Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: C.B.
Date of Birth: [redacted]

Dates of Hearing: 11/25/2014 and 1/12/2015

CLOSED HEARING
ODR File No. 15478-14-15-KE

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney Mark Voigt Esq. Plymouth Meeting Executive Campus 600 West Germantown Pike, Suite 400 Plymouth Meeting, PA 19462 610-940-1709
Local Education Agency Solanco School District 121 South Hess Street Quarryville, PA 17566-1225	LEA Attorney Mark W. Cheramie Walz Esq. Sweet, Stevens, Katz & Williams LLP 331 E. Butler Avenue New Britain, PA 18601 215-345-9111 x 126

Date Record Closed: February 4, 2015
Date of Decision: February 19, 2015

Hearing Officer: William Culleton Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

Student[1] is currently attending high school at a charter school that is not a respondent in this matter. Since 2003, Student has lived within the respondent school district (District). Student is thought to be an eligible child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and an individual with a disability protected by the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). (NT 8-9; P 3.)

Parent contends that Student has suffered from epilepsy and specific learning disabilities during the entire time that Student was a resident of the District. Parent asserts that the District failed to perform its "child find" duties under both the IDEA and section 504, from 2003 to the date on which Student enrolled in the charter school. Parent asserts that, because the District did not provide Student with accommodations and special education services, she kept Student out of public school during that time period, educating Student through Amish tutors affiliated with an Amish school.

Parent asserts that the District's failure to identify Student in 2003 deprived Student of a FAPE from the first day of the 2003/2004 school year until the date of Student's enrollment in the charter school for the 2014/2015 school year.[2] Parent demands compensatory education on an hour for hour basis for this period of time. The District denies failing to perform its child find duties toward Student, and denies the appropriateness of compensatory education.

The hearing was completed in two sessions. I conclude that the District failed to comply

[1] Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

[2] Prior to the hearing, the District moved to limit these claims, asserting the IDEA's two year statutory limitation of actions, which also applies to the section 504 claims. P.P. v. West Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009). After an evidentiary hearing, I denied the motion, concluding that an exception was applicable as provided in the IDEA. (NT 216-225.)

with its child find obligations under section 504 with regard to Student, as a result of which Student was deprived of a FAPE. I order the District to provide compensatory education to Student.

ISSUES

1. Did the District inappropriately fail to identify Student as a child with a disability, and thus fail to comply with its Child Find obligations under the IDEA and/or section 504, during the relevant period from the first day of school in the 2003-2004 school year until the date of enrollment in the charter school for the 2014/2015 school year?

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

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

FINDINGS OF FACT

1. From age fifteen months until December 2001, Student experienced multiple seizures that were not eliminated with medication. Student was hospitalized multiple times. At least once, in 2000, mechanical ventilation was administered in connection with a seizure. Student was tried on several medications and combinations of medications. (NT 39-40, 113; P 1, 2.)

2. From about December 2001 to January 2004, Student's seizures were effectively controlled through a combination of medications; however, when doctors weaned Student off of these medications, Student experienced another seizure, in January 2004. (NT 42-43; P 1, 2.)

3. Student's medications were again adjusted, and Student's seizures were effectively controlled from January 2004 until the summer of 2010, and from October 2010 to November 2014. (NT 40-41; P 1, 2.)

4. Parent and Student's aunt, a licensed practical nurse, believe that Student remained at risk at all times for another seizure due to metabolic variances and their interaction with dosage levels, growth and change, and other factors. (NT 39-40, 113, 261-262.)

5. Student's doctors prescribed the anti-seizure medication Topamax and, for emergency treatment of a seizure, rectal administration of Diastat. Parent also had equipment at home to protect against aspiration of vomit in the event of a seizure. (NT 40; P 1.)

6. Diastat can be administered only by a person who has training and familiarity with the individual manifestations of the patient's seizures. (NT 57-58, 102-105, 293-294; P 13, 16: S 1.)

7. Student resided in the District while of school age, from age five to the present. (NT 61, 82-86; S 9.)

8. In 2003, the District became aware of Student's eligibility for kindergarten in its schools, when Parent initiated the process of enrolling Student in the District. (NT 43-44, 131-133, 138-139, 149-152, 396-397; P 5, P15; S 2.)

