***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: V.W.

Date of Birth: [redacted]

ODR No. 17572-15-16-KE

CLOSED HEARING

| Parties to the Hearing: | Representative: |
|---|---|
| Parent[s] | Daniel M. Fennick, Esquire<br>Anderson, Converse & Fennick<br>1423 East Market Street<br>York, PA 17403 |
| West York Area School District<br>2605 West Market Street<br>York, PA 17404-5529 | Sharon W. Montanye, Esquire<br>Sweet, Stevens, Katz, Williams, LLP<br>331 East Butler Avenue<br>New Britain, PA 18901 |
| Date of Hearing: | June 7, 2016 |
| Record Closed: | June 27, 2016 |
| Date of Decision: | July 25, 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 school district named in this matter (District), during the Student's ninth grade year (2013-2014 school year). Student is not identified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with a disability, nor has Student been provided with accommodations for a disability pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504).

Student's mother (Parent) filed this due process request, asserting that the School failed to meet its "child find" obligations under the IDEA and section 504 to identify and evaluate Student, after Student exhibited symptoms of an emotional disturbance. Parent asserts that, because the District failed to comply with its "child find" obligations, Parent was forced to enroll Student in another public school district, and to pay a non-resident fee for that district's services. Parent seeks only reimbursement of the non-resident fee that Parent paid for Student's tenth grade year (2014-2015 school year).

The District denies the alleged procedural violation. It asserts that it was under no obligation to evaluate Student under either law because, based upon what it knew at the time, Student's emotional disturbance was temporary and had no impact upon Student's academic achievement.

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 to comply with its child find obligations and I order it to reimburse Parent for the non-resident fee that Parent paid.

[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.

## ISSUES

1. Did the District fail to perform its "child find" obligations under the IDEA and section 504 during Student's ninth grade year?

2. If so, should the hearing officer order the District to reimburse Parent for a non-resident fee or tuition that Parent paid to another public school district in order to enroll Student in that district for Student's tenth grade year?

## FINDINGS OF FACT

1. Student was successful and motivated in school prior to April 2014. Student was a high achiever academically and a successful athlete on one of the school's high-level athletic teams. (NT 88, 188, 218-219, 255-256; S 2.)

2. While in ninth grade, Student and a classmate became involved in what they both considered to be a boyfriend/girlfriend relationship; these children terminated that relationship in February 2014. (NT 89-91, 184-187; P 17 p. 1.)

3. On or about April 1, 2014, Student became aware that the same classmate had posted extremely personal and derogatory comments about Student on social media, comments that were false and that aimed at harming Student's reputation regarding social relationships. (NT 89-91, 145, 184-187.)

4. As a result of the social media postings, and while attending school, Student experienced derision and damage to interpersonal relationships with various peers. (NT 91-93, 186-188, 244.)

5. At Parent's urging, prior to April 8, 2014, Student notified the vice-principal of Student's school and Student's counselor about the social media postings and harassment in school. (NT 95, 99, 230.)

6. On April 8, 2014, Student met with a therapist pursuant to Parent's referral, and on the next day, Parent and Student met with Student's primary care physician, who prescribed medication for Student's anxiety. (NT 95-96; P 2.)

7. On April 10, 2014, Parent notified school personnel that Student needed to be excused from school due to an appointment for counseling. (NT 96-97; P 2 p. 4.)

8. On April 10, 2014, Student's private counselor notified Student's school counselor that Student was experiencing feelings of being victimized at school and that the private counselor was concerned for Student's emotional safety. Student's school counselor believed at that time that Student thought that many peers were staring at and talking about Student. (NT 43-44, 242-244; P 17 p. 1.)

9. In April 2014, Student was allowed to leave the classroom where the former boyfriend/girlfriend was present and complete work in the school counselor's office on

several occasions, because Student was unable to work in the presence of the former boyfriend/girlfriend and other class members. (NT 233-234.)

10. On April 21, 2014, Parent met with school officials and discussed the Student's allegations of harassment during school hours. At this point, Student was experiencing signs of depression and anxiety, with sleep disturbance, loss of motivation for school responsibilities and withdrawal from normal activities. (NT 48-49, 100-103; P 17.)

