

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: C. U.

Date of Birth: [redacted]

Dates of Hearing:

December 21, 2015

February 4, 2016

February 15, 2016

March 3, 2016

March 4, 2016

CLOSED HEARING

ODR Case # 16808-1516AS

Parties to the Hearing:

Parent[s]

Redbank Valley School District
920 Broad Street
New Bethlehem, PA 16242

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Charles Steele, Esquire
428 Forbes Avenue / Suite 700
Pittsburgh, PA 15219

Michael Musone, Esquire
120 West Tenth Street / Suite 503
Erie, PA 16501

March 29, 2016

April 19, 2016

Jake McElligott, Esquire

INTRODUCTION

Student (hereinafter “student”)¹ is an elementary school age student who resides in the Redbank Valley School District (“District”). Since first being evaluated by the District in the 2013-2014 school year, over the ensuing school years the student was found to be not eligible for special education as a student with a disability under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”) and Pennsylvania special education regulations (“Chapter 14”).² In August 2015, the student was identified as a student with a disability, specifically as a student with autism.

Parents claim that the student should have been identified earlier and, as a result, was denied a free appropriate public education (“FAPE”). Parents seek compensatory education as a remedy.

The District counters that, at all times over the course of the school years at issue, it met its obligations to the student under IDEIA/Chapter 14. Consequently, the District claims that no remedy is owed.

For the reasons set forth below, I find in favor of the District.

¹ To protect confidentiality related to the student, the generic use of “student”, rather than a name and/or gender-specific pronouns, will be employed in this decision.

² It is this hearing officer’s preference to cite to the implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162.

ISSUES³

Should the student have been identified
under the terms of IDEIA/Chapter 14
earlier than August 2015?

If so,
is compensatory education owed to the student?

FINDINGS OF FACT

1. The student has attended District schools since kindergarten.

Kindergarten & 1st Grade – 2011-2012 & 2012-2013

2. In September 2011, at the beginning of the student's kindergarten year, the student's parents provided permission for the District to

³ The complaint, filed on September 5, 2015 shortly after the student was identified as eligible, was unclear as to the status of the student's individualized education plan ("IEP") for the 2015-2016 school year. The initial hearing session was scheduled for November 2, 2015. In prehearing consultation with counsel, the hearing officer confirmed that in October 2015, an IEP had been developed in the first weeks of the school year and that the student's parents signed a notice of recommended educational placement ("NOREP"), agreeing to the student's placement. Initially, then, the hearing began with a denial-of-FAPE claim for the first two months of the school year, roughly September and October 2015. In the midst of the hearing, at the February 15, 2016 hearing session, it became apparent that the October 2015 NOREP had not been signed by the parents in full agreement with the recommended IEP/placement. The parents harbored reservations/conditions which they did not share on the NOREP or with the District, nor did parents' counsel share with District counsel or the hearing officer that the claim was more open-ended in the minds of parents, and parents' counsel, than had been shared in communications. Procedural decisions were made which, in the light of an ostensibly ongoing program dispute in the minds of parents, would have been made differently if that information had been available during hearing planning in September/October 2015. Therefore, given the state of the record as of February 15th, where no evidence had yet been introduced as to the 2015-2016 school year, the hearing officer ruled that the hearing in the instant matter would address only the evaluation/identification issue and that any alleged denial-of-FAPE related to the 2015-2016 school year would not be placed at issue. The procedural directive was without prejudice as to parents' ability to file a subsequent complaint regarding any alleged denial-of-FAPE related to the 2015-2016 school year. (Hearing Officer Exhibit ["HO"]-7, HO-8, HO-9, HO-10).

share information with the student's pediatrician. (Parents' Exhibit ["P"]-1).

