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

DUE PROCESS HEARING

Name of Child: J.W.

ODR #17329 / 15-16 KE

Date of Birth:
[redacted]

Dates of Hearing:
April 11, 2016
May 4, 2016

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Hollie John, Esquire Jacobson & John 99 Lantern Drive Suite 202 Doylestown, PA 18901
Bristol Borough School District 450 Beaver Street Bristol, PA 19007	Karl Romberger, Esquire Sweet, Stevens, Katz & Williams 331 Butler Avenue PO Box 5069 New Britain, PA 18901
Date Record Closed:	June 21, 2016
Date of Decision:	June 28, 2016
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background and Procedural History

Student[1] is an early elementary school age child who enrolled in the District for kindergarten in the 2014-2015 school year and repeated kindergarten in the 2015-2016 school year. At the time the hearing sessions were taking place Student had not yet been identified as eligible for special education. Student's Grandparents, who have physical and legal custody, asked for this hearing because they believed that Student should have been evaluated and identified as a child with a disability, entitled to special education services. Further they alleged that the District discriminated against Student, and also that the District retaliated against them for filing the hearing request.

Over the course of the hearing the parties with their counsel's assistance cooperated in resolving several issues. The parties considered the results of an independent educational evaluation dated January 28, 2016 which the Grandparents obtained and for which the District has agreed to pay. Student was found eligible for special education and an IEP and a NOREP were prepared. This decision therefore only addresses the remaining issues as put forth below.

The parties collaborated in producing Joint Exhibits, and their efforts in this regard made for an efficient hearing and are greatly appreciated.

The testimony of every witness, the content of each exhibit, as well as the parties' written closing statements, were reviewed and considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. For the reasons set forth below, I find in favor of the Grandparents on the first three issues and for the District on the fourth.

Issues

Did the District violate its child find obligation?

If the District did violate its child find obligation, what form and amount of compensatory education is owed to Student?

Did the District discriminate against Student?

Did the District retaliate against the Grandparents for filing the due process hearing complaint?

[1] This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

Stipulation

The parties stipulated that an ER was issued on 6/1/2016; the IEP meeting was conducted on 6/2/2016; the IEP is dated 6/2/2016; and, the NOREP is dated 6/2/2016.[2]

Findings of Fact

1. Student is an elementary-school aged child who lives in the District with the Grandparents who have physical and legal custody. [NT 35-36, 90-91]

2. Student entered kindergarten in the 2014-2015 school year and repeated kindergarten during the 2015-2016 school year. [NT 36-37]

3. Kindergarten in the District is full-day, from 8:05 a.m. until 1:55 p.m., a total of 5 hours and 50 minutes, [NT 37, 171]

4. Prior to entering kindergarten Student attended a full-time preschool program. There were reportedly no behavioral issues in preschool. [NT 37, 80, 91-92; J-26]

5. From the beginning of Student's first kindergarten year Student resisted going into school and the Grandfather had to carry Student, kicking and screaming, into the building. [NT 37-38, 208-213, 242-243, 261; J-6, J-12]

6. Once in the building Student would also refuse to go into the classroom, or would sit on the floor by the classroom door, or try to run out of the classroom. [NT 37, 71, 154-155, 208-213]

7. There were several times when the Grandparents had to take Student home because they were unable to get Student out of the car; on these days, Student's attendance was marked as 'unexcused'. [NT 107-109, 121-122; J-20]

8. The behaviors Student demonstrated are not atypical for a kindergarten student being separated from the family and the home in the first couple months of school, but it is not typical after that period. [NT 267, 270-271]

9. In the classroom, Student [exhibited redacted behaviors], yelled, refused to do tasks or follow directions, slept, made noises, ripped up papers, shut down, and was defiant. At least once Student locked self in the bathroom. A couple times a month the Grandparents

[2] The following was presented in the Grandparents' Closing Statement: "The Parties Stipulate that ESY is currently still an issue, and that if the parties are not able to resolve the issue in the near future, that the Parents can assert a claim regarding ESY in a due process hearing."

were called to pick Student up from school because of "uncontrollable" behaviors. [NT 38, 44, 47, 101, 151-153, 163-165, 184, 219, 253; J-3, J-6, J-12]

10. Student would not come back into school when recess was over to the point where Student's recess was removed. [NT 123]

11. The extreme behaviors seen in the school setting were not being seen at home although the Grandmother reported that Student was starting to act up at home. [NT 40-41, 93-94; J-14]

12. During the 2014-2015 school year, the guidance counselor called the Grandmother at work several times each week to describe and discuss Student's behaviors. [NT 100, 102]

13. The District and one or both Grandparents met at least eight times during the first kindergarten year to discuss Student's behavior. District staff at various meetings included the principal, the teacher, the guidance counselor, the school social worker, the director of special education and the superintendent. A worker from the Children and Youth Agency attended on one occasion. [NT 38-40, 86-87, 92-93, 166]

