

*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: K.G.

Date of Birth: [redacted]

ODR No. 16600-15-16-KE

### **CLOSED HEARING**

Parties to the Hearing:

Representative:

Parent[s]

Heather M. Hulse, Esquire  
McAndrews Law Offices, P.C.  
404 North Washington Avenue, Suite 310  
Scranton, PA 18503

Pocono Mountain School District  
135 Pocono Mountain School Road  
Swiftwater, PA 18370

Glenna M. Hazeltine, Esquire  
King, Spry, Herman, Freund & Faul, LLP  
One West Broad Street, Suite 700  
Bethlehem, PA 18018

Dates of Hearing:

February 1, 2016, February 5, 2016

Record Closed:

February 26, 2016

Date of Decision:

March 15, 2016

Hearing Officer:

William F. Culleton, Jr., Esquire, CHO

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> is a resident of the District named in this matter (District), and is of high school age. Student's mother (Parent) filed this due process request, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) and the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504)<sup>2</sup>. Parent asserts that the District failed to comply with its Child Find obligations under these laws, by failing to identify Student in a timely fashion as a child with a disability under those statutes. Parent also asserts that the District failed to evaluate Student appropriately and failed to provide Student with a free appropriate public education (FAPE) as required by the IDEA and section 504. The District asserts that Student is not a child with a disability or a qualified handicapped person, as defined in the IDEA and section 504 respectively, and that its regular-education interventions have provided Student with meaningful educational benefit.

The hearing was completed in two sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that Student is not an eligible child with a disability as defined by the IDEA and that the District provided appropriate services under section 504. I decline to enter the order that Parent seeks.

### **ISSUES**

1. During the relevant period from April 29, 2013 to the last day of hearings in this matter, February 5, 2016, did the District fail to comply with its Child Find obligations under the IDEA and section 504?
  
2. During the relevant period, did the District fail to provide Student with a FAPE as defined by the IDEA and section 504?

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

<sup>2</sup> It is not contested that Student is of school age and therefore "otherwise qualified" under section 504; nor is there any question that the District receives federal funds and is thus subject to the requirements of section 504. Thus, Student is within the class protected under section 504, and the only issues are whether or not the District complied with its obligations under section 504 Child Find and FAPE provisions. 34 C.F.R. §§104.3(1), 104.31, 104.32 and 104.33.

3. Did the District provide to Student an appropriate section 504 Service Agreement from November 24, 2014 until February 5, 2016?
4. 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?
5. Should the hearing officer order the District to provide Student with an independent educational evaluation at District expense (IEE)?
6. Should the hearing officer order the District to provide any services at present or in the future, consistent with the findings and recommendations of an IEE?

### **FINDINGS OF FACT**

1. Student's developmental milestones were normal, and Student had no health problems, developmental or behavioral difficulties, or diagnoses of disability prior to entering seventh grade. Student was not retained in any grade prior to seventh grade. (S 15.)
2. Student attended the public schools of another state from kindergarten until April 29, 2013, when Student was in seventh grade. (S 1, 2.)
3. Student did not exhibit high rates of absences while attending the other state's public schools until Student's seventh grade year, when absences increased significantly to over fifty absences for the school year. (S 1.)
4. Student was not identified for IDEA eligibility or section 504 eligibility while in the public schools in the other state. (NT 351; S 2, 3, 15.)
5. In April 2013, Parent moved to Pennsylvania with Student, separating from Student's father. Parent established residence in the District and enrolled Student in the District, seeking placement in Student's regular education neighborhood school, on April 29, 2013. (S 15.)
6. Student struggled with emotions over the transition, and, after enrollment in the District, continued to be absent from school due to Student's resistance to accepting the transition, appearing at school for only one day. (S 33, 47.)
7. Parent gave no indication that Student was thought to be a child with a disability on the District's registration forms that she filled out in April 2013, and did not orally inform the District of any diagnosis of anxiety upon Student's enrollment or during the last weeks of Student's seventh grade year. The District did not receive Student's educational transcript from the public school in the other state for months after April 29, 2013. (NT 64, 79, 303-304, 306-307; S 2, 3, 36.)

