

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: S.V.

Date of Birth: [redacted]

ODR No. 17224-15-16-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Daniel B. Cooper, Esquire
Law Offices of Kenneth S. Cooper
45 East City Avenue, # 400
Bala Cynwyd, PA 19004

Walter D. Palmer Leadership
Learning Partners Charter School
910 North 6th Street
Philadelphia, PA 19123

Not Appearing

Date of Hearing:

March 3, 2016

Record Closed:

March 13, 2016

Date of Decision:

March 26, 2016

Hearing Officer:

William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)¹ was a student of the charter school (School) named in this matter, from kindergarten to seventh grade; in the middle of Student's seventh grade year, December 2014, the School closed, and Student enrolled in a middle school of the Student's school district of residence (District). 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). Parent asserts that the School failed to comply with its Child Find obligations under the IDEA, by failing to identify Student in a timely fashion as a child with a disability. Parent also asserts that the School failed to provide Student with a free appropriate public education (FAPE) as required by the IDEA. Parent seeks full days of compensatory education from the beginning of Student's kindergarten year in 2007 to the date on which the School closed in December 2014.

The respondent School is closed and did not appear for the scheduled hearing, despite the receipt of notice by an individual identified in ODR records as a contact for the School.

The hearing was completed in one session. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the School failed inappropriately to identify Student pursuant to its Child Find obligation and failed to provide Student with a FAPE for a portion of the time claimed by Parent.

ISSUES

1. During the relevant period from the first day of school in the School's 2007-2008 school year until the last day of school in December 2014, did the School fail to comply with its

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

Child Find obligations under the IDEA by failing to conduct an initial evaluation of the Student?

2. During the relevant period, did the School fail to provide Student with an appropriate placement?
3. During the relevant period, did the School fail to provide Student with a FAPE as defined by the IDEA?
4. Should the hearing officer order the School to provide Student with compensatory education for or on account of all or any part of the relevant period?

FINDINGS OF FACT

1. Student has no history of abnormal developmental milestones, and Student had no health problems. (P 3.)
2. Student's birth parents separated when Student was an infant, and Student's father has been absent from Student's life for long periods [redacted]. (P 3.)
3. Student's full-scale intelligence quotient (IQ) is in the very low to below average range, with significant weakness in verbal reasoning and higher scores in non-verbal reasoning. (NT 98; P 3.)
4. Student has a history of irritability and hyperactivity as a young child. (P 3.)
5. Student attended the School from kindergarten through the middle of seventh grade, when the School closed. (NT 29-30.)
6. Student exhibited behavioral struggles in kindergarten and first grade at the School. When Parent asked for help, the School intervened in first grade by providing social skills, coping skills and self-esteem instruction in a regular education setting. (NT 34-38.)
7. Student's grades were satisfactory in first grade, except for some grades reflecting continued behavioral difficulties. (NT 38-43.)
8. In second grade, Student's behavior continued to be problematic, including teacher reports to Parent about Student being disruptive, not working in class, struggling with attention and focus and eloping from class. (NT 43-47.)
9. Student's behavior in second grade escalated to aggression toward peers, and the School disciplined Student. Student [engaged in concerning behavior] in a relative's home. Student received outpatient therapy with the local behavioral health agency, and was medicated. The School was aware of these developments, but continued its regular education supports, with some interruptions due to staffing problems. The behavioral health agency observed at the School for wrap-around services eligibility. (NT 43-53, 54-58.)