11. Student began exhibiting dangerous behavior, including wandering away from home and lying down in the street in front of oncoming traffic. (NT 104, 152; P 17 p. 2.)

12. On April 29, 2014, Student's school counselor called Parent in the morning and asked Parent to take Student to a crisis center because Student was talking about hurting self and expressing suicidal ideation. Later, Parent provided a note from the crisis unit showing that Student had been seen. (NT 97, 105-106, 230, 244-245; P 2, 3, 17.)

13. On April 30, 2014, Parent provided an attendance excuse form to District personnel citing "emotional concerns". (NT 97; P 2 p. 5.)

14. In April and May 2014, Student's emotional disturbance and the medications prescribed for Student seriously affected Student's concentration and mental stamina in the face of frustration when learning. (NT 99-104, 109-111, 126-128, 190; P 5 p. 7, P 17.)

15. From April 1, 2014 to May 20, 2014, Student's demeanor, behaviors and personal care habits deteriorated visibly. (NT 107-113; P 6.)

16. In May 2014, Student displayed the following symptoms visibly: depressed mood, insomnia, psychomotor retardation, decreased concentration and suicidal ideation. These symptoms caused marked impairment in Student's ability to function. (NT 107-111; P 6 pp. 2, 5, P 8.)

17. On May 5, 2014, Student's private counselor signed an excuse form for an appointment with the private counselor. (NT 98, 142-143; P 2 p. 6.)

18. On May 12, 2014 Parent took Student to crisis again, and the crisis unit recommended inpatient admission, but Student refused, stating that Student wanted to take a benchmark test at school in the next few days. (NT 106-108; P 17.)

19. Student took the benchmark test and scored "advanced". (S 5.)

20. On May 18, 2014 Student was admitted to inpatient treatment voluntarily for about four days due to depression and statements indicating a plan for self-harm. Parent notified the school of Student's admission. (NT 107-109, 113, 174-175, 245-246; P 6 pp. 2, 5, 9, P 9 p. 6, P 17.)

21. Parent notified Student's school counselor that Student had been admitted for inpatient treatment for emotional difficulties. (NT 113-114; P 5, 7.)

22. On May 21, 2014, while Student was in the hospital, both of Student's Parents met with school officials, including Student's counselor. Student's Father travelled from another

state at some distance. During the meeting, both Parents informed school personnel that Student was depressed and anxious. Parents informed the school personnel that they desired Student's reintegration back to the District's school placement, and that Student needed special arrangements in order to make such re-integration possible. Parents indicated that they were considering transferring Student to another school or district if the District could not offer a plan to support Student's reintegration into the District school in the following school year. (NT 118-120, 149-150, 165-166, 273-274, 283; P 4.)

23. Student was discharged with a diagnosis of Major Depressive Disorder, Recurrent. Diagnosis called for "Rule Out" of Post Traumatic Stress Disorder. The inpatient psychiatrist prescribed anti-depression and anti-anxiety medications. (NT 114-115; P 8.)

24. After the admission, the inpatient unit sent a note to the Student's school officials requesting schooling at home for Student for the balance of the school year. The note indicated that this recommendation was due to Student's anxiety and concerns related to the current school placement. (P 7.)

25. The District provided what was called "homebound" instruction for Student, pursuant to the recommendation of the inpatient hospital and Parents' request. The instruction was located at the Student's school, and provided in the afternoon, in classrooms without any other students, and continued until late in the day, when students were expected to have left for the day. Parents and Student preferred this arrangement. Student received approximately five hours per week of individual instruction; most sessions lasted one to one and one-half hours total for a given day. (NT 123-125, 188-189, 223, 293-296; P 5, P 9 p. 3, P 11, P12.)

26. District teachers accommodated Student's assessments to reduce stress and support Student in passing Student's courses. (NT 125-126; P 5 pp. 5, 7, 9.)

27. The District counselor offered to adjust Student's schedule in the fall of tenth grade, to enable Student to avoid classes with individuals who might make Student uncomfortable. (NT 227-229, 246-248; P 5 p. 11.)