8. In April 2013, the District did not refer Student for consideration of an initial evaluation because it had no indication that Student's absenteeism was caused by an emotional disorder or condition. (NT 49-51, 57, 61, 63, 73, 85-86, 91; 303-304, 306-307; S 2, 3, 36.)
9. While enrolled in the District after April 29, 2013, Student returned to live in the other state with Student's father for much of the remainder of the school year. Student attended the assigned District neighborhood school twice during the remainder of the Student's seventh grade year. (NT 84-85; S 6, 15, 40, 47.)
10. On April 29, 2013, an individual identified as Parent's friend indicated in a telephone call from the District's home visitor that Student was experiencing anxiety that caused physical symptoms and interfered with Student's attendance. (NT 63; S 47, 61.)
11. On June 4, 2013, Parent filled out papers to withdraw Student from the District, citing as the reason Student's anxiety and "not attending." However, the withdrawal was not approved, because there was no receiving school. (S 2, 15.)
12. Student returned to the District for the start of Student's 2013-2014 school year, and, initially, Student was retained in seventh grade due to non-completion of seventh grade courses. (NT 64-67; S 4.)
13. The District offered to promote Student to eighth grade in its special school for children who would be retained otherwise. Parent consented to this alternative regular education placement. (NT 64-67, 111-113; S 6, 40.)
14. The special school is designed on a Response to Intervention model, and for students who would be retained otherwise, it is a Tier One intervention. (NT 171.)
15. Student entered the special school for the start of eighth grade in September 2013. Student met with the assigned counselor on September 24, 2013 and told the counselor that Student was upset about leaving home and friends in the other state. Student did not describe feelings of fear. (NT 100-101; S 33.)
16. Parent informed the special school principal that Student had experienced anxiety due to moving to a new home and school in Pennsylvania. Parent did not disclose to any District personnel any diagnosis of anxiety during the first half of Student's eighth grade year in the special school. (NT 99, 303-304, 306.)
17. During Student's eighth grade year, special school personnel did not refer Student for consideration of an initial evaluation because it had no indication that Student's absenteeism was caused by an emotional disorder or condition. Rather, personnel at the special school considered Student's absenteeism and emotionality to be the short-term product of Student's difficulty responding to the Student's transition to a new family configuration, a new state, a new home and a new school. (NT 49-51, 57, 61, 63, 73, 85-86, 91, 125-126, 171-173, 303-304, 306-307; S 2, 3, 36.)
18. The school arranged for Student to attend school in a separate, attended space with one-to-one assistance for the first few weeks, and then gradually re-enter the classroom when ready emotionally. Student was to check in with the counselor daily. (NT 175-176; S 33.)

19. The special school provided Student with small classes and specially designed regular education interventions, including counseling, all of which addressed Student's attendance and supported Student emotionally. (NT 111-121, 128-130; S 15.)
20. On September 27, 2013, the counselor sent home a list of private therapists in case Parent and Student should consider a therapist to be a good idea. (S 33.)
21. Student began attending school under the plan of gradual re-entry to classes, and Student's attendance improved in late September and October. (S 33.)
22. By November 4, 2013, the school counselor was aware that Student was seeing a private counselor. (S 33.)
23. Student's attendance improved significantly in eighth grade, from September 30, 2013 to April 25, 2014. From April 25, 2014 to June 19, 2014, Student's attendance declined; however, for the school year, Student's attendance improved significantly in contrast to Student's attendance during seventh grade. (NT 104-106, 170-172, 177, 179; S 7, 33, 41.)
24. Student's grades improved in the third marking period of eighth grade. Student's PSSA scores were Basic in Mathematics, Science and Writing, and Proficient in Reading. (NT 170-172; S 33, 34.)
25. Parent requested an educational evaluation in April 2014 and submitted a written request for an educational evaluation on May 1, 2014. (S 10.)
26. Student graduated from the District's special school because Student met minimal District requirements for graduation to ninth grade in Student's neighborhood high school. Student passed three major subjects and three special subjects. The District assigned Student to Student's neighborhood high school. (NT 106-108, 186-187; S 12, 15, 17, 27.)
27. On June 16 and June 17, 2014, the District's certified school psychologist tested and evaluated Student. (S 15.)
28. On August 22, 2014, the District provided to Parent an evaluation report dated August 6, 2014. (S 15.)
29. The evaluation was conducted and its conclusions were provided by a qualified school psychologist. (NT 193-196, 199-200.)
30. The evaluation concluded that Student was not a child with a disability under the IDEA. It recommended consideration of a section 504 service agreement in recognition of Student's mild anxiety secondary to being moved to a new home, separated from Student's father and paternal family in another state, and also due to being moved to a new school. (NT 200-203; S 15.)
31. The evaluation considered all IDEA disability classifications and concluded that Student's history, behavior test scores and self-reports did not fall within any IDEA disability definition. (S 15.)

