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

OPEN HEARING
ODR File Numbers: 21043-18-19
21230-18-19

Child's Name: K. W. **Date of Birth:** [redacted]

Parent:
[redacted]

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Hearing Officer: James Gerl, CHO **Date of Decision:** January 23, 2019

DECISION

DUE PROCESS HEARING

21043/18-19AS
21230/18-19AS

BACKGROUND

The school district requested a due process hearing to contest the parent's request for three independent educational evaluations. Thereafter, the parent filed a due process complaint alleging that the school district failed to evaluate the student upon transition to kindergarten from early intervention services, that the district violated its child find obligation, that the district denied the student a free appropriate public education, and that the district denied the parents meaningful participation in the process. The two complaints were consolidated upon the request of the parties in order to allow a more efficient resolution of the disputes.

The parent raised certain additional issues in the second complaint that were not repeated either in the statement of issues by counsel at the outset of the hearing or in the parent's post-hearing brief. Such issues concerned alleged violations of Section 504 and alleged unlawful retaliation. Such issues have been waived and are not considered herein.

In view of the foregoing, I find in favor of the district on the issues of whether the parents are entitled to a publicly funded independent educational evaluation, whether the school district should have evaluated the student upon entry into kindergarten, whether the district violated its child find obligation and whether the district denied the student a free appropriate public education. I find in favor of the parent with regard to the issue of whether the district denied the parents their right to meaningful participation.

PROCEDURAL HISTORY

These two due process complaints were heard over two hearing days. At the hearing sessions, 17 witnesses testified. The school district's Exhibits 1 through 30 were admitted into evidence. The parent withdrew their Exhibits 10 and 16 as duplicative of school district exhibits. Parent Exhibits 1 through 9, 11 through 15, and 17 through 27 were admitted into evidence. Parent exhibits 19 and 20, however, were never provided to the hearing officer and are not a part of the record. At the outset of the hearing, a motion by the parent for additional educational records of the student was granted.

After the hearing, counsel for each party presented a written closing argument/post-hearing brief and proposed findings of fact. The briefs of both parties included references to documents which were not offered into evidence and

which were not the subject of a request for official notice, and, therefore, are not a part of the administrative record Such extra-record documents were not considered in this decision.

All arguments submitted by the parties have been considered. To the extent that arguments advanced by the parties are in accordance with the findings, conclusions, and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments have been omitted as not relevant or not necessary to a proper determination of the material issues as presented herein. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUES

1. Did the school district appropriately deny the parent's requests for three independent educational evaluations, and if not, is the parent entitled to three independent educational evaluations at public expense?

2. Should the school district have evaluated the student upon entry into kindergarten?

3. Did the school district breach its child find obligation?

4. Did the school district deny a free appropriate public education to the student, and if so, is the student entitled to compensatory education?

5. Were the parents provided with meaningful participation in the process?

FINDINGS OF FACT

Based upon the stipulations by counsel on the record at the hearing, the hearing officer makes the following findings of fact:

1. The student was identified with a speech language impairment by an early intervention services provider on October 29, 2014.

2. The student received early intervention speech language services through an IFSP.

3. The student began kindergarten in the district at the beginning of the 2016 – 2017 school year.

4. A substitute teacher was told to leave the school building that the student attended on April 6, 2018 and is not permitted to return to the school district.

5. An independent intake evaluation of the student was conducted by a psychologist on April 10, 2018.

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact:[1]

6. The student's parents have lived apart since approximately 2013. A divorce custody order by the Court of Common Pleas dated July 25, 2015 provides that the parents have joint physical custody of the child. Each parent retains educational decision-making authority. (S-6; T of father; T of mother)

7. On November 13, 2014, an individualized family service plan (IFSP) was developed for the student. The IFSP noted that the student had a delay in speech articulation skills. The IFSP provided for early intervention speech language therapy to be provided to the student 45 minutes per day for five days per week. (P-3)

8. The student's father did not participate in the meetings pertaining to the IFSP for the student. The student's father was not aware of the IFSP for the student

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1. [1] (Exhibits shall hereafter be referred to as "P-1," etc. for the parent's exhibits; "S-1," etc. for the school district's exhibits; references to testimony at the hearing is hereafter designated as "T" of _____).

until he was notified that the student had missed a speech/language therapy session. (T of father)

9. At the time of the student's speech services under the IFSP, the student was living with the mother Monday through Thursday morning and with the father and father's girlfriend Thursday afternoon through Sunday. The student only received early intervention speech/language services at the mother's house. (T of father; T of mother; T of father's girlfriend.)

10. After two or three speech language therapy sessions, the student's mother withdrew the student from early intervention services under the IFSP. The mother felt that the speech language therapy was not doing anything for the student and the mother declined to consent to further sessions. (T of mother; T of early intervention coordinator; S-4; S-21)

11. On December 17, 2015, the early intervention provider informed the district that the student had been withdrawn from early intervention services by the student's parent. Prior to that time, communications from the provider to the district listed the student as "active with plan." (S-4; T of early intervention coordinator)

12. The early intervention provider does not issue a notice of recommended educational placement when a parent withdraws a student from early intervention services. (S-30, T of early intervention coordinator)

13. After being notified by the provider that the student's parent had withdrawn the student from early intervention services, the district's early intervention coordinator marked "nonapplicable" in the district's database concerning requiring of permission to evaluate or to obtaining any further documentation from the parents. (T of early intervention coordinator)

