

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 Due Process Hearing Officer

Final Decision and Order

Open Hearing

ODR File Number

23619-1920AS

Child's Name

Z.W.

Date of Birth

[redacted]

Parent(s)/Guardian(s)

[redacted]

Pro Se

Local Educational Agency

Southern Tioga School District

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Hearing Officer

Brian Jason Ford, JD, CHO

Date of Decision

09/04/2020

Introduction

This special education due process hearing concerns the educational rights of a child (the Student). The Student's parent (the Parent) requested this hearing and alleges that the Student's former school district (the District) violated the Student's rights.¹ As explained below, I find in favor of the District.

The Parent is not represented by an attorney. I will avoid legal jargon to the extent possible and explain what jargon cannot be avoided and has not been explained in prior orders.

The federal special education law is called the Individuals with Disabilities Education Act (IDEA).² The IDEA requires the District to identify and evaluate all children who are suspected of having any of the disabilities recognized by the IDEA. This requirement is called Child Find. The Parent claims that the District should have identified the Student and proposed an evaluation, and that the District's failure to do so is a Child Find violation. The Parent further claims that the Child Find violation resulted in substantive harm to the Student, and that an award of compensatory education is required to remediate that harm.

The Parent's Child Find claim is different from most Child Find claims. In most Child Find cases, parents allege that a child's poor academic performance, social/behavioral issues, or both were the "red flags" that should have prompted an evaluation. In this case, those typical red flags are

¹ The Parent requested an open hearing. However, to protect the Student's privacy, identifying information is omitted to the greatest extent possible – except for the cover page of this Decision and Order.

² 20 U.S.C. § 1400 *et seq.*

not alleged. The Parent's complaint includes no mention whatsoever of the Student's academic performance, and the Student did not have behavioral problems in school. Rather, the Parent alleges that the Student had difficulty attending school because of Lyme disease, and the attendance difficulties negatively impacted upon the Student's education.

The Parent alleges that the District knew that the Student had Lyme disease and knew (or should have known) that the attendance issues were both the result of Lyme disease and were educationally harming the Student. The Parent alleges that this knowledge should have prompted the District to evaluate the Student for special education eligibility. The District did not propose an evaluation, did not evaluate the Student, and did not offer special education at any time before the Student left the District.

The particular Child Find claim described above is the only substantive claim that is raised in the complaint for which the Parent demands relief.

Throughout these proceedings, I have explained both my understanding of the only claim raised in the Parent's complaint and that I can only address that that claim. As explained below, that claim is not supported by the record of this due process hearing.

Procedural History

The procedural history of this matter is outlined in two pre-hearing orders. I provide the following for background and context.

On April 13, 2020, the Parent requested this due process hearing by filing a complaint.

On April 20, 2020, the District filed a sufficiency challenge. The District argued that the Parent's complaint did not satisfy IDEA pleading requirements because the Parent alleged no facts.

The same day, I granted the District's sufficiency challenge. I found that the Parent's complaint alleged a Child Find violation but included no facts. I did not dismiss the Parent's complaint. Instead, I permitted the Parent to amend the complaint to allege facts.

On May 9, 2020, the Parent filed an amendment. The amendment supplemented the original complaint without replacing it. Through the amendment, the Parent alleged that the Student has Lyme disease, that the Student missed school for several reasons including Lyme disease, and that the Parent communicated with the District about the Student's Lyme disease.³ The complaint, as amended, includes no allegations concerning the Student's academic performance or behavioral conduct.

On May 12, 2020, the District filed a motion to dismiss, raising the IDEA's statute of limitations. After email correspondence with the parties, I granted the Parent's request to address the District's motion through a hearing (as opposed to briefs).

On June 26, 2020, this hearing convened via video conference for the limited purpose of taking evidence relevant to the District's motion to dismiss. Shortly before the hearing convened, the parties filed joint stipulations. The

³ The amendment also includes facts about the Parent's effort to obtain records from the District. As noted in the pre-hearing orders, the Parent has a well-established right to access the Student's educational records both under FERPA and the IDEA, and the District's response to the Parent's effort is surprising in its placement of form over function. Regardless, the amended complaint does not raise an independent claim concerning the Parent's right to the Student's educational records because the Parent demands no relief for an IDEA records access violation. The only issue before me is the alleged Child Find violation, and the only facts alleged in relation to the Child Find violation are the Student's medical condition, the Student's absences, and the District's knowledge of both.

parties stipulated that the Parent withdrew the Student from the District on August 22, 2018 and has never re-enrolled the Student in the District.

