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Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: F.W.

Date of Birth: [redacted]

Dates of Hearing: 3/25/2015, 4/20/2015

OPEN HEARING

ODR File No. 15806-14-15- AS

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
Stroudsburg Area School District
123 Linden Street
Stroudsburg, PA 18360

Date of Decision:
Hearing Officer:

Representative:

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June 9, 2015
William Culleton Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

Student is a resident of the District who graduated from middle school to high school within the last two years. (NT 6-7; J 1.) Student is a qualified individual with a disability protected by the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). (NT 6-8.) Student is thought to be a child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (6-7.)

Parents assert that the District failed to fulfill its “child find” obligation under the IDEA, and section 504. Parents¹ assert that the District failed to provide Student with a FAPE under both the IDEA and section 504 during the period permitted by the IDEA statute of limitations, from January 19, 2013 to the present (“relevant period”). (NT 39-40.) In particular, Parents assert that the District denied Student a FAPE by failing to respond appropriately to bullying by Student’s peers over a period of several years, and by failing to address Student’s educational needs for social skills. Parents seek compensatory education and prospective relief. The District denies all allegations.

The hearing was completed in two sessions. I conclude that the District failed to comply with its IDEA child find obligations, failed to provide appropriate section 504 service agreements, failed to provide a FAPE under section 504, and failed to address Student’s victimization and cyber bullying in December 2014 and January and February 2015. I order both compensatory education and prospective relief.

¹ Student, Parents 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. Because the Student’s mother engaged in many transactions with the School, she is referred to below as “Parent” in the singular.

ISSUES

1. Did the District fail to perform its “child find” obligation to Student under the IDEA, by failing to evaluate Student appropriately, from January 19, 2013 to the last day of hearing in this matter?
2. Did the District provide the Student with appropriate section 504 service agreements, addressing all of Student’s educational needs, from January 19, 2013 to the last day of hearing in this matter?
3. Did the District provide Student with a FAPE under the IDEA and section 504, from January 19, 2013 to the last day of hearing in this matter?
4. Should the hearing officer order the District to provide Student with compensatory education for all or any part of the period from January 19, 2013 until such time as the District should provide Student with an appropriate program and placement?
5. Should the hearing officer order the District to provide Student with any educational services prospectively?
6. Should the hearing officer order the District to reimburse Parents for the fees of their private evaluator?

FINDINGS OF FACT

1. Student has been identified with an autism spectrum disorder consistently from two years of age to the present. Student began receiving speech therapy and occupational therapy at 2 1/2 years of age. Student attended preschool for children with special needs in another state, and attended social groups while in preschool. Student received behavioral health rehabilitation services in the home when Student was in elementary school. (NT 223-224; J 3.)
2. Student has a history of temper tantrums in the home and community, perseverative behaviors, receptive and expressive language delays, social isolating, sensory issues, difficulty with transitions, self-stimulatory behaviors, unusual behavior at school resulting in teasing by peers, difficulty responding to multiple step directions, preference for socializing with younger children, need for prompting to engage in age-appropriate activities, and vulnerability to influence by peers and victimization by peer bullying. (J 3.)
3. In February 2009, when Student was in third grade, Student was evaluated by the local behavior health rehabilitative agency. The evaluation recommended a functional behavior assessment and behavior modification treatment plan, with goals and techniques

addressing improved attention, self-esteem, concentration, interaction, coping skills, reduced temper tantrums and safety awareness. (J 3.)

