

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
Final Decision and Order

CLOSED HEARING
ODR File Number: 19549 17 18

Child's Name: T.L. **Date of Birth:** [redacted]

Date(s) of Hearing:
9/19/17, 10/12/17, 11/8/17

Parent:
Parent(s)

Counsel for Parent
Michael Basch, Esquire
Fine, Kaplan & Black
One South Broad Street Floor 23
Philadelphia, PA 19107

Local Education Agency:
Sankofa Freedom Academy Charter School
2501 Kensington Avenue
Philadelphia, PA 19124

Counsel for the LEA
Anne Hendricks, Esquire
Levin Legal Group
1301 Mason Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

Hearing Officer: Linda M. Valentini, Psy.D., Certified Hearing Official

Date of Decision: 12/21/17

Background

Student¹ is a mid-teen aged student formerly enrolled at the Charter School (School) who was found eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) under the classification of specific learning disability.²

The Parent requested this hearing asserting that the School denied Student a free appropriate public education (FAPE) because it failed to identify Student as eligible for special education in a timely manner, eventually conducted an evaluation that was inappropriate, and then initially offered an inappropriate Individualized Education Program (IEP). The Parent further contends that although the final IEP provided for Extended School Year (ESY) programming, the School failed to offer Student these services in summer 2017 following 8th grade. The Parent seeks the remedies of compensatory education for two academic years and two summers and reimbursement for an Independent Educational Evaluation (IEE) conducted in August 2017 and issued on September 11, 2017³. The School maintains that its programming for Student has been appropriate at all times, that Student was not denied FAPE, and that no remedy is due.

Based upon the preponderance of the evidence before me I find in favor of the Parent on some, but not all, her claims.

Issues

1. Did the School fail in its Child Find duty to timely evaluate and identify Student?
2. Was the evaluation that the School performed in March 2017 appropriate?
3. Was the IEP offered in April 2017 appropriate?
4. Did the School violate Student's entitlement to FAPE by not conducting a Functional Behavior Assessment (FBA) and creating a Positive Behavior Support Plan (PBSP)?
5. If the answer to any of the above questions is yes, what relief is warranted, in what amount, and for what time period?

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300.818.

³ Upon motion of the School I excluded Parent's document P-36 (the IEE report) from the record. At the next hearing session the Parent made a formal motion for reconsideration; I agreed to take the motion under advisement. Having thoroughly reviewed the entire record I have concluded that my initial ruling to exclude P-36 should stand. As is the required practice, a copy of this exhibit will be sent to ODR under separate cover should my decision be appealed and a reviewing court wish to examine the excluded document. [NT 522]

6. Is the School required to reimburse the Parent for the IEE conducted on August 24, 2017 and issued on September 11, 2017?

Findings of Fact⁴

Background 5th Grade⁵

1. Student enrolled in the School during the 5th grade, in November 2013. [NT 934]
2. During the 5th grade year Student evidenced difficulties in the areas of reading and math through various normed probes including the Study Island Diagnostic Test, the 4 Sight test and the PSSA⁶. [P-2, P-43, P-44, P-49]
3. Student was not referred for Response To Intervention (RTI) for reading or math at any time during 5th grade. [NT 50, 175-176, 192-194, 317; 378-379]
4. The objective of RTI is to provide structured intervention/instruction in a different manner than the child was previously receiving in order to promote achievement in a given skill domain. Data is collected on an ongoing basis through multiple assessments, preferably weekly, followed up by data analysis, preferably monthly, in order to adjust the instruction a student receives, and to determine whether or not the intervention is having a positive effect on achievement. If it is not, intervention is changed so as to provide a different type of instruction or intervention. If there is progress and growth then this path is continued to ensure that the student can achieve at a level in the skill area that allows the student to make gains. [NT 526-527]
5. When a student is doing poorly across all subject areas, and multiple assessments indicate below age and grade level performance, there is reason to evaluate the child to see if the child should be identified as a child with a disability. [NT 529, 535]

⁴ The relevant period for potential recovery in this matter is August 9, 2015 through August 9, 2017 (Grades 7 and 8). Findings of Fact prior to that period are given to establish context.

⁵ Throughout the record there are some exhibits that were duplicates, i.e. the same document offered by both parties marked as S-# or P-#. In this decision I may reference one or the other, but not both.

⁶ Particular caution should be observed when looking at group-administered standardized tests such as the PSSA. The PSSA helps Pennsylvania meet federal and state requirements, as well as providing educators, stakeholders, and policymakers with important information about the Commonwealth's students. The intended uses of the PSSA are to: 1. Provide information for use in school and district accountability systems; 2. Improve curricular and instructional practices in order to help students reach proficiency in the Pennsylvania Core Standards (ELA and Mathematics) or the Pennsylvania Academic Standards (Science). As such, although schools and parents often cite to PSSA scores to highlight progress or lack of progress, the instrument is not primarily intended to represent an individual student's level of achievement. As such, although I took notice of Student's PSSA scores, except for mention in this Finding of Fact I do not cite them or rely upon them to gauge Student's progress or lack thereof. See information at the following: <http://www.education.pa.gov/pages/pssa-information.aspx#tab-1>.

Background 6th Grade

6. During the 6th grade year Student continued to evidence well below age and grade level skills in reading. The September 2014 STAR assessment found that both Student's reading grade equivalent score and Instructional Reading Level were 3.4. Student's Reading Age (8.11) was more than 3 years below Student's chronological age. [P-6, P-48]
7. On the November 2014 STAR reading assessment, Student's reading grade equivalent score was 4.0 and the Instructional Reading Level was 3.7. Student's Reading Age (9.04) was considerably below Student's chronological age. [P-6; P-48]
8. On the February 2015 STAR reading assessment, Student's reading grade equivalent score was 5.0⁷ and the Instructional Reading Level was 4.5. Student's Reading Age (10.03) was considerably below Student's chronological age. [P-6]
9. In June 2015, Student's STAR scores had all declined from the February 2015 scores. Student's reading grade equivalent dropped to 4.5, Student's Instructional Reading Level dropped to 4.1. Student's Reading Age dropped to 9.09, and was considerably below Student's chronological age. [P-6, P-48]
10. In December 2014, Student scored Below Basic on the first reported School Weekly Assessment in reading. In language arts, Student scored Below Basic on the final three School Weekly Assessments, two in January and one in February. [P-8]
11. At the School, quizzes generally are teacher-made and tests come from Study Island. In September Student failed the first Study Island tests in language arts class. Student received a D on language arts tests in October and November, failed language arts tests in November and December, failed two subsequent language arts tests in January, and received a D on a language arts test in April and another D in May. Student received a D in language arts on the 4th quarter report card. [NT 488; P-1, P-5]
12. Student failed two out of three writing tests during the 2014-2015 school year. [P-5]
13. The language arts teacher wrote that the Student "continues to struggle with using context clues to determine the meanings of words and summarizing what [Student] has read." [P-5]
14. The language arts teacher did not utilize standardized tests to assess progress. Instead, she believes that as students read out loud to her, she can "hear whether they're reading fluently or not", and "can tell whether they're making progress". [NT 632-633]