14. Having been made aware by a community agency that they could request an evaluation, the Grandparents made oral requests for an evaluation during each of their meetings. The District told them that the request had to be in writing but did not facilitate their fulfilling this requirement by having them put the request in writing then and there. [NT 41-43, 82-83, 98-99, 110-112, 167, 199]

15. The principal told the Grandparents that the District does not evaluate kindergarten children. [NT 41-43, 53-54, 82-83, 110-112][3]

16. The Grandparents were never provided with a Permission to Evaluate Form. [NT 44]

17. The Grandparents were called about an incident that occurred on January 20, 2015 when Student [redacted]. [J- 3]

18. In an email alerting key staff including the teacher and the principal, the guidance counselor noted that in her phone call with Grandmother about this incident they discussed beginning the Child Study Team (hereinafter CST) process. The guidance counselor wrote that she would put a CST packet for the teacher in her mailbox, and the guidance counselor testified that she did put the CST packet in the teacher's mailbox. The guidance counselor did not follow up with the teacher when she did not get the completed CST packet back. [NT 237-239, 256; J-3]

19. The teacher did not recall receiving a CST packet, and did not follow up with the guidance counselor to inquire about it. [NT 174, 237-239, 256, 288; J-3]

[3] See the credibility section for a discussion of this finding.

20. The Grandparents were called to pick Student up pursuant to another incident on January 26, 2015. The guidance counselor emailed key staff including the principal and the teacher describing the incident: Student was refusing to go into class, [redacted]. Student had to be restrained. [J-6]

21. The guidance counselor wrote that she and the teacher met with the Grandfather and discussed several options including taking Student to the crisis center for emergency mental health intervention, but the Grandparents did not agree. [NT 47-48, 50; J-6]

22. In her January 26, 2015 email the guidance counselor also wrote that they discussed with Grandfather that "they could also take [Student] out of kindergarten for the year and have [Student] repeat next year. But none of us really liked that idea because [Student] is going to be 7 next month, is already a bigger kid in the class and is low academically". [J-6]

23. In a February 6, 2015 "To Whom It May Concern" letter the guidance counselor stated that Student "has had to be restrained by [herself] or the Disciplinarian on many occasions". [NT 48, 50-51, 246; J-12]

24. The letter described Student's behavior as follows: "Student has had numerous and escalating behaviors over the past few months. For most of the school year [Student] has refused to come into the school building in the morning [redacted] or calling [Student's] grandmother." [J-12]

25. The Grandparents gave a copy of the letter to the Children and Youth agency worker. At a subsequent meeting in which the Children and Youth agency representative was present the principal denied that Student had been restrained and when the letter was referenced the principal responded that she had not written the letter. [NT 53; J-12]

26. The Children and Youth agency asked about an evaluation for Student and the principal reiterated that the District doesn't evaluate kindergartners.[4] [NT 52-54, 74, 112; J-15]

27. The February 6, 2015 letter stated that "[o]ur Behavior Analyst will also be observing [Student]." The behavioral analyst was supposed to develop a behavior plan for Student as the classroom behavior plan was not working for Student. The behavior analyst never observed Student in the 2014-2015 school year. [NT 185-186, 204-205, 227-228, 252; J-12)

28. On March 4, 2015, the teacher wrote an email stating that "[Student] is not academically ready for first grade curriculum." Student had difficulty identifying pictures in a book, could not track print, knew only 4 out of 60 sight words, could not recognize or apply rhyming words, was unable to count syllables, and was unable to blend speech sounds. Math was unable to be assessed due to behaviors. [J-14, J-17, J-18, J-19]

29. On March 9, 2015 the guidance counselor emailed the teacher and the principal among others that the Children and Youth worker was requesting a meeting with the school and the Grandparents. The guidance counselor wrote referencing the Children and Youth

[4] See footnote 3.

worker, "She is also going to discuss evaluating [Student] to see if [Student] qualifies for an IEP even though that situation has been discussed several times already. [J-15]

30. The meeting was held on March 11, 2015[5] and it was at that meeting that shortening Student's day was discussed. Subsequently Student was brought in at 11:00 or 11:30 instead of when the other children started their day. [NT 39]

31. In March or April the Grandparents were told that Student would be retained in kindergarten. Student was the only student in the class who was repeating kindergarten. [NT 104-105, 182]

32. On May 5, 2015 since the shortened days were not effective and they had been informed that Student was going to have to repeat kindergarten in any event, as well as being encouraged to keep Student home for the remainder of the school year, the Grandmother notified the school that they had agreed to remove Student from school for the rest of the school year since Student was continuing to act out and nothing was working. The Grandparents agreed to remove Student if the absence would be marked as excused rather than withdrawn. Although the paperwork stated Student would be marked as excused, Student was dis-enrolled. [NT 49, 55-56, 78-79, 105, 116, 259-260; J-20]