On July 6, 2020, I granted the District's motion in part and denied it in part. While the motion speaks for itself, I held that the portion of the alleged Child Find violation that occurred from April 13, 2018 through August 22, 2018 was timely. I dismissed the remainder of the Parent's complaint.

On August 19, 2020, this hearing reconvened via video conference for the purpose of taking evidence relevant to the alleged Child Find claim. At the conclusion of that hearing, I granted the Parent's request to take written closing statements in lieu of oral closing statements. I received the parties' closings on August 28, 2020.

Issues

Only one, narrow issue is presented in this case: Did the District violate the Student's rights by committing a Child Find violation when it failed to take action in response to its knowledge of the Student's absenteeism caused by Lyme disease.

Compensatory education, described below, is the only remedy that the Parent demands.

Findings of Fact

I have reviewed the record of this matter in its entirety. I make findings of fact only as necessary to resolve the issue before me. I find as follows:

1. The 36 findings in the pre-hearing order resolving the District's motion to dismiss this matter are incorporated as if set forth herein.
2. For context, I note that the Parent withdrew the Student from the District on December 7, 2017 and re-enrolled the Student in the District on February 12, 2018.
3. The Student's 2016-17 attendance report was entered into evidence at S-2. The 2016-17 attendance report was not contested, and so I accept it as an accurate account of when the Student was and was not in school. I discuss the Student's attendance during the 2016-17 school year below.
4. The Student's 2017-18 attendance report was entered into evidence at S-6. The 2017-18 attendance report was not contested, and so – except as noted – I accept it as an accurate account of when the Student was and was not in school.
5. There is an error on the 2017-18 attendance report. the Student is reported as missing 10.5 days of the 2017-18 school year. The correct number is 8.5.⁴ The Student is marked as absent on December 8, 2017, which is the day after the Student withdrew from the District. Excluding December 8, 2017, the Student was marked as absent on nine other days including the last day of school. The last day of school was a half day, and so the correct number is 8.5.⁵ Beyond this error, I accept the report at S-6. I discuss Student's attendance during the 2017-18 school year below.

⁴ My pre-hearing order regarding the District's motion to dismiss also incorrectly reports a total of 10.5 absences.

⁵ The District also marked the Student as "Half Day AM" on a day when the Student arrived at 11:25 after an eye doctor's appointment. If this counts as a .5 absence, the correct number is 9, not 8.5. The distinction makes no difference to the outcome of this case.

6. Documents similar to the 2016-17 and 2017-18 attendance reports were introduced. The primary difference between those documents and the documents cited above is the District's determination as to whether absences were excused or unexcused. Otherwise, the documents are substantively the same. For example, compare S-6 and 2-23.
7. The Parent completed a Student Health Update form at the start of the 2017-18 school year. The Parent reported that the Student had Lyme disease, the Student's legs hurt, the Student had joint pain, and the Student had headaches. P-40.
8. A school nurse record dated September 26, 2017, mostly repeats the Parent's statement on the Student Health Update form. P-23. This record is a note in the Student's nursing file, as opposed to a log of a visit to the nurse and does not indicate that the Student experienced the indicated symptoms on that particular day.
9. The District's 2017-18 calendar was entered into evidence at S-5. The accuracy of that calendar was not contested, and so I find it is an accurate depiction of when school was and was not in session during the time in question. According to that calendar, there was no school on May 7 and 28, 2018. May 31, 2018, the last day of school, was an early dismissal day.
10. Evidence concerning the Student's academic progress was entered into evidence at P-8, P-10, P-11, P-12, P-13, P-15, P-41, P-42.⁶ As noted above, there is no claim in this case that the Student's

⁶ Evidence concerning the Student's academic progress after the Student left the District in the 2018-19 and 2019-20 school year was also introduced at P-44 and P-46.

academic progress should have triggered a special education evaluation in accordance with the IDEA's Child Find obligation.