⁷ As pointed out in the Parent's written Closing Argument, after February 2015 Student never again achieved a STAR reading score as high as 5.0. Nearly two years later, in January 2017, Student's last reported STAR score was 4.4, more than 4 years below grade level. The March 2017 ER found that Student's reading skills were below 5th grade level. I conclude that either the February 2015 STAR reading score as reported was inaccurate, or that Student experienced significant regression immediately after this time. [P-6, P-28]

15. Student was not referred for RTI for reading in 6th grade. The language arts teacher testified that even if students are two years below grade level in reading and perform Below Basic on standardized tests, she would not refer them for RTI because based on the overall student population's test performance the School "would just be RTI-ing everybody." [NT 50, 175-176, 192-194, 378-379, 633-636]
16. Similar to Student's reading struggles, during the 6th grade year Student continued to evidence difficulty in math on standardized as well as teacher-made assessments. [NT 342-343]
17. In October 2014, Student scored Below Basic on 4 of the 5 subtests of the 4 Sight math test. In November 2014, Student's overall performance on the 4 Sight math test dropped to Below Basic. Over the year 4 Sight math subtest scores declined from the initial baseline from September 2014 in three areas. [P-44]
18. Student scored Below Basic on the first reported School Weekly Assessment in math in February 2015 [P-9]
19. In September 2014 Student failed the first math test and math quiz. Subsequently Student failed three math tests in October, one in November, and one in December. Student failed an additional math test in January, two in February and scored a D on a March 2015 test. [P-5]
20. Student received F's on over 40 homework and classwork assignments in math during the 2014-2015 school year. [P-5]
21. Student was not referred for RTI and did not receive RTI for math at any time during 6th grade. [NT 50, 175-176, 192-194, 317-318, 365, 378-379]
22. In October 2014 Student failed the first science test of the school year and failed subsequent science tests in December and March, for a failure rate of 75% on assessments in 6th grade science during the school year. [P-5]
23. Student failed social studies tests in December and January, and two tests in April, for an 80% failure rate in 6th grade social studies over the course of the school year. [P-5]

Relevant Period

7th Grade Academics

24. On the November 2015 STAR reading assessment, Student's reading grade equivalent score was 3.5 and the Instructional Reading Level was 3.5, notably only one month higher than Student's score had been in September 2014. Student's reading age was 9.0, over four years below Student's chronological age. [P-6, P-48]
25. There is no documentation of further standardized reading assessments during the remainder of the 2015-2016 school year. [P-41]

26. Student's reading level on the February 2016 and April 2016 report cards was recorded as 3.5, more than 4 years below grade level. [P-1]
27. Student failed 2 out of 4 language arts quizzes during the 1st semester of 7th grade, and received a D on a third quiz. [P-5]
28. Student received an F in language arts on the first quarter report card. [P-1]
29. Student received a D in language arts on the final 7th grade report card. [P-1]
30. Student's 7th grade math teacher had also been Student's math teacher in 6th grade. There is no documentation of any standardized math assessments of Student during 7th grade. [NT 753; P-41]
31. In 7th grade Student failed all math tests given during the first semester in 2015 – one in September, two in October, one in November, and two in December, and also failed a math test in February 2016 and one in May 2016; in April 2016 Student received a D on a math test. [P-5]
32. Student failed 2 out of 4 math quizzes during the first semester of 7th grade. Of the three math quizzes given during the second semester, Student received an F on one and a D on the other. [P-5]
33. According to the teacher who taught Student math in both 6th and 7th grades, low scores on standardized tests, and receiving F's and D's on most math tests over the course of a year, are not a basis for a student to receive RTI, because "if you look at the students that we have, it wouldn't stand out for a student to be below basic...". [NT 323-324, 337-339]
34. According to Student's 6th/7th grade math teacher, how a student does on homework, classwork and small group discussions is a better gauge of what a student knows than scores on standardized or teacher-made tests. [NT 322-324, 342-343]
35. However, Student received in excess of 20 F's on homework and classwork assignments in math during the first semester of 7th grade and more than 25 F's on homework and classwork assignments in math during the second semester. [P-5]
36. Student received a D in math on the final 7th grade report card. [P-1]
37. Student's 6th/7th grade math teacher noted that if he was "listening to them participating in class and they're asking questions and I notice that they're completely not understanding the math concepts, then I would say that it would be that they're really just not able to understand the math concepts or they're just not grasping what I'm teaching, then I would say maybe they should be referred to the RTI process." [NT 323-324, 340]
38. Student was not referred for RTI in 7th grade. [NT 50, 175-176, 192-194, 317, 365, 378-379]

7th Grade Behavior

39. In January 2016, concerns about Student's behavior in the classroom and about conflict with a peer resulted in two meetings between the Parent and the School. One of these meetings was a re-centering meeting. The Parent indicated that she wanted Student to see the counselor and signed permission for this service which Student did receive.⁸ [NT 696-698, 875-876, 996]
40. Student continued to exhibit behavior problems after the January 2016 meeting, and the School frequently called the Parent at work to report behavior problems. [NT 878-879, 977-979, 984-99; P-22]
41. In March 2016, Student was suspended for an incident with the math teacher; however the Dean overruled the suspension and the suspension was never written up.⁹ [NT 882-885; P-22]
42. Although the dean and the school counselor conferred during 7th grade about interventions to keep Student in class, counseling records were not retained and the dean did not make notes about these conversations. [254-255, 886]

8th Grade Academics

43. In October 2016 Student's STAR reading grade equivalent was 4.7 and the Instructional Reading Level was 4.3, both approximately 3.5 years below grade level. Student's Reading Age was 10.0, more than 4 years below Student's chronological age. [P-6, P-48]
44. As of January 2017, all Student's STAR scores were lower than Student's scores from October 2016. Furthermore, as of January 2017 all Student's STAR scores were lower than Student's scores from February 2015, indicating regression over the two year period. [P-6, P-48]
45. The Student's reading level on the final report card of the 8th grade school year was 5.1, which was nearly 4 years below grade level. [P-1]
46. In the 28 month period from February 2015 until June 2017, the Student made one month of reading progress, moving from 5.0 to 5.1 [P-1]

⁸ The record is very unclear as to the Parent's response when the teacher asked if she wanted an FBA done for Student, and whether or not the Parent signed permission for an FBA. However the record is clear that the Parent wanted Student to see the counselor, and that in any event an FBA was not done following the January 2016 meeting. [NT 697-698, 877, 1038-1039]

⁹ Although the Parent estimates that Student received approximately 11 days of out of school suspension in 7th grade there are no suspensions recorded in the attendance records. The Parent was puzzled about this, as is the hearing officer. [NT 984-987; P-11]