4. In May 2009, when Student was in third grade, the school counselor recommended that Student receive a section 504 service agreement, due to diagnosis with Asperger's Disorder. Parents agreed, and the service agreement was instituted. (NT 467-473; J 2.)
5. As part of the District's evaluation of Student for a section 504 service agreement in May 2009, the Student's school nurse reported that Student had poor communication skills and difficulties in social interaction. The School nurse indicated that this might require Student to be isolated at times, reducing Student's access to academic hours. (J 2.)
6. As part of the District's evaluation of Student for a section 504 service agreement in May 2009, Student's teacher reported that Student had difficulty focusing, and became fixated on items in the environment, requiring repetition of directions and a great deal of redirection. The teacher also reported that Student preferred to play independently or with computers during indoor recess. The teacher recommended preferential seating and redirection, as well as questioning techniques. A second teacher recommended against providing a section 504 service agreement, because that teacher found Student to be included in groups and to have some social skills. (J 4.)
7. It is unusual for an educational agency to evaluate a student on the autism spectrum for intervention without conducting an initial evaluation including a complete psychoeducational evaluation. The evaluation for section 504 service agreement and subsequent service agreements did not address all of Student's educational needs. (NT 230-234, 254-255.)
8. The section 504 evaluation report in May 2009 reported that Student's disability of Asperger's Syndrome substantially limited Student' major life activities, including self-care, concentration, performing manual tasks, learning, thinking, communicating, social interaction, speaking, lifting, and working. (J 2.)
9. The section 504 evaluation report concluded that Student needed accommodations or modifications in order to receive equal educational services in the regular education setting. (J 2.)
10. The May 2009 section 504 service agreement provided for preferential seating, a buddy system to help Student with homework at the end of the day, frequent checks for understanding by the teacher, and frequent redirections. The buddy system, explicitly directed to helping Student with homework, also was aimed at exposing Student to social interaction with a variety of peers. (NT 473; J 2.)
11. The May 2009 section 504 service agreement did not provide for explicit instruction in social skills, emotional self-regulation, or behavioral self-regulation. The May 2009 section 504 service agreement did not address sensory needs. It did not provide for speech and language therapy, a functional behavior assessment or a positive behavior support plan.

It made no provision for prevention of bullying victimization, although the District was on notice that Student had been victimized by bullying by the time of the section 504 evaluation. (NT 231, 492-494; J 2.)

12. In May 2010, the District evaluated Student for continuation of section 504 accommodations. A teacher reported that Student enjoyed positive social relationships with peers. The evaluation found that Student's disability continued to affect concentration, performing manual tasks, learning, thinking, communicating, social interaction, speaking and working. The evaluation found that Student's impairment limited Student's success in school with regard to self-care, concentrating, performing manual tasks, learning, thinking, communicating, speaking, lifting, working and social interaction. (J 4.)
13. The May 2010 section 504 service agreement provided for preferential seating, frequent checks for understanding, frequent redirections. It did not provide for the peer buddy system previously initiated. It did not provide explicit instruction in social skills, emotional self-regulation or behavioral self-regulation. It did not address sensory needs. It did not provide for speech and language therapy, functional behavior assessment or a positive behavior support plan. It made no provision for prevention of bullying victimization. (J 4.)
14. In September 2011, the District and Parent revised Student's section 504 service agreement to add an accommodation allowing Student to stand at Student's desk while doing work, as long as it did not disrupt others. The revisions did not address social skills, emotional self-regulation or behavioral self-regulation. The revisions did not provide for sensory needs, functional behavior assessment, positive behavior support plan or prevention of bullying victimization. (J 5.)
15. In September 2012, when Student was in middle school, the District and Parent continued Student's section 504 service agreement without any changes. (J 6.)
16. When Student was in middle school and in high school, Student was victimized by peers, who influenced Student to purchase food for them with lunch money that Parents had allocated for Student. The District was aware of this victimization as of September 2012, and Parents have continued to notify District personnel that Student was being bullied. (NT 63-65, 70-74, 80-88, 104-107, 139-141, 447-449, 451-456, 458-463; J 7, 20.)
17. From January 2013 to present, Student continued to be unable to understand social cues and teasing; thus, Student was unaware when others were making fun of Student. Even when being ridiculed, Student believed peers who told Student that they were Student's friends. (NT 57-62, 233-238; J 39.)
18. The District was aware that Student was receiving speech therapy sessions privately. (NT 125.)
19. From January 2013 to present, Student continues to demonstrate compulsive behaviors, difficulty with transition, difficulties with peer interaction, unusual mannerisms or behaviors, and vulnerability to bullying and other victimization. Parent discussed these

issues with District personnel. (NT 61-63, 77-80, 108-111, 129-130, 139-141; 204, 241-248, 386-387, 413-41; J 39.)