32. The school psychologist reviewed Student's developmental, medical and school history through a parental information questionnaire filled out by Parent and by interviewing with Student. Parent reported no developmental or educational needs in the questionnaire. (NT 207-208; S 15.)
33. The school psychologist obtained teacher reports from Student's eighth grade social studies and science teachers, and obtained responses to an academic competence rating questionnaire from Student's eighth grade mathematics and English Language Arts (ELA) teachers. (S 15.)
34. The mathematics and ELA teachers reported that Student's academic performance was at grade level. The social studies and science teachers did not report Student having any difficulty with learning the grade level curriculum. They reported that Student displayed strengths in reading and participating in class, and recall of learned material. One teacher indicated that Student had engaged in positive as well as negative social interaction. Teachers did not report developmental needs. (S 15.)
35. Teachers reported that Student displayed difficulties with sitting quietly in class, distractibility, aggressive and argumentative behavior toward peers, uneven performance and motivation, poor study skills and absences. (S 15.)
36. The school psychologist administered standardized cognitive and achievement tests, as well as a standardized evaluation inventory addressing academic ability. In addition, the psychologist administered behavior rating inventories that address executive function, depression and anxiety, behavior, self concept, emotional intelligence, and the emotional or behavioral symptoms of a broad range of clinical mental and emotional disorders. (S 15.)
37. Student's cognitive testing revealed average to low average abilities in all realms, with lower abilities in non-verbal reasoning and fluency. Achievement testing revealed average age-level academic functioning in reading, mathematics and writing, with the exception of low average mathematics fluency, consistent with tested ability. These scores were corroborated by an additional academic evaluation test showing grade level achievement, as well as teacher reports consistent with the test data. (S 15.)
38. Testing of executive functions revealed fundamental self-regulatory abilities and metacognitive executive functions that were within age and grade level expectations, with some difficulty in initiating and self-monitoring activities. (S 15.)
39. The psychologist addressed Student's emotional, social, behavioral and adaptive functioning through administration of three different behavior rating inventories. Taken together, these inventories elicited ratable responses from Student, parent and teachers. (S 15.)
40. The behavior rating inventories detected mild anxiety and reduced self-concept, as well as some physical symptoms of anxiety, impulsivity and distractibility, with weak study skills. They revealed some difficulty being flexible and managing change effectively. (S 15.)