47. Student did not receive RTI for reading during the 8th grade school year. [NT 50, 317, 365, 378-379, 386-387]
48. Although progress monitoring data and work folders were not retained at the end of the school year, the 8th grade math teacher described Student as doing well in his class. Asked if it was possible that a child with very weak foundational skills in numerical operations could do well on the 8th grade math curriculum with the use of a calculator, the math teacher testified credibly that this was quite possible. [NT 399-402]
49. During the 8th grade school year, Student failed 2 of out of 4 science tests, and failed 8 out of 10 science quizzes. [P-5]
50. Student earned over 30 F's on science classwork and more than 10 F's in science homework in 8th grade. [P-27]
51. Student's report card grades in 8th grade science included D's for two marking periods and a final grade of C-minus. [P-1]
52. In 8th grade Student failed every social studies quiz from September 2016 through February 2017, and 7 out of 10 quizzes over the course of the school year. [P-5]

8th Grade Behavior

53. The School's system of addressing inappropriate behavior involves four levels of violations. Level 1 violations (inappropriate language, disrespecting an adult, and disruption of class) are addressed directly by teachers and do not involve the dean except when they are repeated three or more times, which then constitutes Level Two. Teachers are required to fill out and submit write-up forms for Level 1 infractions that describe the incident, the school's intervention, and if the intervention was successful. However, teachers did not write up every behavioral violation that the Student incurred. [NT 845-850, 853-854]
54. Student had ongoing behavior problems in science class with the science teacher¹⁰ during 8th grade; Student also had behavior problems in subjects other than science. [NT 859, 865, 904]
55. The dean's interventions to address Student's behavior problems included talking with Student, calling the Parent, and often having Student sit in his office and do work rather than being in class. [NT 843, 864]
56. On September 20, 2016, Student was written up for a Level 2 violation (disrespecting an adult, severe/intentional disruption of class, and repeated Level 1 violations); there was no documentation of the referenced prior Level 1 violations. [NT 886-887; P-21]

¹⁰ By all accounts the science teacher had difficulties with class management and School witnesses tended to discount Student's role in the conflict; I do not accept this as a reason to minimize Student's behaviors in that class.

57. In November 2016, there was an incident at school involving the Student and peers. The School called the Parent and there was a mediation meeting. [NT 893-994; S-19]
58. The math teacher commented in December 2016 that Student's "behavior outside of class sometimes causes [Student] to miss instruction, which hinders [Student's] progress." [P-5]
59. An incident occurred on December 20, 2016 that warranted re-centering, but Student skipped this requirement. [S-19]
60. In January 2017, Student was written up for engaging in inappropriate classroom conduct, failure to follow direct orders of an adult, insubordination, and repeat violations; there was no documentation kept of the prior Level 1 violations. According to the write-up, Student was 'threatening the peace and tranquility of the classroom'. [NT 901-902; P-21]
61. On February 14, 2017, Student engaged in another Level 2 violation for insubordination, inappropriate classroom conduct, and disrupting the school environment. On February 26, 2017 Student was identified as a 'student of concern'. [NT 842, 903-904; S-19, P-21]
62. On March 31, 2017, an incident occurred in science class that warranted the involvement of both the dean and the special education coordinator. [S-19]
63. On April 24, 2017, Student was written up for another Level 2 violation and a Level 3 violation for in inappropriate classroom conduct, disruption of the school environment and insubordination including extreme disrespect to a teacher. Student could have been, but was not, suspended. [NT 857, 905-907; P-22]
64. Under the School's behavior management system, Level 3 violations warrant an FBA and a positive behavior support plan. [NT 915]
65. Additional behavior incidents occurred at school throughout May 2017. [S-19]

8th Grade Emotional Functioning

66. On October 12, 2016, the dean brought Student to the counselor because Student revealed [redacted] in a setting that was not the School. The counselor took Student to the Crisis Center, and Student was admitted to a Partial Hospitalization program. [NT 889-890; P-15]
67. Student was treated for three weeks at the Partial Hospitalization program, where Student was diagnosed with Major Depressive Disorder. [P-16, P-17]
68. School staff were informed that Student had been placed in the Partial Hospitalization program. [NT 1007]
69. The dean did not believe Student had emotional problems, despite knowing that Student had [redacted] and was hospitalized. [NT 891]
70. On January 25, 2017, Student told a staff member that [redacted]. [NT 838; S-19]

71. No follow-up meeting was held about [redacted], no intervention was provided and neither the Parent nor the dean were notified of [redacted]. The dean testified that if he had been informed, he would have brought it to the attention of the counselor and convened a meeting. [NT 838, 840-841]
72. On May 2, 2017, the dean sent the following in an email to the middle school referral group and to Student's teachers: "[The Student's] write-up was given to [the special education coordinator] and we both reached out to mom about the incident. We're still suggesting that [Student] not [be in] class during [Student's] science period. [Student] can get [Student's] work and do it inside of my office or another designated classroom. A lot of [Student's] issues are related to [Student's] ED, which we're trying to work through daily." [NT 909-910; S-19, P-24]
73. On May 9, 2017, the special education coordinator saw Student sitting on the floor outside a classroom [redacted]. The special education coordinator contacted the dean and the school counselor. [NT 188; S-19]
74. On June 3, 2017, Student was recommended for another Partial Hospitalization admission. However, on June 9, 2017, Student's psychiatrist reported that the Student was instead seeking ongoing outpatient mental health services. [S-19]

School's Evaluation

75. There is conflicting evidence about when the Parent requested an evaluation. In any event, an evaluation was completed in March 2017 by an experienced certified school psychologist under contract with the School (School's psychologist). [NT 46, 269-272; 979-984, 999, 1030-1033, 1036; P-28]
76. For purposes of the evaluation the School's psychologist obtained parent and teacher input and conducted a record review. She procured an extended classroom observation from another professional. [NT 77, 98; P-28]
77. The School's psychologist administered a test battery that consisted of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V), Wechsler Individual Achievement Test – Third Edition (WIAT-III), Behavior Assessment System for Children – Second Edition (BASC-2), Behavior Rating Inventory of Executive Functioning (BRIEF), Adaptive Behavior Assessment System – Second Edition (ABAS-II), and the Beery VMI (a test of visual-motor integration). [P-28]
78. The WISC-V is an intelligence test. On the bell-shaped curve¹¹, Student's WISC-V scores and corresponding percentile ranks¹² were as follows: Verbal Comprehension 70 (2nd percentile), Visual Spatial 83 (13th percentile), Fluid Reasoning 76 (5th percentile),

¹¹ On the bell-shaped curve, a score of 100 is dead-average, generally with 90-109 being the Average range, 80-89 the Below Average range, 70-79 the Borderline range, and below 70 being the Extremely Low range.

¹² The percentile rank of a score is the percentage of scores in its frequency distribution that are equal to or lower than it. For example, a test score that is greater than 75% of the scores of people taking the test is said to be at the 75th percentile, where 75 is the percentile rank.

