1001)
47. Student scored in the proficient range for math on the PSSA tests administered in the spring of 2013. Parent also acknowledged that Student was also proficient on curriculum-based assessments. Parent attributed Student's ability to perform successfully on the PSSA assessment to a limited number of questions, and the essentially random nature of Student's working memory deficits, such that Student was able to retrieve the math concepts tested at that time, but might not have been able to recall those same concepts on another occasion, or to recall different concepts that might have been included on the PSSA test but were not. . (N.T. pp. 999, 1015, 1016, 1018; S-58)
48. Parent's request for a new FBA was discussed at the IEP team meeting on April 10, and the District issued a permission to reevaluate. (N.T. pp. 295, 296, 299, 985, 986; S-34)
49. From early May through the beginning of June, during the time the FBA was ongoing, Student's disciplinary referrals increased significantly. There was one disciplinary incident in early January 2013, none in February, two on the same day in late March and none in April. From May 2 through the end of the school year, Student received 9 disciplinary referrals, two more than the number of serious incidents that occurred between the beginning of the school year and May 1 (7 referrals). (N.T. pp. 301—303, 866, 874—876, 994—996; S-56 pp. 14—34)
50. After the new FBA was completed by a District behavior consultant, IEP meetings were held on June 11 and June 17 to incorporate the FBA results and discuss revisions to Student's IEP. In light of the increased disruptive behaviors, the District concluded that the school-wide behavior plan that had previously been successful for Student was no longer sufficient, and developed a behavior intervention plan (BIP). A personal care assistant (PCA) was added as a related service due to the recent emergence of significant behaviors during the school day that Student appeared unwilling or unable to control. (N.T. pp. 299, 307, 437, 441—446, 867, 873, 874; S-42, S-44 pp. 5, 17; S-45)

Independent Evaluation/Current Placement

51. Parent first requested an independent educational evaluation in April 2013, which the District initially denied, since the FBA Parent had requested was being conducted.

- Parent renewed the IEE request in June 2013. (N.T. pp. 8668, 870, 876, 986; S-36, S-37 pp. 11, 12, S-47, S-60)
52. Parent obtained the IEE, termed a “Comprehensive Neurodevelopmental Evaluation” during the summer of 2014, a year after Student left the District, from a New York City provider directed by a medical doctor with specialty training in pediatrics and neonatology. There is no indication in the report that a licensed psychologist, school psychologist, neuropsychologist or other specifically trained professionals administered and interpreted the results of the standardized cognitive and achievement tests, language, behavior and visual/motor assessments administered to Student. The report does not disclose the specific staff members who assessed Student or the qualifications/experience in psychometric testing of the staff members who assessed Student. (N.T. pp. 876, 877; S-57, HO-6)
 53. There is no indication in the report that the evaluator(s) gathered background information directly from any source other than Parent. They did not contact District staff. The IEE report includes no classroom observation or FBA. The report includes some comments on Student’s general demeanor, development of rapport with the staff and difficulties with engagement in the testing process (N.T. pp. 289, 880; S-57 pp.)
 54. Recommendations for instructional strategies to help Student overcome the effects of ADHD symptoms in the independent report include movement breaks, prompts for attention, organizers for academic tasks, assistance with organization strategies, checklists, strategies for diminishing rushing through tasks, systematic approaches to writing and math tasks with adult assistance, taking tests in a separate location and use of a calculator for math assessments. (S-57 pp. 17—25)
 55. Many of the recommended strategies are included, although with less detail, in the SDI found in the District 4th grade IEPs and the Service Agreement accommodations in place between 2nd grade and 4th grade. (S-9 pp. 3, 4, S-10 pp. 3, 4, S-16 pp. 3, 4, S-24 pp. 2, 3, S-26 pp. 11, 12, S-28 pp. 10, 11, S-29 pp. 12, 13, S-30 pp. 13, 14, S-35 pp. 16, 17, S-38 pp. 13, 14, S-40 pp. 14, 15)
 56. Other supportive strategies in the independent report focus on encouraging Student to access materials and supplemental instruction available on the internet, such as games to develop higher order thinking skills and instruction from Kahn Academy. (S-57 pp. 18, 22)
 57. On September 1, 2013 Parent notified the District that she was withdrawing Student from the District to enroll in the cyber charter school that had requested Student’s records from the District on August 5, 2013. (S-50, S-52)
 58. At the time of the due process hearing, Parent reported that there are some math concepts, notably long division, that Student has been unable to master regardless of accommodations, supports and services Student is receiving as recommended by the independent report and otherwise. (N.T. pp. 1017, 1018, 1020, 1021)