20. From January 2013 to present, Student has continued to demonstrate a deficit in social skills, including poor conversational abilities, that has led Student to be socially isolated, both at home, in the community and at school. Student's deficits in social interaction, conversation and communication are overt and can be seen by an untrained lay person. (NT 74-81, 123-124, 343-349, 377, 380-382, 386, 425.)
21. Student received social skills group on a regular basis from the local behavior health agency. District personnel were aware of this. (NT 74-81, 123-124, 343-349, 377-380.)
22. September 2013, the District and Student's Parents continued Student's section 504 service agreement without amendments, except that the accommodation for standing at Student's seat was removed at Parent request. (NT 202-203; J 8.)
23. The District's school counselor was responsible for renewing the section 504 service agreement in September each year, starting in September 2013. At that point in the year, teachers were not in a position to provide meaningful input to the counselor, although Student's current functioning was the factual basis for deciding whether or not to renew the section 504 service agreement, and what accommodations Student would need for the coming school year. (NT 203-206, 208, 209, 211-212.)
24. The counselor did not read the original evaluation report that led to classification of Student as eligible for the service agreement in 2009. The counselor never observed Student interacting with a group of peers. (NT 203-209, 496-497.)
25. In September 2014, the District and Parents continued Student's section 504 service agreement without amendments. (J 11, 12.)
26. In grade and middle schools, Student achieved predominantly A and B grades, except for language arts, in which Student's grades varied from C to B in most grade levels. (J 16.)
27. Student did not have a problematic disciplinary history in school. (NT 442; J 18.)
28. In November 2014, the District was on notice that peers continued to influence Student to purchase food for them from Student's lunch money. (NT 129; J 20.)
29. Student reported to the school counselor that peers were bothering Student. (NT 304, 316-318.)
30. Due to Student's autism spectrum disorder, Student lacks self-advocacy skills, and is unlikely to seek assistance from school personnel when experiencing social and emotional difficulties. In addition, Student has resisted telling Parents about victimization and bullying that Student has experienced. (NT 232-233, 249-251, 422, 447-456.)

31. On December 23, 2014, Student was in a fight with a peer [at school], with another peer filming the encounter. The second peer posted the film of the fight on a social media outlet, along with threatening language directed toward Student. (NT 186-188; J 13, 18, 41.)
32. School authorities began investigating the incident on January 6, 2015, by interviewing the peer who had posted the tape of the fight on social media. (NT 117-119, 133, 176; J 18.)
33. The peer was told to remove the tape from the social media website, and school officials subsequently directed the peer to remove it. However, school officials did not contact the peer's parents to ask them to direct the peer to do so. The tape was available on social media for several weeks before it was taken down. (NT 117-119, 133, 148-152, 176-180; J 18.)
34. Student was expelled from school for ten days, and during that time, peers continued to post threatening and derogatory messages directed at Student. (NT 133; J 18, 30.)
35. Upon Parent's informal appeal to the principal, Student's penalty was reduced from out of school suspension to in school suspension and the principal emphasized to Student that Student should inform school staff when other students called Student names or invited Student to fight. The principal arranged for Student to be escorted to benchmark testing scheduled for the following week. (NT 172, 181-182; J 18.)
36. Parent decided to keep Student home during the suspension period, and the out of school suspension was reinstated at Parent's request. Student did not come to school for benchmark testing on the following week. (NT 87-88, 92-98, 122; J 18.)
37. Student was traumatized by these events and was medically diagnosed with Post Traumatic Stress Disorder (PTSD) and Anxiety Disorder. The behavioral health agency recommended that Student undergo outpatient therapy for trauma and anxiety. (NT 121; J 14, 29, 39.)
38. Student was afraid to return to school because of the fight and threats, and Student's therapist and doctor recommended against Student returning to the same school building where the fight had occurred. (NT 305-309, 316-318, 350-351, 385-386, 418, 429; J 14, 18, 39.)
39. After the fight, the District placed Student on homebound services and sent work home to Student. (NT 178; J 34.)
40. On January 22, 2015, the District received the report of the psychological evaluation, diagnosis of PTSD and Anxiety Disorder, and recommendation against returning to the same school. (NT 339-340; J 14, 15.)
41. On February 6, 2015, the District sought Parents' permission to evaluate Student for eligibility under the IDEA. The request included a request for permission to conduct a psychiatric evaluation. (J 15.)