3. Over the course of the 2011-2012 school year, the student's kindergarten year, the student made educational progress, showing marked and steady progress in letter-naming, phoneme segmentation, and nonsense word fluency. (School District Exhibit ["S"]-13)
4. Although the student exhibited some problematic behaviors at home, the student's behavior in school was not problematic. (Joint Exhibit ("J")-9; Notes of Testimony ["NT"] at 617-618, 626, 1141-1143).
5. In the 2012-2013 school year, the student's 1st grade year, the student made educational progress. The student continued to show marked and steady progress in phoneme segmentation and nonsense word fluency. The student showed marked and steady progress in curriculum-based reading, although the student's scores were in the below-average range. The student's grades/reports of progress showed consistency in all academic areas. (J-8; S-13).
6. The student's 1st grade teacher completed a behavioral assessment at the request of the student's pediatrician and returned it. The student did not exhibit problematic behavior in school, although nurse's reports show multiple visits to the school nurse in the spring of 2013 for a variety of complaints (mainly stomach ache or abrasions). (P-35, P-44; NT at 581-584, 617-618).

2nd Grade – 2013-2014

7. In the fall/winter of 2013-2014, the student continued to visit the school nurse with complaints as those in the spring of the previous year. (P-35, P-41).
8. The student's 2nd grade teacher and the parents regularly corresponded by email. At times, the student struggled with homework, and this was a consistent theme of parents' emails to the teacher. In school, however, the student did not exhibit difficulties with academic work that required interventions. In the same vein, parent often shared information about behaviors at home which the student's teacher did not see in the school environment. (P-41; NT at 273-274, 279-280, 534-536, 598-599).

9. The student continued to exhibit problematic behaviors at home and community-based services were provided to the student and the student's family. In October 2013, the student's community-based provider observed the student at school. At times, the student exhibited limited sensory issues but, overall, the student did not exhibit problematic behaviors or behaviors that interfered with the student's learning or the learning of others. (P-40; NT at 273-274, 280-281, 703-715).
10. In the fall of 2013, the student began to meet intermittently with the school counselor at parents' request. As part of these meetings, the school counselor would sometimes have the student engage in journal writing. Parents were aware of the services and were in frequent contact with the school counselor, including what the student shared in the journal. (P-45; S-3; NT at 503-505, 507-508, 521-525, 599-600).
11. In October 2013, the student's pediatrician diagnosed the student with autism spectrum disorder, a report that was shared with the District. (P-2).
12. The District evaluated the student, performed by a school psychologist from the local intermediate unit ("IU"). In December 2013, the IU school psychologist issued her report. (J-1).
13. The December 2013 evaluation report ("ER") included the October 2013 report from the student's pediatrician, and noted the diagnosis of autism spectrum disorder. The December 2013 ER included achievement testing, where the student performed in the average range in broad reading, broad mathematics, math calculation skills, and academic skills. The ER noted that the student's lowest scores were in applied math skills, although those scores were a relative weakness (low average) rather than an achievement deficit. (J-1).
14. The December 2013 ER included teacher input and observations of the evaluator in the testing environment. The IU evaluator noted the diagnosis of autism spectrum disorder, which included notations by the pediatrician's office of deficits in social/emotional reciprocity, deficits in nonverbal communication, deficits in social relationships, restricted patterns of behavior/interests/activities. The IU evaluator opined: "These symptoms have not been observed in the school setting to a significant degree, and (the student) is functioning academically at grade level as evidenced by teacher information and current assessments." (J-1 at page 9).

15. The December 2013 ER indicated that, as a result of the autism spectrum diagnosis, the student had a disability but did not require specially designed instruction. Therefore, the student was found to be not eligible for special education. (J-1).
16. After the issuance of the December 2013 ER, the student was administered screening instruments in speech and language and occupational therapy. Both screenings indicated the need for follow up in these areas. (P-3).
17. Parents disagreed with the conclusions of the December 2013 ER and requested additional evaluation of the student. The District arranged for a second evaluation by a school psychologist from a nearby school district. (P-20; J-2).
18. In January 2014, given parents' disagreement with the December 2013 ER and at their request for support, the student began to receive some supports through the Title I reading program. (NT at 611-614, 1016, 1031-1042).
19. In mid-January 2014, the student was involved in an incident rooted in mis-communication between the student, the student's teacher, and the parents. As a result of the mis-communication, parents requested that the meetings with the school counselor cease. The school counselor testified that, as part of her professional protocols, the student's journal was shredded by the counselor. At the end of January 2014, the parents requested that the student's journal be sent home and were informed at that time that the journal had been destroyed. (P-41 at pages 13 and 18, P-45; S-3; NT at 509-510, 590-593, 599-607, 609-610).
20. In February 2014, the family received a private speech and language evaluation and a private occupational therapy evaluation. The private speech and language evaluation found that the student had "moderate to severe deficits in syntax construction, paragraph comprehension, and pragmatic judgment, which prevent (the student) from communicating effectively in the home, school, and social settings". The private occupational therapy evaluation found that the student had deficits that "substantially negatively affect (the student's) ability to independently, safely, and adequately complete age expected (activities of daily living) tasks and to fully participate in school activities. (The student) requires OT treatment to address these deficits to avoid injury and to bring (activities of