10. Student's grades did not clearly suffer in consequence of these behavioral difficulties in second grade. (NT 47-48.)
11. [In second grade,] Student was admitted for psychiatric hospitalization and was diagnosed with psychiatric disorders during that hospital admission. (NT 44-45; P 3.)
12. Student's behavioral difficulties continued in third grade. (NT 53-54.)
13. Student was hospitalized in April or May 2011, when in third grade, after Student threatened self-harm due to being physically touched at the school during an incident of acting out. The School was notified of these facts. (NT 52-66.)
14. In mid-May of 2011, when Student was in third grade, Parent requested an evaluation pursuant to the IDEA, and put this request in writing. (NT 64-66.)
15. Student's behavior continued to be problematic in fourth grade. Teachers reported to Parent that Student continued to struggle with attention problems, disruptive behavior, leaving Student's seat and class, aggressive behavior and defiant behavior. (NT 67-70.)
16. During fourth grade, Student's grades declined. (NT 70.)
17. During Student's fourth grade, the School performed an evaluation and found Student not eligible for special education under the IDEA. This was discussed at a meeting in June 2012, at the end of the school year. (NT 72-74, 77-78.)
18. During the June 2012 meeting, the School provided a Service Agreement² providing accommodations to Student. (NT 76-80.)
19. Student's behavior continued to be problematic during fifth grade, including reported aggressive behavior, elopement and cutting classes, and disciplinary violations leading to suspensions. (NT 80-82, 84-88.)
20. Student's grades continued to be extremely low and at risk of failure in fifth grade. (NT 82.)
21. Student continued to struggle with emotional difficulties, continued to receive therapy from behavioral health providers, and continued to take medication for emotional difficulties. (NT 83-84.)
22. In sixth grade, Student continued to struggle emotionally, and was re-traumatized by [previous incidents]. (NT 89.)
23. In sixth grade, Student was substantially withdrawn from education, reportedly exhibiting withdrawal at school, and engaging in seriously problematic behaviors including aggression and elopement, as well as not completing assignments. (NT 90-93.)

² This is an offer of accommodations provided pursuant to Chapter 15 of the Pennsylvania Code, which applies section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, requiring accommodations for qualified handicapped children.

24. In sixth grade, many of Student's grades continued to be at risk of failure. Student was not reading proficiently and Student's mathematics skills were deficient. (NT 90-93, 95-96.)
25. In November of Student's sixth grade year, the School conducted an evaluation for a purpose unknown at this time, but it did not find Student to be eligible for special education under the IDEA. (NT 97-98.)
26. Student continued to receive therapy and medications for emotional difficulties in sixth grade. The School was aware that Student was receiving therapy. (NT 93-95.)
27. The School made no changes in its interventions to address Student's emotional, social and behavioral needs in sixth grade. (NT 100-102.)
28. Student's behavior continued to be problematic and Student's grades continued to be at risk of failure during Student's seventh grade year. (NT 106-107; P 3, 5.)
29. Student continued to exhibit emotional difficulties and to receive therapy in seventh grade. (NT 109-110.)
30. The School did not intervene effectively to address Student's needs in seventh grade. (NT 106-108.)
31. The School closed abruptly over the winter holiday break, and Parent immediately enrolled Student in a middle school in the District. (NT 29-30, 108-109.)
32. In the new District middle school, Student immediately demonstrated the same behaviors of withdrawal and aggression that had characterized Student's behavior in the School. (NT 110-111; P 3, 5.)
33. In November 2015, less than one year after the School closed and Student enrolled in Student's district of residence, Student left school without permission and was not found for hours. Parent had Student admitted to a psychiatric facility where Student was diagnosed with a depressive disorder, Oppositional Defiant Disorder, ADHD "by history", and Parent-Child Relational Problems. (P 1.)
34. Student received failing classroom grades in seventh grade, but was allowed to pass with recorded grades of "D" in all but one subject. Student did not participate in class or perform assignments. Student demonstrated withdrawn and disruptive behavior in the classroom. (P 3.)
35. Student's seventh grade PSSA scores were below basic in English Language Arts and Mathematics. (P 3.)
36. The District evaluated Student when Student was in eighth grade and issued its evaluation report on January 11, 2016. (P 3.)
37. The District's evaluation report classified Student as a child with Emotional Disturbance and a secondary classification of Other Health Impairment due to attention deficits. (P 3.)