33. During the course of the 2014-2015 school year, the District/principal suggested that the Grandparents obtain outside assistance by taking Student to the crisis center, taking Student to the doctor, obtaining wrap around services for Student, or obtaining outpatient counseling services for Student. The Principal also suggested removing Student from school for the remainder of the year and having Student repeat kindergarten. [NT 49, 78-79, 86-87, 95-98, 109-110, 182-183, 243-244; J-3, J-4, J-6, J-8, J-9, J-10]

34. The kindergarten teacher for the 2014-2015 school year was not familiar with the term "child find," and did not recall any trainings she attended regarding the District's Child Find obligation. She was familiar with the term "red flags," but thought they would be related to academics and not behaviors. She could not recall if she ever referred a child for an evaluation based upon behaviors in her 13 years of teaching. She was unable to describe the District's referral process, except that it started with the Child Study Team, but did state that the CST process did not address behavior. [NT 148-149, 158-161, 225-227, 228-229-229]

35. On July 23, 2015, the Grandparents' advocate from a community agency wrote an email to the then director of special education, requesting that Student be evaluated. There were some communications about the evaluation, but then the communications stopped. [NT 112-114, 122; J-26]

36. Student was retained and re-enrolled for kindergarten for the 2015-2016 school year. [NT 57, 147]

[5] The date was established as the letter was written on March 9th, a Monday, and referenced that the meeting was going to be on Wednesday.

37. Student's second Kindergarten teacher was not provided with any information about Student prior to the start of the 2015-2016 school year, [NT 295]

38. Student displayed the same behaviors – [redacted] – as in the previous year. [NT 57]

39. The second kindergarten teacher kept a journal noting Student's behaviors, which included [redacted]. [NT 57-58, 85, 301-304; J-16]

40. In September 2015 Student's teacher contacted the director of special education seeking strategies to utilize with Student. [NT 298, 300]

41. The Grandparents were told on one occasion that Student could not go on a field trip unless accompanied by a grandparent. [NT 114-115, 123]

42. The behavior analyst observed Student in the classroom in October 2015 and spoke with the teacher at least ten times, but she did not conduct an FBA. [NT 298, 338]

43. On September 30, 2015, the principal emailed the Grandparents and the guidance counselor stating that she would have a Functional Assessment of Behavior (FBA) completed. The second kindergarten teacher testified that she was still waiting for the FBA at the time of her testimony (May 4, 2016) even though she had stressed the need for it at least as early as January 2016. [NT 257-258, 311-314; J-28)

44. During the 2015-2016 school year, the teacher had to call the disciplinarian for assistance with Student several times. She also sent Student to another teacher's room for a break, and if they had an extra 1:1 aide, she would utilize that person for Student. [NT 306-308, 316-317, 328]

45. During the 2015-2016 school year Student had some good days, not that many, but at least more than the previous year. [NT 57]

46. The kindergarten teacher for the 2015-2016 school year was not familiar with the term "child find," but could describe a process of pre-referral intervention strategies that she would use in her classroom. She did not know that a child manifesting solely behavioral issues could be referred for an evaluation for special education. [NT 296-298, 331-333]

47. The guidance counselor for the 2014-2015 and 2015-2016 school years received no training regarding the District's child find obligations, other than through coursework for her degree, which was at least 15 years prior to the hearing. She did not know that a child manifesting solely behavioral issues could be referred for an evaluation for special education. She stated that she did not know why an evaluation was not conducted for [Student], but she thought that there had to be academic impact in order to refer for an evaluation. [NT 231, 233, 245-246, 247-248, 249]

48. The Grandparents obtained an independent educational evaluation for Student; the report is dated January 28, 2016. The evaluator was in contact with the guidance counselor as early as October 15, 2015. [NT 58-59, 279-280; J-21, J-25]

49. In providing information for the IEE the second kindergarten teacher stated that the classroom management system did not work for Student and that she had tried three alternative systems for Student that she devised on her own, without the benefit of an FBA. [NT 304-305; J-25]

50. The IEE reported cognitive ability to be within the Low Average range as assessed on the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V). Student's Full Scale IQ was 87. Index standard scores were: Verbal Comprehension 76, Visual Spatial 97, Fluid Reasoning 94, Working Memory 88, and Processing Speed 100.[6] [J-25]

51. The IEE reported the following achievement standard scores as assessed by the Wechsler Individual Achievement Test – Third Edition (WIAT-III): Listening Comprehension 77, Oral Expression 84, Early Reading Skills 64, Alphabet Writing Fluency 94, Spelling 75, Math Problem Solving 66, and Numerical Operations 61. [J-25]