41. There was no evidence of significant emotionality or conduct problems. Data did not reveal depression, anger, disruptive behavior, adaptive behavioral deficits, atypical externalizing or internalizing behaviors, atypical withdrawal or hyperactivity, emotionality or overt signs of anxiety. The inventories indicated that Student was generally effective in dealing with daily demands and happy. The inventories also indicated that Student works well under pressure. (S 15.)
42. The behavior inventories revealed that Student displayed well-developed social skills that were typical of a child of Student's age; however, they also revealed an underdeveloped capacity to have satisfying interpersonal relationships, including the need to develop better listening skills and appreciation for the feelings of others, with tendencies to be disruptive, intrusive and threatening toward peers. Student's relationships with family were rated as good. (S 15.)
43. Based upon all of the data elicited, and with attention to the IDEA definitions of disabilities, the psychologist ruled out emotional disorder, specific learning disability, other health impairment, autism, intellectual disability, speech or language impairment, and any physical or sensory impairment. (NT 211-220; S 15.)
44. During eighth and ninth grades, Student did not experience an emotional or mental condition over a long period of time and to a marked degree that manifested itself in an inability to learn; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, inappropriate types of behavior or feelings under normal circumstances; pervasive unhappiness or depression; or a tendency to develop physical symptoms or fears associated with personal or school problems. (S 15.)
45. On August 27, 2014, the District proposed and Parent consented to an evaluation for a section 504 service agreement. (S 16.)
46. Student began ninth grade in Student's neighborhood high school. Student was absent on at least nine school days from the first day of school until September 29, 2014. (S 17.)
47. On or about September 2, 2014, Parent applied to enroll Student in a cyber charter school, and Student enrolled in the cyber charter school on September 22, 2014. (S 18.)
48. Student did not receive any special education or section 504 services while enrolled in the cyber charter school. (S 22.)
49. Student continued to demonstrate significant attendance problems while in the cyber charter school. Student was failing three major subjects. (S 18.)
50. On November 21, 2014, Student re-enrolled in the District and was assigned to Student's neighborhood public high school. (S 18, 22.)
51. On November 24, 2014, the District offered a section 504 service plan to Student. It was based upon Student's self-report of anxiety related to transitioning from the cyber charter school to the neighborhood public high school, with concerns about navigation and becoming "overwhelmed". (S 23.)

52. The plan provided accommodations in the form of temporary permission to leave classes early and visits to the school counselor daily as needed. (S 23.)
53. Parent consented to the section 504 service plan on November 24, 2014. (S 23.)
54. Student was absent approximately twenty-eight times between November 21, 2014 and January 22, 2015; this included six days of in-school suspension. (NT 365-368; S 28.)
55. On January 23, 2015, Parent removed Student from the District and on February 2, 2015, Parent re-enrolled Student in the cyber charter school, and Student continued to be enrolled in the cyber charter school for the remainder of the school year. (NT 341-343; S 24, 25.)
56. Student continued to have absence problems while in the cyber charter school, as well as low grades. (NT 374, 382; S 27.)
57. Student returned to the District in September 2015. Student continued to be absent frequently. District personnel were advised that Student's history of removal from the District school for ninth grade was asserted to be due to anxiety. (NT 344, 362-363; S 29, 35.)
58. Upon being advised of Student's history of anxiety, the school counselor notified Student's teachers, referred Student to school-based mental health services and referred Student to an anxiety support group at the school. (NT 363, 375.)
59. Student participated in the anxiety support group on a long-term basis. (NT 363, 409.)
60. Student experienced at most some mild anxiety during tenth grade. (NT 383-386.)
61. The section 504 service plan was not amended in September 2015; however, there was no need to provide for leaving class early at that point in time. Student did check in with the counselor, who remained available, but Student sought out the Counselor only once during the year. (NT 375-382, 384-385, 391-392; S 31.)
62. Student cut classes or was entirely absent from school for several days in September 2015. (S 35, 42, 45.)
63. Student's attendance improved in September and October 2015, and Student did not evidence marked characteristics of anxiety. (NT 383-384, 386, 396-397; S 35.)
64. In tenth grade, Student's grades were improved, but Student continued to perform below Student's cognitive potential. Student was able to attain "B" grades in photography, ELA and Spanish. Student was failing Algebra, and was at risk of failing Chemistry and Civics. (NT 391, 398, 404-409; S 27, 43.)



## CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward 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.<sup>3</sup> 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<sup>4</sup> that the moving party is entitled to the relief requested in the Complaint Notice. 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 the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent’s claim, or if the evidence is in “equipoise”, the Parent cannot prevail under the IDEA.

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<sup>3</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>4</sup> 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 upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

## 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 have weighed the evidence with attention to the reliability of the testimony.

I accord reduced weight to Parent's testimony, for three reasons: first, much of that testimony was based upon Student reports, and as such was hearsay, which remained uncorroborated; second, Parent never provided either a written therapist's note or expert evidence to support her key assertion that Student was medically diagnosed with some form of clinically significant anxiety disorder; third, there were contradictions in the record regarding some of Parent's statements.