42. In high school, Student's grades declined in English and Social Studies to B- and C- respectively, in the Student's last two marking periods. (NT 417; J 16.)
43. Student was and is concerned about falling behind in schoolwork due to the limited five hours of instruction that Student receives on homebound instruction. In addition, the District has asked Student to return Student's band instrument. All of this has impacted Student negatively emotionally. (J 39.)
44. Peers continue to make fun of Student on social media. Other peers have stopped socializing with Student. (NT 83-84, 116-117; J 30, 39.)
45. In February and March 2015, a private psychologist evaluated Student and found that Student had been bullied and continued to suffer from a generalized anxiety disorder requiring therapeutic and educational supports. (J 39.)
46. The private evaluator recommended that the Student be transferred to a different school, preferably in another school district. The evaluator also recommended that school staff be proactive in preventing any further incident of bullying, and that this should include daily conversation with Student to discern whether any further bullying is occurring. The evaluator also recommended continuing Student's 504 service agreement. (J 39.)
47. One of the students involved in the fight is no longer placed in a school district building in the current school year. (NT 159, 183.)

DISCUSSION AND CONCLUSIONS OF LAW

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), an IDEA case, the United States Supreme Court held that the burden of persuasion is on the party that requests

relief. Thus, the moving party must produce a preponderance of evidence that the other party 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 Parents requested due process and the burden of proof is allocated to the Parents. The Parents bear the burden of persuasion that the Parents’ claims are true. If the Parents fail to produce a preponderance of evidence in support of their claims, or if the evidence is in “equipoise”, then the Parents cannot prevail.

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]." Ridley Sch. Dist. v. M.R., 680 F.3d 260, 271 (3d Cir. 2012)(citing P.P. v. West Chester Area School District, 585 F.3d 727, 738 (3d Cir. 2009)); Taylor v. Altoona Area Sch. Dist., 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010); 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a), (c). 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.

Local educational agencies are required to fulfill their child find obligation within a reasonable time after notice of behavior that suggests a disability. D.K., 696 F.3d above at 249 (if a district should have known of an educational deficiency through compliance with its statutory duties, student may be entitled to compensatory education) (citing W.B. v. Matula, 67 F.3d 584, 501 (3d Cir. 1995)).

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). An evaluation must be sufficiently comprehensive to address all of the child's suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6).

In the present matter, Parents assert that the District failed to issue a permission to evaluate Student, even though Parents did not request one, during the relevant period². The question of fact presented for the relevant period is: did the Student's disability and its effect, if any, on Student's educational opportunity constitute a reasonable "suspicion" that Student was a child with a disability under the IDEA? Ridley Sch. Dist. v. M.R., 680 F.3d, above. This standard applies even for students who, like Student, are advancing from grade to grade. 34 C.F.R. §300.111(c)(1).

There is no question that the Student has a disability, and the District knows it; Student has Asperger's Disorder, on the autism "spectrum", and the District has recognized this since 2009, and every year thereafter – including the years within the relevant period – by issuing section 504 service agreements for Student. Thus, the fact question is further narrowed: was there a reasonable suspicion that Student's Asperger's Disorder was interfering with Student's education during the relevant period? If so, then the District's "child find" duty under the IDEA would have required it

² As indicated in the formulation of issues, I am limited by the IDEA statute of limitations to adjudicate only District actions or inactions on or after January 19, 2013. This is the relevant period for purposes of this decision.

to perform a comprehensive educational evaluation to determine if Student should be classified under the IDEA. 34 C.F.R. §300.111(a)(1)(i).

I conclude that there was such a reasonable suspicion. I find that the District's awareness of Student's Asperger's disorder alone raises a reasonable suspicion the Student's disability interferes with Student's ability to access the heart of the public school curriculum that requires the development of social skills. The record shows (through the credible and reliable testimony of Parents' expert psychologist's³ testimony) that it is unusual to fail to evaluate a child with an autism spectrum disorder, simply because the diagnosis implies the likelihood of multiple developmental and cognitive deficits that are likely to impact educational opportunity without specially designed instruction.