9. Parent made an appointment with District personnel to have Student enrolled for kindergarten, and to have Student screened for full day kindergarten under a new program offered by the District for enhancing literacy skills. (NT 43-44, 71-73; P 5, P15; S 2.)

10. In making these inquiries and this appointment, as well as in subsequent conversations during the summer of 2003, Parent orally disclosed to District personnel repeatedly that she was concerned about Student's seizures. (NT 43-48, 52, 55-56, 71-73; P 5, P15; S 2.)

11. In the summer of 2003, a District representative tested or assessed Student at the Student's neighborhood District elementary school. Parent told the District personnel conducting the testing that Parent was concerned about Student's seizure disorder and possible developmental delays. (NT 46-48, 73.)

12. Parent believed that this testing was intended to address Parent's concerns about Student's seizures and developmental delays. (NT 43-49, 112.)

13. Parent did not request an evaluation in writing. No District agent provided Parent with a form for requesting and consenting to an evaluation, and no one told Parent that she had to request an evaluation in writing. (NT 43-49, 78, 80, 140-141.)

14. The District considered this testing to be a "screening" for early literacy skills, to determine whether or not Student needed to attend part day or full day kindergarten. (NT 122-128; S 1; P 4.)

15. District policy and practice at the time was that District personnel did not provide for referral of Student by the literacy skills screener to recommend a special education evaluation, prior to completion of enrollment. (NT 137-141, 197-199, 355; S 1.)

16. District policy and practice at the time was that District personnel did not provide parents with procedural safeguards to parents of children chosen for full day kindergarten. (NT 355, 395-396.)

17. Student's scores on the kindergarten screening showed below average literacy and that Student was among the most in need of additional instructional time in kindergarten. (NT 49, 189; P 4; S 1, 21.)

18. District personnel recorded Student as entering kindergarten with no indicator of special education needs. (NT 128-132, 189; P 5.)

19. In July 2003, District personnel assigned Student to full day kindergarten. A District agent stated to Parent that Student needed full day kindergarten because Student needed extra help. This individual also stated to Parent that Student was developmentally behind other students. Parent disclosed Student's seizure disorder to this individual. (NT 49-50.)

20. A District representative advised Parent that full day kindergarten would involve bussing Student to the morning session at one school, then bussing Student to another school for the afternoon session, then bussing Student home. (NT 49- 52, 125; P 2, P 5.)

21. Parent expressed to District personnel that she was concerned about Student's safety on the bus in the event of a seizure. (NT 52.)

22. The District did not offer to place a qualified person on the bus for Student in order to intervene in the event of a seizure, or to have emergency medication or ventilation equipment available on the bus in the event of a seizure. (NT 53-55.)

23. Two employees of the District's contracted bus transportation company spoke to Parent prior to the 2003-2004 school year, and indicated to Parent that the bus drivers would not be able to provide appropriate medical intervention to Student, should Student suffer a seizure while riding on the bus company's buses. The bus company could not guarantee Student's safety under the circumstances. The individuals indicated that, should Student suffer a seizure on the bus, the bus driver would pull over and call 9-1-1, but would not do anything else. (NT 58-60, 96, 106-107.)

24. The District had one school nurse, who was assigned part time in Student's assigned neighborhood school. When the school nurse was not physically at the school, there were no staff appropriately credentialed to administer Diastat rectally. It was possible that the school nurse would be far enough away from Student's neighborhood school that the nurse would not be able to return in time to properly administer Diastat. (NT 55-56, 106-107.)

25. Parent spoke to the school nurse about her concerns for Student's safety in school in the event of a seizure. (NT 55, 87.)

26. Neither the school nurse nor any other District personnel asked Parent for a written permission to evaluate or suggested that an evaluation would be considered; no one from the District advised Parent that Student had rights under the law to reasonable and necessary accommodations for a seizure disorder. (NT 56, 60, 62-65, 67, 189, 193, 195.)

27. Because of her concern about Student's safety, both in school and on the bus, in light of Student's seizure disorder, Parent did not complete enrollment with the District, and decided to provide educational services privately, believing that this constituted home-schooling under Pennsylvania law. (NT 39-46, 57-58, 98-99, 102-107, 111-112, 234; S 1,

2, 5, 7, 8.)