38. The District's evaluation report recommended educational support to address Student's emotional struggles, in the form of a classroom with lower than typical teacher to student ratio, numerous modifications, and a class-wide behavior support system. (P 3.)
39. Student's reading and mathematics skills are below average. (P 3.)
40. Student's adaptive functioning is in the extremely low range for conceptual, social and practical skills. (P 3.)
41. Student's behavior indicates clinically significant deficits in school with regard to attention problems, adaptability, social skills, leadership and study skills. (P 3.)
42. Student exhibits an inability to build or maintain satisfactory relationships with peers and adults; inappropriate behaviors or feelings; a pervasive mood of depression; and a high level of physical symptoms related to depressed mood. These symptoms have persisted over a long period of time and are present in both the home and school. (P 3.)
43. On February 8, 2016, the District presented an IEP to Parent, placing Student in supplemental emotional support. Specially designed instruction included explicit instruction in social skills and de-escalation techniques in the general education setting. The District also offered school based counseling, thirty minutes per week, and extended school year services. (P 5.)

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.³ 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 evidence⁴ that the

³ 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).

⁴ 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

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.

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 somewhat reduced weight to Parent’s testimony, for three reasons: first, some of that testimony was based upon Student and teacher reports, and as such was hearsay, which remained uncorroborated; second, Parent displayed some vagueness of memory, which appears to have been contradicted by the documentary record in one non-material respect (Parent testified

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

that the 2015 hospitalization was for three weeks, plus several weeks of partial hospitalization, but it was only for about ten days, with about a month for partial hospitalization); third, Parent testified from written notes, obviously due to her unfamiliarity with testifying and nervousness, but also demonstrating her own lack of confidence in her memory for past events. Because Parent's memory was not precise for events in 2015, as demonstrated by her recollection of Student's hospitalization, I conclude that it was likely more imprecise for events before that time.

Nevertheless, I accord substantial weight to Parent's testimony, as my findings of fact attest. Her demeanor and manner of answering questions gave me every reason to find her credible and sincere. Often, she did not answer in a way that supported her position, due to lack of memory, about which she was forthcoming and frank. On balance, I find that Parent's testimony represents her best recollection of Student's lengthy and complicated educational and psychiatric history.

I am mindful that this matter was unopposed at hearing because the School has been closed for years. While this affects the weight that I accord to Parent's testimony, untested by cross-examination, it also leaves a record that is preponderant to the extent that I give weight to Parent's testimony. Thus, all of the above findings are based upon a preponderance of the evidence. While some of the material evidence is circumstantial, none of it is contradicted in the record. I conclude that I can derive inferences of fact from Parent's lengthy recapitulation of Student's struggles in school, combined with evidence of the recent District evaluation report. In drawing inferences, I remain mindful that Parent's summary of events is given only from the perspective of a loving parent trying to cope with Student's steady and downward spiral in the School, which did little to break that fall.

CHILD FIND UNDER THE IDEA

Under the IDEA Child Find requirement, the local education agency 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 agency'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, I must determine when the School 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 School complied with its Child Find obligations under the IDEA.

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 School 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). One of these categories is “emotional disturbance”, 34 C.F.R. §300.8(c)(4)(i). Parent argues that Student evidenced emotional struggles throughout Student’s tenure at the School, to the point of needing psychotherapy, and that these emotional difficulties caused Student to avoid schoolwork, misbehave in class to the extent of being disruptive, and to act out aggressively to the extent of sustaining multiple disciplines and suspensions during the Student’s entire tenure at the School. The questions that I must determine are: 1) did Student’s behavior at school provide the School with facts that reasonably suggested that Student met the definition of emotional disturbance under the IDEA; and 2) when during Student’s tenure from kindergarten to the middle of seventh grade did the School know such facts? To answer these questions, one must keep in mind the IDEA definition of emotional disturbance.

EVIDENCE OF BEHAVIOR SUGGESTING EMOTIONAL DISTURBANCE

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).

The condition must “adversely affect a child’s educational performance.” 34 C.F.R. §300.8(c)(4)(i). In addition, the definition distinguishes the above characteristics from “social maladjustment.” 34 C.F.R. §300.8(c)(4)(ii).

