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: 21096-18-19

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

Parents:
[redacted]

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D.

Date of Decision: 03/10/2019

INTRODUCTION

The student (hereafter Student)[1] is a late preteen-aged student residing in the District (District) but who has attended a cyber charter school since the spring of 2018. In late August 2018, the Parents filed a Complaint against the District pursuant to the Individuals with Disabilities Education Act (IDEA),[2] Section 504 of the Rehabilitation Act of 1973,[3] and the Americans with Disabilities Act (ADA),[4] as well as the applicable federal and state regulations. They alleged deficiencies in programming prior to Student's disenrollment and demanded compensatory and prospective relief. The District denied all of their claims.

The case ultimately proceeded to an efficient due process hearing with the parties presenting evidence in support of their respective positions.[5] The Parents sought to establish that the District failed in its child find obligations and in programming for Student, including imposing discipline in February 2018; they sought an evaluation by the District and a program based on that evaluation. The District maintained that Student had not been eligible for special education while enrolled, and that there was no reason to suspect a disability; it further declined to evaluate Student who was enrolled in a different Local Educational Agency (LEA).

For all of the following reasons, the Parents' claims must be granted in part and denied in part.

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[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. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with 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 codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

[3] 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

[4] 42 U.S.C. §§ 12101-12213.

[5] References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

PROCEDURAL HISTORY

a. The Parents' Complaint was filed on August 26, 2018.

b. The parties through their counsel and the hearing officer engaged in prehearing communications that included a continuance of the original hearing date to early November 2018 due to scheduling concerns of the Parents, and also a change in counsel for the District. The decision due date was thereafter extended.

c. The parties jointly moved to continue the November 2018 hearing and extend the decision due date in order to provide filings relating to the scope of the claims. The hearing was rescheduled for December 10, 2018.

d. In due course, the District filed a Motion to Limit the scope of the Parents' claims. The Parents asserted that an exception to the IDEA two-year statute of limitations applied, and the District denied those contentions. (HO-1.)

e. This hearing officer directed the parties to present evidence on the scope of the claims at the hearing scheduled for December 10, 2018. (HO-2.)

f. Just prior to the December 2018 hearing date, the Parents clarified that they were withdrawing their claim that an exception to the IDEA statute of limitations applied. The scope of the hearing was therefore limited to the two year period immediately preceding the filing of the Complaint. (HO-3; HO-4.)

g. Because the parties had been preparing for a hearing on the scope of the claims, a joint request to continue that December 2018 hearing was granted and sessions were scheduled for February 2019, the dates of earliest mutual availability. The decision due date was also again extended.

h. The matter proceeded to an efficient hearing in February 2019.

ISSUES

1. Whether the District violated its child find obligations to Student during the 2016-17 and/or 2017-18 school years;

2. Whether the District should have afforded Student the disciplinary protections in the IDEA as a "thought to be eligible" student in February 2018;

3. If the District did violate its child find obligations to Student during the 2016-17 and/or 2017-18 school year, should Student be awarded compensatory education; and

4. Whether the District should be ordered to conduct an evaluation of Student for eligibility under the IDEA and Section 504 despite Student's enrollment in another LEA, as well as an appropriate program based on that evaluation?

FINDINGS OF FACT

1. Student is late preteen-aged and is a resident of the District. (N.T. 34.)

2. Student began attending school at the District during preschool. During that preschool year, teachers occasionally indicated to the Parents that Student sometimes was distracted or inattentive and needed to continue development of social skills. The first grade teacher reported that Student required redirection at times and was demonstrating most skills at a basic rather than proficient level. Otherwise, Student's report cards through the end of second grade reflected that Student was generally meeting expectations with some Title I support. (N.T. 44, 47, 50, 54; P-1, P-2, P-3, P-4; P-5; S-22; S-25.)

3. In the fall of the 2016-17 school year (third grade), the teacher referred Student to the Response to Intervention (RTI) team based on some behaviors that Student was exhibiting in the classroom, specifically showing disrespect to the teacher and refusing her directives. The Parents attended an initial RTI meeting with the teacher and others including the guidance counselor, principal, and school psychologist. (N.T. 56-59, 79-81, 88-90, 96, 121, 123; S-23.)