52. The IEE reported teacher rating scales on the Behavior Assessment Scales for Children - Second Edition (BASC-2) to be within the Clinically Significant range for Hyperactivity, Aggression, Conduct Problems, Anxiety, Depression, Somatization, Atypicality and Withdrawal. Scores were within the At-Risk range for Attention Problems and Learning Problems. [J-25]

53. The IEE reported teacher rating scales on the Conners 3rd Edition to be within the Very Elevated Range for Hyperactivity/Impulsivity, Defiance/Aggression, and Peer Relationships; within the Elevated range for Inattention and Learning Problems; and, in the High Average range for Executive Functioning. [J-25]

54. The IEE reported teacher rating scales on the Behavior Rating in Executive Functioning (BRIEF) to be within the Elevated range on every index and scale. [J-25]

55. The independent educational evaluator concluded that at this time Student met criteria for identification as an IDEA-eligible student pursuant to the disability classification of Other Health Impairment, with consideration over time of the disability classifications of Specific Learning Disability and Emotional Disturbance. [J-25]

56. The parties stipulated at the second hearing session that Student is an eligible student under the IDEA, with the classification of Other Health Impairment. [NT 142; J-25]

57. On February 4, 2016, the Grandparents filed the Due Process Hearing Complaint. [J-1]

58. Following the filing of the Due Process Hearing Complaint, the Grandparents reported they no longer received help getting Student into school, whereas before they used to receive assistance from school staff. [NT 60-61, 66-69, 86, 116-118, 124-126, 131]

[6] Standard Scores are arranged along the bell-shaped curve with 100 at the apex of the curve being exactly average.

59. Following the filing of the Due Process Hearing Complaint, the Grandparents reported that communication from the principal and the guidance counselor stopped. [NT 118, 131]

60. Following the filing of the Due Process Hearing Complaint, the principal called the police when the Grandfather parked in a restricted spot in which he had parked since Student entered school. [NT 61-62]

61. Following the filing of the Due Process Hearing Complaint, the principal yelled out in front of a crowd that the Grandfather tried to run her over. [NT 62]

Legal Basis and Discussion

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Grandparents asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also* generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014).
I found the Grandparents' testimony to be credible and reliable for the most part, although I did not agree with their characterization of District staff's reported behavior as retaliatory. I found the second kindergarten teacher to be honest and straightforward and fully cooperative with the hearing process; I also found her to be genuinely concerned for Student and interested in doing all she could to help Student. In contrast I found that the other District witnesses were cagey in their responses, and that one in particular seemed barely able to rein in her displeasure at having to answer questions from either attorney.

The contested point that required a credibility determination was whether or not the District has an (unwritten) "policy" of not evaluating kindergarten children. The Grandparents testified that the principal repeatedly told them that the District does not evaluate kindergarten children. [NT 41-43, 53-54, 82-83, 110-112] The two kindergarten teachers denied ever saying this themselves

and/or being told that this is a policy, and cited occasion[s] when they did refer a kindergartner for an evaluation because of academic needs. [NT 157, 159, 265] The principal did not testify although there were two hearing sessions and the second was held in her building. On balance I find the Grandparents to be credible on this point. The teachers have no basis of knowledge about what the principal may or may not have said, although both indicated a striking bias toward 'wait and see'. Given Student's behaviors, serious to the point of requiring restraint on "many occasions", and given Student's "low" academic functioning, the only conclusion I can reasonably draw is that the principal, at least, if not the District as a whole, does not believe in evaluating kindergartners.

FAPE: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). "Special education' is defined as specially designed instruction…to meet the unique needs of a child with a disability. 'Specially designed instruction' means adapting, as appropriate to the needs of an eligible child …the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

Question: Did the District violate its child find obligation?

Answer: The District violated its Child Find obligation.

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 US.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The IDEA sets forth the responsibilities (commonly referenced as "child find" responsibilities) borne by school districts for identifying which children residing in their boundaries are in need of special education and related services such that "[all] children with disabilities residing in the State…regardless of the severity of their disabilities…are identified, located and evaluated…" 20 U.S.C. §1412(a)(3).

Child Find is a positive duty requiring a school district to begin the process of determining whether a student is exceptional at the point where learning or behaviors indicate that a child may have a disability. *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999). The possibility that the student's difficulty *could* be attributed to something other than a disability does not excuse the district from its child find obligation. *See Richard V. v. City of Medford,* 924 F.Supp. 320, 322 (D.Mass.1996). 34 C.F.R. §300.101(c)(1) provides: "Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade." School districts' and other LEAs' child find activities must occur within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District,* 696 F.3d 233, 249 (3d Cir. 2012).