DISCUSSION AND CONCLUSIONS OF LAW

This case arose primarily from Parent’s understandable concern over the effects of Student’s ADHD symptoms on school functioning, particularly academic progress and behaviors. The record suggests, however, that Parent has some unreasonable expectations concerning special education services that school districts are required to provide to IDEA eligible students, and with respect to the level of parental participation in program and placement decisions provided by the IDEA statute. Perhaps without fully realizing it, during the period in dispute in this case, Parent was extraordinarily demanding in her efforts to assure that the District provided supports and services to eliminate the effect of Student’s disability-related needs in the school setting.

The difficulty for Parent in this, as in many other cases of disagreement over the details of special education services, is that school district obligations to an IDEA eligible child are not nearly as broad and intensive as a loving parent understandably desires. The IDEA statute provides that a school-age child with a disability is entitled to receive a free appropriate public education (FAPE) from his/her school district of residence. 20 U.S.C. §1400, *et seq.*; 34 C.F.R. §300.300; 22 Pa. Code §14. The required services must be provided in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd 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 (3RD Cir. 1999). Consequently, 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. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993).

An eligible student is denied a FAPE if his/her 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). On the other hand, however, under the interpretation of the IDEA statute established by the *Rowley* case and other relevant decisions, a school district is not required to provide an eligible child with services designed to provide the “absolute best” education or to maximize the child’s potential. *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995). Consequently, the underlying question for all cases in which the level and type of special education services are at issue is not whether the District provided the most and the best possible special education services for an eligible child, but whether it provided just enough. And in making that determination, the IDEA “gold standard” is whether the services the District provided enables the child to participate and make progress in the regular education curriculum. *See* 34 C.F.R. §300.39(a)(1), (b)(3), (i), (ii)¹

It is not hard to understand why the parent of an IDEA eligible child wants his or her school district to commit a level of attention and services high enough to overcome the effects of the child’s disability to the greatest extent possible, and as soon as possible, as Parent in this case appears to have expected. School districts, however, are not required to assure that a parent’s highest aspirations for her child are met. If a school district’s services are sufficient to enable a

¹ “Special education means specially designed instruction at no cost to parents, to meet the unique needs of a child with a disability.” §300.39(a)(1); “Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction— (i) To address the unique needs of the child that result from the child’s disability; and (ii) **To ensure access of the child to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.**” (Emphasis added)

child with a disability to adequately meet the regular academic standards set for every child in the district, it has amply fulfilled its overall IDEA obligation to the child. Here, the record supports the conclusion that the District fulfilled its obligations to provide Student with a FAPE during the time Student was enrolled in the District.

Burden of Proof

The IDEA statute and regulations provide the opportunity for parents and school districts to present a complaint and request a due process hearing in the event special education disputes between them cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, because Parent challenged the District's actions during the period in dispute, Parent had the obligation to establish the violations she alleged and that were identified at the beginning of the due process hearing in this case. The party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

Parent in this case did not produce sufficient persuasive evidence to establish any of the claims and violations she alleged and, therefore, has not prevailed on any of the issues identified for decision at the first session of the due process hearing, as explained below.

Child Find²

Parent's claims for denial of FAPE to Student are based, in part, upon the "child find" obligation imposed on school districts by the IDEA statute and federal regulations, requiring states to identify, locate, and evaluate all potentially disabled children, including those who may be "advancing from grade to grade." 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a), (c)(1); *G.D. v. Wissahickon School District*, 2011 WL 2411098 (E.D.Pa 2011) at *6. In Pennsylvania, that obligation is fulfilled by school districts, and in some cases, intermediate units, in compliance with 22 Pa. Code §§ 14.121–14.125 (2008)

In order to meet the child find obligation, a school district must, within a reasonable time after becoming aware of facts likely to indicate that a child could have a disability, "conduct an evaluation of the student's needs, assessing all areas of suspected disability," *P.P. v. West Chester Area School District*, 585 F.3d 727, 730 (3d Cir.2009) (citing 20 U.S.C. § 1414(b); *O.F. v. Chester Upland Sch. Dist.*, 246 F.Supp.2d 409, 417 (E.D.Pa.2002) citing *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir.1995). "Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE." *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C.2008), quoted in *G.D. v. Wissahickon School District* at *6.