Working Memory 74(4th percentile), Processing Speed 72 (3rd percentile) and Full Scale IQ 76 (5th percentile). [P-28]

79. On the WISC-V Student's cognitive skills were found to be at a level that suggests Student would struggle in school without specially designed instruction; scores in five of six summary areas were in the borderline range, between the below average range and the extremely low range, and confidence levels indicated that some scores could fall into the extremely low range. [P-28]
80. Taking the confidence interval into consideration, the School's psychologist administered the Adaptive Behavior Assessment System – Second Edition (ABAS-II) to rule out a classification of Intellectual Disability. Results of this assessment allowed Intellectual Disability to be ruled out. Although she should have included the ABAS results in her report the School's psychologist did not, given the negative findings¹³. [NT 135-136; 571-572]
81. The WIAT-III is an academic achievement test. On the bell-shaped curve, Student's scores and percentile ranks were as follows: Listening Comprehension 86 (18th percentile), Reading Comprehension 90 (25th percentile), Math Problem-Solving 76 (5th percentile) Sentence Composition 76 (5th percentile), Word Reading 76 (5th percentile), Essay Composition 97 (42nd percentile), Pseudoword Decoding 83 (13th percentile), Numerical Operations 74 (4th percentile), Oral Expression 87 (19th percentile), Oral Reading Fluency 81 (10th percentile), Spelling 72 (3rd percentile), Math Fluency – addition 79 (8th percentile), Math Fluency – subtraction 76 (5th percentile), Math Fluency – multiplication 69 (2nd percentile). [P-28]
82. Composite WIAT-III scores were as follows: Oral Language 85 (16th percentile - Below Average), Total Reading 79 (8th percentile – Borderline), Basic Reading 80 (9th percentile – Below Average), Reading Comprehension and Fluency 81 (19th percentile – Below Average), Written Expression 78 (7th percentile – Borderline), Mathematics 74 (4th percentile – Borderline), Math Fluency 74 (4th percentile – Borderline), Total Achievement 77 (4th percentile – Borderline). [P-28]
83. Based on an analysis comparing Student's cognitive functioning and academic achievement the School's psychologist concluded that Student qualified for special education under the classification of Specific Learning Disability. [P-28]
84. Assessment of Student's executive functioning was done through the BRIEF, with the Parent and the 8th grade math teacher as the respondents. Although Student showed deficits in executive functioning in both settings, as would be expected they showed up more severely in the school setting. Areas of difficulty in school were found to be inhibiting impulses, adjusting to changes in routine or task demands, modulating

¹³ Although in this case the omission did not affect the outcome of the evaluation or the hearing decision because neither party was arguing that Student should be classified as having an Intellectual Disability, in future the School's psychologist should include data from all tests administered in her reports.

emotions, initiating problem-solving or activities, sustaining working memory, planning and organizing problem-solving approaches, and self-monitoring of behavior. [P-28]

85. The School's psychologist utilized the BASC, an instrument used to assist in the differential diagnosis and classification of a variety of emotional and behavioral disorders in children and adolescents. The Parent and the 8th grade math teacher were the raters on the BASC. [NT 81-83, 87-88; P-28]
86. On the BASC results from the Parent, Student was Average in the areas of hyperactivity and attention problems. The teacher's ratings also placed Student in the Average range for attention problems, but in the At-Risk range for hyperactivity. A score in the At-Risk range identifies a problem area that, while not severe enough to require formal treatment, may have the potential for developing into a larger problem and therefore requires careful monitoring. [P-28]
87. While not conferring the diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) or Attention Deficit Disorder (ADD) (formally listed in the DSM-5 as Attention Deficit Hyperactivity Disorder, predominantly inattentive type¹⁴) the School's psychologist did not go beyond her data, but drew the team's attention to the possibility of ADD in her report. [NT 81-82, 160-161; P-28]
88. The School's psychologist included an array of recommendations in her evaluation report to address issues of focus, attention, and organization. [P-28]
89. Despite being heavily involved in disciplinary matters with Student, and during 8th grade having spoken with the school counselor about Student's emotional issues, the dean was unaware that Student was being evaluated, did not provide written input for the ER, did not read the ER after it was finished and did not attend a meeting to discuss the ER. [NT 832-833, 835-839]
90. The Parent did not note Student's psychiatric partial hospitalization in October 2016 on the parent information form prepared for the evaluation. [NT 142; S-5]
91. Although the School's psychologist knew that Student had been admitted to a Partial Hospitalization program, she did not know the reason, and despite requesting that the medical records be provided to her, she did not receive them. [NT 70-71, 73, 149-151]
92. In addition to being sensitive to symptoms of ADHD/ADD as discussed above, the BASC also served as an assessment of emotional concerns. [P-28]
93. On the BASC's Clinical Scales, the Parent's responses resulted in only one Clinically Significant area, depression, an area which came up as Average on the teacher's ratings. It is unclear whether or not the Parent knew at the time that Student had been diagnosed with Major Depressive Disorder at the Partial Hospitalization program. The School did not have information about that formal diagnosis at the time of the evaluation. [P-28]

¹⁴ Diagnostic and Statistical Manual 5th Edition, published by the American Psychiatric Association.

94. Areas that came up as At-Risk based on the Parent's responses were anxiety and withdrawal. Areas that came up as At-Risk based on the teacher's responses were hyperactivity, as noted earlier, as well as aggression, anxiety, and withdrawal. [P-28]
95. Based on the limited information the School's psychologist had been given, and based on the data from her assessments, the evaluator did not confer an emotional disturbance classification. [P-28]
96. The School's psychologist highly recommended that if Student was receiving behavioral health services, an interagency meeting be arranged among the Parent, the behavioral health agency and the School to more fully understand Student's behavioral problems and the current services being provided to address Student's needs in relation to these concerns. [P-28]
97. The School's psychologist also recommended that based on Student's behavior, an FBA should be conducted to further assess areas of concern and to inform a Positive Behavior Support Plan. The School did not follow the recommendation to conduct an FBA until very near the end of the academic year. [NT 276-278; P-28]
98. On April 6, 2017, the School held a meeting with the Parent to discuss the evaluation. The School's psychologist was present at the meeting, but the Parent was not given a written evaluation report (ER). [NT 1008-1010, 1013-1015]

April 6, 2017 IEP

99. The IEP meeting was held late in the day on April 6, 2017, the same day as, and immediately following, the evaluation review meeting. [NT 1008-1009]
100. The Parent, the special education coordinator and the School's psychologist attended the meeting, which started late because the Parent was delayed. The two teachers slated to attend had left because there was a hurricane warning; they reviewed the IEP draft at a later date. The dean, who had spent considerable time dealing with Student's behaviors, was not invited to the meeting. [NT 274-275, 837, 1008-1009, 1013]
101. The Parent was presented with a draft IEP. The Parent requested that another meeting be held with Student's teachers present, and she was assured that this would happen. [NT 1017, 1019-1023; P-3]
102. Since Student exhibited behaviors that impeded learning, the April 6, 2017 IEP should have endorsed the section of the IEP asking if Student's behaviors impeded learning. [NT 101-102]
103. There was no discussion at the April 6 meeting about levels of special education services, goals and objectives, whether Student needed a behavior plan, the amount of time per day that Student needed special education, or ESY programming. [NT 1020-1023]

104. Although the draft IEP carried a goal for reading comprehension (which was Student's highest reading area on the WIAT-III), there were no goals related to greater needs in word reading, decoding, sentence composition, essay composition or spelling. [P-29]
105. Although the draft IEP carried a very broad goal for numerical operations, there was no goal for math problem-solving. [P-28]
106. The draft IEP provided for only 45 minutes of resource room instruction per day. [P-29]
107. The draft IEP did not include behavior goals or a behavior plan. [P-29]
108. The ESY determination section of the draft IEP was left blank. [P-29]
109. The draft IEP did include a range of appropriate specially-designed instruction that addressed Student's executive functioning deficits, but there were no goals to address these deficits and no provision for individual instruction or training in this area.