In its written closing argument the District cites *Board of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 313 (6th Cir.), *cert. denied*, 552 U.S. 1042 (2007) to support the proposition that identifying a very young student in need of special education is a delicate balance and that it is difficult to discern whether a young child is "either disabled or developmentally delayed". The *Fayette County* case, which considered child find in the context of Kindergarten and 1st Grade, is distinguishable from the present matter in that the court found the school "did not ignore [the student's] early problems. It took appropriate action by implementing specialized reading instruction, Reading Recovery Program participation, and behavior-management strategies." In contrast the record in the instant matter is devoid of any attempt on the District's part to provide systematic positive behavior management strategies during Student's first kindergarten year. This second kindergarten teacher explained that, in her view, it is her job to try every possible strategy before referring a child for special education and that not doing so would be to disserve the Student [NT 332]. While this teacher's testimony was clearly heartfelt, the fact is that although she tried a sticker system, clip-art/feelings communication, and a work/break routine her efforts in the second kindergarten year were largely those of a dedicated teacher, with such guidance as the behavior specialist could offer over ten consultation sessions without having conducted [the promised] FBA, and without the benefit of psychoeducational testing that could have fully informed her teaching strategies.

An evaluation for special education eligibility is not like a risky experimental medical procedure where the cost may be physical pain, suffering and debilitation and the ultimate benefits may be uncertain. An evaluation for special education presents no danger; in the hands of an evaluator who is skilled and experienced in testing young children there is a great likelihood that an accurate assessment will be the outcome. If the child is evaluated and found not eligible then nothing is lost, and some insights into how to help the child in the regular education program may be obtained. Conversely, if a child is found eligible, a formal plan of education can be put into place so that appropriate specialized instruction and services can begin early when a child is most malleable. Unlike conducting an evaluation, retention, the option the District chose to recommend and exercise in lieu of an evaluation, is not necessarily risk-free, particularly in the long-term social/emotional realm.

Aside from whether the District itself has any bias toward not evaluating kindergarten children, the record is clear that the school staff equated the need for special education with the need for specialized academic instruction, ignoring that emotional and behavioral instruction and support is equally valid a reason for special education. See, for example, *Breanne C. v. Southern York County School District*, 2010 WL 3191851 (M.D. Pa. 2010). Notable, was the first kindergarten teacher's answer when asked her response to the Grandparents' requests for an evaluation: "I personally didn't -- as my professional opinion I didn't think [Student] needed to be evaluated." [Q Why] "Because nothing stood out academically to me that [Student] needed to be evaluated for." Asked how about behaviorally, she replied, "Not necessarily." When asked by the hearing officer what she meant by 'not necessarily' the teacher replied, "Nothing was a huge concern that I thought [Student] needed to be evaluated for [Student's] behaviors. [NT 167-168] It was clear from her spontaneous first response that, to this teacher, special education equaled elevated academic needs, not behavioral needs. I found her answer "not necessarily" to be disingenuous. Even the least experienced teacher would have to recognize that if behaviors such as [redacted] and being defiant persisted for over two months into the school year something was likely to be wrong. In fact, the District's responses indicated that staff definitely saw that something was

wrong with Student: they contacted the Grandmother at work on numerous occasions, they suspected that there was a problem at home to cause the behaviors, they recommended crisis psychiatric treatment and outpatient counseling, and they recommended wrap-around services. They recommended a shortened school day for Student and well before the end of the school year they recommended retention. The District definitely saw that something was wrong, but did not seem to see that it had any responsibility to do anything about it, other than opting for retention.

Question: As the District did violate its child find obligation, what form and amount of compensatory education is owed to Student?

Answer: Student is entitled to an award of compensatory education equal to the hours of deprivation of FAPE.

Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood.* Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method ("hour for hour"), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional.* An alternate, more recent method ("same position"), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel.Reid v. District of Columbia,* 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014);.*Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA."). In *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) the court also endorsed this position although it also cited to *M.C.*

The "same position" method, while essentially ideal, has significant practical problems in that unless the parents produce a credible expert to testify about what is needed to being the child up to the same position he or she would occupy but for the denial of FAPE the hearing officer is left with having to craft a remedy based on educated estimation. Although on several occasions this hearing officer has been able to do so with relative confidence, the instant matter does not present such an opportunity. Therefore the default "hour for hour" approach will be used.

Student had severe school refusal behaviors from the start of the first kindergarten year, and in a letter dated February 6, 2015 the guidance counselor noted that Student had to be restrained "on many occasions". In fact, in an earlier email dated January 20, 2015 to key staff the guidance counselor noted that in a phone call with Grandmother they discussed beginning the Child Study Team process and that she would put a CST packet for the teacher in the teacher's mailbox. No

CST packet arrived in the teacher's mailbox to the teacher's recollection, the teacher did not follow up with the guidance counselor, and the guidance counselor did not follow up with the teacher.