When a school district violates its "child find" obligations and fails to identify a student as a Protected Handicapped Student under § 504 or as a student in need of special education under the IDEA, and provides no specialized instruction to the

² One of the issues identified for decision at the first hearing session was whether Parent should be permitted to prove claims and seek relief from 2nd grade, the 2010/2011 school year. After considering Parent's offer of proof relating to whether she could establish that exception to the two year IDEA limitations period, Parent's claims were limited to most of the 2012/2013 school year (4th grade). The reasons for that decision were explained fully on the record at the 3rd hearing session. N.T. pp. 540—551 (2/2/15) and do not need to be repeated here.

It was, however, necessary to consider whether the District violated its child find obligation prior to the period in dispute, and whether the Service Agreement accommodations were appropriate, since both of those issues affected the question whether Student was denied a FAPE for the period in 4th grade before the IDEA evaluation was completed and an IEP was developed. (FF 20, 21, 22, 23, 38)

student to meet the unique needs of his/her disability, the student has been denied a FAPE. See *Forest Grove Sch Dist. v. T.A.*, 557 U.S. 230, 238-39, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009) ("[W]hen a child requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.")

Lauren G. v. West Chester ASD, 906 F. Supp. 2d 375 at 391, 392 (E.D.Pa. 2012)

The evidence in this case does not support Parent's contention that the District violated its child find obligation by failing to conduct a comprehensive IDEA evaluation when she first requested it in Student's 2nd grade school year. (FF 3) Parent initially addressed her concerns about developing behavior symptoms that indicated possible ADHD by contacting Student's pediatrician for a medical evaluation. (FF 6) The record strongly suggests that Parent was initially prompted to request an evaluation from the School District by the policies and procedures of the medical practice, which supplied a sample letter for requesting an evaluation. (S-3)

The District reasonably responded to Parent's initial request by discussing her concerns, followed by gathering and reviewing information about Student's academic progress, behaviors and functioning in the school setting, in accordance with its general policies. (FF 4, 5, 8, 9) Although Student demonstrated some fluctuations and inconsistencies in academic skills, particularly writing, Student was generally performing well during 2nd grade. (FF 8, 9, 10, 11)

The concerns identified by Student's 2nd grade teacher were the kinds of behaviors that alerted Parent to the possibility that Student had ADHD, which was diagnosed soon after. (FF 12, 15) In light of the behavior issues, the school psychologist reasonably concluded that Student's writing difficulties were more likely related to impulsivity and rushing through a non-preferred task that could be addressed by accommodations for ADHD. (FF 10, 12, 13)

As court decisions considering child find issues have noted, it is not unreasonable for school districts not to “rush” to an evaluation of a child in the early school years, when basic academic skills are still developing. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 252 (3d Cir. 2012); *K.A.B. v. Downingtown Area School District*, 2013 U.S. Dist. LEXIS 99321 *14, 15 (E.D. Pa. 2013).

Based upon the information about Student available at the time of Parent’s initial evaluation request, it was not unreasonable for the District to suggest the SST process before proceeding immediately to an IDEA evaluation. It was also not unreasonable to conclude that the needs Student was exhibiting at the time could be sufficiently addressed by a §504/Chapter 15 Service Agreement once the ADHD diagnosis was confirmed. (FF 13, 15, 16) Based upon the evidence, the alleged child find violation in this case is a classic example of “20/20 hindsight,” meaning that Parent reexamined the situation that existed in February 2011 in light of later information and concluded that the District should have evaluated Student in 2nd grade. Knowing now that Student is a child with a disability because an evaluation nearly two years after Parent’s first request led the District to conclude that Student’s ADHD reached the level of an IDEA disability, she faults the District for not identifying it earlier. The reasonableness of the District’s actions, however, must be evaluated in terms of the information available at the time Parent requested an evaluation when Student was in 2nd grade, not in light of information acquired later. Taking into full account the facts as known to the parties during the 2010/2011 school year, Parent did not prove a child find violation.