28. The District did not seek permission to evaluate Student for either IDEA eligibility or section 504 accommodations. It did not offer to provide supports or accommodations to Student if needed to permit re-integration to a District school in tenth grade, other than advance review of schedule to avoid peers who might make Student uncomfortable. Additional supports and accommodations could have been offered, but District personnel saw no reason to offer them at the time. (NT 139, 246-248, 283-285.)

29. At no time did any District official inform Parents that an evaluation under section 504 or the IDEA was possible, and no District official or employee recommended such an evaluation. (NT 120-123.)

30. The District's counselor and principal did not recommend an evaluation under either the IDEA or section 504 because it was their judgment that Student's disability was situational and therefore temporary. In addition, it was their judgment that Student's disability was not significantly impairing Student's learning or education. In addition, District officials did not believe that Student would have fit into an emotional support classroom due to

Student's high academic achievement. Therefore, a judgment was made to wait and see what the effect of therapy would be during the summer and then re-assess the need for either additional accommodations or an evaluation in the fall. (NT 254-259, 275-282, 289-297.)

31. On or before June 2, 2014, Student answered in writing a series of questions assessing biology vocabulary. The answers indicated that Student felt as if not alive and that life was bad; that Student needed to adapt to a "hateful" world full of "mean" people; and that Student desired to watch "something get killed". Student's counselor sent this to Parent with advice to show it to Student's counselor. (NT 127; P 5 p. 14.)

32. In athletics, Student attended some but not all practices during the summer, and did not exhibit the same level of motivation that Student had exhibited prior to April 1. (NT 130-131, 192-193.)

33. In August 2014, a neighboring public school district accepted Student's enrollment. Parents enrolled Student in the neighboring district because the District had not proposed any accommodations to support Student's re-entry into the neighborhood District high school for tenth grade. (NT 133-135; P 14.)

34. Parents paid $10,200.00 to the neighboring school district for providing educational services to Student. (NT 137-138; P 16.)

35. By receiving instruction outside of the regular classroom, and for the most part outside of the regular school day, Student was deprived of the educational benefits of social relationships and the opportunity to learn and practice the social skills needed to collaborate and discuss the academics being taught in the regular class setting. (NT 235.)

36. From April 1 through May 17, Student was absent from school for 11 school days. (S 4.)

37. Student was absent 5 school days in connection with being hospitalized. (S 4.)

38. Student was on "homebound" instruction for 12 school days. (S 4.)

39. Student's social relationships and social life were disturbed due in part to the harassment and due in part to the Student's depression. (NT 198-202; P 17 p. 2.)

40. In May, June and July, Student experienced emotional pain that was triggered by the experience and memory of being in school with peers. This caused Student to be unable to attend regular school hours and classes in the circumstances at that time. (NT 54-67, 81; P 17.)

## 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.[2] In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[3] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent's claim, or if the evidence is in "equipoise", the Parent cannot prevail under the IDEA.

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[2] 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).

[3] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this matter, I have weighed the evidence with attention to this duty.

I find that Parent's testimony was credible and reliable. Parent's manner of answering questions and demeanor during questioning by both parties' attorneys disclosed no effort to dissemble or embellish. Parent's testimony is corroborated in almost all respects by the exhibits. I could find no material contradictions among the witnesses that would affect my impression of Parent's veracity or accuracy.

Similarly, I find that Student's testimony was sincere, credible and reliable. Student's demeanor was open and truthful. Student did not contradict other witnesses or the documentary record in any substantial way so as to reduce the weight that I accorded to Student's testimony.