28. Parent, at her own expense, retained individuals from the Amish community, who had some teaching experience in the local Amish parochial school, to provide tutoring services to Student. These teachers were not Pennsylvania certified teachers. Parent provided these services for 10 years. (NT 61, 234-242; P 17.)

29. These services consisted of teaching Student about the basics of reading, writing and mathematics. The private tutors did not teach Student the Pennsylvania curriculum, including social studies, science and literature. They did teach some art, some health and some history. (NT 234-239.)

30. While receiving private tutoring at home, Student did not participate in many of the extracurricular and social activities provided to students by the District. Student did participate in occasional recreational activities, along with students at the local Amish school. (NT 108, 239-241.)

31. Student's siblings attended elementary and high schools provided by the District. Parent attended school functions and athletic events sponsored by the District. On these occasions, Parent sometimes indicated to District personnel that Parent was "homeschooling" Student. (NT 66-67, 89-90.)

32. During the period from the summer of 2003 to summer of 2014, the District did not conduct a comprehensive educational evaluation under the IDEA, nor did the District evaluate Student for provision of section 504 accommodations. During this period, the District did not inquire into the nature of Parent's "homeschooling" of Student, nor did the District institute truancy proceedings. (NT 62-69.)

33. As of October 21, 2002, District policy called for child find in the form of outreach to parents of preschool-aged children, including potential signs of developmental delay. Notices were to be published in newspapers, other media, District handbooks and on the District website. (NT 149; P 10.)

34. From 2003 to date, the District has provided public notice of its child find obligations and notice that it was prepared to offer special education services to eligible children within its geographical boundaries. These notices were provided in summary form as part of school calendars distributed to parents of children attending school in the District. These notices also were provided on the District's website and in some newspapers. (NT 141-149; S 10-16.)

35. Parent did not see or read the notices given by the District to the general public regarding the availability of special education services. Parent does not utilize the Internet in order to read the District’s website. (NT 80-82.)

36. Parent was unaware of Student’s rights under the IDEA and section 504. (NT 56-57, 61, 90-91.)

37. The District has never provided prior written notice or procedural safeguards to Parent with regard to Student. (NT 54, 60, 63-65, 67.)

38. Student's sister attended District schools for at least seven years. (NT 367-368; S 9.)

39. Student has experienced relative weakness in mathematics. By September 2014, Student was achieving educationally at about the fifth grade level in mathematics. (NT 164-167; P 2.)

40. Student's performance in a ninth grade curriculum in the cyber-charter school is poor in all academic subjects. As of November 2014, Student had earned a "D" in English and had not completed any lessons in Mathematics. Student was failing Earth Science, Health, Introduction to Computer Science, and World History. (NT 164-170; P 19.)

41. Student may need remediation in mathematics and reading. (NT 172-173, 242.)

42. Student's present performance may be due to non-engagement and non-completion of assignments at the charter school. (NT 173-176, 249.)

43. Student is experiencing emotional difficulties, which Parent attributes to the fact that Student did not have a public school experience. (NT 244-245.)

DISCUSSION

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward (introducing evidence first) and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer). In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[3] that the other party

[3] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based

failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

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

In this matter, the Parent requested due process and the burden of proof is allocated to the Parent. The Parent bears the burden of persuasion that the District's decision to change Student's placement was inappropriate under the IDEA. If the Parent fails to produce a preponderance of evidence in support of her claim, or if the evidence is in "equipoise", then the Parent cannot prevail under the IDEA.

CHILD FIND UNDER THE IDEA

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

An evaluation must be sufficiently comprehensive to address all of the child's suspected

upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6). Failure to conduct a sufficiently comprehensive evaluation is a violation of the District's child find obligations. D.K. v. Abington Sch. Dist., 696 F.3d 233, 250 (3d Cir. 2009)(a poorly designed and ineffective evaluation does not satisfy child find obligations).

CHILD FIND UNDER SECTION 504

The Rehabilitation Act of 1973, section 504, provides:

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

29 U.S.C. §794. Federal regulations implement this prohibition in school districts receiving federal financial assistance.[4] 34 C.F.R. §104 et seq. These regulations require school districts to provide a FAPE to qualified handicapped children, but that obligation is defined differently than under the IDEA. Districts must provide "regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy" the procedural requirements of the Act. 34 C.F.R. §104.33.