June 14, 2017 IEP

110. On June 14, 2017, the School convened the second IEP meeting that the Parent had requested on April 6, 2017. [NT 733]
111. The June 14 IEP meeting included the special education coordinator, the CEO, the School's psychologist, several of Student's teachers, the dean, the Parent and counsel for the parties. [NT 733]
112. The IEP team discussed Student's need for special education for all academic subjects (English, math, science and history). [NT 735; P-33]
113. The IEP team also discussed Student's needing reading and math interventions in a resource room. [NT 735]
114. The revised IEP included: placement in a learning support class for all academic subjects, daily research-based reading and math interventions in a resource room; expanded academic goals; goals for conflict resolution, following directions, complying with adult directives, and organizational skills; expanded Specially Designed Instruction (SDI) and program modifications; plans for an FBA to be conducted, followed by development of a Positive Behavior Support Plan; provision for a speech screening to be conducted, as recommended in the March 2017 evaluation; school based counseling; and ESY programming. [P-33]

ESY

115. Student stopped coming to school during regular school hours on or around May 29, 2017. [NT 278]

116. At the June 14, 2017 meeting the IEP team agreed that Student would receive ESY programming. The record is contradictory as to whether the programming would begin in 2017 or in 2018. [NT 255-256; 1024-1025]
117. In the period from June 14, 2017 until July 19, 2017, the IEP was internally revised by the School based on input from school staff and counsel for both parties. (Stipulation re P-33)
118. The IEP dated June 14, 2017 was finalized by the School and provided to Parent's counsel on July 19, 2017. (Stipulation re P-33)
119. The final copy of the June IEP sent to Parent's counsel provided that Student would receive ESY services in the summer of 2018. [P-33]
120. The Parent indicated to the IEP team in June 2017 that Student was not going to return to the School for 9th grade. As such the School believed the IEP, including its provision for ESY, was being written for 9th grade to be implemented in another school setting. [NT 259, 302, 312, 433, 450-453; S-19]
121. Despite being in frequent communication with the School during the school years in question, throughout summer 2017 the Parent did not contact the School regarding when ESY 2017 services would begin or where services would be provided. [1074-1079]

IEE

122. While Student was enrolled in the School the Parent did not request that the School fund an independent educational evaluation. [NT 499, 1044-1045]
123. Student formally withdrew from the School on August 18, 2017. On August 24, 2017, Student was independently evaluated by a privately retained psychologist (private psychologist). [P-25]

Legal Basis

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]. In special education due process hearings, 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 Parents asked for the hearing and thus assumed the burden of proof.

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); The District Court “must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.” *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014);..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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). Although most of the witnesses were credible, I make specific observations about several below.

Although the Parent was credible in some respects, and it was clear that she is a loving and devoted parent, for several reasons I do not accept her position that she was unaware of her child’s need for a special education evaluation to address academic functioning until the 8th grade year, in December 2015/January 2016. Her assertion that she was relying solely on alleged teachers’ reports that Student was “an average student in reading and math”, and that had she known about Student’s struggles she would have requested an evaluation, does not ring true. First, she was not a naïve parent, given that Student’s older sibling is a special education student and has been eligible for years (NT 960-961). Second, her poise, expressive ability, and engagement during the hearing, coupled with her description of herself as having been an excellent student at the top of her class in high school and in post-secondary education, belies her claim that she did not know that she could research Student’s ongoing class grades online, the availability of which is clearly posted on the second side of each quarterly report card after the section for teacher comments (NT 956-957, 1051, 1106-1107; HO-1). Third, given that she herself was and is a high-achieving individual it seems highly unlikely that she did not at the very least explore her child’s progress the old fashioned way – by asking Student to show graded tests to her. I make this credibility finding specifically because the time when the Parent knew or should have known about Student’s need for an evaluation occurred at least by the middle of 6th grade and consequently any request for recovery outside the period August 9, 2015 through August 9, 2017 must be denied on the basis of untimeliness. In addition, given the Parent’s involvement with various school staff members, I cannot credit the Parent’s testimony that she was expecting Student to attend ESY during summer 2017 and was just waiting passively for the School to contact her about dates and location [NT 1074-1079]. I contrast her testimony with the credible testimony of School staff that during the June 14, 2017 IEP meeting ESY was placed into the IEP to be implemented in 9th grade in another school [NT 259, 302, 312, 433, 450-453].

Student’s 6th/7th grade math teacher’s testimony was given very little weight as he insisted, despite a multitude of failing grades on tests and quizzes, that Student was doing well in his class on the grounds that when he spoke with Student one-to-one Student demonstrated an understanding of the work. Students’ understanding of concepts must be gauged by their performance on a variety of standardized and teacher-made assessments, regardless of whatever ostensibly occurs in their private dialogues with teachers.

It is worth noting, on the other hand, that Student’s 8th grade math teacher was able to supply a

satisfactory and credible explanation about how a student could do relatively well in the 8th grade math curriculum with the use of a calculator even though foundational skills (basic numerical operations) were not in place [NT 765-766].

Although he was frequently involved in Student's disciplinary issues, the dean of students curiously presented as almost dismissive of Student's ongoing classroom behavior issues because they usually involved only one teacher who reportedly had issues with students in general. In his testimony the Dean gave the impression of minimizing Student's behaviors and emotional issues which in turn diminished his credibility.

Charter Schools: A charter school acts as the LEA for its students, and assumes the duty to ensure that a FAPE is available to a child with a disability in compliance with IDEA and Section 504 and their respective implementing regulations. 34 C.F.R. 300.209(c); 22 Pa. Code §§ 14.103, 711.3. Chapter 711 *et. seq.* of the Pennsylvania School Code, "Charter School and Cyber Charter School Services and Programs for Children with Disabilities", contains regulations specific to individuals with disabilities being educated in charter schools and cyber charter schools. Chapter 711 incorporates by reference all the IDEA regulations at 22 Pa. Code 711.3. Chapter 711 also incorporates relevant antidiscrimination provisions in Section 504 and its implementing regulations. Charter schools and cyber charter schools must comply with 22 Pa. Code Chapter 4 relating to academic standards and assessment, 22 Pa. Code Chapter 11 relating to pupil attendance, and 22 Pa. Chapter 12 relating to discipline of students 22 Pa. Code §711. *et. seq.* Further references will be to the IDEA and/or its regulations.