The District leaned heavily upon the indisputable fact that, despite Student's emotional deterioration during the period between April 1 and the end of school in June, Student managed to finish the year with very high grades. The District suggests that this in itself contradicts Parent's depiction of a child unable to concentrate and unable to complete assignments. I conclude that Student's high achievement does not contradict Parent's assertions that Student's academic functioning was impaired in ninth grade. Given Student's high level of achievement and academic skill prior to April 1, 2014, it is entirely plausible that Student could overcome the effects of Student's emotional deterioration sufficiently to maintain high grades – especially in view of the fact that grades are a function of both performance and subjective teacher judgment, and the evidence that Student's teachers, out of their great compassion, modified their normal

expectations, especially during the "homebound" instruction period, whose stated purpose was to assure that Student would pass Student's courses and graduate to tenth grade. In sum, I do not accord less weight to Parent's assertions as to Student's impaired academic functioning in April, May and June, based upon Student's high grades for the second half of the year.

I accorded full weight to the testimony of Student's private counselor, as to the witness' observations and clinical conclusions based upon Student's presentation in the clinical setting. I accorded little weight to the witness' conclusions about Student's circumstances and functioning in school, because this was based entirely upon hearsay, and the witness, being only a treating professional, had no occasion to seek corroboration of Student's beliefs as to circumstances at school.

I found the District's witnesses – the Student's counselor and principal - to be credible. I accorded little weight to the testimony of the school psychologist, who listened to testimony and provided opinions based upon hypotheticals. I found that the hypotheticals by their very nature could not convey the full circumstances in which the District educators made the judgments about whether or not to evaluate Student or to offer additional supports to Student.

CHILD FIND UNDER THE IDEA AND SECTION 504

Under the IDEA "child find" requirement, 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a), (c), a local education agency has a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability." 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)); Perrin v. Warrior Run Sch. Dist., 2015 U.S. Dist. LEXIS 149623 (M.D. Pa. 2015). Section

504 imposes a similar obligation.[4] See P.P. v. West Chester Area School District, 585 F.3d above at 738.[5]

Local educational agencies are required to fulfill their child find obligation within a reasonable time after notice of behavior that is likely to indicate a disability. Ridley Sch. Dist. v. M.R., 680 F.3d above at 271-272. The courts will assess the reasonableness of an agency's response to such information on a case-by-case basis, in light of the information and resources possessed by the agency at a given point of time. Ibid. Even if parents do not cooperate fully with agency efforts to identify a student, it is still the responsibility of the agency to identify those children who are in need of the IDEA's protections. Taylor v. Altoona Area Sch. Dist., 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010). A Parent's omission to request an evaluation does not absolve the agency of its "child find" duties under both statutes. M.C. v. Central Reg. Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996)(child's right to FAPE not dependent upon vigilance of parents).

THE DISTRICT'S DECISION NOT TO EVALUATE

I conclude that the District in this matter was obligated to evaluate Student under both the IDEA and section 504. The evidence shows preponderantly that the District was aware of Student's depression in school, beginning in April 2014. It was aware in April that Student was experiencing thoughts and fears that were significantly unusual for this Student, and that Student's social relationships were deteriorating. It was aware that Student's emotional wellbeing had deteriorated to the point of psychiatric hospitalization. I conclude that this information objectively suffices to

[4] Pennsylvania regulations further define students protected under section 504 as "protected handicapped student[s]". Arguably broader than section 504 itself, the Pennsylvania regulation requires accommodation of any otherwise qualified student whose mental disability "substantially limits or prohibits participation in … an aspect of the student's school program." 22 Pa. Code 15.2.

[5] It is undisputed that Student is "otherwise qualified" within the meaning of section 504, and that the District is a recipient of federal funds. (NT 22-23.)

charge the District with "reasonable" suspicion that Student was experiencing a disability, and that, at least upon notice of psychiatric hospitalization, the District was obligated to evaluate Student.

The record is preponderant that District educators were aware that Student was experiencing depression as early as April 2014. By April 10, the District's counselor knew that Student had been out of school to see a private counselor, and that Student reported to the private counselor an excessive concern that many classmates were looking at and judging Student. Moreover, the private counselor called the school counselor to convey her impressions of Student's feelings of victimization due to alleged bullying, and the private counselor pointedly stated that she was concerned about Student's emotional wellbeing. On April 29, 2014, Student expressed a desire not to live and thoughts of self-harm to the school counselor, who immediately contacted Parent to take Student to a crisis center. Student missed the next day of school, and the school counselor knew that this was due to "emotional concerns." Thus, the school counselor knew, or at least "reasonably suspected" that Student was experiencing a "[a] general pervasive mood of unhappiness or depression", 34 C.F.R. §300.8(c)(4)(i)(D).