Districts are obligated to "[u]ndertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education … ." 34 C.F.R. §104.32(a). Thus, section 504 imposes a "child find" obligation on school districts that includes the obligation to evaluate children within their jurisdiction appropriately to determine whether or not they are qualified handicapped persons. The District must evaluate "any person

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

who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 C.F.R. §104.35(a).

In the present matter, there is no evidence that the Student has been evaluated and found to be a child with a disability under the IDEA. There is some evidence that Student has a condition that might qualify as a disability as defined by the IDEA, but there is no evidence that any such disability requires special education or related services under the IDEA. Therefore, in the present matter, I analyze the record solely under section 504 requirements. Nevertheless, these requirements are broad and demanding, and I conclude that the District failed to meet them.

THE DISTRICT FAILED TO MEET ITS "CHILD FIND" OBLIGATIONS

I conclude that the District failed to perform its "child find" obligations with regard to Student. The evidence is preponderant that the District knew that the Student was a school-age child living within the District's geographical area, and thus was "otherwise qualified" under section 504. 29 U.S.C. §794. The evidence also is preponderant that the Parent put the District on notice that Student was experiencing a seizure disorder that required accommodations in order to provide Student with access to public education. Thus, the District was on notice that Student was "believed" to be in need of accommodations. 34 C.F.R. §104.35(a). The District was on notice of these facts as of the summer of 2003, more than one month before Student was eligible to start in kindergarten. Under these circumstances, the District was obligated to seek Parent's permission to evaluate Student for section 504 accommodations.

It is undisputed that, sometime before July 2003, Parent contacted District personnel in order to request information about enrolling Student in the District for kindergarten. The District

documented that it "screened" Student for participation in a special literacy program which would provide full day kindergarten to Student. The record is preponderant that, by July 2003, the District had determined that Student was eligible for full day kindergarten under this literacy program, and that District personnel contacted Parent to advise her of this eligibility. It is clear that the District knew of Student's eligibility for public school within its jurisdiction, and engaged in multiple communications with Parent about this.

I conclude that Student's seizure disorder, at all relevant times, met the legal test of section 504 and Pennsylvania regulations for a disability that prohibits participation in school in the absence of accommodations, namely, safety precautions in view of the potential for life threatening seizures. 22 Pa. Code §15.2. Student's disability required special provisions in order to ensure Student's safety in a public school setting, and during transportation to and from school. Student had suffered from multiple disabling seizures that, on this record, were both severe and life-threatening. Although by 2003 the seizures were under control with medication, Student had lived for several years with frequent, disabling seizure activity. Student was under the care of a team of physicians, including specialists in seizure disorders. Student's physicians had attempted to bring Student's seizures under control with multiple medications and combinations of medications. By 2003, the doctors had been able to bring Student's seizures under control with medication, but the record shows that there was a continuing danger that Student would have a seizure in spite of the medications.

The record is preponderant that it was necessary to have immediate access at all times to emergency medication, administered rectally, in the event of a seizure. It also was necessary to take immediate measures to prevent Student from choking to death due to vomiting during seizures. The record is preponderant that, in the public school environment, and during

transportation to and from school, it was necessary to have individuals who were qualified and trained to respond to a seizure, which could occur at any moment. This response would necessarily include administering the rectal emergency medication, and keeping Student's airway clear, while summoning emergency services.

I conclude that Parent orally told District personnel several times the Student suffered from a seizure disorder, and that Parent was concerned for Student's safety. Parent testified under oath that she advised various District personnel about Student's seizure disorder at least four times. According to Parent's testimony, she disclosed this concern to a secretary who made the initial appointment for "screening" Student for eligibility for the literacy program involving full day kindergarten. She reiterated this information to the individual who performed the "screening" in the summer of 2003. She testified that someone called in July 2003 to tell her that Student was eligible for full-day kindergarten; Parent reiterated her concerns about Student's seizure disorder at that time, in the context of a discussion of the need for busing Student to the afternoon portion of kindergarten. Parent also testified that she mentioned her concerns about Student's seizure disorder to the District's certified school nurse. I conclude that this evidence is preponderant on the record before me, and establishes that the District was on notice of Student's seizure disorder, the attendant safety concerns, and the possible need for accommodations in order to assure that Student would have access to public school education.