11. Exhibit P-43 is a doctor's note from April 28, 2020, stating that the Student has Lyme disease.

Discussion

The Burden of Proof

The Parent requested this hearing and demands relief. The Parent, therefore, must carry the burden of proving the claim raised in the amended complaint.⁷ The Parent must prove the claim by preponderant evidence and cannot prevail if the evidence rests in equipoise.⁸

This means (in generalities and lay terms) that the Parent's evidence that the Student is entitled to compensatory education must be more credible and convincing than the District's evidence to the contrary, and that the Parent has not met that burden if the evidence is equal on both sides.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and

⁷ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

⁸ See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

persuasiveness of the witnesses.”⁹ This means that I must make witness credibility determinations in all cases, whether or not the witness credibility is a deciding factor in the case.

I find no issue with any witnesses’ credibility as all witnesses testified honestly and to the best of his or her ability. To the extent any witnesses’ testimony conflicts with another’s, those witness either recall events differently or have different opinions. Some of those differing points of view are described below. None of my findings above are contingent in any way on a witness credibility determination. Similarly, the ultimate resolution of this matter does not hinge on witness credibility.

The Child Find Obligation

The IDEA's Child Find provision requires states to ensure that “all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated.”¹⁰

Courts have described the Child Find provision as a “continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability” as defined by the IDEA.¹¹ The evaluation of children who are suspected of having a disability must take place within a reasonable period of time after the school is on notice of that the child is likely to have a disability.¹²

⁹ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). See also *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014)

¹⁰ 20 U.S.C. 1412(a)(3).

¹¹ *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009); see also 20 U.S.C. § 1412(a)(3).

¹² *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). While the court in *Ridgewood* referenced behavior, the same is true of a child’s academic presentation.

Child Find is a procedural obligation, and so a Child Find violation is a procedural violation. However, a Child Find violation is the type of procedural violation that may result in substantive educational harm. A school district's failure to timely evaluate a child who it should reasonably suspect of having a disability may, and often does, harm the child. The difference between procedural and substantive violations, and why that difference is important in this case, is discussed below.

The Child Find violation alleged in this case is specific and atypical. The Parent alleges that the District knew that the Student had Lyme disease and that the Student was missing school as a result of the Lyme disease.¹³ The Parent argues that this knowledge should have signaled to the District that a special education evaluation was necessary.¹⁴

There is preponderant evidence that the District regarded the Student as having Lyme disease during the 2017-18 school year. The Parent-completed health form and the District's nurse records from the start of the 2017-18 school year say that the Student had Lyme disease and joint pain as a result. The Parent also told the District that the Student had Lyme disease during the 2017-18 school year, and there is no evidence that the District questioned or disputed that information at the time. *NT passim*.

I find that the Parent has proven that the District understood that the Student had Lyme disease during the period of time in question. As discussed below, that knowledge alone was not a Child Find trigger.¹⁵

¹³ The Parent also alleges in the amended complaint that the Student missed school for other reasons during periods of time that I excluded when I partly granted the District's statute of limitations motion.

¹⁴ In the Parent's closing brief, the Parent also argues that the Student's academic progress should have also been a signal to the District. Again, as noted in the pre-hearing order concerning the District's motion to dismiss and during the evidentiary hearing, that claim is not before me. I cannot address issues that were not pleaded.

¹⁵ This statement is not categorical. I make no finding about whether knowledge of Lyme disease may be a Child Find red flag in and of itself under different facts and circumstances.

Lyme Disease May Be a Qualifying Disability

Having established that the District understood that the Student had Lyme disease, the next step is to determine whether Lyme disease may be a qualifying disability under the IDEA.

The IDEA recognizes 13 disabilities, some of which are better described as categories of disabilities.¹⁶ Other Health Impairment is one of the 13 disabilities. As defined by IDEA regulations:¹⁷

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that –

- i. Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- ii. Adversely affects a child's educational performance.

¹⁶ See 34 C.F.R. § 300.8(c).

¹⁷ 34 C.F.R. § 300.8(c)(9)

The Parent argues that Lyme disease matches the definition of Other Health Impairment (OHI).

Neither party introduced evidence about what Lyme disease is or its typical presentation. The Parent's testimony, taken as a whole, was that the Student was frequently fatigued and in physical pain as a result of Lyme disease to the point where the Parent would carry the Student through school. That testimony is disputed but, to decide whether Lyme disease could be a qualifying disability, I will assume that the Parent's testimony is true. With that assumption in place, Lyme disease may result in limited strength or vitality.¹⁸ I find, therefore, that Lyme disease may be a qualifying disability under the IDEA's OHI disability category depending on its actual, student-specific presentation.