I found all other witnesses' testimony to be credible and reliable, based upon substantial consistency with the record, manner of responding to the questioning of both parties' attorneys, and demeanor.

## 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 its

responsibility to identify those children who are in need of the IDEA'S protections. Taylor, 737 above at 484.

Child Find does not demand that schools conduct a formal evaluation of every struggling student. A school's failure to diagnose a disability at the earliest possible moment is not per se actionable. D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir. 2012). Nevertheless, local educational agencies are required to fulfill their Child Find obligation within a reasonable time after notice of behavior that suggests a disability. Ibid.

Failure to conduct a sufficiently comprehensive evaluation is a violation of the District's "child find" obligations. D.K., 696 F.3d above at 250 (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).

Therefore, as discussed above, I must determine when the District was reasonably on notice that the Student was exhibiting behaviors suggesting a disability as defined by the IDEA, in order to determine whether or not the District complied with its Child Find obligations under the IDEA. I conclude that the District was not reasonably on notice of behaviors suggesting a disability as defined by the IDEA during the relevant period of time.

#### DEFINITION OF DISABILITY UNDER IDEA

As a condition of the receipt of federal funding, the IDEA requires states to make available a "free appropriate public education" (FAPE) to an eligible child with a disability. 20 U.S.C. §1412(a)(1)(A); see 22 Pa. Code §14.104. The IDEA defines "child with a disability" as a child with certain defined disabilities who "by reason [of such disabilities] needs special education and related services". 20 U.S.C. §1401(3)(A)(ii); 34 C.F.R. §300.8(a); see 22 Pa. Code

§14.101(defining “Student with a disability” by reference to 34 C.F.R. §300.8). This must be determined through an evaluation conducted in accordance with the procedural and substantive requirements of the IDEA. 34 C.F.R. §300.8 (definition of child with a disability includes evaluation according to the IDEA). Thus, I must determine whether the District was on notice of any facts suggesting that Student met the definition of a disability under the IDEA.

The IDEA lists ten categories of disability, 20 U.S.C. §1401(3)(A)(i). Parent argues that Student struggled with anxiety and depression that caused Student to avoid school during the relevant period, and that this alone comes under one of the ten IDEA categories. The IDEA does not include anxiety within the ten categories of disability; however, Parent argues that Student should have been classified under one of the IDEA’s ten categories: “emotional disturbance”, 34 C.F.R. §300.8(c)(4)(i). Parent also suggests that a classification of Specific Learning Disability might be appropriate, 34 C.F.R. §300.8(c)(10), emphasizing certain discrepancies in the standardized testing of various components of Student’s cognitive functioning. I conclude that Parent has failed to prove by a preponderance of evidence that the District was on notice of behaviors suggesting the existence of either of these IDEA categories of disability.

The regulations that implement the IDEA define “emotional disturbance” in detail. 34 C.F.R. §300.8(c)(4). The definition requires a “condition” exhibiting one or more enumerated “characteristics”; the characteristics must be “to a marked degree” and must be exhibited “over a long period of time”. 34 C.F.R. §300.8(c)(4)(i). The enumerated “characteristics” are:

- “An inability to learn that cannot be explained by intellectual, sensory, or health factors, 34 C.F.R. §300.8(c)(4)(i)(A);
- “An inability to build or maintain satisfactory interpersonal relationships with peers and teachers”, 34 C.F.R. §300.8(c)(4)(i)(B);

- “Inappropriate types of behavior or feelings under normal circumstances”, 34 C.F.R. §300.8(c)(4)(i)(C);
- “A general pervasive mood of unhappiness or depression”, 34 C.F.R. §300.8(c)(4)(i)(D); and
- “A tendency to develop physical symptoms or fears associated with personal or school problems, 34 C.F.R. §300.8(c)(4)(i)(E).

In addition, the definition distinguishes the above characteristics from “social maladjustment.” 34 C.F.R. §300.8(c)(4)(ii).

