

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

Pennsylvania  
Special Education Hearing Officer

DECISION

Child's Name: A.S.

Date of Birth: [redacted]

Dates of Hearing: 6/17/2015 and 8/14/2015

CLOSED HEARING

ODR File No. 16183-14-15 KE

Parties to the Hearing:

Representative:

Parents  
Parent[s]

Parent Attorney  
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Date Record Closed:

August 18, 2015

Date of Decision:

August 24, 2015

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is an early-teenaged student in the New Castle Area School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parent filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing convening over two brief sessions. The Parent sought to establish that the District failed to timely identify Student as eligible for special education, and to provide Student with FAPE before and after its evaluation. The District maintained that its identification of Student was not untimely and that its special education program was appropriate for Student. The evidence presented, however, was quite limited, and the testimony did not include any teachers or other District staff who knew Student well. After review of the evidence that was presented, and for the reasons set forth below, I find in favor of the Parent and Student for a portion of the time period at issue.

### **ISSUES**

1. Whether the District complied with its Child Find obligations in timely identifying Student as eligible for special education;
2. Whether the District properly identified Student's eligibility category under the IDEA;
3. Whether the District provided an appropriate education to Student; and
4. If the District did not provide an appropriate education to Student, is Student entitled to an award of compensatory education?

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

<sup>2</sup> 20 U.S.C. §§ 1400-1482.

## **FINDINGS OF FACT**

1. Student is an early teenaged student who resides in the District. Student is eligible for special education. (Notes of Testimony (N.T.) 18; Parent Exhibit (P-) 2 p. 12; School District Exhibit (S-) p. 12)<sup>3</sup>
2. Student began receiving monthly therapy with a psychiatrist as well as medication for Attention-Deficit/Hyperactivity Disorder (ADHD) at a young age from the local county Department of Human Services (DHS). The DHS services continued as of the time of the due process hearing. (N.T. 20-21, 23, 47-48, 53-54, 60)
3. One of Student's medications affects Student's ability to wake up in the morning. (N.T. 49, 82)
4. By the time of the due process hearing, Student had stopped taking all medications. (N.T. 51-52)

### 2013-14 School Year

5. Student was enrolled in the District at the beginning of the 2013-14 school year, sixth grade. At the time of Student's registration, the District was not provided with any records indicating eligibility for special education from the prior school district. Due to problematic behaviors at the beginning of the school year, in late September 2013 Student was placed into a partial hospitalization program through the county DHS where Student remained until January 2014. (N.T. 25-26, 28, 98-99, 141-43, 148; P-1; S-6)
6. At the time Student entered the DHS program, Student exhibited excessive motor activity and talking, inattention, poor focus, and poor impulse control. (P-1; S-6)
7. The county DHS partial hospitalization program provides academic and therapeutic services that include medication management by a psychiatrist. The District provides the academic component of the program. (N.T. 87-91, 97)
8. After Student returned to the District from the DHS program in early 2014, Student exhibited problematic behaviors including physical aggression for which Student received out of school suspensions for seven days in March and April. Student was also referred to the guidance counselor in May. Student returned to the DHS program at the very end of the school year. (N.T. 28-29, 102, 144-46; S-7E)
9. Student had 29 absences from school during the 2013-14 school year and was tardy 5 times. (P-2 p. 3)

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<sup>3</sup> References to duplicative exhibits will be to one or the other or occasionally both.

10. Student's final grades for the 2013-14 school ranged from failing (Social Studies and Language Arts) to passing (Reading, Mathematics, and Science), with 99-100% in Gym, Art, and Music. (S-7E)