4. After the initial RTI meeting in the fall of 2016, the teacher began using a few behavior interventions with Student including positive reinforcement and a behavior contract. Classroom management techniques that were not successful for Student were discontinued at the same time. (N.T. 90-93, 98-99, 105; S-23.)

5. Student also at times would talk out during class in third grade, especially at the start of the school year, but not to any extent that was concerning to the teacher. (N.T. 103-04.)

6. The RTI interventions were successful for Student and the process was discontinued in December 2016. Student met the majority of expectations by the end of that 2016-17 school year. (N.T. 92-93, 147-48; P-6; S-23.)

7. During the 2017-18 school year (fourth grade), the Parents were concerned that Student was experiencing difficulty with both academics and behaviors. (N.T. 59-60.)

8. Student's fourth grade teacher observed Student to call out in class at times and to hurry through tasks, and sometimes act impulsively, but not to any extent that was atypical of peers. The teacher monitored those behaviors and they were easily addressed in the regular education classroom. (N.T. 161-70, 177, 180.)

9. Student was meeting many of the expectations during the first half of the fourth grade school year. (P-8.)

10. Over the course of the 2016-17 and 2017-18 school years, some of Student's behaviors such as defiance or disrespect of others were recorded as data for the school-wide positive behavior support system. That collection of data is not the same as a disciplinary report. (N.T. 153-54; P-9.)

11. In February 2018, Student was involved in an incident on a school bus that involved a violation of the District Code of Conduct. Student was subsequently suspended from school for ten days and expelled for one day. (N.T. 66-67, 193-95; P-10.)

12. Prior to the February 2018 incident, Student was never evaluated for special education, and the District never sought permission to conduct such an evaluation. (N.T. 68.)

13. After the February 2018 incident, the Parents began to explore charter schools for Student. (N.T. 77-78,

14. In March 2018, the Parents for the first time asked the District to conduct an evaluation. The District responded with a form for their consent. (N.T. 69, 155, 195-96; P-13; S-19.)

15. Student enrolled in a cyber charter school on March 16, 2018, and the District confirmed that enrollment with the charter school. The District then forwarded information to the charter school about the pending evaluation, and also notified the Parents of those actions. (N.T. 74, 83, 196-98; S-17; S-20.)

16. After Student was enrolled in the charter school, they had Student evaluated by a private psychologist who diagnosed Attention Deficit Hyperactivity Disorder (ADHD). Student began to take medication for ADHD. (N.T. 73; P-14.)

17. The charter school evaluated Student and issued an Evaluation Report in September 2018, concluding that Student was eligible for special education under the classification of Other Health Impairment based on ADHD. (P-16.)

18. The charter school developed an Individualized Education Program (IEP) for Student in October 2018 that proposed itinerant learning support. (P-17.)

19. The Parents did not provide the District with the report of the private psychologist or the charter school's ER or IEP until after the Due Process Complaint was filed in August 2018. (N.T. 81-82.)

20. The Parents have not advised the District of any intention to re-enroll Student. (N.T. 198.)

21. The District provides information to the public about its responsibilities to identify children with disabilities. (N.T. 185-88; S-10; S-11.)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer*, *supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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).

This hearing officer found each of the witnesses who testified to be credible, and their testimony was essentially quite consistent where it overlapped.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' closing statements.

RELEVANT IDEA PRINCIPLES

The IDEA and state and federal regulations obligate local educational agencies (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." Those laws also obligate an LEA to provide a "free appropriate public education" (FAPE) to children who are eligible for special education. 20 U.S.C. §1412.

"Child Find extends to children 'who are suspected of [having] … a disability … and in need of special education, even though they are advancing from grade to grade." *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012)(citations omitted)(alterations in original). Nevertheless, the law "does not demand that schools conduct a formal evaluation of every struggling student." *Id*.

LEAs are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, LEAs are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability, but that obligation does not arise "at the earliest possible moment." *D.K., supra*, 696 F.3d at 249 (citation omitted). This is particularly so where the school professionals consider a student's presentation to be not atypical of same-aged peers. *Id*.

The IDEA defines a "child with a disability" as a child who has been evaluated and identified with one of a number of specific classifications and who, "by reason thereof, needs special education and related services." 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. Those classifications or categories are "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a).