The District introduced evidence to contradict parent's assertions about these conversations – four with District personnel and two with bus drivers. I find that the District's evidence does not substantially contradict Parent's testimony. There was no evidence to contradict the Parent's testimony that she conveyed her safety concerns to the secretary who set up the appointment for "screening" in July 2003; to the person who did the "screening" thereafter; to the person who

called Parent to offer full time kindergarten; or to one of the bus drivers. The certified school nurse denied any memory of such a conversation eleven years previous, but did not deny that it happened. Similarly, the former Director of special education, who had been a counselor in 2003 at another school building, also denied memory of any such conversation, but her testimony too did not deny that it happened. Finally, one of the bus drivers denied aspects of the conversation as reported by Parent, but corroborated that it happened and corroborated that Parent told the driver of Parent's safety concerns. In sum, I find that the evidence is preponderant that the Parent put the District on notice of Student's seizure disorder and Parent's safety concerns.

In reaching my conclusion in this matter, I considered four pieces of circumstantial evidence. I find that the circumstantial evidence makes it more likely than not that the District knew about Student and knew that Student was not in school because of a disability.

In addition to the above communications, Parent testified that she told two different bus drivers about Student's seizure disorder and her safety concerns. One of these drivers testified, corroborating that Parent discussed this with the driver. The other driver could not be located as a witness for this hearing. Although these drivers did not work for the District, and therefore Parent's statements to the drivers cannot be imputed to the District, this evidence circumstantially bolsters Parent's testimony, because it shows a pattern of disclosing Parent's concerns to those associated with planning for Student's attendance at public school kindergarten.

Second, Parent's sister, Student's aunt, corroborated that, in 2003, Parent was very concerned about Student's safety in public school and in transportation to public school. Parent's sister's testimony increases the likelihood that Parent disclosed her safety concerns to the District, as most reasonable people would do in the circumstances.

Third, Student's sister attended District schools for about seven years; moreover, Parent

attended school functions in connection with Student's sister's attendance in District schools. I conclude that, under these circumstances, it is unlikely that District personnel did not become aware that the sister had a member of her family not attending public school due to a physical disability.

Fourth, the evidence showed preponderantly that District child find procedures did not provide for referral of children for any kind of evaluation, when such children would qualify for full day kindergarten. The criterion for this service was a demonstration of below average literacy skills; yet, there was no procedure to assess children found to be in this category, in case their needs might include accommodations for a disability other than learning disability, such as Student's seizure disorder. While District officials ably explained that kindergarten may be too early to assess a child for learning disability under the IDEA, they did not show any reason why the trained personnel conducting "screening" for full day kindergarten should not be trained to refer children with other disabilities for evaluation, including children such as Student, whose disability showed a need for section 504 accommodations at the very least, in order to prevent exclusion from school due to safety concerns. Under these circumstances, it was more likely than not that Student's needs would not be addressed, even after the screener was told of Student's needs. I conclude by a preponderance of the evidence that this is what happened.

I conclude that, despite being on notice that Student could not attend public school without accommodations, due to a seizure disorder, the District did nothing to accommodate Student's needs. Consequently, it failed to prevent Student's exclusion from public school due to a disability. No District personnel reported that Student needed accommodations due to disability in order to attend the full day kindergarten that they were offering to Student. No District personnel referred Student to the school counselor or the District's special education department to consider whether

or not to evaluate Student for either special education or section 504 accommodations. No one contacted Parent to seek permission to evaluate. No one advised Parent of her rights to seek evaluation and accommodations. I conclude that the District's inaction, in the face of notice of Student's needs, constituted a failure to comply with its "child find" obligations under both the IDEA and section 504. I conclude that this failure began in July 2003 and continued until May 2014, when Parent sought legal counsel and was advised of her rights.

CHILD FIND DUTY IS NOT LIMITED TO ENROLLED CHILDREN

The District argues that the District had no obligations to Student under section 504 because Student was never enrolled in the District. I find this argument to be misplaced, because the section 504 child find duty required the District to "find" eligible or protected children regardless of enrollment. Districts are obligated to identify and locate every qualified handicapped person residing in their jurisdictions, not just those who enroll. 34 C.F.R. §104.32(a).