As Parent described Student’s behaviors, I conclude that, at some point in time, they indicated the likely presence of an emotional disturbance as defined by the IDEA. The School was aware of facts indicating the following: Student at some point in time was so withdrawn from education that Student refused to participate in class, refused to do assignments, and instead engaged in disruptive, sometimes aggressive behavior in school. Student was defiant and irritable when touched, and engaged in fighting with peers. At home, Student exhibited similar behaviors

of work refusal. Student was diagnosed clinically and given medication for emotional disorder. Student was hospitalized twice, once for threatening self-harm, and once for eloping from school and disappearing for hours. These facts suggest the presence of four of the five IDEA categories in the definition of emotional disturbance.

Student was unable to learn, 34 C.F.R. §300.8(c)(4)(i)(A), as demonstrated by failing grades. This was not explained, on the present record, by Student's below average IQ; Student's marks were at risk of failure for years, and this is not consistent with a low IQ (73) that is above the Intellectual Disability (ID) range (70 and below, with concomitant adaptive behavior deficits). The more likely explanation for Student's grades, based upon Parent's credible testimony, is a complete withdrawal from the educational process.

Student reportedly demonstrated an inability to have appropriate relationships with peers and adults, 34 C.F.R. §300.8(c)(4)(i)(B). Teachers reported that Student repeatedly defied and disrespected teachers and school rules, leading to multiple disciplines and suspensions over several years. Student repeatedly was reported by School personnel to have engaged in conflict with peers. On this record, the evidence at least suggests to a reasonable mind that Student was exhibiting this sub-category of the IDEA definition of emotional disorder.

Student reportedly demonstrated inappropriate types of behavior or feelings under normal circumstances, 34 C.F.R. §300.8(c)(4)(i)(C). Teachers and Student stated that, instead of joining in with peers in classroom activities, Student withdrew and escaped from all learning. Student expressed a desire to harm self, and eloped from school. Student reportedly lost control physically, experiencing escalating emotional meltdowns when touched in a mild manner, thus reacting inappropriately to the behavior of others in normal circumstances.

Parent credibly testified to facts that indicated Student's general pervasive mood of unhappiness or depression, 34 C.F.R. §300.8(c)(4)(i)(D). Parent testified that Student was medicated for this mood in a clinical setting. Recent documents show that Student experiences such a mood disorder, and I conclude that the reports in evidence, taken with Parent's testimony as to Student's behavior at home, and Student's hospitalizations, raise an inference that such mood disturbances have troubled Student for a lengthy period of time in the past.

WHEN THE SCHOOL WAS ON NOTICE OF POSSIBLE EMOTIONAL DISTURBANCE

While Parent testified that Student's behavior was problematic in kindergarten through second grade, I give little weight to Parent's uncertain memory of events that remote, as explained above. Although Parent reports that Student [engaged in concerning behavior] outside of school when Student was in second grade, leading to clinical treatment and prescription of medication, I cannot accord this preponderant weight for placing the School on notice of behaviors suggesting a disability under the IDEA at that time. Moreover, Parent testified frankly that Student's marks did not suffer palpably during this early period; therefore, this reported behavior would not have met the IDEA definition of emotional disturbance because there is no evidence that the School saw an effect upon Student's educational performance, 34 C.F.R. §300.8(c)(4)(i), or that this behavior rose to the level in school of requiring special education, 34 C.F.R. §300.8(a).

Similarly, when Student was in third grade, in addition to generally inappropriate behavior in school, Student reportedly engaged in serious behavior that was inappropriate in normal circumstances, 34 C.F.R. §300.8(c)(4)(i)(C), by having an emotional melt-down due to being gently touched at school by an adult. Parent put this event at the end of third grade, and testified that she requested an evaluation at that time. Giving due weight to this evidence, I do not find it

preponderant that the School was on notice of a possible emotional disturbance as defined by the IDEA during Student's third grade year.

The evidence as to Student's fourth grade year was sparse, with Parent essentially testifying that Student was no better in fourth grade than in third grade. Parent reported that Student's grades had declined during fourth grade, but did not indicate that the decline was so precipitous as to indicate by itself a need for special educational interventions. No report cards were available from the School, nor did Parent save any that she had received indicating a decline in grades.