In addition, the District was aware as early as 2009 that Student had a history of social skills deficits, problematic peer interactions, difficulties in social communication and conversation, and vulnerability to bullying. During the years from 2009 to January 19, 2013, Parent credibly testified that she notified District counselors and other personnel about her concerns on multiple occasions that Student was being bullied at school, repeatedly. The District knew that Student was receiving social skills training from the local mental health agency. Student told Student's assigned counselor about being bothered by other students. Twice during the period from 2009 to present, including once in the fall of 2014, within the relevant period, the District was placed on notice that Student's peers were victimizing Student by influencing Student to purchase items for them, both in the form of free lunches and purchase of books. I find all of this evidence to prove preponderantly that there was reasonable suspicion that Student was a child with a disability, whose disability was

³ I find that this witness was qualified by experience and education to offer this opinion, and that it was reliable. The witness was a licensed clinical psychologist and a certified school psychologist, who had extensive experience in public school settings. (J 28.)

interfering with Student's ability to develop appropriate social skills and social communication ability.

In defense, the District pleads that its personnel were not aware of any such skill deficits or vulnerability. School counselors from the relevant period testified that no one had ever told them about such things. District introduced a parade of teachers who stated that they never observed such things. I accord reduced weight to this testimony, and, balanced against the credible testimony of Parents and Student, I conclude that the evidence is preponderant to the contrary.

I accord little weight to the testimony of Student's counselors, who were in charge of formulating the section 504 service agreement for each year of the relevant period. Student's testimony directly contradicts theirs. There is evidence in the record that Student is truthful, both because of Student's oath during the hearing, and because Student's disability of Asperger's disorder makes Student unlikely to lie, simply due to Student's cognitive functioning. In addition, both Parents and Parents' clinicians from the behavioral health program for Student testified that District personnel were made aware of Student's deficits in social functioning. Moreover, I find it incongruous that the case managers in charge of implementing Student's section 504 service agreements would not have heard anything about Student's social functioning, especially when they were on notice that Student's disability was Asperger's disorder.

Similarly, I accorded little weight to the testimony of Student's teachers from eighth and ninth grade. Each of these teachers saw Student for one period per day. The record is preponderant that Student was a serious student who was driven to succeed in class, and academically overall. While these teachers all indicated that they had observed Student communicating with peers successfully in their classes, none testified to overhearing any of the Student's communications; none observed or overheard Student in social situations outside of the classrooms they were

supervising. Thus, none were in a position to assess the quality of Student's social communication and social functioning.

While some of the earlier service agreements contained appended teacher reports as part of the updating of the service agreement, the most recent ones, including those during the relevant period, contained no such documentation. Thus, there is no documentation supporting the teachers' claims that they knew of no social difficulties experienced by this child with Asperger's during the relevant period. Given that the section 504 service agreement was to be reviewed every year, and that it appeared to be appropriate procedure to solicit teacher comments each year, it is somewhat incongruous to find none for the relevant period.

In sum, there was reasonable suspicion, during the relevant period, that Student was a child with a disability as defined by the IDEA. Therefore, I will order appropriate relief.

FAPE AND PROCEDURAL SAFEGUARDS UNDER SECTION 504 AND CHAPTER 15

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 assistance⁴. 34 C.F.R. §104 et seq. The regulations define discrimination to include denying a qualified person with a disability the opportunity to participate in or benefit from the state-provided aid, benefit, or service, 34 C.F.R. §104.4(b)(i); affording benefits or services that are not equal to those afforded others, 34 C.F.R. §104.4(b)(ii); providing services or benefits

⁴ There is no issue here that Student is eligible or that the District receives federal funds. (NT 471; J 2, 4-6, 8, 11.)

that are not as effective as those provided to others, 34 C.F.R. §104.4(b)(iii); and providing different or separate benefits or services, unless different services are needed to provide equal and equally effective benefits or services, 34 C.F.R. §104.4(b)(iv).