daily living) abilities to age expectations.” (P-4, quoted at pages 2 and 7).

21. Over February and March 2014, the independent school psychologist performed an evaluation. He issued his ER in April 2014. (J-2)⁴
22. In April 2014, continuing to recognize parents’ concerns in the face of the student not qualifying for special education, the building principal communicated with the student’s parents about tutoring and after-school teacher support in mathematics. Parents declined the offer. (S-5; NT at 618-621).
23. The April 2014 ER included the data and results from the December 2013 ER, including the diagnosis of autism spectrum disorder. (J-2).
24. In the April 2014 ER, the student’s father shared input indicating that the parents had ongoing concerns about the student’s academic, social, and behavioral progress. The student’s father noted the inconsistency between the behavior that was observed in school and that observed at home. (J-2).
25. As part of the evaluation, in March 2014 the independent evaluator observed the student in school. The evaluator noted that the student appeared “comfortable in the classroom setting” and did not exhibit “tendencies associated with autism spectrum disorder or any attentional deficits.” (J-2 at page 2).
26. Teacher input in the April 2014 ER continued to show academic progress and no problematic behaviors. (J-2).
27. As part of the evaluation, the independent evaluator requested behavior rating scales from educators and parents. The student’s 2nd grade teacher and the school counselor both rated the student with clinically-significant scores in somatization (reports of feeling ill) and at-risk scores in internalizing problems. (J-2).
28. The student’s parents rated the student with clinically-significant scores in hyperactivity, anxiety, depression, and

⁴ The ER is dated March 14, 2014. A notation on the ER, however, indicates that it was not furnished by the evaluator until April 18, 2014. Therefore, the reference to the ER will be April 2014 as that is a more accurate indication of when the report was available for the multi-disciplinary team’s consideration. (J-2).

- withdrawal, and at-risk scores in conduct problems, somatization, atypicality, and attention problems. The parents endorsed as “almost always” the following items: cannot wait turn, is overly active, interrupts others, has poor self control, has short attention span, is easily distracted, is negative about things, says ‘I don’t have friends’, is nervous, and worries what other children think. (J-2).
29. An IU occupational therapy evaluation was part of the April 2014 ER. The occupational therapist found that the student exhibited deficits in visual closure and directionality, leading to legibility issues in the student’s writing, but the occupational therapist did not recommend school-based services. Based on a sensory profile completed by the student’s 2nd grade teacher, the occupational therapist noted no sensory deficits. (J-2)
30. An IU speech and language therapy evaluation was part of the April 2014 ER. The speech and language pathologist found that the student’s results on assessments of language development and language processing indicated that the student indicated scores in the average or low-average range and was not in need of speech and language services. (J-2).
31. The private speech and language evaluation from February 2014 was not shared with the IU speech and language evaluator. No occupational therapist testified; the record is silent as to whether or not the private occupational therapy evaluation from February 2014 was shared with the IU occupational therapist. (NT at 435-436).
32. The April 2014 ER contained updated achievement data utilizing a different achievement measure, with standard scores across sub-tests of reading, spelling, and mathematics ranging from 99-115. The achievement testing showed that the student’s scores were “commensurate with measured intellectual potential and current grade placement.” (J-2).
33. In the summary recommendations of the April 2014 ER, the independent evaluator opined, in part: “(The student) is making adequate progress academically and is mastering those necessary prerequisite skills at (the) current grade level placement. There are no behaviors or adaptive deficiencies related to previously state (sic) diagnoses that have a significant adverse impact on learning. (The student) does not exhibit any significant outward indicators of (autism spectrum disorder) and attention and time on task are similar to that of...same age peers.” (J-2 at page 15).