Anyone who has worked in schools or preschools knows that it is not unusual for young children[7] to resist staying in the building in the first few days or weeks of school, preferring to stay at home. In some cases this resistance can last a month or more. However, in Student's case the resistance lasted all year, accompanied by severe acting out behaviors and the need for restraint on "many occasions". Given the severity, the frequency, and the duration of the child's behaviors, I find that at the very latest the evaluation process should have started by the beginning of November 2014, which I will specify as Tuesday November 3, 2014 with a Permission to Evaluate being issued and no doubt being signed by the Grandparents immediately. Considering the 60-calendar-day time period for completing an evaluation, the evaluation report should have been issued on or before Friday January 2, 2015. Allowing ample time for the multidisciplinary team to meet, and for the next step, an IEP team meeting, to take place, Student should have had an IEP in place at the very latest by Monday, January 26, 2015.

Accordingly, taking into account the timeline put forth above, entitlement to compensatory education began to accrue on January 26, 2015 and continued to the last day of school in June 2015. Compensatory education again began to accrue on the first day of school in the 2015-2016 school year, and continued through June 2, 2016, the day the IEP was completed. Because Student's unaddressed behavioral problems rendered Student largely unavailable to the instruction offered, I will award whole days of compensatory education, calculated at 5.0 hours per day (disallowing 55 minutes from the 5 hour, 55 minute day for transitions) for every day the District was in session during the two regular academic school years in that period. Given that Student could be expected to have attended school once a special education program was in place, there will be no deduction for the days Student was in partial attendance or absent from school, nor for the period in May and June 2015 when Student was withdrawn from kindergarten. However, even though the new IEP provides that Student is eligible for Extended School Year (ESY) I will not award hours for ESY for summer 2015 because by the end of February 2015 the District would not have had robust data to determine whether or not Student needed ESY.

The compensatory education hours are to be used exclusively for educational, developmental and therapeutic services, products or devices that further the Student's IEP goals. The value of these hours shall be based upon the usual and customary rate charged by the providers of educational, developmental and therapeutic services in the county where the District is located and geographically adjacent Pennsylvania counties.[8] The compensatory services may be used after school, on weekends and in the summers until Student's 21st birthday. The services are meant to supplement, and not be used in place of, services that are in Student's IEPs.

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[7] Although, Student was on the older end of the age range for kindergarten.

[8] Although in the past I have limited the monetary value of compensatory education to the total cost to a District for salaries and benefits that would have been paid to the staff providing the denied services, a November 2015 decision by the Eastern District, *Sch. Dist. of Phila. v. Williams, 2015 U.S. Dist. LEXIS 157493,* reversed such a restriction noting that "Third Circuit precedent requires that it [compensatory education] be calculated based on the educational time deprived rather than the cost savings reaped by the School District. *See M.C.,81 F.3d at 397*."

Question: Did the District discriminate against Student?

Answer: The District discriminated against student.

In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to FAPE. The drafters of Section 504 were not only concerned with [a student] receiving a FAPE [as is the case with the IDEA] but also that a federally funded program does not treat a student differently because he or she is disabled. *Chavez v. Tularosa Municipal Schools*, 2008 WL 4816992 at *14 (D.N.M. 2008), quoting *Ellenberg v. N.M. Military Inst.,* 478 F.3d 1262, 1281-82 n. 22 (10th Cir.2007)(quoting C. Walker, Note, Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School, 58 Stan. L.Rev. 1563, 1589 (2006).

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). Since the January 2009 effective date of the ADA Amendments Act of 2008, which expanded the definitions of both "substantial impairment" and "major life activity" under §504 as well as the ADA, both reading and learning are explicitly included in the definition of major life activity. See 34 C.F.R. §104.3j(2)(i), (ii).

The Commonwealth of Pennsylvania protects a student's right to be free from discrimination on the basis of handicap or disability, through Chapter 15 of the Pennsylvania Code, part of the regulations implementing the educational statutes of the Commonwealth. 22 Pa. Code Chapter 15. Similar to Section 504, Pennsylvania's Chapter 15 regulations require a substantial limitation with respect to education, defining a "protected handicapped student" as "A student who meets the following conditions: Is of an age at which public education is offered in that school district; has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; is not eligible as defined by Chapter 14 [relating to special education services and programs]; or who is eligible but is raising a claim of discrimination under §15.10 [relating to discrimination claims]." 22 Pa. Code §15.2.

Chapter 15 by its terms is intended to implement students' rights under section 504, and it does not expand or limit those rights. 22 Pa. Code §15.11(c). During school years 2014-2015 and 2015-2016 eligibility under Chapter 14 was not established, and Student did not have a Section 504 Service Plan. Relevant to this matter, the obligation to provide FAPE to a child with a disability is substantively the same under Section 504 and under the IDEA. *Ridgewood*, *supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Here, the conclusions above that the District denied the student a FAPE under the terms of IDEIA/Chapter 14 are adopted in finding that the student was analogously denied a FAPE under the terms of Section 504/Chapter 15.