#### APRIL 29, 2013 TO THE END OF STUDENT’S SEVENTH GRADE SCHOOL TERM

I conclude that Parent has failed to prove by a preponderance of the evidence that the District was reasonably on notice that Student’s behaviors were suggestive of a disability as defined by the IDEA. As noted above, anxiety in and of itself is not a disability as defined by the IDEA. Nor does the IDEA require referral for evaluation for every child who is struggling in school. In this matter, Student was absent during all but one day of school from April 29, 2013 to the end of the school year. The evidence is not preponderant that this alone constituted reasonable notice of a disability.

The District had no evidence of a history of disability. Parent did not disclose any concerns with anxiety in all of the registration documents that Parent filled out for Student. Parent admits that Parent did not tell the District that Student was experiencing anxiety in April through June of 2013; there was no medical information indicating a diagnosis of mental or emotional disorder. By the end of April, the District’s home visitor, following standard protocol for absentee children,

discovered that Student had returned to live in Student's previous home in another state; an unrelated adult in the Pennsylvania household described behavior consistent with anxiety.

I conclude that this anecdotal information, discovered near the end of the school year, did not constitute reasonable notice of behavior that suggested the existence of a disability. The only disability category possibly implicated would have been emotional disturbance, but that classification requires characteristics of the child's internal emotional wellbeing; absenteeism alone does not suggest that such characteristics are present in the child, nor does the Student's absenteeism during the three months while enrolled in the District suggest any emotional difficulty extending over a long period of time as the definition requires. Therefore, there was no child find violation from April 2013 to the end of that school term.

#### STUDENT'S EIGHTH GRADE SCHOOL TERM

As Student entered the District's special school for students who would otherwise be retained, the District was on notice of additional information, but I conclude that this additional information did not rise to the level of behavior reasonably suggesting the existence of a disability as defined by the IDEA. The school's experienced counselor reasonably concluded that Student's struggles were likely to be no more than short-term and that the limited available facts did not reasonably suggest a need for special education.

Although the record is contradictory as to when Parent brought Student's anxiety to the attention of special school personnel (Parent testified that she did not do so until mid-year, but the school counselor indicated receiving such notice closer to the beginning of the school year), the school counselor was on notice that Student was struggling with attendance as of September 2013,

from two sources: Parent had submitted a form to withdraw Student from the District in June 2013, which mentioned Student's anxiety in connection with absenteeism, and Student had described Student's emotional difficulties secondary to transition to Pennsylvania, when the counselor had interviewed Student on September 24, 2013. Although Student described very upset feelings related to leaving the former home and friends, and indicated that those feelings would render Student "unable to function", Student also agreed to try a gradual re-integration into school, which the counselor put into place, utilizing the regular education supports available in the special school.

I conclude that the evidence does not prove by a preponderance that the judgment of the counselor was unreasonable in this regard. This witness was highly experienced in dealing with children with emotional difficulties, and was assessing very limited evidence. Student had never been classified as in need of special education. There was no evidence of a medical diagnosis of emotional disorder.<sup>5</sup> The circumstances reasonably suggested a transitory emotional upset related to stressful circumstances, and not anything "marked" or likely to extend "over a long period of time", 34 C.F.R. §300.8(c)(4)(i). There was nothing in the evidence to suggest that Student's emotions regarding the transition were disproportionate to the difficult circumstances of that transition. Parent at hearing produced no expert opinion evidence to the contrary.

The evidence shows, by a preponderance, that Student responded positively to the regular education interventions – characterized in the record without contradiction as Tier One interventions on a Response to Intervention model – and began to attend with more frequency.

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<sup>5</sup> The counselor did send home a list of therapists in September 2013. By November 2013, District personnel became aware that Student was seeing a counselor; the evidence does not show that they were aware of the exact nature or purpose of the counseling. There is no evidence that District personnel could infer from the mere fact of counseling that Student's emotional needs had reached a greater degree of seriousness or were continuing over a long period of time, as required under the definition of emotional disturbance in the IDEA. Rather, given Student's notable progress integrating into the classroom at the special school, and functioning well in academic, social and emotional terms when present in school, District personnel did not unreasonably conclude that any emotional upset that Student had experienced was temporary and not "marked" in degree, indicating that therapeutic support, along with the regular education interventions provided by the special school, were showing a likelihood of success.