34. The April 2014 ER indicated that, as a result of the autism spectrum diagnosis, the student had a disability but did not require specially designed instruction. Therefore, the student was found to be not eligible for special education. (J-2).
35. Also in April 2014, a licensed psychologist who had seen the student in April 2013, November 2013, and April 2014 provided a letter to the parents indicating that the student had been diagnosed with pervasive developmental disorder/not otherwise specified and ADHD. It is unclear when this document was shared by parents with the District, although it first appears in an evaluation report issued in June 2015. (P-49; J-3).
36. At some point after the issuance of the April 2014 ER, parents retained special education counsel. Through that representation, parents secured an independent educational evaluation ("IEE"). The second independent evaluator is a school psychologist with deep experience in autism evaluation and services. It is unclear exactly how long counsel represented the family in this period, although no special education complaint was ever filed on behalf of the student. (HO-12; NT at 973-974, 1228-1230).
37. In the 2013-2014 school year, the student made educational progress. The student showed marked and steady progress in curriculum-based reading, although the student's scores were in the below-average range. The student's earned grades in reading, spelling, and English were As and Bs, although the student consistently received C grades in mathematics. The student received "satisfactory" or "outstanding" notations for non-graded subjects (social studies, science/health, handwriting, art, and special classes). (J-8; S-13; NT at 274-275).
38. In 2nd grade, the student did not exhibit problematic behavior in the educational environment. (NT at 273-274, 280-281, 622-626, 1042-1043).
39. In June 2014, after the end of the school year, the student received emergency services from a community-based behavioral health program. This information was not shared with the District. (P-14; NT at 628).

3rd Grade – 2014-2015

40. Over May and June 2014, the second independent school psychologist performed an evaluation. He issued the IEE in August 2014. (J-5).
41. The August 2014 IEE included a summary of the data and results from the April 2014 ER, including the diagnosis of autism spectrum disorder in addition to attention deficit hyperactivity disorder (“ADHD”) and anxiety. (J-5).
42. In the August 2014 IEE, the student’s parents shared input indicating that the student continued to exhibit “a number of significant behavior issues in the home.” (J-5 at pages 3-4).
43. As part of the evaluation, in May 2014 the independent evaluator observed the student in school. The evaluator did not note any problematic behaviors, and the student was appropriately engaged academically, socially, and behaviorally during the observation. (J-5).
44. Teacher input in the August 2014 IEE continued to show academic progress and no problematic behaviors. (J-5).
45. The student’s teacher completed assessments related to social responsiveness and social/emotional/behavioral scales. Results across all elements of these assessments fell in the normal range. On an assessment of attentional issues, the student’s teacher reported elevated scores on all scales (oppositional, inattention, hyperactivity), results “consistent with a diagnosis of (ADHD)”. (J-5).
46. In the conclusions of the August 2014 IEE, the second independent evaluator opined, in part: “Data suggest that there are dramatic differences between (the student’s) behavior at home versus at school. (B)ehavior at home is extremely challenging and stressful for the family. School personnel report few concerns with...behavior or academic performance. However, results of teacher report, parent report, and direct observation suggest that (the student) meets criteria for a diagnosis of (ADHD)....Although (the student) was previous (sic) diagnosed with an autism spectrum disorder, (the student’s) social orientation and...interactions with peers preclude an (autism spectrum diagnosis) at this time.” (J-5 at page 6).