By May 18, the school counselor was aware that the Student's known symptoms of depression had deteriorated further, necessitating inpatient psychiatric hospitalization. Parent notified District personnel of this, and made it clear that Student's mood was generally and pervasively depressed. On May 21, 2014, while Student was in the hospital, both Parents met with the principal and counselor and informed them that Student was depressed and anxious. They indicated that Student would not be able to attend regular classes for the remainder of the school year, and this was corroborated shortly thereafter with a note from the inpatient unit. Parents also indicated that Student would not be able to return to school for tenth grade without substantial

supports in the next school year. This information was confirmed adequately by subsequent communication from the inpatient unit.

In addition to reasonable notice of a general and pervasive mood of depression, both at school and at home, the evidence is preponderant that the District's educators were also aware that depression and anxiety were disrupting Student's participation in the regular classroom and damaging Student's social relationships during this period. Student, with permission, left class several times to study in the school counselor's office, because Student could not concentrate on classes when the former boyfriend/girlfriend was there. Student was missing more time for private counseling and repeated trips to the crisis unit. Student reported being harassed by peers in the hallway. Although there is no evidence that grades were adversely affected, Student's normal participation in general education was disrupted, affecting both academic participation and social growth. At least by the time of Student's hospitalization, the District was reasonably on notice that Student was experiencing an inability to maintain satisfactory interpersonal relationships", 34 C.F.R. §300.8(c)(4)(i)(B), both for purposes of social growth and for purposes of collaborative learning.

It is well accepted that education in Pennsylvania must address basic developmental needs in the emotional, behavioral and social domains. The regulations promulgated by the Pennsylvania Department of Education for public education require local education agencies to "prepar[e] students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens." 22 Pa. Code § 4.11(b). Thus, public education in Pennsylvania is intended to provide opportunities for students to: (1) Acquire knowledge and skills. (2) Develop

integrity. (3) Process information. (4) Think critically. (5) Work independently. (6) Collaborate with others. [and] (7) Adapt to change. 22 Pa. Code § 4.11(c). See generally, M.C. v. Central Regional Sch. Dist., 81 F.3d 389 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996)(education includes progress in emotional and social domains); Breanne C. v. Southern York County School District, 2010 WL 3191851 (M.D. Pa. 2010)(education includes progress in all relevant domains under the IDEA, including behavioral, social and emotional.)

Therefore, I conclude that, at least as of Student's hospitalization on or about May 18, 2014, and the meeting with Parents on May 21, 2014, the District was aware of sufficient facts that it should have "reasonably suspected" that Student was a child with a disability defined under the IDEA and section 504. Ridley Sch. Dist. v. M.R., 680 F.3d above at 271; Perrin v. Warrior Run Sch. Dist., 2015 U.S. Dist. LEXIS 149623 (M.D. Pa. 2015); P.P. v. West Chester Area School District, 585 F.3d above at 738. The District was aware of symptoms that should have created a reasonable suspicion of a pervasive mood of unhappiness, which negatively and substantially impacted Student's education and "participation in … the [Student's] school program." 22 Pa. Code 15.2.

The District's notice of facts constituting reasonable suspicion increased in June. Student was unable, due to Student's disabled condition, to return to regular classes at all. Doctors requested home-based instruction, and the parties came to an accommodation in which Student would receive about five hours of individual instruction per week, in the afternoon, alone in classrooms, so that Student could avoid meeting any peers at all. This arrangement lasted until the end of the school year. Thus, Student, due to emotional disturbance, was not able to participate in the regular education school program at all during this time. This was not a typical education, and it showed how Student's disabling emotional condition was depriving Student of the opportunity

to participate in the school program in which Student had been so successful in the past. That Student managed to get good grades under these circumstances is a testament to Student's intelligence, strength of character and diligence.