Free Appropriate Public Education and Compensatory Education

Above, I describe what the Child Find obligation is and find that Lyme disease may be recognized by the IDEA as a form of OHI depending on its student-specific presentation. Analysis in this case is also informed by the Parent's demand for compensatory education. Understanding what compensatory education is and how that demand impacts upon the analysis in this case requires some understanding of IDEA's most fundamental guarantee: a free appropriate public education (FAPE).

Under the IDEA, children with qualifying disabilities who require special education are entitled to a FAPE. Schools provide a FAPE by offering an "educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹⁹ The IDEA

¹⁸ Pain is not explicitly mentioned in the definition of OHI. Taken as a whole, and despite the lack of explicit evidence, the Parent's testimony indicates that Lyme disease is painful and exhausting in a way that is consistent with the definition of OHI.

¹⁹ *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017).

includes procedures for evaluating children and then creating Individualized Educational Programs (IEPs), which function as blueprints for each qualifying child's special education.²⁰

Unfortunately, there are many ways that the process envisioned in the IDEA can break down. In some instances, the issue is substantive (i.e. an IEP was not reasonably calculated to provide a FAPE). In other instances, the issue is procedural (i.e. a school took too much time to complete an evaluation). Sometimes, procedural issues can result in substantive harm (i.e. a student did not receive special education because a school took too much time to complete an evaluation).

Compensatory education is an appropriate remedy when a school violates a child's right to a FAPE.²¹ If an IDEA violation results in substantive educational harm, the hearing officer may find that a denial of FAPE occurred. In contrast, if an IDEA violation is procedural and does not result in substantive educational harm, the hearing officer cannot find that a denial of FAPE occurred.²² Without proof of substantive harm, hearing officers cannot find a FAPE violation and without a FAPE violation, hearing officers cannot award compensatory education.

As applied in this case, to obtain compensatory education, the Parent must prove both that the alleged Child Find violation occurred, and that the Child Find violation resulted in substantive educational harm. Without proof of substantive educational harm, the Student is not entitled to compensatory education even if the Parent proves that the District violated its Child Find obligation.

²⁰ See, e.g. 20 U.S.C. § 1414.

²¹ See *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

²² 20 U.S.C. § 1415(f)(3)(E)(ii); *id.*

Lack of Evidence of Child Find Triggers and of Substantive Educational Harm

The Parent's burden to prove substantive harm is brought into focus by starting with an assumption that the District violated its Child Find obligation. Assuming that the alleged Child Find violation occurred, the Parent did not present preponderant evidence of educational harm to the Student, and so I must deny the Parent's claim.

The Parent argues that the Student's Lyme disease caused the Student to miss school and suffer from pain and fatigue in school as well. The Parent argues that these factors – reduced strength or vitality in school and absences – had an adverse effect on the Student's educational performance. The Parent presented the Student's grades and test scores as evidence of that adverse effect.²³ The Parent's evidence, however, does not link the Student's attendance to the Student's Lyme disease. Similarly, the Parent's evidence does not link the Student's academic performance to the Student's attendance. Given the narrow issue before me, I cannot find a denial of FAPE without those connections.

The period of time in question runs from April 13 through August 22, 2018. However, it is overly myopic to ignore the context of the Student's attendance history. During the 2016-17 school year, the Student missed 23 full days of school. The Student missed full school days throughout the school year, starting in September. The District wrote "illness" as the reason that the Student was out of school for the majority of those days.

²³ There is brief mention in the Parent's testimony that Lyme disease also had or has a negative effect on the Student's cognitive abilities. See *also*, P-43. The Parent did not raise that issue in the amended complaint and, were it before me, the Parent's brief comment and a doctor's note written years after the Student left the District would not constitute preponderant evidence.

Additionally, the Student was taken out of school early or came to school late on 60 other days throughout the 2016-17 school year.

In contrast, the Student missed no days of school from the start of the 2017-18 school year through the Student's withdraw from the District on December 7, 2017. This represents a remarkable improvement over the prior school year for the same period of time. The rate of early outs during the same period of time remained consistent between the 2016-17 and 2017-18 school year but, as detailed below, the Student's overall pattern of attendance was moving in the right direction.