The District argues that it had no obligation to seek permission to evaluate Student because Parent made no such request in writing. Again, I find this argument unpersuasive. Regardless of its duty under state regulations to evaluate based upon Parent's oral requests, the District's obligations arose from its child find duty to at least respond to those requests and offer to evaluate.

The District's cramped reading of its obligations under 2003 state regulations pertaining to evaluation requests is not consistent with the regulatory comments made upon subsequent amendment to those regulations in Chapter 14, which indicated a departmental policy and an implied requirement that a local educational agency make some reasonable response to an oral request for evaluation, rather than just ignoring it, as the District did in this case. 38 Pa.B. 3575 (amendment to "clarify" that an agency has an obligation to provide a written evaluation request

form to an orally requesting parent). Given the coextensive breadth of the section 504 child find requirements, I conclude that the District was obligated by its child find duties to provide at least a reasonable response to Parent's multiple oral requests for an evaluation and accommodations for Student's section 504 disability.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this case, due to the passage of time, I gave particular attention to Parent's credibility and reliability, because her testimony supplied the material facts upon which my conclusions are based.

I conclude that Parent's testimony is credible and reliable with regard to whether or not she notified District personnel of Student's seizure disorder and Parent's concerns for Student's safety. Although other witnesses contradicted some details of her testimony, I find that these contradictions are due to the passage of time and the vagaries of memory, and not due to intentional embellishment or invention.

The District rightly points out that the Parent's testimony is self-contradictory concerning the names of people to whom she spoke, and circumstances under which she spoke to them. She plainly did not remember names, and even mixed up the names of people to whom she spoke. However, she repeatedly indicated on direct testimony that her memory for names was unclear, and that she could be wrong as to the names of those to whom she spoke.

Parent depicted two conversations on the telephone with bus drivers, but one driver

testified that the conversation was at the bus stop in person. Parent said that the driver asked her not to put Student on the bus due to lack of safety procedures and equipment; however, the driver denied asking this. The driver did corroborate that she told Parent that there would be no emergency intervention and that the driver, in the event of a seizure, would only call her company's dispatcher and ask the dispatcher to call 911. (NT 283-284.) Thus, the driver corroborated the material fact of this conversation, although she contradicted other aspects of Parent's testimony about it. There was no evidence contradicting Parent's testimony about the telephone call from the other bus driver.

The District's former Director of special education, who was a school counselor in 2003, denied involvement in the kindergarten "screening" and assignment of Student, and contradicted Parent's testimony that the two knew each other and were "friends". (NT 344-345.) However, the Director's testimony was grounded in a lack of memory (casting doubt on the alleged friendship), and the Director explained that she had had many conversations with parents over the years concerning their children's needs (NT 345.) The Director did not contradict the Parent's material testimony that Parent told the Director – then counselor – about Student's seizure disorder, prior to the summer of 2003.

Other District witnesses testified to lack of memory about the events of 2003, and testified as to procedures and practices that were in place in 2003 or at present, raising inferences that tended to contradict Parent's testimony or rendered its accuracy unlikely. In particular, the certified school nurse testified that her practices in 2003 would not have led her to call Parent, as Parent indicated. (NT 288-289.) Nevertheless, this witness could say no more than that she did not remember the conversation, and she admitted that she could have spoken with Parent as Parent asserted. (NT 294.) Thus, her lack of memory does not weigh substantially against Parent's

testimony that the nurse did in fact speak to her about nursing staffing at the school proposed for Student.

It is not determinative that, according to the certified school nurse's testimony, Parent misremembered concerning the number of certified school nurses in the District. (NT 287-288.) I find that this was not embellishment, but was a defect of memory due to the passage of time. I also note that Parent had testified forthrightly that the nurse had told Parent about the nurses' aides that would be present in Student's school building when the certified school nurse was not present; thus, it does not appear that Parent was deliberately minimizing the extent of nursing services that would be available to Student in the event of a seizure.

The issue in this matter is not whether or not the District could have accommodated Student; the issue is whether or not the District responded to Parent's concerns when it was on notice that Student had serious safety needs. Thus, Parent's inaccuracy about nursing staffing in 2003 does not detract from the weight of her testimony on notice to the District and its lack of response.