Student's good grades in "homebound" instruction do not prove that Student did not need specially designed instruction, 34 C.F.R. §300.8(a)(defining "child with a disability" as a two-pronged test, the second of which is that the child, by reason of disability, "needs special education and related services.") On the contrary, the "homebound" instruction itself was a major modification of the amount and delivery of instruction, which would fit the definition of "special education". 34 C.F.R. §300.39(a)(defining "special education" as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including … [i]nstruction conducted … in other settings … ."); 34 C.F.R. §300.39(b)(3)(defining "specially designed instruction as "adapting … the content, methodology or delivery of instruction … .") The teachers' additional modification of course requirements also constituted specially designed instruction under the above definition set forth in the IDEA. Similarly, the "homebound" services would constitute "accommodations" as defined in Chapter 15. 22 Pa. Code §15.3 ("needed to afford the student equal opportunity to participate in … the school program … to the maximum extent appropriate to the student's abilities.")

In short, both the information available to the District and the District's provision of "homebound" services to Student demonstrated at the time that Student should be "reasonably suspected" of being a child with a disability or qualified handicapped child. Therefore, the District was obligated under the "child find" provisions of both the IDEA and section 504 to evaluate Student. Its failure to do so was a procedural violation. See D.K. v. Abington Sch. Dist., 696 F.3d above at 249-250.

I find the District's rationales for not evaluating to be contrary to the IDEA and section 504. Essentially, District officials rendered an a priori evaluation that Student was not eligible, without first convening a multi-disciplinary team, including Parents, as required by the IDEA. 34 C.F.R. § 300.306(a)(1). School witnesses testified to three such rationales: that the Student's emotional disturbance had not affected Student's grades; that Student was too high-functioning to fit into an emotional support class; and that Student's emotional disturbance would not last for a "long period of time" as required under the IDEA definition of Emotional Disturbance, 34 C.F.R. §300.8(c)(4)(i). I find none of these rationales to be reasonable on this record.

As discussed above, there was ample evidence that Student's disability interfered with Student's ability to participate in the general education curriculum. A child's advancement from grade to grade does not absolve an agency of its child find obligation. D.K. v. Abington Sch. Dist., 696 F.3d above at 249.

Student's "fit" within the District's existing emotional support classroom is irrelevant to whether or not Student needed additional supports and accommodations in order to safely transition from staying home at the end of ninth grade to full participation at the beginning of tenth. It is fundamental that services are to be designed to fit the child, not the other way around. 34 C.F.R. §300.39(a)(defining special education as services "designed to meet the unique needs" of the child).

School officials determined that Student's emotional disturbance did not last "for a long period of time", even though Student had exhibited symptoms that interfered with participation in class in April, and continued to exhibit depressive thoughts in June, a span of about two months. Even as late as August, the evidence shows that Student was unable to return to a District school due to fear and anxiety that Student would be hurt again upon return. I conclude that it was not

reasonable to rely upon a determination that the disturbance was temporary in order to decide not to evaluate the validity of such a view.

DENIAL OF A FAPE AND REMEDIATION

Here, Parent argues that, due to the District's failure to evaluate Student for special education, and due to its failure to respond to Parents' request for a plan to support Student in returning to school, they were forced to make a decision to withdraw Student from the District and place Student unilaterally in a neighboring school district. The record is preponderant that the District was reasonably on notice that Student might be a child with a disability needing substantial supports so that Student could attempt safely to return to school – any such attempt would require Student to overcome the effects of Student's disability and fears of further emotional damage and pain. Although Parents had requested some kind of plan – including an option of District placement in a neighboring public school district – the District only offered to schedule Student's classes so as to avoid peers that might upset Student.

In view of the District's failure to evaluate Student, I conclude that this offer was not sufficient to assure Parents that their child would be safe if Student attempted to return to the District. Without any reassurance, then, the family went from May 21, 2014 to August 2014 without any reason to believe that an attempt at re-integration into the District would be emotionally safe for Student.[6]

[6] A local educational agency is to be given a reasonable amount of time to respond to facts that reasonably place it on notice of an obligation to evaluate. D.K. v. Abington Sch. Dist., 696 F.3d 233, 250 (3d Cir. 2009) (citing W.B. v. Matula, 67 F.3d 584, 501 (3d Cir. 1995)). I conclude that the District was reasonably on notice of the obligation to evaluate by May 21, 2014. Yet it failed to request permission to evaluate, and by August 2014, Parents were forced to make a decision on placement. I conclude that the District was given a reasonable time to decide to evaluate on this record.