Parent testified, not without some confusion as to the temporal order of events, that the School evaluated Student and issued an evaluation report in June 2012 – the end of Student's fourth grade year. The report found Student ineligible for special education. There was no evidence to impeach the School's evaluation, which certainly weighs against a finding against the School for fourth grade. On the whole, I find the evidence insufficient to find a Child Find violation in Student's fourth grade year.

At the end of fourth grade, the School offered Student a service agreement pursuant to Chapter 15 of the Pennsylvania Code and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Parent testified that Student's behavior escalated in fifth grade, in spite of the School's section 504 interventions, and that Student's grades essentially bottomed out at a level that was constantly at risk of failure for that grade.

At this point, the School knew that Student had a history of clinical treatment and medication for emotional difficulties, declining grades that were bottoming out at a level of at risk for failure in most subjects, very unsatisfactory relationships with peers and adults, inappropriate behavior in normal circumstances, such as overreacting to mild touching by adults, possible [concerning behavior] as a child, and conduct at least suggesting that Student was experiencing a

general or pervasive mood of unhappiness or depression. Meanwhile, the School put its section 504 interventions into place and the evidence shows preponderantly that these interventions were unsuccessful to improve Student's emotional, social behavioral or academic performance.

Therefore, the evidence preponderantly shows that, during Student's fifth grade year, the School was on notice of a possible emotional disturbance. According to the School a reasonable period for rectification of its educational supports, the record shows preponderantly that the School should have recognized that its supports were not working within the first month of school, or by October 1, 2012. Allowing it the 60 day statutory period for evaluation, it should have completed another evaluation of Student by December 1, 2012.

Parent credibly testified that this did not occur, and that there was not another evaluation of Student until November of Student's sixth grade. Therefore, I conclude by a preponderance of the evidence that the School failed to perform its Child Find obligations under the IDEA from December 1, 2012, until November 2013.

During that sixth grade year, the evidence is preponderant that the School was aware of facts again suggesting the continuation of an emotional disturbance affecting Student's educational performance. By School report and Parent's understanding, Student's emotional difficulties deepened, and Student's behavioral struggles and academic withdrawal at school escalated. Student demonstrated aggression, elopement, and refusal to participate in schoolwork or assignments. Student's basic academic skills – reading and mathematics - seemed to lag behind Student's same-grade peers. The School was aware that the Student was receiving medication and clinical therapy, but did not change its interventions at all during that year.

Parent testified that the School again evaluated Student in sixth grade, in November 2013, but there is no evidence in the record of this reported evaluation or of its purposes. It is not even

clear that it was an evaluation for IDEA eligibility; Parent's memory and testimony were not clear on that score. I cannot give determinative weight to Parent's recollection of the conversation that she reports about the classifications considered, because her understanding of IDEA and its classifications was manifestly limited. Thus, I do not accord this reported evaluation substantial weight against Parent's assertions of Student's struggles in sixth and seventh grade, and Student's need for much more support than Student was receiving.

Moreover, the Parent introduced documentary evidence, supported by her own testimony, proving preponderantly that the District re-evaluated Student when Student was in eighth grade, and found Student eligible for special education under the IDEA category of emotional disturbance. This evidence, along with Parent's testimony, shows preponderantly that Student should have been classified as a child with a disability during all of Student's sixth grade year and half of seventh grade, until December 2014 when the School closed.

By definition, an emotional disturbance requires symptoms to have existed over a long period of time and to a marked degree that adversely affects educational performance. 34 C.F.R. §300.8(c)(4)(i). The District's evaluation found that Student exhibited at least four of the sub-categories that define emotional disturbance in the IDEA, This finding is evidence that Student was exhibiting the defined behavioral symptoms for a long period of time.

Parent's testimony is preponderant that Student was completely withdrawn from schooling during sixth and seventh grades, was experiencing behavioral and social dysfunction, and was not achieving in school at all. Thus, Student was displaying the same behaviors in sixth and seventh grade that the District later classified as emotional disturbance, in an evaluation that found these behaviors to have existed for a long period of time, by definition.