#### 2014-15 School Year

11. At the beginning of the 2014-15 school year, seventh grade, Student returned to the District and again exhibited problematic behaviors. Student would not complete work and was restless. Student was referred to the Student Assistance Program (SAP). (NT. 29-31, 103)
12. The District sought but was unable to obtain permission from the Parent to provide SAP interventions. (N.T. 103-05)
13. Student was suspended for nine days in September and October 2014, and also received several detentions and in-school suspensions during those months in addition to making three visits to the guidance office reporting difficulties with peers. Student was tardy on a number of other occasions during that time period. (P-2 pp. 3-4; S-7F)
14. Student was placed into a different county DHS program for older children in October of 2014 after a two to three week period when Student was not in school. This DHS program is essentially the same program as that Student had previously attended for younger children. (N.T. 31-33, 35, 88-89, 96, 153)
15. In December 2014 while Student was still at the DHS program, a meeting convened and a special education evaluation was discussed. The Parent gave permission to conduct that evaluation. (N.T. 124-25; S-1)
16. Following discharge from this county DHS program, Student was placed on homebound instruction. The homebound instruction was not provided based on a physician's recommendation or prescription. Homebound instruction had very limited success with Student, and the Parent was unhappy with those services. (N.T. 32-33, 35-38, 56-58; P-2 pp. 1, 2; S-10)
17. The District undertook the special education evaluation of Student while Student was on homebound instruction. An Evaluation Report (ER) issued on January 30, 2015. (N.T. 34-36, 91; P-2; S-2)
18. Cognitive and achievement testing of Student was conducted for the ER. Student's cognitive ability reflected borderline and low average scores (Wechsler Intelligence Scale for Children – Fourth Edition, Full Scale IQ 74). Student's academic achievement scores were in the average to low average range on all subtests, with low average results on the Brief Reading and Brief Writing composites (Woodcock-Johnson Tests of Achievement – Third Edition). Comparison of the ability and achievement testing revealed no significant discrepancy in any area. (P-2; S-2)

19. The District school psychologist believed that the cognitive and achievement assessments did not necessarily provide accurate results because Student was tired during those assessments. (N.T. 92-93; P-2; S-2)
20. Behavior rating scales (Behavior Assessment System for Children – Second Edition, BASC-2) were obtained from the homebound teacher, with results in the clinically significant range for hyperactivity, attention problems, learning problems, and atypicality, and in the at risk range for conduct problems, withdrawal, and all of the adaptive scales (adaptability, social skills, leadership, study skills, and functional communication); Index scores were all in the clinically significant or at-risk range with the exception of internalizing problems. Student's self-report form of the BASC-2 reflected concerns in the clinically significant range with respect to attitude to teachers, sensation seeking, atypicality, locus of control, depression, sense of inadequacy, hyperactivity, and interpersonal relations; and in the at-risk range with respect to attitude to school, social stress, anxiety, and attention problems; all Index scores were in the clinically significant or at-risk range. There were no BASC-2 Parent rating scales returned. (P-2; S-2)
21. Student was failing all classes at the time of the special education evaluation. (P-2 p. 4)
22. The District school psychologist concluded that Student was eligible for special education on the basis of an Other Health Impairment. The ER recommended several accommodations as well as a behavior management plan with positive reinforcement. (N.T. 94, 105, 109; P-2; S-2)
23. The District also conducted a Functional Behavioral Assessment (FBA) in February 2015. The behaviors of concern identified were inappropriate verbalizations, gestures, and refusals. Skill deficits related to those behaviors were social and self-regulation skills. The hypothesis based on an interview was that Student became defiant and oppositional, and refused to do work, to escape academic demands or direction from authority figures. (P-4; S-4)
24. A meeting to develop an Individualized Education Program (IEP) for Student convened several days after Student returned to school in February 2015. The IEP noted Student's needs in the areas of reading, social skills, and study skills. (N.T. 38-40, 126)
25. The IEP contained annual goals for reading fluency and comprehension with 70% accuracy on 7 out of 10 trials; mathematics computation and problem solving with 70% accuracy on 3 out of 5 trials; and social skills/behavior with 80% accuracy. Program modifications and specially designed instruction were modified grading scale; study guides and structured notes for history and science; modified assessments in history and science; extra time, and frequent breaks. A brief positive behavior support plan referenced breaks from tasks and a token economy system. The IEP proposed supplemental emotional support, with Student participating in the regular