Similarly, several other District witnesses testified to procedures that would have been in place in 2003. The District's Supervisor of special education testified quite credibly about the "research" that she had done to show that the District had procedures and practices in place that would have addressed Student's needs. However, none of this directly contradicted Parent's testimony, and to the extent that it might have done so indirectly, it was for the most part uncorroborated hearsay that does not rise to the level of substantive evidence.

In addition to consistency and conflict with the record, I also considered Parent's way of answering questions and demeanor during the hearing. I noted several instances in which questions provided Parent with the opportunity to embellish, and Parent did not do so, rather being precise

about the facts from her memory and careful about the limits of her memory. During a thorough and probing cross-examination, Parent became somewhat defensive. On the whole, however, I found Parent to be credible and reliable with regard to the material facts in this matter.

As to the remaining witnesses, I found all to be credible, but also found all to lack memory of the most pertinent facts. The Supervisor of special education was credible, and had the most information; however, she had no personal knowledge of the events in 2003, and the bulk of her testimony was hearsay, based upon conversation with other District personnel who did not testify. As noted above, most of this remained uncorroborated, and the Supervisor's testimony did not address whether or not the District knew of Student's needs or responded to them in 2003 or after.

Parents introduced the testimony of a principal at the cyber-charter school, and I found his testimony to be highly credible. It indicated that Student was struggling at the cyber-charter school, and that there was insufficient evidence as to why.

The District introduced a retired principal who had no memory relevant to the events in question, and whose testimony was unclear as to whether or not the witness was in a position to know anything about the matter in 2003. (NT 271-272, 274.) I found this testimony to be unhelpful.

The District's Assistant Superintendent testified credibly about present procedures, but had no recollection pertinent to the material events in 2003.

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the District to make up

such services on an hour-by-hour basis; however, there is support also for a "make whole" approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010).

Parent requests that I order the District to provide Student with 5,400 hours of compensatory education. Parent reasons that the Student lost ten years of public school education and that this constitutes three hours per school day, and 180 school days per school year. By multiplying these numbers, Parent asserts that the District is responsible for the 5,400 hour total that they claim. I decline to order compensatory education based upon these assumptions, because they are not supported adequately by the record, and because they do not take into account several equitable considerations that I conclude render such an order inappropriate in the circumstances of this matter.

First, although I conclude that the District failed to identify and address Student's need for accommodation in 2003, I cannot conclude that the District should shoulder the full equitable responsibility for this failure of its child find services under section 504 for a period of ten years. While the District did not reach out to Parent concerning the availability of accommodations, likewise, the Parent did not make a reasonably searching inquiry as to the availability of such services. Just as her frequent contacts with District personnel over that period of time show that the District is more likely than not to have had notice of Student's needs, so also, those frequent contacts with the District show that it is more likely than not that the Parent had adequate opportunities to discover the availability of accommodations, even if she did not understand her legal rights.

There is documentary evidence that, in March 2004, Parent told one of Student's doctors that she was considering home-schooling Student for both safety and other, educational reasons. (P 1.) This indicates that the Parent was still considering public school as an option in March 2004,

despite the District's lack of response to her expressions of need, and that her decision not to send Student to public school was not entirely caused by the District's failure to perform its child find obligation under section 504. This, and the record as a whole, indicates that Parent's ultimate decision to home-school Student was to a significant extent a matter of choice.

I find it implausible that Parent, during the entire ten year period, desired nothing more than a public school education for Student, yet never tried again to inquire about what services might be available to Student to enable Student to attend school safely. This is even more of an equitable concern when considering that the Student's seizure disorder was well controlled by medication for most of that ten year period, thus ameliorating the acuteness of Parent's reasonable safety concerns over time.

In sum, I conclude that an hour-for hour approach to ordering compensatory education in this matter would be inequitable. It would be disproportionate to the District's appropriate responsibility for its failure to provide appropriate child find under section 504. It would be disproportionate to Student's known educational needs. It would be disproportionate to what is needed to restore Student to approximately the position Student would be in if the District had complied appropriately with its child find obligations in 2003. Thus, it would be both inequitable and inappropriate on this record.