Student likewise began to show some improvement in grades, which all of the evidence shows were directly dependent upon Student's attendance. During the year, Parent submitted no evidence of a medical diagnosis. Thus, the evidence shows that, during Student's eighth grade year, the District was not on notice of behavior that reasonably suggested the existence of an IDEA-defined disability.

Parent argues that Student's improved attendance remained very poor overall. The record shows that Student's absences continued to occur at a high level, despite the significant improvement. Student improved Student's grades only in contrast with the utter failure of the previous year of transition from one state to another. Student continued to under-perform in view of Student's apparent cognitive potential.

Nevertheless, the evidence shows that, when in school, Student did not demonstrate any of the characteristics of functioning that are warning signs of an IDEA-defined disability. There is no evidence suggesting that Student demonstrated an "inability to learn", 34 C.F.R. §300.8(c)(4)(i)(A); "inability to build or maintain satisfactory interpersonal relationships", 34 C.F.R. §300.8(c)(4)(i)(B); "[i]nappropriate types of behavior or feelings", 34 C.F.R. §300.8(c)(4)(i)(C); "[a] general pervasive mood of unhappiness or depression", 34 C.F.R. §300.8(c)(4)(i)(D); or "physical symptoms", 34 C.F.R. §300.8(c)(4)(i)(E).

Parent argues that absenteeism itself constituted behavior suggesting "inappropriate ... fears associated with personal or school problems", 34 C.F.R. §300.8(c)(4)(i)(E); however, Student did not exhibit behaviors in school consistent with this argument. Rather, the evidence shows that Student functioned well at school, albeit with a still concerning habit of absenteeism. District personnel knew that Student's transition had been a significant stressor, and there was no reason to assume that Student's circumstances did not continue to be stressful. On this record,



Parent has failed to show that the District erred by interpreting Student's behavior as not reasonably suggestive of an IDEA disability during Student's eighth grade year.

#### THE DISTRICT'S EVALUATION WAS APPROPRIATELY COMPREHENSIVE

The District performed an initial evaluation under the IDEA during the summer of 2014, and delivered its report to Parent prior to Student's entrance into ninth grade. The District evaluation concluded that Student was not a child with a disability as defined by the IDEA. I conclude that the evaluation was comprehensive and addressed all reasonably suspected disability categories.

The IDEA sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child ... ." 20 U.S.C. §1414(a)(1)(C)(i). The evaluation must address all "areas related to the suspected disability", 20 U.S.C. §1414(b)(3)(B), 34 C.F.R. §300.304(c)(4), and must be "sufficiently comprehensive to identify all of the child's special education and related services needs ... ."

Parent asserts that the District's evaluation in this matter was insufficiently comprehensive and failed to identify all of Student's needs for special education services. I conclude that the Parent's evidence failed to prove this assertion by a preponderance of the evidence.<sup>6</sup>

The evaluation consisted of a review of educational records, a review of teachers' reports, cognitive and achievement testing; a wide-scope behavior inventory that essentially screens for a

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<sup>6</sup> Parent challenged some of the methodology employed by the evaluator, including the experienced school psychologist's omission of a classroom observation in the course of this evaluation, which was conducted during the summer months. I have reviewed Parent's arguments in this regard and I conclude that the procedural criticisms are not supported by preponderant evidence. The psychologist testified and defended her evaluation methodology convincingly. As to classroom observations, the evaluation was supported by teachers' input that was based upon observation of the Student in the classroom, and I find that this procedure did not detract from the reliability of the evaluation report on the present record. In any event, I conclude that any procedural irregularities would not have detracted from the comprehensiveness or overall reliability of the school psychologist's conclusions.

broad array of emotional and behavioral concerns; and four more specific behavior inventories that focused upon academic achievement, executive functions, anxiety and depression, and emotional/social ability. The evaluator considered suspected disabilities of Other Health Impairment, Specific Learning Disability, and Emotional Disturbance, as well as ruling out all other IDEA classifications.