These regulations require school districts to provide a FAPE to qualified handicapped children, but the federal regulations implementing section 504 define that obligation 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 [persons with disabilities] as adequately as the needs of [non-disabled] persons are met and (ii) are based upon adherence to procedures that satisfy” the procedural requirements of section 504. 34 C.F.R. §104.33(b)(1).

It is well accepted that education in Pennsylvania must address basic developmental needs in the emotional, behavioral and social domains. The regulations promulgated by the Pennsylvania Department of Education for public education require local education agencies to “prepar[e] students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens.” 22 Pa Code § 4.11(b). Thus, public education in Pennsylvania is intended to provide opportunities for students to: (1) Acquire knowledge and skills. (2) Develop integrity. (3) Process information. (4) Think critically. (5) Work independently. (6) Collaborate with others. [and] (7) Adapt to change. 22 Pa Code § 4.11(c). Cf., M.C. v. Central Regional S. D., 81 F.3d 389 (3rd Cir. 1996), cert. denied, 117 S. Ct. 176 (1996)(education includes progress in emotional and social domains); Breanne C. v. Southern York County School District, 2010 WL 3191851 (M.D. Pa. 2010)(education includes progress in all relevant domains under the IDEA, including behavioral, social and emotional.)

In order to provide equal opportunities to benefit from the social skills aspect of the curriculum, districts are obligated to evaluate children within their jurisdiction appropriately, in order to determine whether or not they need special services and accommodations under section 504. 34 C.F.R. §104.32(a). Districts must evaluate “any person who, because of [disability], 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). While the federal regulation’s evaluation requirement applies explicitly to placement decisions, Pennsylvania’s Chapter 15 provides that a district also may need to evaluate in order to provide related aids, services or accommodations. 22 Pa. Code §15.5(c).

I conclude that the District failed, during the relevant period, to address Student's needs for accommodation in the area of social skills development, and especially in the area of Student's vulnerability to bullying. Although the 2009 section 504 service agreement contains substantial evidence of Student's social skills deficits, and communication deficits that impinge upon Student's ability to function socially, the counselor who re-issued Student's section 504 service agreement testified that she had not even read the 2009 evaluation. Moreover, the counselors testified that their procedure was to issue the section 504 service agreement for the prospective school year in September, at a time when teachers were just getting to know the student, and were not in a position to provide meaningful teacher input into Student's needs, whether academic or social. There was no evidence that the counselors reached back into the previous school year in order to obtain teacher reports from more experienced reporters. Indeed, for the section 504 service agreements applicable to the relevant period, there were no teacher reports appended. The teachers who testified could not affirm that they had been asked for teacher reports in connection with the annual

review of the Student's section 504 service agreement. Thus, the District's procedures for re-issuing the section 504 service agreements were deficient in that they did not include even a rudimentary exploration of the Student's needs from year to year.

The service agreements themselves made no mention Student's needs with regard to social skills and social communication. They contain few accommodations, focused upon accommodations for Student's attention difficulties and difficulties processing directions. They did not provide for social skills training, teaching pragmatic social communication, or helping student learn how to avoid being manipulated and victimized by bullies. I find the service agreements to have been inappropriate on their face, based on the evidence in this record as to Student's educational needs.

As with the IDEA child find issue discussed above, I conclude that the District's defense is unavailing. The District seems to argue that Student did not have any social skills deficits during the relevant period. The District seems to argue that Student did not experience bullying during the months between January 2013 and December 2014, when Student was drawn into a fistfight [at school], recorded on an iPad, and posted on social media. This defense is implausible on its face, given the preponderant evidence that Student was bullied repeatedly both before and after the relevant period.

Student's social skills deficits, on this record, are a developmental need caused by Student's disability on the autism spectrum. It is not plausible that these deficits, proven preponderantly to have existed prior to January 2013, simply disappeared on a date two years prior to the filing of Parents' due process complaint. The continuing nature of Student's social skills deficits is proven by the events of December 23, 2014, when Student was bullied for the world to see.