With respect to the second prong of IDEA eligibility, "special education" means specially designed instruction which is designed to meet the child's individual learning needs. 34 C.F.R. § 300.39(a). Further,

> *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—
>
> (i) To address the unique needs of the child that result from the child's disability; and
>
> (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

LEA OBLIGATION FOR STUDENTS NOT ENROLLED

In Pennsylvania, the school district of residence is generally responsible for educating students residing within its boundaries, including children with disabilities, with some exceptions. 24 P.S. §§ 13-1302, 13-1372; 22 Pa. Code § 11.11. Like school districts, charter schools are public schools. 24 P.S. § 17-1703-A. And, a charter school may be an LEA and thereby "assume the duty to ensure that a FAPE is available to a child with a disability in

compliance with the IDEA … and section 504." 22 Pa. Code § 711.3; *see also* 34 C.F.R. §§ 300.28, 300.209; *R.B. v. Mastery Charter School*, 532 Fed. Appx. 136 (3d Cir. 2013).

In a case where an eligible child is not currently enrolled in the school district of residence, but the parents ask that school district to develop a special education program for him or her, it is incumbent upon the district to comply. *James v. Upper Arlington City School District*, 228 F.3d 764 (6th Cir. 2000)(holding that a school district's obligation toward a child with a disability arises from his or her residence within the district and not on enrollment); *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011)(concluding that a parent's request for an evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop an IEP). *See also I.H. v. Cumberland Valley School District*, 842 F. Supp.2d 762 (E.D. Pa. 2012)(denying the school district's motion to dismiss claims relating to its obligations to develop an IEP for a resident student no longer enrolled in the district where the parent had requested that it propose a special education program for her to consider for the student); *L.T. v. North. Penn School District*, 2018 U.S. Dist. LEXIS 211781 (E.D. Pa. Dec. 14, 2018)(applying *I.H.* to resident school district when the student was in a residential placement in another district but was expected to be discharged). However, the trigger is that "parents either re-enroll their child in public school or request evaluations so they can re-enroll him, [and then the] district must evaluate and develop an IEP for that child for purposes of proposing a FAPE." *I.H.*, 842 F.Supp.2d at 772 (quoting *Moorestown*, 811 F.Supp.2d at 1073).

More recently, in *Shane T. v. Carbondale Area School District*, 2017 U.S. Dist. LEXIS 163683 (M.D. Pa. Sep. 28, 2017), the District Court reviewed a situation where the student was in a private school, but the parent had completed and provided forms to register and re-enroll that

student in the school district, and the school district failed to respond by seeking an evaluation in order to develop a special education program to propose. The Court there concluded, under the specific facts presented, that the school district had an obligation to evaluate the student unless there was a clear expression by the parent that the student would not return: "it is not the parent's obligation to clearly request an IEP or FAPE; instead, it is the school's obligation to offer a FAPE unless the parent makes clear his or her intent to keep the student enrolled in the private school." *Id*. at *41. The *Shane T.* Court also explained that, "it is not the secret desire of the parent that matters, but the objective manifestation of those desires that dictate whether or not the public school must offer a FAPE." *Id*. at *41. In order words, "[t]he proper inquiry was whether it was clear to the District that [the student] would not be attending the District even if a FAPE was offered." *Id*. at *48. This rationale is persuasive and logical.

THE PARENTS' CHILD FIND CLAIM

The Parents' first claim is that the District failed to timely identify Student as a child with a disability during the 2016-17 and 2017-18 school years. On this issue, they have clearly failed to meet their burden of proof. The evidence demonstrates that Student was referred to the RTI process during third grade (2016-17 school year) because of behaviors exhibited in the classroom. A plan of regular education interventions was developed and was successful. Student similarly engaged in a few concerning behaviors during fourth grade but was easily redirected by the classroom teacher. In both school years, Student overall was able to meet expectations of grade-level peers, and neither teacher considered Student to be presenting differently than typical peers.

There was an incident in February 2018 that ultimately resulted in a suspension and expulsion, followed by the Parents' decision to enroll Student in a charter school. That one

incident, standing alone, does not point to a suspicion of disability or a need for special education. In any event, when the Parents thereafter made a request for an evaluation, the District promptly complied.