Child Find: Students with disabilities are entitled to a free, appropriate, public education (FAPE). The IDEA and its implementing state and federal regulations obligate LEAs to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. This obligation is commonly referred to as "child find." Under the IDEA's "child find" requirement, 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. *See P.P. v. West Chester Area School District*). Districts are required to fulfill the child find obligation within a reasonable time after notice of behavior that suggests a disability. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). School districts are not, however, required to identify a disability "at the earliest possible moment." *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). 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. *Ridley*. A Parent's failure to request an evaluation does not absolve the local education agency of its "child find" duties. Because child find is an affirmative obligation of an LEA, a parent is not required to request that an LEA identify and evaluate his or her child, and more importantly, a parent's failure to make such a request does not relieve the LEA of its child find obligations. *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). *See also Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238,

247 (3d Cir. 1999); *Matthew D. v. Avon Grove School Dist.*, 2015 WL 4243471 (E.D.Pa. July 13, 2015)

Evaluations: The purpose of an initial evaluation is to determine whether a student meets any of the criteria for identification as a “child with a disability” as that term is defined in 34 C.F.R. §300.8, as well as, if the child is found to be eligible, to provide a basis for the contents of the child’s IEP, including a determination of the extent to which the child can make appropriate progress “in the general education curriculum.” C.F.R. §§300.8, 300.304(b)(1)(i), (ii). In conducting an evaluation, the IDEA imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained. In conducting the evaluation, the LEA must: (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability under § 300.8; and the content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum. The LEA must not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 34 C.F.R. §§ 300.304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified, and utilize assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child. 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

Failure to conduct a sufficiently comprehensive evaluation is a violation of the District’s “child find” obligations. *D.K. v. Abington Sch. Dist.*, 696 F.3d (a poorly designed and ineffective evaluation does not satisfy “child find” obligations). An evaluation must be sufficiently comprehensive to address all of the child’s suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6).

FAPE: Student is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). ‘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.

A child's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982)). FAPE "consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction." *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Rowley*. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. (*Ridgewood Board of Education*). The Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with "meaningful educational benefits" in light of the student's "intellectual potential." *Shore Reg'l High Sch. Bd. v. P.S.* 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir. 1988)); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the U.S. Supreme Court considered a lower court's application of the *Rowley* standard, observing that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017). The Court concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 352. This standard is consistent with the above interpretations of *Rowley* by the Third Circuit. At least two federal District Courts in Pennsylvania have recently opined that the *Andrew F.* decision did not change Third Circuit jurisprudence regarding the standards for judging whether a special education program is appropriate. *E.D. v. Colonial School District*, No. 09-4837, 2017 U.S. Dist. LEXIS 50173, at *36 (E.D. Pa. Mar. 31, 2017); *Brandywine Heights Area School District v. B.M.*, 2017 U.S. Dist. LEXIS 47550, at *29 n. 25 (E.D. Pa. Mar. 28, 2017)

However, Local Educational Agencies [LEAs] need not provide the optimal level of service, maximize a child's opportunity, or even set a level that would confer additional benefits; the child must be offered a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988); *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3rd Cir. 2012). The IDEA entitles Student to an appropriate educational opportunity, but an IEP is not required to incorporate every program, aid, or service that parents desire for their child. *Mary Courtney T; Ridley*. An eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement, as noted in several federal district court decisions. *See, e.g., J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). *Andrew F.* did not disturb this standard which entitles a child to what is reasonable, not to what is ideal.

IEP: The central mechanism by which the IDEA secures the right to a FAPE for all children is the "Individualized Education Program," 20 U.S.C. §§ 1412(a)(4), 1414(d), which is "the package of special educational and related services designed to meet the unique needs of the disabled child." *Ferren C.*, 612 F.3d at 717 (quoting *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 526 (3d Cir. 1995)). "[A]n Individual Education Program (IEP) is the primary vehicle for

providing students with the required free and appropriate education.” *S.H. v. State-Operated School District of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

The IEP for each child with a disability must include a statement of the child’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum and meeting the child’s other educational needs that result from the child’s disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

The issue of whether an IEP is appropriate is a question of fact. *D.S. v. Bayonne, supra*, (quoting *S.H. v. State-Operated Sch. Dis. Of Newark*, 336 F.3d 260, 271 (3d Cir. 2003)). The determination of whether an IEP is appropriate may rely only on evidence that was available to a district when it made its program and placement decisions. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993) (“Neither the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.”) Evidence of a child’s subsequent educational progress (or lack thereof) may be considered only insofar as it bears on the issue of whether the IEP was appropriate when it was created. *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir. 1995) (approving ruling in *Fuhrmann*).

FBA and PBSP: The IDEA only expressly requires an FBA and a PBSP upon removal of an eligible child for 10 school days in a school year (20 U.S.C.A. §§ 1415(k)(1)(D) and 1415(k)(1)(F)) which did not arise in this case. Otherwise, there is no such obligation under the IDEA. In *T.L. by K.L. and K.L. v. Lower Merion Sch. Dist.*, 116 LRP 27140_(E.D. Pa. 06/20/16) the court held that outside of the disciplinary context, an FBA isn’t necessarily required where an IEP provides other means to address behaviors except to the extent implicit in the requirement that the IEP team “consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address ... behavior [that impedes the child’s learning or that of others].”

The federal Office of Special Education Programs (OSEP) issued a Dear Colleague letter on August 1, 2016 addressing the issue of positive behavior interventions. Such letters, while not binding, are owed deference when assessing the supports a child needs in order to receive FAPE. In the Letter, OSEP notes that the IDEA specifically requires IEP Teams to consider the use of positive behavioral interventions and supports, and other strategies, to address behavior for any child with a disability whose behavior impedes his or her learning or that of others. 20 U.S.C. §1414(d)(3)(B)(i). This requirement applies to all IEP Teams, regardless of the child’s specific disability, and to the development, review, and revision of IEPs (34 CFR §300.324(a)(2) and (b)(2)). OSEP writes that “Incidents of child misbehavior and classroom disruptions, as well as violations of a code of student conduct, may indicate that the child’s IEP needs to include

appropriate behavioral supports. This is especially true when a pattern of misbehavior is apparent or can be reasonably anticipated based on the child's present levels of performance and needs. To the extent a child's behavior including its impact and consequences (e.g., violations of a code of student conduct, classroom disruptions, disciplinary removals, and other exclusionary disciplinary measures) impede the child's learning or that of others, the IEP Team must consider when, whether, and what aspects of the child's IEP related to behavior need to be addressed or revised to ensure FAPE."

ESY: Acknowledging that some students may require programming beyond the regular school year, the federal legislature deemed that ESY services are to be provided to an eligible child if necessary to assure that the child receives a free, appropriate public education). 34 C.F.R. §300.106(a)(2). Although not a separately articulated issue in the parties' opening statements, the issue of ESY was addressed in testimony and will be briefly addressed below.

Compensatory Education: Compensatory education is an appropriate remedy that accrues from the time when 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; Ridgewood; P.P.* (quoting *Lauren W. v. DeFlaminis*, 480 F.3d 259, 272 (3d Cir. 2007)). The "child is entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem." *M.C. v. Central. Regional; Ridgewood*. Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). To compensate for past violations, "[a]ppropriate remedies under IDEA are determined on a case-by case basis." *D.F. v. Collingswood Bd. of Educ.*, 694 F.3d 488, 498 (3d Cir. 2012). 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, relatively 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."). The "same position" method has been most recently endorsed by the Third Circuit. "Compensatory education is crucial . . . and the courts, in the exercise of their broad discretion, may award it to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation." *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 625 (3d Cir. 2015).