I also find that the record is preponderant that these deficits existed, without District

intervention, during the relevant period. I found both Parents to be sincere and truthful in their depiction of Student's social struggles. As discussed above, I give their testimony preponderant weight over the very carefully constructed testimony of educators who claimed to have seen nothing, heard nothing and known nothing during the relevant period. Their lack of careful monitoring itself impeaches any suggestion that their lack of knowledge of Student's needs proves that Student did not have such needs.

Thus, I conclude that the section 504 service agreements were deficient during the relevant period because they did not address Student's social skills deficits and social communication needs. I further conclude that the District failed to provide a FAPE as required under section 504. I will order the District to provide compensatory education accordingly.

THE DECEMBER BULLYING INCIDENT AND ITS SUBSEQUENT CONTINUATION IN SOCIAL MEDIA

Much of the hearing was devoted to the December 23 fistfight and its aftermath. Parents urge me to find that the District responded inappropriately to this incident. I have ruled in this matter that I can make determinations about District responses to the extent that they indicate a failure to provide a FAPE. However, it is not within my jurisdiction to oversee a District's policies and procedures for responding to incidents of bullying, or to second-guess disciplinary decisions. Therefore, in this case, my review of the record regarding this incident is limited.

I conclude on this record that the District's personnel failed to respond appropriately to Student's needs when they responded to the fistfight on December 23, 2014. District officials did not learn of the incident until January 6, 2015. They immediately interviewed all or most of the students involved, including Student. The record shows that they kept informal notes, but did not make formal incident reports until after the Parents filed for due process; then they back-dated the

reports as if those were made at the time of the investigation. The notes are not part of the record. (NT 148-149, 172; J 26.)

Within hours, they were aware that there was a video of the fistfight on social media. However, the investigators, school disciplinary officials, did not ensure that the student-videographer removed the video from social media right away. Although the school officials asserted that they had told the student-videographer to take the video off of social media, the evidence is not clear as to when this was communicated. At any rate, the school did not exercise its authority over the student-videographer to ensure that the video was removed promptly; as a result, the video remained on social media for weeks, into February, and it drew several threatening comments directed against Student.

District officials treated the matter as a disciplinary one – as no more than a fight - and suspended Student for ten days. Student did not return after ten days because of Student’s anxiety and fear in the wake of the incident and the cyber-bullying that was continuing to be directed toward Student in social media. The District then placed Student on home-bound instruction.

The District did not do anything to plan a transition back to school for Student, did not provide any supports to student beyond the five hours of homebound instruction, and did not immediately seek to evaluate Student. It was not until January 22, 2015, after the District received a note from a mental-health evaluator indicating that Student was suffering from a diagnosed emotional illness, that the District sought to evaluate Student for IDEA eligibility. Parents did not consent. Student remains on home-bound instruction.

I conclude that the District failed to respond to Student’s bullying by protecting the Student, the victim of the bullying, from further harm. It failed to stop the cyber-bullying for several weeks. It refused to treat the matter as anything other than a disciplinary incident. It failed to provide

accommodations under section 504 to allow Student either to transition back to the school to which Student was assigned or to reassign Student to a new school. In short, it failed to provide a FAPE to Student in the wake of the fistfight bullying at school, and in the midst of the cyber-bullying in social media. Accordingly, I will order the District to provide Student with compensatory education until such time as the Student returns to school with appropriate services.

REIMBURSEMENT FOR PRIVATE EVALUATOR'S REPORT

I will not order reimbursement for the private evaluator's report. This was a clinical psychological evaluation to address Student's emotional condition in March 2015. It was not obtained due to parental disagreement with an evaluation or re-evaluation under the IDEA. It was not an educational evaluation, and it did not make educational recommendations that the District adopted or upon which the District relied. Thus, I find no legal or equitable basis to order reimbursement of its cost.

PROSPECTIVE RELIEF

As discussed above, the District has failed in its child find duty to identify and evaluate Student. In consequence, I will order the District to fund an independent educational evaluation (IEE), by an evaluator of Parents' choice who meets the qualifications required by the District for IEEs, as set forth in District policy pursuant to the requirements of the IDEA. In this way, the District will fulfill its duty to evaluate for IDEA purposes. I also will order the District to convene an IEP meeting within a reasonable time thereafter as appropriate.