I conclude that Parents' decision to place Student unilaterally in a neighboring public school district was appropriate[7] in light of the reasonably anticipated danger to Student and the District's inaction even after it was asked to do more. In placing Student in the neighboring school district, Parent incurred a non-resident fee for one year. After that year, Parent moved into the neighboring district; thus, Parent seeks reimbursement of the one year non-resident fee in this matter.

A hearing officer can remediate an agency's child find violation. D.K. v. Abington Sch. Dist., 696 F.3d above at 249. For example, if a district should have known of an educational deficiency through compliance with its statutory duties, the student may be entitled to compensatory education. Ibid.

Under the IDEA, I am authorized to remediate a procedural child find violation only if it has substantive results that deny a FAPE. I may find a denial of a FAPE only if the procedural violation: 1) impeded the child's right to a FAPE; 2) significantly impeded the parent's right to participate in the decision-making process; or 3) caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2). There is no preponderant evidence that the failure to evaluate impeded a right to a FAPE, because there was no evaluation; thus, I cannot speculate on whether or not Student would have been found eligible for special education – and thus have a right to FAPE. There is ample evidence, however, that the District's decision significantly impeded the Parent's opportunity to participate in the decision-making process regarding whether or not to provide

[7] I do not apply the standard "Burlington-Carter" analysis here. This is required only where the unilateral placement is to a private school, where the IDEA does not apply to the parental placement, and tuition reimbursement would allocate public budgetary resources to a private entity. Here, Parents chose a public school district, which does not implicate these considerations. See, e.g., T.L. v. Lower Merion Sch. Dist., 2016 U.S. Dist. LEXIS 80315 (E.D. Pa. June 20, 2016). See also, 34 C.F.R. §300.148(equitable rules for unilateral private placement). Nevertheless, my findings and conclusions analogously address all three steps of that analysis.

Student with a FAPE. Thus, I conclude that I am authorized to find and remedy a denial of a FAPE, as defined in 34 C.F.R. §300.513(a)(2).

As there is no finding of a denial of a FAPE, I cannot order compensatory education. Nevertheless, Student's tenth grade year was not "free" to Parent, even though she sought a "public" education for Student. It cost Parent something to keep her child safe from additional trauma and the risk of another descent into suicidal depression. I conclude further that this cost was directly the result of the District's procedural failure to comply with its "child find" obligations. Therefore, exercising my equitable authority as a hearing officer for special education, I conclude that it is appropriate to order the District to reimburse Parent for the amount of the non-resident fee that Parent paid to the neighboring school district, in order to remedy its procedural violation that impeded Parent's opportunity to participate in the decision as to whether or not Student was eligible for special education.

I also conclude that such an order is appropriate under section 504. By refusing to evaluate Student for special education accommodations under section 504, the District effectively excluded Student from its services and forced Parent to pay for public school services elsewhere. I conclude that it thus violated section 504 substantively and that reimbursement is the appropriate remedy by analogy to tuition reimbursement for unilateral private placement.

## CONCLUSION

In sum, I find that the District violated its Child Find obligations under both the IDEA and section 504 by failing to evaluate Student for special education when it was reasonably on notice that Student might be a child with a disability with rights under both statutes. In consequence, the District impeded Parent's right to participate in the eligibility decision. In equity, I conclude that

it is appropriate to order the District to remediate this violation by reimbursing Parent for the cost of the unilateral placement in a neighboring school district.

## ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the District shall reimburse the Parent forthwith in the amount of $10, 200.00 for the full cost of the non-resident fee or tuition that Parent paid for the privilege of enrolling Student in the neighboring school district.

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

*William F. Culleton, Jr. Esq.*

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

July 25, 2016