47. The August 2014 IEE indicated that the student did not qualify for special education services. The independent evaluator provided multiple recommendations for programming, however, including a recommendation that the student receive educational accommodations through a Section 504 plan (for students with a disability who do not require special education). (J-5).
48. In September 2014, following the issuance of the August 2014 IEE, the student's pediatrician's office issued a letter indicating views related to the IEE and the author's views on programming for the student in the educational environment. (P-12).
49. In September 2014, a private occupational therapy evaluator prepared a document for school recommendations for a sensory diet. It is unclear when this document was shared by parents with the District, although it first appears in an evaluation report issued in August 2015. (P-33; J-4).
50. In September 2014, the August 2014 IEE was considered by the student's multi-disciplinary team, which drafted a Section 504 plan for the student. (J-5 at page 9, J-6).
51. The Section 504 plan indicated that the student's disability was ADHD. Recommended accommodations from the August 2014 IEE were incorporated into the Section 504 plan, in addition to other accommodations. (J-6; NT at 323-329).
52. The student no longer received Title I supports in reading (as the District did not offer Title I services to 3rd grade students), but the student began to receive Title I supports for mathematics. (S-10 at pages 16-19; NT at 1044-1045).
53. The student's 3rd grade teacher and the student's parents communicated regularly by email. The pattern of difficult behavior at home and a lack of such behaviors at school continued through most of the school year. (P-42; S-9; NT at 314, 338, 1046-1047).
54. In November 2014 and thereafter, issues with peers on the school bus at the end of the school day became a more frequent focus of the communications, including the principal. (S-7, S-9, S-10; P-48).
55. In January 2015 and thereafter, there were also occasional difficulties with peers, but the regular education and/or Section 504 interventions addressed those difficulties. (S-9; NT at 314).

56. In February 2015, the student's transportation was changed from the regular school bus transportation to a smaller school van transportation. After a few weeks, the student began to ask the building principal about returning to the bus. (P-13, P-48; S-7, S-10).
57. Over March-May 2015, the student's in-school behavior began to change markedly. (NT at 314, 338, 348, 1046-1048, 1050-1051, 1057-1058, 1070-1073).
58. On March 20, 2015, the student had multiple incidents with peers across the school day. In the morning and at lunch, the student thought others in class were whispering about the student, and the student shouted at the others, startling the class; at lunch, the student shouted at other students for no reason. In the afternoon, during indoor recess, the student wrestled with another student. When the teacher addressed it, the student left the room and began to cry in the hallway. During Title I mathematics services, the student disrupted the class with an outburst. The Title I teacher, who had worked with the student in 2nd grade and 3rd grade, noted how out-of-the-ordinary these behaviors were for the student. (P-47, P-48; S-7, S-8; NT at 334-337, 1046-1048, 1058-1062, 1077-1079).
59. On April 27, 2015, after an altercation with the student's mother at home, the student was admitted for five days to an in-patient psychiatric admission at a local hospital. The student's hospitalization was shared on a limited basis with the District. (J-3; P-8; S-9 at pages 34-40, 340-341, 1051).
60. In May 2015, in the days after the student's return to school, the student's Section 504 team met to revise the student's Section 504 plan. The parents also requested that the student undergo another evaluation for special education services. (J-7; P-52; S-10).
61. On May 14, 2015, the student was involved in a classroom incident where the student was shouting, giggling, banging on the desk, and not sitting still. The student was removed to the principal's office. (P-47; S-8; NT at 338-339).
62. In 3rd grade, the student's earned grade in spelling was an A. The student's earned grades in reading, English, math, and science were Bs. The student received "satisfactory" or "outstanding" notations for non-graded subjects (social studies, handwriting, art, and special classes). (J-8; NT at 348).