Therefore, I will apply the "make whole" approach to ordering compensatory education in this matter. Ferren C. v. School Dist. of Phila., above at 718. In doing so, I consider how far behind Student is, both academically and developmentally, at this time. I will also consider Student's present educational program and how any compensatory education would be appropriately provided to Student in Student's present situation.

The evidence, presented by the principal of the cyber charter school, is that Student is in

ninth grade, but is functioning at a less than ninth grade level academically. Parent's testimony shows that home-schooling enabled Student to learn to read, and the principal and documentary evidence indicated that Student's delay in reading is not as severe as that in mathematics, which appears to be about a four year delay (fifth grade level functioning in ninth grade). Parent's testimony shows that Student did not receive much education in social studies or science from the tutors. Thus, it is clear that Student should receive substantial tutoring to remediate any failure of the home school program[5] to provide student with grade-level instruction in these subjects, consistent with the Pennsylvania curriculum.

However, Student is presently in a cyber-charter school. Assuming that Student should be working on the cyber-school curriculum for a full school day of at least six hours, five days per week, I consider what amount of compensatory education can be provided for remedial purposes every day, in addition to the six hours per day that Student is already committed to. Two additional hours per day of tutoring would be a strenuous requirement for a ninth grade student; I will order compensatory education based upon this consideration.

Under section 504, Student is entitled to be made whole for what Student has not received within a regular education curriculum. Thus, Student is entitled to a twelfth grade education equal to what the Commonwealth provides to all students. The record does not show how many hours of compensatory education will remediate past losses of appropriate instruction. Therefore, I will order that compensatory education be provided to Student in addition to the services of the cyber-charter school, in an amount sufficient to enable Student to graduate from the cyber-charter school or any Pennsylvania public school with a regular high school diploma. (NT 246.) To ensure

[5] In adopting this approach to compensatory education, I am mindful that the Parent provided home-schooling services to Student at private, not public expense, contrary to the legal mandate that education be "free". However, for the equitable reasons discussed above, I have chosen to enter an order aimed at making Student whole, not at simply restoring hour-for- hour those services that were not provided "free" to Parent.

sufficient remediation, I will order provision of at least two hours per school day attended by Student for four years or until Student graduates from the cyber-charter school.

These hours may include counseling and other mental health services that Student needs, in addition to those provided by private insurance or the behavioral health and public welfare systems. The record shows that Student, deprived of a typical public school education, with its social and extracurricular opportunities, would appropriately benefit from services to help Student to adjust to Student's present circumstances, as well as to learn social and other skills that Student may not have learned in the ten years of home schooling. (NT 243-246.)

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District inappropriately failed to identify Student as an individual with a disability, and thus failed to comply with its Child Find obligations under section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §794, during the relevant period from the first day of school in the 2003-2004 school year until the date of enrollment in the charter school for the 2014/2015 school year.

2. The District inappropriately failed to provide a free appropriate public education (FAPE) in the least restrictive environment to Student during the relevant period, contrary to its obligations under section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §794.

3. It is further **ORDERED** that the District shall provide compensatory education to Student in the amount necessary to enable Student to graduate from the cyber-charter school in which Student is presently enrolled, or any Pennsylvania public school in which Student is enrolled, with a regular diploma.

4. The District shall provide this compensatory education in the amount of at least two hours per day, beginning on the date of this Order, for every school day in which Student

participates appropriately in the cyber-charter school program, as determined by Student's compliance with the policies and procedures of the cyber-charter school or public school in which Student is enrolled for attendance in compliance with Pennsylvania mandatory attendance laws, subject to the requirements of any Individualized Education Program or section 504 Service Agreement that may be provided to Student.

5. The District shall provide compensatory education in the above amount for four school years, or until Student graduates as set forth above, whichever occurs first.

6. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's graduation as set forth above. Services in the amount set forth above may occur after school hours, on weekends, or during summer months when convenient for Student or Parent. Services may include, but are not limited to, professional counseling, vocational training at a secondary level of curriculum, and remedial courses designed for students seeking admission to college, as appropriate.

7. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.

8. The cost of any ordered service may be limited to the current average market rate in Pennsylvania for privately retained professionals qualified to provide such service.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

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

February 19, 2015