IEE: Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency..." 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process

complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii). Parental disagreement with an evaluation’s conclusions is not evidence that an evaluation is inappropriate; parental disagreement with supported conclusions is irrelevant to the inquiry. Further, the inquiry is not even whether or not a hearing officer agrees with an LEA’s evaluation results. Provided that the LEA conducted its evaluation under IDEA standards and supported its conclusions with data derived from properly administered assessments the evaluation must be deemed appropriate, that is, whether the LEA’s evaluation met the standards for appropriateness set forth in the IDEA. The focus of the inquiry in an IEE dispute is whether the district appropriately assessed the student in all areas of suspected disability. *See, e.g., Avila v. Spokane Sch. Dist. 81*, 69 IDELR 204 (9th Cir. 2017, unpublished)

Discussion

Child Find: An LEA has a continuing obligation to identify and evaluate all students who are reasonably suspected of having a disability (*Ridley, P.P, Perrin*) within a reasonable time after notice of behavior that suggests a disability (*Matula*) although the LEA does not have to identify a disability at the earliest possible moment (*D.K*). The courts (and hearing officers) 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 (*Ridley*). Even if parents do not cooperate fully with an LEA’s efforts to identify a student (or do not request an evaluation), it is still the responsibility of the school 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)). Because child find is an affirmative obligation of an LEA, a parent is not required to request that an LEA identify and evaluate his or her child, and more importantly as it applies to the instant matter, a parent's failure to make such a request does not relieve the LEA of its child find obligations (*M.C., Ridgewood, Matthew D.*).

Although 4-Sight scores in reading in 6th grade appear to support moderate progress, this progress was inconsistent and ultimately Student regressed such that from September 2014 (6th grade) to November 2015 (7th grade), over a fourteen-month period, Student’s scores evidenced a mere one month gain. Granted, when the School enrolled Student an achievement gap of several years below grade level already existed, and I will not fault the School for giving Student some time to adjust and try to gain ground in the new school environment. I can also understand the School’s point of view that because of the small class size, students are already getting the equivalent of the first level of RTI. However, RTI is a formal time-limited process and providing it with fidelity requires a planned sequence of progress monitoring and revisions as needed; this is not what the teachers described Student having received.

Over the course of 6th grade it became increasingly clear that Student was failing in the major core curriculum areas. The School should have initiated an evaluation at least by the start of the second half of that year. Instead, according to the Parent, School staff allegedly represented to her that Student was an average student in reading, math, science and social studies [NT 937-945, 952-960, 975]. The School holds the position that all its students are disadvantaged and that Student was in fact typical for its population. Teachers made several references to their belief that if the School provided RTI to Student it might as well be “RTI-ing” most of its students, or that if Student

should have been evaluated then many of its students should be evaluated. While I am sympathetic to the real situation in which the School finds itself, the law requires that I consider the individual child. Further, having listened intently and with respect to the administrators as they described the School's aspirations for the students under their care I believe that they in fact are not advocating that their children as a group should be held to a lower standard than more fortunately situated learners.

Evaluation: The IDEA provides that an evaluation must be sufficiently comprehensive to address all of the child's suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6). In fact, failure to conduct a sufficiently comprehensive evaluation is a violation of the LEA's "child find" obligations (*D.K* - a poorly designed and ineffective evaluation does not satisfy "child find" obligations). However, the label assigned to a particular assessment is less important than the skill areas the assessment evaluates. Therefore, the focus of the inquiry is whether the LEA appropriately assessed the student in all areas of suspected disability (*Avila*). Both federal law and state standards govern whether or not the District's evaluation was appropriate. The IDEA sets forth two purposes of the required evaluation: to determine whether or not a Student is a Student with a disability as defined in the law, and to "determine the educational needs of such Student . . ." 20 U.S.C. §1414(a)(1)(C)(i). The IDEA regulations prescribe in detail the procedures to be used in order to fulfill these purposes. 34 C.F.R. §§300.301 to 300.311. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., *Eric H. v. Judson Independent School District*, 2002 U.S. Dist. Lexis 20646 (W.D. Texas 2002). In addition to the above requirements, Pennsylvania regulations provide special requirements for assessment of suspected specific learning disability. 14 Pa.Code §14.125. The evidence is preponderant that the School complied with both federal and state procedural requirements,

While the School was obligated to identify Student to the extent of eligibility for services, this requirement is not stated so broadly as to require specific determinations as to precise diagnostic categories or comprehensive identification of functioning deficits as part of child find. In this conclusion I am persuaded by 20 U.S.C. §1412((3)(B); 34 CFR 300.11(d) which states that child find does not require classification by disability as long as a child is identified as a child with a disability, i.e., as eligible for special education. Because the School identified Student as eligible I fail to find that its evaluation was inappropriate. I agree with the Parent's expert that the School's evaluation was thorough in its exploration of Student's learning disabilities [NT 571]. I note that, while not formally identifying Student with other health impairment (ADHD or ADD), the evaluator did assess this area of suspected disability (activity and attention levels) through the BASC. Results of this instrument, in concert with the BRIEF, formed the basis for appropriate recommendations in the ER to assist the IEP team. For purposes of establishing initial IDEA eligibility, the evaluator was not required to administer every known test so long as the tests that were administered addressed suspected disabilities.

Based on anecdotal information, and some aspects of the BASC, the School's evaluator could have entertained an additional classification of emotional disturbance. Knowing that Student had been psychiatrically hospitalized, the evaluator sought to obtain these medical records but they were not provided to her or to the School.

The absence of medical records hindered the School's psychologist from a definitive determination of whether Student merited the additional classification. The evaluator, however, did recommend

additional exploration of Student's needs through a Functional Behavior Analysis as well as addressing emergent issues through a Positive Behavior Support Plan. I find that the evaluator's caution in this regard was warranted, and cannot conclude that not conferring the classification of emotional disturbance was inappropriate or rendered the evaluation insufficient. I do conclude that the School's evaluation met IDEA's requirements in that it examined Student's eligibility for special education services, as well as providing a basis for the contents of the IEP.

IEP: Student's April 6, 2017 IEP team was not created by a properly constituted IEP team. None of Student's teachers were present for the initial IEP meeting, and the dean, who had been the person most involved in handling behavior issues, was neither present nor invited. The April 2017 IEP, though containing robust specially designed instruction, failed to include appropriate goals to address Student's severe reading deficits, Student's executive functioning deficits, or Student's significant behavior issues. Most importantly, the amount of time Student was to spend receiving targeted specially designed instruction in the resource room was inadequate given Student's cognitive limitations and the degree of deficit Student demonstrated in reading and fundamental mathematics. The School was concerned that Student would not cooperate with and/or willingly attend special education resource room instruction, and this concern turned out to be justified during the brief time the IEP was implemented. However, the School was still responsible for offering an appropriate amount of specialized instructional time commensurate with Student's deficits, and for creating a behavior plan to address resistance on Student's part. If it was the School's intention to provide intensive push-in specialized instruction to supplement Student's resource room time, this was not evident in the April 2017 IEP. While least restrictive environment (LRE) considerations are of great importance, the LRE that should be offered must represent what is appropriate for the individual child; in this case Student's deficits warranted a greater amount of pull-out special education services than offered in the April 2017 IEP.