- education environment for electives, History, Science, and lunch; a classroom aide for one hour per day was a related service. (P-6)
26. The Parent approved the Notice of Recommended Educational Placement (NOREP) for supplemental emotional support. (P-5; S-5)
  27. Progress monitoring on the IEP goals was reported only in terms of overall percentages for the nine week period and problematic behaviors exhibited; and Student had minimal success with the educational program implemented pursuant to that IEP. The Parent did not receive progress reports on Student's IEP goals. (N.T. 40, 126-28, 152-53; S-3 pp. 21-23)
  28. Student was referred to the guidance counselor in March 2015 for inappropriate behavior in class. (S-7F p. 7)
  29. The District attempted to contact the Parent through written requests to schedule another IEP meeting in the spring of 2015, but were unsuccessful as the Parent did not receive the invitations. (N.T. 55-56, 127-28, 133, 151-52; S-9B, S-9C)
  30. Student's final grades for the 2014-15 school year were at or below passing in English, World Cultures, Science, Music, Art, and Social Skills; Student's grades were significantly higher in Music, Technical Education, and Family and Consumer Science, and somewhat higher in Mathematics. Student's records reflected 10 excused and 4 unexcused absences, and 23 days tardy. (S-7F)
  31. The District recommends an emotional support program for Student. If the Parent requests an IEP meeting, the District will convene the team to discuss revisions to the program for the 2015-16 school year. (N.T. 107-08, 114-15, 126-27)
  32. The parties agreed to a publicly funded Independent Educational Evaluation (IEE). (N.T. 13, 15, 62)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent, who requested this hearing.

Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible, testifying to the best of their recollection; contradictions in the testimony appear to this hearing officer to be related to memory rather than a lack of candor.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision.

#### IDEA Principles

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. This obligation is commonly referred to as “child find.” School districts are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted). Nevertheless, when a school district has reasonable suspicion of a disability, the obligation is triggered. *P.P. v. West Chester Area School District*, 585 727, 738 (3d Cir.

2009). Child find is an ongoing requirement. *Id.*

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). Further,

*Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

"There is no precise standard for determining whether a student is in need of special education, and well-settled precedent counsels against invoking any bright-line rules for making such a determination." *Chelsea D. v. Avon Grove School District*, 2013 U.S. Dist. LEXIS 98125 \*24 (E.D. Pa. July 15, 2013) (quoting *West Chester Area School District v. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002)).

The IDEA further requires the states to provide a “free appropriate public education” (FAPE) to all students who are eligible for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase



“free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

An appropriate education encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (citing *M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir. 1996)). Further, a child’s educational placement must be determined by the IEP team based upon the child’s IEP, as well as other relevant factors. 34 C.F.R. § 300.116. All local education agencies are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa Code § 14.145(5). The IDEA imposes an obligation for eligible students to be educated in the “least restrictive environment” which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000).

## The Parents' Claims

The first issue is whether the District failed to meet its obligation to identify Student as eligible for special education before December 2014. The evidence in the record establishes that in the fall and spring of the 2013-14 school year, the District was aware of Student's admission to and discharge from a partial hospitalization program, and it was the District that provided the academic component of the integrated treatment program for supporting Student emotionally. Soon after Student returned to the District in early 2014, Student exhibited serious aggressive behaviors that resulted in discipline including out of school suspensions, clearly interfering with Student's learning. Certainly by the end of March 2014, the District had reason to suspect that Student's social/emotional/ behavioral manifestations were a disability within the meaning of the IDEA, and seriously impeded Student's ability to achieve success in the regular education environment. Had the District appropriately undertaken a special education evaluation at that time, pursuant to the applicable timelines,<sup>4</sup> an IEP would have been developed to address Student's needs for implementation no later than the start of the 2014-15 school year. Thus, I conclude that the District violated its child find obligation to Student.

The start of the 2014-15 school year reflected a continuation of the same social/emotional/behavioral concerns, poor attendance, and failing grades. Although the referral to the SAP program was a step in the right direction, it was too little too late, particularly when considered along with the periods of time Student was not in school before and after the return to the DHS program, including some weeks of homebound instruction (a very restrictive placement) for unknown reasons. Student's placement in the DHS partial hospitalization program again that fall provided Student with necessary support and services and, fortunately,

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<sup>4</sup> 34 C.F.R. §§ 300.301-300.306, 300.320-300.324, 300.503; 22 Pa. Code §§ 14.123, 14.131.

was also a signal to the District, albeit belated, that a special education evaluation was necessary. The delay in arriving at this conclusion amounts to a denial of FAPE.

The Parent raises a claim that the evaluation itself did not properly identify Student's eligibility category. On this record, however, there is insufficient evidence of whether or not Student meets the criteria of a child with a specific learning disability. It is noteworthy that the parties have agreed to an IEE that is underway and will undoubtedly provide additional important information about Student's academic and functional strengths and needs. Moreover, whether or not the District reached the correct conclusion on a disability category is immaterial if the student's educational program was appropriate. As discussed below, and without regard to particular IDEA disability categories, I find it was not.