I am satisfied that these procedures, taken as a whole, were sufficiently comprehensive to assess Student in all areas related to the suspected disabilities, 34 C.F.R. §300.304(c)(4). Through these procedures, the psychologist considered Student's difficulties in the areas of emotional functioning, as well as Student's social functioning and behavior. With teacher and Parent reports, as well as the behavior inventories, the cognitive and achievement testing provided appropriate data enabling the school psychologist to rule out Specific Learning Disorder as well as Other Health Impairment. The school psychologist defended these determinations convincingly. The report considered also the absence of any indication of physical impediments to learning and school functioning. Given the breadth of the evaluation, I also conclude that it was sufficiently comprehensive to uncover any of Student's needs for special education and related services, 34 C.F.R. §300.304(c)(6). Therefore, its finding of no IDEA disability was not a violation of the District's Child Find responsibility.

#### STUDENT'S NINTH GRADE SCHOOL TERM

Although the District satisfied all of its child find obligations through its appropriate initial evaluation declining IDEA classification and recommending consideration of a section 504 service agreement, Parent argues that the District failed during Student's ninth grade year to provide Student with a FAPE pursuant to section 504. I conclude that the Parent has failed to prove this

allegation by a preponderance of the evidence. Student was enrolled in Student's neighborhood high school in September 2014, yet Student was not present for many of the school days in that month. The District had obtained permission by the start of school to evaluate Student for a service agreement, but Student's absences did not afford the District a reasonable opportunity to complete an appropriate evaluation. While Student's continued absences in September confirmed the recommendation of the District's August 2014 evaluation report that a section 504 evaluation and service agreement were appropriate, the District cannot be faulted for failing to provide these services within the approximately twenty school days before Student was disenrolled in favor of the cyber charter school – especially as Student was absent for many if not most of those days. Thus, I find no failure to reasonably accommodate Student during that period of time.

Student returned to the District in November 2014, and the District promptly provided a section 504 service agreement. On this record, I conclude that the District appropriately addressed Student's expressed needs by accommodating Student's concerns that Student would be overwhelmed by the transition back to a public high school from the cyber charter school setting.

Parent argues that the Student continued to be absent during this period of time, and therefore the service agreement was proven to be inappropriate. Yet the evidence shows that Parent again removed Student from the high school and re-enrolled Student in the cyber charter school by January 2015. There the Student remained until the following school year. The duty of "reasonable" accommodation implies that, just as an agency has a reasonable period to detect and respond to a need under the IDEA, so also the District should be accorded a reasonable period of time to respond to the failure of its service agreement to address a need that it is designed to address.

Here, there is no evidence that the absenteeism was due to Student's anxiety or any disability, and the educational need identified by Student had nothing to do with absenteeism, but was directed to feelings that might rise during Student's attendance at school. Parent did not allow the District a reasonable period of time to adjust the accommodations to address absenteeism, if appropriate. Under these circumstances, the parent has failed to prove a section 504 child find violation for Student's ninth grade.

#### STUDENT'S TENTH GRADE SCHOOL TERM UNTIL FEBRUARY 5, 2016

Student returned to the District for tenth grade. Again, the Parent fails to show preponderant evidence that the District failed to accommodate Student properly under section 504. On the contrary, the evidence shows that Student exhibited no more than mild anxiety, participated in school without showing any evidence of disability or disability-related impairment of ability to learn, and made some progress in school. On this record, again, I cannot conclude that the District failed to provide Student with appropriate services.

Parent argues that this service agreement was inadequate to address Student's needs. I conclude that the evidence does not prove this by a preponderance. The record shows that Student did not make use of the accommodations in the service agreement; therefore, the record shows that they were not needed. Indeed, Student's attendance and grades improved over the tenth grade year, albeit not commensurate with Student's abilities. The evidence is not preponderant that the District failed to meet Student's needs as a protected handicapped student.

**CONCLUSION**

In sum, I find that the Parent has failed to provide preponderant evidence that the District failed either to perform its Child Find obligation or to provide appropriate section 504 accommodations. Its evaluation declining to classify Student was appropriate. Therefore, I decline to order any of the relief requested by the Parent.

**ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the request for relief is hereby DENIED and DISMISSED. 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

March 15, 2016