Student has been bullied, and the record shows preponderantly that Student has been injured emotionally as a result. Therefore, I conclude that it is necessary to order prospective relief

to enable Student to transition safely back to school as soon as possible. Parents urge me to order the District to place Student in a different building; however, even their expert was unable to recommend such a step definitively without further consulting with Student. Moreover, the Student is scheduled to be placed in a different building next year anyway, a building with different administration. The record does not show that this would be insufficient to protect Student from the emotional sequelae of Student's traumatization at the school building to which Student is presently assigned. Rather than order placement in yet another different building, I will order the District to provide related services designed to detect and trigger intervention into any incidents that might threaten this vulnerable child's emotional health in the new building to which Student will be assigned by the District.

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).

I conclude that the present record does not support a "make whole" approach to the deficiencies in Student's section 504 service agreements. Although Student's area of need is specific and thus appears at first glance amenable to the "make whole" approach, there is no metric in evidence that would help the hearing officer to prescribe how to determine when

Student is “made whole” for the failures of the District’s educational program. Therefore I will order the District to provide compensatory education services on an hour-for-hour basis.

I will order the District to provide the educational interventions that it should have provided. I conclude that this will amount to one hour per week, representing the time that would have been devoted to attending a social skills class.

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 matter, I made the determinations set forth above. I found Parents’ expert witnesses to be credible, but also took into account their lack of data about District educational programs. I reduced the weight accorded to school disciplinary and investigative officials due to their back-dating of the write-ups of their investigation.

CONCLUSION

I conclude that the District failed to comply with its child find duty under the IDEA, failed to provide appropriate section 504 service agreements, and failed to provide a FAPE under section 504 during the relevant period. I also conclude that the District failed to respond appropriately to the December 23, 2014 fistfight to the extent that it failed to treat the incident and subsequent posting of the video on social media as incidents of bullying and failed to provide Student with appropriate protection from the emotional sequellae of the incident and appropriate

accommodations to enable Student's safe return to school. I decline to order reimbursement of Parents' expert's fees.

ORDER

1. Within ten calendar days of the date of this order, the District shall make available public funding for an Independent Educational Evaluation (IEE) by an evaluator selected by the Parents. The evaluator shall meet the qualifications and fee structure specified by the District for IEEs in conformity with the IDEA. The IEE shall be a comprehensive psychoeducational evaluation including but not limited to an evaluation of social skills, speech and language, including social pragmatic communication, sensory needs, attention, and mental and emotional health through a psychiatric examination.
2. If the IEE finds Student eligible for special education, the District shall convene an initial IEP meeting within thirty calendar days of receipt of the IEE, to create an IEP for Student.
3. Starting immediately, the District shall assess Student's achievement in the ninth grade curriculum, and shall provide any remedial instruction necessary to ensure that Student is able to reach at least the satisfactory level of academic achievement in the classes that Student is now attending, so that Student will begin the next academic year with an appropriate ninth grade academic background.
4. Within ten calendar days of the date of this order, the District shall offer to revise the current section 504 service agreement to provide Student with the following services in the new school to which Student will be assigned for the coming school year: explicit teaching of social skills appropriate to Student's age and intellectual capability, at least one session per week; daily check in with a school counselor to inquire into any bullying, harassment or social difficulty encountered by Student and to plan effective intervention; and weekly meetings with school counselor to address any emotional difficulties due to transition back to school. These services shall be provided until the Student, the Parents and the school counselor agree in writing that they are no longer necessary to protect student from bullying.
5. The District shall provide compensatory education to Student in the amount of one hour for every week in which Student's currently assigned school was open for students from January 19, 2013 until such time as the Student begins attending school in the 2015-2016 school year with appropriate services in place as required by this Order.
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 acquisition of social and social communication skills, or that provides treatment or support for Student's emotional health and well-being. 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, psychiatric treatment, psychotherapy, psychoeducational services, professional counseling, explicit teaching or training, and individual tutoring.

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.

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

DATED: June 9, 2015