In addition to denying Student FAPE under Section 504/Chapter 15 the District discriminated against Student. A student with a disability who is otherwise qualified to participate in a school

program, and was denied the benefits of the program has been discriminated against in violation of Section 504. *S.H. v. Lower Merion School Dist*., 729 F.3d 248 (3d Cir. 2013). A student who claims discrimination in violation of the obligations of Section 504 must show *deliberate indifference* on the part of the District. *Id.* I do find deliberate indifference in the following ways:

Refusal to Evaluate: The District refused to evaluate Student upon the Grandparents' oral or the advocate's written requests because Student was a kindergarten Student. I have found credible the Grandparents' testimony that the principal stated that the District does not evaluate kindergartners. The District could have produced the principal to refute this point, but did not.

Expecting the Family to Seek Services Outside School: Although the District's recommendation that the Grandparents procure mental/behavioral health services outside school was entirely appropriate were it coupled with the evaluation process, the District chose not to take the steps the law provides to assess children's academic, behavioral, social and emotional needs in school formally and fully, and to address those needs through an integrated education plan.

Restraining Student on "Many Occasions": During the 2014-2015 and the 2015-2016 school years Student should, at the very least, have been considered a "Thought to Be Eligible" child. The school staff used restraints on multiple occasions, and did not conduct an FBA. For lack of an appropriate educational plan in place (an IEP with a Positive Behavior Support Plan informed by a Functional Behavioral Assessment) this child not only endured restraining physical contact but likely also was subjected to the critical scrutiny of peers.

Removing Recess: The District removed recess from this child, thus depriving Student of socialization with peers. Given Student's reluctance to come into school in the morning, it is predictable that coming into the building after recess was a problem. The record is devoid of any behavior modification measures the school staff could have tried to address this problem, such as an enticing reward in the classroom after recess, a one-to-one aide joining Student toward the end of the recess period, and/or even making leaving the yard and going into school a fun and interesting class activity such as pretending to be a marching band [or forming a conga line].

Excluding Student from School for Part of the Day: Although the Grandparents were in agreement, the District's recommendation late in the 2014-2015 school year to keep Student home for the first several hours of the school day was discriminatory as it deprived Student of access to whatever meager benefit Student could have obtained given the absence of special education services.

Suggesting that Student Be Kept Home toward the End of the School Year: There are extreme circumstances when an eligible child requires a period of instruction in the home rather than attending school in a school building. In those cases the District sends teachers into the child's home to provide appropriate instruction. In the instant matter,

Student was not eligible because Student had not been evaluated, and Student therefore did not receive the benefits of instruction in the home, but rather was permitted to avoid school entirely. It is difficult to think of a more satisfactory arrangement from this child's limited and immature point of view than to get to stay at home all day.

Failure to Involve a Behavior Analyst in a Timely Manner/Conduct an FBA: In her February 6, 2015 letter the guidance counselor stated that the behavior analyst would be observing Student. The behavior analyst never observed Student in the 2014-2015 school year. When the behavior analyst did observe Student in October of the second kindergarten year, she did not conduct an FBA. On September 30, 2015, the principal had emailed the Grandparents and the guidance counselor stating that she would have a Functional Assessment of Behavior (FBA) completed. As of May 4, 2016 the second kindergarten teacher was "still waiting" for the FBA even though she had stressed the need for it at least as early as January 2016.

Failure to Follow-Through on the Process of CST Referral: Although the record is not definitive about whether the counselor did or did not place the CST referral packet in the teacher's mailbox what is certain, by the guidance counselor's own admission, is that she did not follow-up with the teacher to be sure that the CST packet was completed and the CST process started. This failure, in a record of multiple failures, was the most blatant, but by far not the only, demonstration of deliberate indifference.

Question: Did the District retaliate against the Grandparents for filing the due process hearing complaint?

The District did not retaliate against the Grandparents for filing the due process complaint.

The 3rd Circuit recently joined the 1st and 11th U.S. Circuit Courts of Appeal in holding that parents must exhaust their administrative remedies before bringing retaliation claims that relate to the enforcement of IDEA rights. *Batchelor ex rel. R.B. v. Rose Tree Media Sch. Dist.*, 63 IDELR 212 (3d Cir. 2014)*;* See also *Rose v. Yeaw*, 32 IDELR 199 (1st Cir. 2000); *M.T.V. v. DeKalb County Sch. Dist.*, 45 IDELR 177 (11th Cir. 2006). The United States Supreme Court is going to consider a special education case concerning exhaustion in its next term.