Appropriateness of Student’s Service Agreements/IEPs

The record establishes that the Student’s initial Service Agreement remained in place from late 2nd grade and through the entire 3rd grade year. (FF 16, 17, 20) During that time, Parent raised no academic or behavior concerns. (FF 18, 19)

After an IDEA evaluation, initiated by Parent's request in October 2012, the District identified Student as a child with a disability and the IEP team proposed an initial IEP in mid-January, which Parent approved. (FF 24, 35, 36, 38, 39, 40) In addition to needs that were related to the symptoms and effects of ADHD, the evaluation disclosed continuing issues with writing, as well as visual motor integration deficits. (FF 34, 35, 36) The IEP goals and special education placement addressed Student's written expression and handwriting needs, while the items of specially designed instruction, similar to the accommodations included in the Service Agreements, addressed Student's additional needs arising from ADHD symptoms. (FF 38, 39, 40) Although the special education placement and services did not eliminate all disability-related effects, Student completed the 4th grade school year with proficient ratings in most subject areas, indicating appropriate grade level progress. (S-53 pp. 9—11)

With respect to Student's behaviors, after some serious disciplinary referrals early in 4th grade related to Student's conflicts with one particular teacher, Student's behaviors created no significant problems until close to the end of the school year, when there was a dramatic increase in disciplinary referrals. (FF 21, 22, 23, 49) Although the basis for the deterioration in Student's behaviors cannot be determined from the record, the evidence establishes that the District responded appropriately. After the new FBA that Parent had requested was completed in early June, Student's IEP team met to consider the results, develop a more intensive behavior plan than Student had needed in the past, and propose adding a PCA to assist in managing Student's behaviors. (FF 50) It is, however, impossible to determine whether the District's proposals would have been effective in addressing the behavior issues, or whether the District may have needed to provide additional services and supports for any disability-related issues in the

following school year, since Student withdrew from the District before the start of the 2013/2014 school year. (FF 57)

Parent Issues During the Second Half of the 2012/2013 School Year

After Student was identified as IDEA eligible and began receiving special education services, Parent's dissatisfaction with Student's academic progress and behaviors increased significantly. (FF 41, 42, 43, 44) Even after a multi-session due process hearing, however, at which Parent had ample opportunity to identify and describe her reasons for believing that the District failed to provide Student with a FAPE, the basis for her claims for the 2012/2013 school year remains unclear. It appears that Parent may have believed that IDEA eligibility and an IEP required the District to provide more extensive services, designed to eliminate all the effects of Student's disability on academic progress. As noted above, however, the District was required only to provide the opportunity for significant learning. The record establishes that the District fulfilled that obligation, and that Student made appropriate progress while enrolled in the District. In addition, Parent acknowledged that despite implementing strategies recommended by the independent evaluation, and despite the efforts of the school Student presently attends, Student has been unable to master long division. (FF 58) That situation illustrates the unfortunate reality that it is not possible to entirely eliminate the effects of a disability on learning, even with the most intensive efforts.

Finally, although the independent evaluation that Parent obtained after Student had been out of the District for a year appeared to provide far greater detail concerning Student's disability-related issues, when it came to "bottom line" recommendations for accommodations to address Student's disability-related needs, the independent evaluation was quite similar to the services and supports the District was providing. (FF 17, 39, 54, 55)

Parent Participation

The basis for Parent's claim that the District denied her full participation in making educational decisions for Student is also unclear. The record establishes that the District was extraordinarily open to listening to Parent's concerns and attempting to provide thorough and reasonable explanations for the issues Parent raised. (FF 41, 44, 46, 48) The District's responses to Parent, however, appeared to engender increasing demands that the District provide all the services Parent believed were necessary for Student, but the District did not believe were necessary based on Student's progress.

The fundamental issue relating to Parent's claim that the District denied her participation rights is the extent to which school districts are required to accept a parent's definitions of appropriate services. This issue has been considered in court decisions, which concluded that although parents are members of the IEP team and entitled to full participation in the IEP process, they do not have the right to control it. *See, e.g., K.C. v. Nazareth Area School District*, 806 F. Supp. 2d 806 (E.D. Pa. 2011). Parent in this case expected to exert a level of control over the services the District was providing to Student that exceeded what the IDEA statute provides. The record, therefore, does not support the conclusion that the District committed either a substantive or procedural violation with respect to Parent's participation rights.

Remedies

Since the District committed no IDEA violations with respect to Student, it is not necessary to consider whether Student is entitled to an award of compensatory education. It is also unnecessary to consider whether a prospective private school placement would be a permissible alternative to compensatory education as a remedy for past IDEA violations.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parent's claims in this matter are **DENIED**. The School District committed no procedural or substantive violation of any statute or regulation relating to special education services, including IDEA/22 Pa. Code Chapter 14 or §504 of the Rehabilitation Act of 1973/22 Pa. Code Chapter 15. The School district, therefore, has no obligation to provide compensatory education, private school tuition or any other remedy to Student.

It is **FURTHER ORDERED** that any claims and/or issues not specifically addressed by this decision and order are unnecessary to the final decision and, therefore, are denied and dismissed.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

March 23, 2015