FBA and PBSP: An LEA is only expressly required by the IDEA to conduct an FBA and develop a PBSP upon removal of an eligible child for 10 school days in a school year. In *T.L.* the court held that outside of the disciplinary context, an FBA isn't necessarily required where an IEP provides other means to address behaviors except to the extent implicit in the requirement that the IEP team "consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address ... behavior [that impedes the child's learning or that of others]."

An OSEP Dear Colleague letter of August 1, 2016, while not binding, is owed deference. The letter notes that the IDEA specifically requires IEP Teams to consider the use of positive behavioral interventions and supports, and other strategies, to address behavior for any child with a disability whose behavior impedes his or her learning or that of others. This guidance is pertinent here. OSEP notes that to the extent a child's behavior impedes the child's learning or that of others, the IEP Team must consider when, whether, and what aspects of the child's IEP related to behavior need to be addressed or revised to ensure FAPE. The School delayed conducting an FBA and developing a PBSP despite its own psychologist's recommendations, thus denying Student FAPE.

ESY: As articulated in opening statements, the Parent is requesting compensatory education for the 7th and 8th grade school years, including ESY for summer 2016. During the hearing, the parties also addressed ESY for summer 2017, and held differing views about whether it was offered, or

should have been offered. I did not receive any evidence that supported Student's entitlement to ESY for either summer, and therefore compensatory education for ESY will not be awarded.

IEE: The Parent unilaterally obtained the IEE after Student completed 8th grade and clearly for purposes of litigation; the record shows that she at no time asked the School for a publicly funded IEE. The Supreme Court, in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 300 (2006), made it clear that an LEA is not required to pay for a Parent's expert. Although the evaluation is likely to be useful for future IEP preparation, its results were not necessary to establish Student's eligibility for special education, as the School psychologist's evaluation filled that requirement adequately. For these reasons, in addition to the fact that it is not relevant to the claims before me, I decline to award reimbursement for the IEE.

Compensatory Education: The IDEA requires that a request for a due process hearing on a complaint must be made "within two years of the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint." 34 C.F.R. §300.511(e), 20 U.S.C. § 1415(f)(3)(c). Action in this context can also mean "inaction", specifically the School's not evaluating Student for special education eligibility. In her August 9, 2017 Complaint the Parent asserts that the School denied Student FAPE "for the past two years" and Parent counsel's opening statement noted Parent's belief that Student is owed "at least two years" of compensatory education. No exceptions to the IDEA's statute of limitations having been claimed, the relevant time period for any recovery under consideration in this matter is August 9, 2015 through August 9, 2017, Student's 7th and 8th grades.

Student was evaluated by a competent and experienced psychologist with whom the School contracted and whom the School clearly trusted. Results of the cognitive assessment revealed the striking extent of Student's intellectual limitations and these limitations shed light on the underlying reasons not only for Student's poor scores on normed achievement tests but also on possible underpinnings of Student's difficulties with schoolwork, with executive functioning and with effective problem-solving in situations involving conflicts with adults and peers. Although I did not have the opportunity to observe Student, from the fragments of information I gleaned from the Parent and from School staff I speculate that in school Student generally presented as more intellectually able than the cognitive testing revealed Student to be. Because the School did not evaluate and identify Student in a timely manner, certainly by the middle of 6th grade, it missed being able to program for Student through a finely tuned lens that would take into account not only what Student needed to learn but also how Student needed to be taught. Once Student was identified, the School produced an initial IEP that failed to adequately develop goals and failed to offer an appropriate amount of time for delivering individualized specially designed instruction.

Student is entitled to compensatory education. I find that Student's greatest unaddressed weaknesses lie in the area of fundamentals in reading and in math. Accordingly, Student is entitled to a total of two and three quarters ($2\frac{3}{4}$) hours per day of compensatory education for every day Student was present in School from the first day through the last day of the 2015-2016 academic school year, and from the first day of the 2016-2017 academic year through April 6, 2017. Student is also entitled to two (2) hours of compensatory education from April 7, 2017 through May 29, 2017. The $2\frac{3}{4}$ hours per day represent the School's failure to provide FAPE in a 45-minute period of reading in a classroom setting with specially designed instruction, failure to provide FAPE in a

45-minute period of math in a classroom setting with specially designed instruction, failure to provide 30 minutes of each of these subjects in a one-to-one instructional setting and failure to provide 15 minutes per day of targeted individual instruction in Student's areas of deficit in executive functioning. The reduction of 45 minutes per day from April 7, 2017 through May 29, 2017, bringing the amount from 2 ¾ hours to 2 hours per day for that period, credits the School's offering Student 45 minutes of special education services daily under the April 6, 2017 IEP. I am excluding ESY during the summer of 2016 and the summer of 2017 because other than the Parent's understandable desire that Student have ESY, Student's eligibility/need under the law for ESY was not established.

The compensatory education may be used for remedial services in reading and math, for tutorial services in core academic subjects where Student may be struggling, for coaching in executive functioning skills, and for counseling services to address difficulties Student might experience in relation to academic/social challenges in school. The total hours must be used by Student's 21st birthday and may be used in the evenings, on weekends, during holiday breaks and in the summer. The value of the hours shall be calculated on the usual and customary fees of properly credentialed professional service providers in Pennsylvania within a 25 mile radius of Student's residence.

Dicta: Although the School failed to address this student's learning issues in a timely and comprehensive manner, and will be required to remediate this failing through an award of compensatory education, I am not unsympathetic to the challenges it faces in educating its children, many of whom are in need of intensive services. The testimony of the School's CEO and of the special education coordinator clearly demonstrated their deep investment in the School's social justice mission and cultural philosophy, and their sincere caring for each of the children under their care. I am hopeful that the School will make the changes necessary to meet its obligations to each one of its current and potential special education students so that all its children can continue to benefit from the School's unique and nurturing learning opportunity.

Order

It is hereby ordered that:

1. The School did violate its Child Find duty towards Student.
2. The evaluation that the School performed in March 2017 was appropriate.
3. The IEP offered in April 2017 was not appropriate.
4. The School did violate Student's entitlement to FAPE by not conducting an FBA and creating a positive behavior support plan.
5. Student is entitled to a total of two and three quarters (2 ¾) hours per day of compensatory education for every day Student was present in School from the first day through the last day of the 2015-2016 academic year, and from the first day of the 2016-2017 academic

year through April 6, 2017. Student is also entitled to a total of two (2) hours per day of compensatory education for every day Student was present in School from April 7, 2017 through May 29, 2017. The compensatory education is to be used as described above.

6. Student is not entitled to compensatory education for ESY in the summer of 2016 or the summer of 2017.
7. The School is not required to pay for the IEE the Parent obtained.

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

Linda M. Valentini, Psy.D., CHO

December 21, 2017

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