The Student started missing full days of school again after re-enrolling on February 12, 2018. The rate of the Student's absences after re-enrollment dropped in comparison to the prior school year, and the reason for the absences also changed. Between February 12 and April 12, 2018, the Student missed two days of school: one day for a dentist appointment, and one day out sick. From April 13, 2018 through the end of the 2017-18 school year (the period of time in question), the Student was absent for 6.5 days of school. Of those, the Student's only unexcused absence occurred on May 31, when the Student missed the final half-day of school. Of the six remaining full-day absences, all of which were excused, one day was for a wedding fitting, one day was for a post-Filed Day sunburn, and four were marked by the District as "sick."

For the entire 2017-18 school year, the Student missed five days of school due to illness. Four of those days occurred during the period of time in question. There is no preponderant evidence in the record linking those absences to the Student's Lyme disease. No doctors' notes, medical records, or contemporaneous correspondence from the Parent establishing that any of the absences during the 2017-18 school year were the result of Lyme disease. I find, therefore, that the Parent has not proven that the Student's

small number of full-day absences during the period of time in question are attributable to Lyme disease.

In addition to the full day absences, the Student left school early on seven days and came to school late once between April 13 and the end of the 2017-18 school year. One of those early outs was for an appointment. For the others, the District marked the Student as sick, or made no notation other than the time that the Student left school. During the same period of time in the prior school year, the Student left school early 12 times and came to school late twice. Year to year, for the period of time in question, the Student early outs and late arrivals were cut nearly in half.

The year-to-year change represents a significant decrease in the rate of the Student's early outs. As noted above, the Student started the 2017-18 school on pace to accrue the same number of early outs as in the 2016-17 school year. That rate sharply decreased after the Student's re-enrollment, yielding a significantly smaller total number. Seen from the other angle, this change evidences a laudable increase in the Student's ability to remain in school for a full day. Any meaningful year-to-year comparison between the 2016-17 and 2017-18 school years shows that the Student was able to come to school more frequently and stay in school more often during the 2017-18 school year. This is particularly evident during the period of time in question.

These factors are the opposite of a Child Find trigger. Assuming that all of the Student's unspecified early outs and early outs for illness were attributable to the Student's Lyme disease (a fact that the District contests²⁴), this evidence shows that the Student's ability to remain in school was meaningfully improving without special education interventions. The Parent has proven that the District regarded the Student as having

²⁴ See, e.g. S-24.

Lyme disease and that Lyme disease may fit the definition of OHI. The Parent has not proven that the Student's attendance should have triggered Child Find, prompting the District to evaluate.

I also find that Parent did not prove that the Student's academic performance was the result of the absences and early outs. Given the narrow, specific issue presented in the Parent's complaint, the lack of evidence on this point is striking. As I have noted throughout this hearing (and throughout this decision), I can only address the issues that are before me. The Parent's complaint includes no claim that the Student's academic performance evidenced a disability or should have triggered Child Find. Rather, the Parent's complaint puts forth a disability-related attendance issue. I noted in the pre-hearing order resolving the District's motion to dismiss that in "many cases, poor academic performance is the natural consequence of high absenteeism." I cannot carry that assumption into the final resolution of this case, and the Student's actual absenteeism is discussed above.²⁵ The Parent did not link the Student's academic performance to the Student's absenteeism. Even if the Parent had proven a Child Find violation, the Parent did not prove substantive harm.

Summary and Conclusions

The Parent alleges an unusual and specific form of a Child Find violation. The Parent alleges that the Student's Lyme disease caused pain and fatigue, resulting in the Student missing school and going home early. The Parent alleges that the Student's absences and early outs were educationally harmful, and that harm is seen in the Student's grades and test scores.

²⁵ I make no finding concerning the appropriateness of the Student's academic performance.

I agree with the Parent that Lyme disease can be a qualifying disability if it satisfies the IDEA's definition of OHI. Whether Lyme disease constitutes OHI requires a case-by-case fact-specific inquiry. In this case, the Parent did not present preponderant evidence that the Student's absences and early outs were attributable to Lyme disease. Moreover, assuming that the absences and early outs were attributable to Lyme disease, the Student's attendance did not trigger Child Find. The record shows that the Student's absences and early outs were significantly improving without special education interventions during the time in question.

Additionally, there is no preponderant evidence in the record that the absences and early outs resulted in educational harm to the Student. Without such proof, I cannot award compensatory education even if I were to assume that the District committed a Child Find violation.

For all of these reasons, I find in favor of the District.

ORDER

Now, September 4, 2020, it is hereby **ORDERED** that the Parent's claims are **DENIED** and **DISMISSED**.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford

HEARING OFFICER