While it is true that Student was diagnosed with ADHD, that did not occur until after Student enrolled in the charter school, which became Student's LEA. Moreover, even a subsequent identification of a qualifying disability under the IDEA does not mean that the District automatically committed an error in failing to do so when Student was enrolled. *See D.K., supra,* 696 F.3d at 252. This hearing officer cannot conclude on this record that the District violated any IDEA obligations by failing to take steps to evaluate Student before the spring of 2018.

DISCIPLINE PROTECTIONS IN FEBRUARY 2018

The IDEA provides protections to students who are not yet determined to be eligible for special education but are involved in discipline where "the local educational agency had knowledge … that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." 20 U.S.C. § 1415(k)(5)(A).

> A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—
>
> i. the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
>
> ii. the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or
>
> iii. the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

Id. § 1415(k)(5)(B). Here, none of the grounds for imputing knowledge to the District exists in this case. There was no evidence that any teacher or other professional expressed concerns about a pattern of behavior, or that the Parents made any evaluation request or provided written concerns about possible eligibility before the February 2018 incident. Accordingly, the disciplinary protections in the IDEA did not apply.

DISTRICT'S OBLIGATION TO EVALUATE AND DEVELOP A PROGRAM

The final issue is whether the District is required to conduct an evaluation of Student and, if appropriate, develop and offer a program. Though it is a close call, this hearing officer concludes that it must now do so.

The case law cited above instructs that a school district of residence must evaluate a student with a different LEA if the parents either re-enroll the student, or the parents request an evaluation for purposes of deciding whether to re-enroll the child. In their Due Process Complaint, the Parents have sought an evaluation by the District and a subsequent program based on that evaluation. The District contends that the Parents did not establish that they have any intention of re-enrolling Student in the District and, thus, the trigger for an evaluation has not occurred. Whether or not they now have the actual intention to re-enroll Student is not determinative, however. The cases that impose the obligation to evaluate in this type of circumstance are based in part on the recognition that parents should be fully informed of how the school district of residence would plan to meet the child's needs before deciding whether to re-enroll him or her. *See, e.g., I.H., supra*, 842 F.Supp.2d at 772-73. Thus, unless there is a clear objective manifestation of an intention to maintain Student's enrollment at the charter school, the District must evaluate Student. *Shane T., supra*. Here, although the Parents have not stated an

explicit intention to re-enroll Student in the District, there is also no objective manifestation of an intention to keep Student in the charter school to excuse the District from conducting the evaluation.

The District also suggested that the ADHD diagnosis and, perhaps, the charter school's evaluation, were flawed. Even if that were true, however, if the District has an obligation to act, the law dictates that it must now conduct its own evaluation of Student in order to determine eligibility, and thereafter if appropriate develop and offer a program consistent with that evaluation. *See* 20 U.S.C. §1414(a)(1)(C)(i) (stating that there are two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child[.]") Thus, the District is not bound by the charter school's conclusions in order to propose a program for the Parents to consider; but, Student currently is identified as eligible for special education.

For all of these reasons, the District will be ordered to conduct an evaluation of Student pursuant to the IDEA and the applicable regulations to be followed by development of a program if needs are identified. The attached order will provide timelines so that this can be completed without undue delay.

Finally, the Parents' claims have been fully addressed under the IDEA, and the same conclusions must be reached under Section 504 and the ADA without further discussion.

ORDER

AND NOW, this 10th day of March, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not fail in its Child Find obligations to Student during the 2016-17 or 2017-18 school years, and Student was not denied a free, appropriate public education.

2. The District did not improperly withhold the disciplinary protections in the IDEA in connection with the February 2018 incident.

3. Within ten calendar days of the date of this decision, the District shall issue a new form to the Parents to obtain their consent to an initial evaluation.

4. Within sixty calendar days of receipt of the Parents' consent, the District shall complete an evaluation of Student under the IDEA and issue an Evaluation Report.

5. Within ten calendar days of the issuance of the Evaluation Report, the District shall hold a meeting with the Parents to discuss the results and formulate a program if the determination is made that Student is eligible for either an IEP or a Section 504 Plan.

6. Nothing in this decision should be read to preclude the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is relinquished.

Cathy A. Skidmore

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Cathy A. Skidmore
HEARING OFFICER
ODR File No. 21096-1819KE