June 2015 & August 2015 ERs

63. In June 2015, as a result of the parents' request in May, an IU evaluator (different from the IU evaluator who issued the December 2013 ER) issued an ER. The evaluator reviewed the December 2013 and April 2014 ERs. (J-3; P-52).
64. As part of the June 2015 evaluation, the parents provided input, including a document from a treating licensed psychologist from April 2014, the August 2014 IEE, the May 2015 discharge report from the psychiatric hospitalization, as well as contemporaneous input from the parents. A July 2014 private evaluation related to auditory processing needs was listed as part of the May 2015 discharge report but was not provided to the IU evaluator. (J-3).
65. The June 2015 ER included teacher input. Again, the student was reported as progressing academically. The student's 3rd grade teacher reported that the ADHD-related deficits (distractibility, need for structure, organization) were present. The IU evaluator notes: "There were no reports of aggression at school submitted for review." (J-3 at page 8).
66. The June 2015 ER indicated that, as a result of the ADHD diagnosis, the student had a disability but did not require specially designed instruction. Therefore, the student was found to be not eligible for special education. In line with the recommendations of the August 2014 IEE, the IU evaluator recommended continuation of the Section 504 accommodations. (J-3; P-50).
67. In early July 2015, the parents formally rejected as incomplete the conclusions of the June 2015 ER. (P-21; NT at 162-173).
68. In mid-July 2015, the student was admitted to a psychiatric hospital. The record is not clear as to how long the admission lasted. A discharge report was not provided to the District, but information was shared as it appears in an August 2015 ER. (J-4; P-36).
69. In early August 2015, the student's multidisciplinary team met to re-consider data for the student. For the first time, private speech and language and occupational therapy reports from July 2014 were shared with the District. Additionally, an April 2014

sleep study for the student was provided to the District. (S-6, S-10).

70. As a result of the early August 2015 meeting, at the request of the IU evaluator, the student's mother, 3rd grade teacher and principal created chronological narratives of the 2014-2015 school year. The bus incidents and bus change, the notable behavior incidents of the 2014-2015 school year, and private reports obtained by the family came to the evaluator's attention for the first time. (J-9; P-47, P-48; S-6, S-7, S-8, S-10; NT at 159-160, 316-320).
71. In mid-August 2015, the student's community-based counseling provider sent a letter regarding their views on the student's needs and need for emotional/behavioral supports in school. (P-17).
72. On August 24, 2015, the student's multidisciplinary team met to consider an ER prepared by the IU school psychologist with the updated data and additional reports/narratives. (J-4).
73. Based on the additional data, including reports that had not been shared previously with the IU evaluator and the detailed narratives provided by the student's mother, 3rd grade teacher, and principal, the IU evaluator concluded that the student qualified as a student eligible for special education services as a student with autism. The evaluator noted especially the classroom incidents in the spring of 2015 where the student exhibited outbursts, crying, and the consequent removal from class in determining a need for specially designed instruction to address emotional regulation and peer interaction. (J-4; NT at 173-175).
74. Because the identification was on the cusp of the 2015-2016 school year, the student's 4th grade year, the student's IEP team began to craft an IEP for the student. (S-6).
75. The 2015-2016 school year began for students on August 26, 2015. The parents filed the special education due process complaint that led to these proceedings on September 5, 2015. (HO-1, HO-2, HO-3, HO-4, HO-11; S-10).
76. All witnesses testified credibly. The heaviest weight was accorded to the testimony of the student's mother, the student's teachers (who worked directly with the student on a daily or near-daily basis), the District's director of special education/principal for the student's 3rd grade year.

DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to the requirements of IDEIA and Chapter 14, Pennsylvania school districts have an obligation “to establish a system of screening...to”, *inter alia*, “identify students who may need special education services and programs.”⁵ School districts are explicitly granted the authority to seek permission from parents to evaluate a student who the school district feels might qualify as a student with a disability.⁶ This duty is known as a school district’s child-find obligation.

Once a school district thinks a student may have a disability and/or require special education, it must seek permission from parents to evaluate the student and cannot proceed with an evaluation until it receives such permission.⁷ Once a school district has received permission to evaluate, the ER must be issued within 60 calendar days from the date the school district received permission from parents.⁸ The calculation of the evaluation timeline includes only calendar days when the school district is in session for the school year and does not include any day over the summer.⁹

The evaluation process “must use a variety of assessment tools and strategies to gather relevant functional, developmental, and

⁵ 22 PA Code §14.122(3); *see also* 34 C.F.R. §300.111.

⁶ 34 C.F.R. §§300.300(a), 300.301(b).

⁷ 34 C.F.R. §300.300(a)(1).

⁸ 34 C.F.R. §300.301(c).