As noted above, a special education program should have been implemented for Student from the start of the 2014-15 school year. The District's IEP that was eventually developed recognized Student's need for special education for reading, mathematics, social skills, and behavior. The document included three annual goals that anticipated Student would make progress in those areas; critically, however, it failed to specify how Student would acquire the skills necessary to demonstrate the requisite improvement. Most concerning is the supposition that Student would demonstrate appropriate behavior and social skills, clearly identified skill deficits that had been characteristic for Student since at least the fall of 2013. Viewed from the perspective of what the District knew at the time the IEP was developed, it was not reasonably calculated to provide Student with meaningful educational benefit.

The IEP as implemented met with little if any success, since Student, predictably, exhibited difficulty managing behaviors appropriately; and, those behaviors continued to impede Student's learning. It is true that the District unsuccessfully attempted to convene another

meeting of the IEP team in the spring of 2015, but the reasons for the parties' inability to communicate effectively, or for the District to obtain the Parent's input through alterative means, are unclear. Nevertheless, because the IEP at the time of its formulation did not appropriately address Student's unique educational needs, and further because the obligation of providing FAPE was placed on the District and not the Parent, the delay in responding to the deficiencies through the end of the 2014-15 school year must be attributed to the District.

### Remedy

It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C, supra*. Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id*. In addition to this "hour for hour" approach, some courts have endorsed a scheme that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Having concluded that that the District's special education program was not appropriate

and failed to address Student's needs, the next question is how to calculate the remedy. The record contains no evidence from which a *B.C.* award, designed to place Student in the position Student would be in had FAPE been provided, may reasonably be derived. Thus, this hearing officer will apply the *M.C.* standard while giving consideration to the time periods that Student was in and out of the school environment for the time period at issue.

Based on the IEP, I equitably estimate that Student should have been provided with appropriate special education and related services for one half of the school day, or approximately three hours per day,<sup>5</sup> to address academic and social/emotional/behavioral needs from the start of the 2014-15 school year. The award must also reflect that Student did achieve success in some subject areas over the course of that school year. Thus, Student shall be awarded three hours of compensatory education for each day that school was in session during the 2014-15 school year, with the exception of the period of time that Student was in the DHS program, to remedy the denial of appropriate special education services provided by the District. To avoid any uncertainty, the county DHS records shall be the basis for determining the exact period of time to be excluded from the award. There will be no credit for the period of the largely unsuccessful and restrictive homebound instruction that school year.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent may decide how the hours of compensatory education are spent and by whom they are provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product, or device that furthers Student's social/emotional/behavioral and/or academic needs. The compensatory education shall

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<sup>5</sup> The minimum amount of instructional time for students in seventh grade is 990 hours per school year, with a minimum of 180 school days. 22 Pa. Code §§ 11.1, 11.3.

be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age sixteen (16).

There are financial limits on the Parent's discretion in selecting the compensatory education; the total cost to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the average of the hourly salaries and fringe benefits that would have been paid to the District teaching professionals who did and would have provided educational services to Student during the period of the denial of FAPE.

Finally, as a matter of dicta, this hearing officer suggests that the parties together develop an agreeable means of effective, ongoing, and collaborative communication between home and school as they continue to work as a team to consider the IEE and to make appropriate revisions to Student's IEP for the fall of 2015 and beyond.

### **CONCLUSION**

For all of the above reasons, this hearing officer concludes that the District failed to timely identify Student as eligible for special education, and denied Student FAPE during the 2014-15 school year. Student is entitled to compensatory education.

## **ORDER**

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

1. The District did not timely identify Student as eligible for special education, contrary to its child find obligation.
2. The District did not provide an appropriate special education program for Student during the 2014-15 school year.
3. The District shall provide Student with three (3) hours of compensatory education for every day school was in session for the 2014-15 school year, with the exception of the period of time that Student was admitted to the DHS program as documented by DHS records. The compensatory education hours are subject to the conditions and limitations set forth above.
4. The parties may mutually agree to alter the terms of the compensatory education award in Paragraph No. 3.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: August 24, 2015