Filing a Due Process complaint under §504 or the IDEA is "protected activity" for purposes of a §504 retaliation claim. *See* 34 C.F.R. 104.61 [incorporating the anti-retaliation regulation of Title VI of the Civil Rights Act of 1964, 34 C.F.R. §100.7(e), providing, in pertinent part: "No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part."]. When parents engage in the process of seeking educational services for students with disabilities, including utilizing litigation if necessary, they should do so secure in the knowledge that engaging in those processes will not be held against them by the school district and that they will not be penalized for engaging in those processes.

To establish whether a school district has retaliated against a Parent for engaging in the processes under IDEA/Section 504, a three-part test has been elucidated, namely: (1) Did the parents engage in protected activities, (2) Was the school district's retaliatory action sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) Was there a causal connection between the protected activity and the retaliation. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3d Cir. 2007). To prove a "causal connection" in a retaliation case a plaintiff may prove "either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link." *Burger v. Sec'y of Revenue*, 575 Fed. App'x 65, 68 (3d Cir. 2014) (citing *Lauren W.*, 480 F.3d at 267). See also *T.F. ex. rel. D.F. v. Fox Chapel Area Sch. Dist*., Civ. A. 12-1666, 2013 WL 5936411, *15 (W.D. Pa. Nov. 5, 2013), *aff'd*, 589 Fed. Appx. 594 (3rd Cir. 2014). The District may defeat the claim of retaliation by showing that it would have taken the same action even if Parent had not engaged in the protected activity.

Did the Grandparents engage in a protected activity? Here, the protected activity is the Grandparents' advocacy for Student's rights under the IDEA, their retaining an attorney and filing a due process complaint against the District on February 4, 2016.

Did the District engage in retaliatory action[s] sufficient to deter a person of ordinary firmness from exercising his or her rights? The alleged retaliatory behavior is that school staff no longer helped the Grandparents get Student into school; that there was not much social contact with staff such as saying "good morning"; that communication from the principal and the guidance counselor stopped; that the principal called the police when the Grandfather parked in a restricted spot in which he had parked since Student started at the school; and that the principal yelled out in front of a crowd that the Grandfather tried to run her over.

Providing physical assistance to the Grandparents to get Student into school was a favor, not an obligation; assisting parents to get a child into a school building is not a duty on any school employee's job description. Although pleasant and sociable office staff create a nice atmosphere in a school building, and marked unpleasantness would not be tolerated, graciousness is appreciated but optional. The teacher who had Student for the second round of kindergarten did not involve the guidance counselor for help with Student but instead looked for help from the director of special education and the behavior analyst, so there may not have been a need for the counselor to communicate directly with the family. A busy principal clearly has the option of having communication with families go through a teacher or other staff person. Although the Grandparents perceived that their relationship with some school staff changed after they filed for due process, the staff did not halt any activity that they were obligated to perform for Student.

The Grandfather habitually parked in a restricted area, and at some point after the hearing request was filed the principal called the police. Here Grandfather reasons that the principal was wrong for ceasing to tolerate his 'illegal' parking, implying that since the principal had previously ignored his transgression he should have been allowed to continue to park 'illegally'. Additionally the Grandfather complained that the principal called him out publicly, accusing him of trying to run her over. The record is not clear whether or not Grandfather was driving in such a way as to make the principal feel threatened, or if the principal perceived threat when none

existed. In either case 'yelling' was not an inappropriate response in the moment, and asking to speak with Grandfather in private was not a viable option.

Overall I find that the alleged behaviors and incidents the Grandparents put forth to support their retaliation claims are insubstantial and certainly would not be sufficient to deter a person of ordinary firmness from exercising his or her rights.

Was there a causal connection between the Grandparents' engaging in a protected activity and the alleged actions of the District? The issue of causation is usually the most difficult element to prove in a retaliation claim. There is no dispute that the Grandparents engaged in a protected activity, and the District may even have engaged in the conduct that the Grandparents ascribe to it. However, given that I find that these alleged District actions were not sufficient to deter a person of ordinary firmness from exercising his or her rights, I decline to address the element of causality as the Grandparents have failed on the second necessary element to succeed in their retaliation claim.

Conclusion

Based upon a preponderance of the evidence I find that the District violated its Child Find obligation to Student and that Student therefore is entitled to compensatory education. I make a separate finding that the District discriminated against Student. I do not find that the District engaged in retaliatory behavior toward the Grandparents.

Order

It is hereby ordered that:

The District violated its child find obligation toward Student.

As the District violated its child find obligation during a portion of the 2014-2015 school year and the entire 2015-2016 school year, Student is entitled to compensatory education in the form of five (5.0) hours for every day the District was in the regular school year session from January 26, 2015 through June 2, 2016. The compensatory education is subject to the conditions set forth in the discussion above.

The District did discriminate against Student.

The District did not retaliate against the Grandparents for filing the due process hearing complaint.

Any claims not specifically addressed by this decision and order are denied and dismissed.

June 28, 2016
Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official