⁹ 34 C.F.R. §300.301(c)(1)(ii); 22 PA Code §14.123(b).

academic information about the child, including information provided by the parent” and must ensure “the child is assessed in all areas related to the suspected disability, including, if appropriate...social and emotional status, general intelligence, (and) academic performance.”¹⁰ Once the ER has been issued, “a group of qualified professionals and the parent(s)” meets to determine whether the child qualifies for special education.¹¹

In making the determination of whether a student is a child with a disability, a school district must “draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior”; and “ensure that information obtained from all of these sources is documented and carefully considered.”¹²

Here, the record is a story of dichotomies. The first and most important is that, over the period of kindergarten through most of 3rd grade, the student presented two stark behavioral profiles. At school, the student presented with no problematic behaviors. There may have been isolated moments of peer conflict (especially on the bus), or slight sensory behaviors, or inattention/distractibility. But taken as a whole, those school years paint a picture of an eager, engaged student who worked effectively in educational environments with both peers and

¹⁰ 34 C.F.R. §300.304(b)(1), (c)(4).

¹¹ 34 C.F.R. §300.306(a).

¹² 34 C.F.R. §300.306(c)(1).

adults. Academically, the student exhibited grade-appropriate learning and progress. At home, though, the student's behaviors could not be more different. The student exhibited anxiety and engaged in outbursts; over time, the behaviors became more exaggerated and took on elements of threats to others and self-harm, including admission for emergency psychiatric treatment.

The evidence supports both behavioral patterns. The documentary evidence and the testimony of the teacher's witnesses and school administrators support the fact that the student's behavior were not problematic at school. The transition to home on the bus presented intermittent behavioral issues, and the student was often in an elevated emotional state upon leaving the bus and entering the home environment. At home, the documentary evidence and the testimony of the student's mother and other non-school providers support the fact that the student's behavior was incredibly challenging. In short, on this record, the two versions of the student's behavior is entirely supported—at school, through most of 3rd grade, the student did not exhibit problematic behaviors; at home, behaviors were challenging and, at times, overwhelming.

This backdrop is critical, though, to understanding the student's evaluation history at the District. Over the course of four evaluations (December 2013, April 2014, August 2014, and June 2015), the observations, input, assessments, and data all support the conclusions

of those evaluations that the student was not eligible under IDEIA as a student with a disability who required special education. The evaluators (who, it must be noted are all external to the District, as either IU or independent evaluators) provided sequentially more detailed reports. Over time, then, understandings of the student deepened, yet those ERs all led to the same conclusion—the student was not eligible under IDEIA. The evaluation processes and ERs were, at each stage, comprehensive and appropriate and met the statutory requirements to meet the District’s child-find obligation.

Accordingly, it is an explicit finding that, over the period from 1st grade/the December 2013 ER through the time of the issuance of the June 2015 ER, the record taken as a whole supports the conclusions of the ERs, namely that the student was not eligible under IDEIA as a student with a disability who required special education.

A second, equally critical dichotomy is the stark change in the student’s school-based behavior between the period of kindergarten through most of 3rd grade and the last quarter of 3rd grade. It is clear that the student’s behavior in school changed in the spring of 2015. Incrementally over the 2014-2015 school year, the student’s relationships with peers on the bus were choppy, ultimately leading to a change in the student’s transportation. Still, the contemporaneous documentation and the evidence taken as a whole do not support a

conclusion that these behaviors should have altered the District's understanding of the student's needs.

By late March 2015, however, that was no longer the case. The student engaged in uncharacteristic confrontational and emotional behaviors that surprised teachers who had worked with the student all year and even over multiple school years. Shortly thereafter, in April 2015, the student was hospitalized. Upon returning to school, in May 2015 the student had another uncharacteristic behavior incident and exhibited more consistent behaviors that were entirely new in the school environment (although some had been long-exhibited in the home environment).

It was this change in the student's in-school behavior, brought to light for the IU evaluator only in August 2015, which led to an identification of the student as a student eligible under IDEIA as a student with a disability in the August 2015 ER. While it would be entirely understandable for parents to think that the District had erred all the way along and 'finally got it right' in August 2015, the record taken as a whole supports the notion that not until May 2015 (after the March incident, the April hospitalization, and the more consistent behavioral changes in May) should the District have had any indication that the student's in-school behavior was changing. To that point, the District had experienced years of non-problematic behaviors in school

and had three outside evaluators confirm what they were seeing—the student did not require special education.