Therefore, giving substantial weight to the District's evaluation and its finding that Student exhibited at least four of the sub-categories that define emotional disturbance in the IDEA, it is plain that Student's emotional disturbance did not arise during eighth grade, when the District issued its evaluation. Rather, this evidence, when combined with Parent's credible and preponderant testimony as to student's struggles in sixth and seventh grades, proves preponderantly that Student was exhibiting symptoms to a degree that the School's failure to identify Student during those years violated its Child Find obligation.

Therefore, the evidence is preponderant that the School failed to comply with its Child Find obligation from November 2013, during Student's sixth grade year, until the day in December 2014 when the School closed its doors. In sum, adding this time period to the prior period for which I conclude that the School failed to comply with its Child Find obligations, the School failed to comply with its Child Find obligations from December 1, 2012 to the last day on which it was open to students in December 2014.

Moreover, Parent's testimony, in light of the District's evaluation report showing Student's deficit in academic achievement, social skill and adaptive skill when observed in the latter half of seventh grade, and when evaluated in eighth grade, proves preponderantly a deprivation of FAPE during that period of time. This evidence shows that Student received no meaningful educational benefit during those years. Therefore, I conclude that the School deprived Student of a free appropriate public education from December 1, 2012 to the last day on which it was open to students in December 2014.

The record is not sufficient to determine whether or not this deprivation of FAPE was due to a failure to provide an appropriate placement or a failure to provide specially designed instruction within the regular education setting of the School. I find the distinction to be irrelevant

to the finding of a deprivation of FAPE. It also is moot, in that Student is now served - and has been served since the start of this due process – by the District; thus any opining on my part about what the School should have done specifically by way of special education is beside the point of this proceeding.

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the local educational agency to make up such services on an hour-by-hour basis; however, there is support also for a “make whole” approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010).

In this matter, the evidence is insufficient to prescribe a “make-whole” remedy, because there was no expert opinion testimony on what remedial and special education services would be needed in order to bring Student’s academic, social and behavioral skills to the level at which they would have been found in the absence of the deprivation of FAPE discussed above. In particular, I have concerns with Student’s potential rate of acquisition in view of Student’s very low IQ, and the complexity created by Student’s emotional disturbance in terms of Student’s ability to function at full cognitive potential while being treated and supported for the emotional disability. The record is silent on these questions. Therefore I will enter an advisory⁵ order for compensatory education to replace the education of which I find that Student was deprived.

⁵ As the School is closed and did not respond, Parent’s pleading indicates that Parent will seek a remedy through the Pennsylvania Department of Education, pursuant to its IDEA responsibilities as State Educational Agency. See, e.g., 34 C.F.R. §300.227.

CONCLUSION

In sum, I find that the School failed to comply with its Child Find obligation from December 1, 2012 to the last day on which it was open to Students in December 2014. In addition, I find that the School deprived Student of a FAPE during that period of time, and I order that the Student is entitled to compensatory education in the amount of a full school day for every school day during the period stated above.

ORDER

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

1. The School failed to comply with its Child Find obligations under the IDEA from December 1, 2012 to the last day on which it was open to students in December 2014.
2. The School deprived Student of a free appropriate public education from December 1, 2012 to the last day on which it was open to students in December 2014.
3. The Student is entitled to compensatory education in the amount of one full school day for every school day on which the School was open, from December 1, 2012 to the last day on which it was open to students in December 2014.
4. The number of hours per school day for purposes of this order shall equal the number of hours in a school day at the School during the times delineated in this order, at the grades in which the School deprived Student of a free appropriate public education.
5. Compensatory education may take the form of any appropriate developmental, remedial or instructional services, product or device, selected in the discretion of Parent, which furthers or supports the Student's education. Services in the amount set forth above may be

provided after school hours, on weekends, or during summer months when convenient for Student or Parent.

6. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.
7. The cost of any such services may be limited to the current average market rate in Pennsylvania for privately retained professionals qualified to provide such service.

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

William F. Culleton, Jr. Esq.

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

March 26, 2016