Therefore, the District knew or should have known that, as of May 2015, the student was exhibiting consistent, problematic behaviors in the educational environment. The June 2015 ER found the student to be non-eligible and, on its face, this would appear to be a violation of IDEIA. But the District had 60 calendar days to complete and issue the ER. Therefore, even though it could be argued that the conclusion of the June 2015 ER was in error (or at least lacked the comprehensive data that was later developed), this was remedied by the identification of the student in the August 2015 ER.¹³

Accordingly, the District appropriately and timely identified the student in the August 2015 ER. No compensatory education is owed to the student.

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There are matters of dicta which will now be addressed. These are legal arguments and/or not matters for fact-finding, but a reader of the record will certainly recognize that counsel and/or the parties disputed

¹³ 34 C.F.R. §300.301(c); 22 PA Code §14.123(b). The District identified the student on August 24, 2015. It had 60 calendar days (not including the summer break from school) to issue the ER which led to this evaluation. Sixty calendar days prior, excluding the summer break, was March 31, 2015. Therefore, even if one asserts the position that the District should have known to identify the student in the June 2015 ER, it was still a timely identification in the August 2015 ER. (HO-11).

certain matters. The hearing officer's views of those matters are shared here.

First, the record contains elements of an oblique assertion by parents that the student was involved in past incidents that might significantly impact the student's mental/emotional health. This hearing officer uses the word 'oblique' not to be dismissive but to characterize the assertion as indirect on this record. The assertion was not direct, aside from parents' beliefs. Some mental health/psychology witnesses who testified or whose documentation is in the record make mention of potential incidents; some make no mention of it at all. Even where it is mentioned, again it is indirect or noted explicitly as "reported". In sum, this hearing officer did not find it probative to bring the assertion into fact-finding.

Second, parents asserted that the journal kept by the student and shared with the school counselor was shredded inappropriately, even leading to an assertion that there may have been spoliation of evidence. This assertion is rejected. One, the school counselor testified credibly that nothing in the journal needed to be preserved in its original form, that she had extracted all of the information in the journal (S-3), and that it was a standard protocol of her profession to do so. Furthermore, there was no indication, in January 2014 when the journal was destroyed, that the parents had engaged counsel, or were moving toward litigation, or were even contemplating that an independent fact-finder

would become involved. To the extent, then, that an argument is made that the counseling journal should have been preserved as a matter of potential artifact in an evidentiary proceeding, it would not seem to be the case.

Third, the record fully supports the notion that the parents are entirely engaged in decision-making in the student's education and well-being. The family's struggles with in-home behaviors, and the effort/sacrifice they have made for their child, is beyond exemplary; it is heartening and deserves deep recognition. At times, though, the record shows that there was a reticence on parents' behalf to share information, or provide consent for contact between the District and private providers. This is not pointed out as a fault; indeed, with all parents had on their plate given the student's in-home behaviors, they can be faulted for nothing as it regards their devotion to their child. But it was often the case that reports or interactions were not contemporaneously reported to the District. This is why, in the testimony of multiple witnesses and in fact-finding, the exact understanding of when a certain document was provided to the District, or how documents/information came within the orbit of the District's knowledge is not always clear.

CONCLUSION

Until May 2015, the District's understanding of the student's needs, its evaluation processes, and ERs were appropriate in concluding

that the student was not eligible under IDEIA as a student with a disability who required special education. The ultimate identification of the student in that regard, in August 2015, was timely and appropriate.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District did not violate its child-find obligations in not identifying the student prior to August 2015 as a student as eligible under IDEIA as a student with a disability who required special education. No compensatory education is owed.

Claims related to the provision of FAPE to the student in the 2015-2016 school year were not placed at issue in the instant matter. This decision and order explicitly do not address on their merits any matters related to the provision of FAPE to the student in the 2015-2016 school year.

Any claim related to the evaluation and identification of the student not specifically addressed in this decision and order is denied.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

April 19, 2016