14. When the mother enrolled the student for kindergarten in the school district, on April 4, 2016, the mother did not check the boxes asking whether the student had ever received early intervention services. Neither parent informed the school district that the student had received early intervention services. (S-7; T of mother)

15. The school district did not evaluate the student when the student began kindergarten or thereafter. (T of early intervention coordinator)

16. In kindergarten for the 2016 – 2017 school year, the student performed well academically. The student was reading on grade level and received satisfactory or outstanding grades in all classes. The student was in a general education classroom for kindergarten and subsequent years in the school district. The student did not display any disruptive or unusual behaviors during kindergarten. (T of kindergarten teacher; T of reading specialist; S-22; S-24)

17. The student had some speech issues with regard to pronunciation early in the kindergarten school year. The student's pronunciation improved during the year,

and the student actively participated in discussions during class. (T of kindergarten teacher)

18. The student participated in the "Leader in Me Lighthouse" program during first grade. The program encourages students to engage in leadership roles. In order to participate in the program, the student had to apply and demonstrate that the student was in good academic standing, had good behavior, was a good speaker and was good at following directions. (T of assistant principal; T of school climate support officer)

19. The student's final grades for first grade were all A's and B's. (S-24; P-13)

20. The student performed average or above average on literacy assessments given twice a year during first grade. (S-8; T of reading specialist)

21. The student performed above average in all subject areas in first grade in a general education classroom. The student was performing on grade level in all academic areas. (T of first grade teacher; S-24; S-12; P-13; P-14; P-15)

22. The student did not have any uncommon behavioral issues in first grade. (T of first grade teacher; T of assistant principal; S-11)

23. The student did not have any issues with speech or pronunciation during first grade. (T of first grade teacher)

24. The student transferred to a different school for second grade after the student's mother had moved. (T of father)

25. The student performed academically on level and on an above average basis in the second grade general education classes. The student was prepared, completed the work on time, actively participated in group discussions and handled redirection well. (T of second grade teachers; S-27; P-27; P-13; P-15)

26. The student did not have any unusual problem behavior issues or anxiety in the second grade. (T of second grade teachers)

27. The student did not have any speech or pronunciation issues during second grade. (T of second grade teachers)

28. The student had a large number of absences from school during the entire time in the school district. The student's absences did not affect the student's classroom performance or grades. (T of kindergarten teacher; T of first grade teacher; T of second grade teachers; S-25;P-13; P-14)

29. On April 6, 2018, a substitute teacher pulled the student by the arm and hit the student on the student's hand and then slapped the student's face. The student had apparently objected when the substitute had yelled at and/or hit another student. (T of assistant principal; T of counselor; P-9; S-10; S-9; S-26; T of father's girlfriend)

30. Following the incident on April 6, 2018, the student met with the school counselor and did not seem to be scared or upset because of the incident with the substitute. (T of counselor; S-11)

31. The student did not demonstrate any significant changes in behaviors or anxiety at school after the April 6, 2018 incident in which the substitute teacher had hit the student. (T of first grade teacher; T of counselor; T of school climate officer; S-11; S-12)

32. The student did suffer some additional challenging behaviors at home after the April 6, 2018 incident, especially involving a reluctance to leave for school in the morning. The student's parents did not bring any such behaviors to the attention of school officials. (T of mother; T of father's girlfriend)

33. On April 10, 2018, the student's father took the student to see a psychologist. The psychologist performed an abbreviated intake evaluation of the student. The psychologist interviewed the student and the father, but the psychologist did not administer any assessments or tests to the student. The report of the psychologist indicates that the student experienced fear as a result of the incident with the substitute teacher. The report made a number of recommendations, including recognizing signs of anxiety, such as "a deer in the headlights look," turns red and clenches fists, breathes more rapidly, begins moving body like getting ready to run or react, or bursts into tears or looks as if about to cry. The report of the psychologist does not recommend IDEA eligibility for the student. The report includes a number of suggested short-term accommodations and modifications for the student's academic program, including a possible temporary 504 plan, if needed. (S-26; P-17)

34. The student's teachers did not report any "deer in the headlights" looks or other signs of anxiety on the part of the student after the incident with the substitute teacher. (T of first grade teacher; T of second grade teachers; T of counselor)

35. On July 18, 2018, the student's father, by counsel, requested two independent educational evaluations, a neuropsychological evaluation and a psychiatric evaluation. (S-13)

36. The school district issued a permission to evaluate by e-mail to counsel for the father on August 10, 2018. The permission to evaluate was mailed to the student's mother on August 23, 2018. (S-14; S-16; S-18)

37. The permission to evaluate form notes that the parent had requested an evaluation of the student. The purposes of the evaluation are stated as determining if the student is eligible for special education or 504 services and to provide clear recommendations on using the student's strength to improve academic performance. The district was proposing that it conduct a comprehensive evaluation of the student, including assessments to determine psychological functioning, literacy achievement, math achievement, speech/language, behavioral/social/emotional functioning, adaptive behavior and a review of academic records. Under other option considered but rejected, the form lists "no evaluation at this time." Under the reason for rejecting that option is that the district "needs to rule out the need for specially designed

instruction for … (the student) to successfully access … (the) academic program." (S-16)

38. The student's father had not seen the permission to evaluate form issued by the school district as of the time of his testimony at the due process hearing herein. (T of father)

39. Neither of the student's parents signed the permission to evaluate form dated August 10, 2018 or otherwise gave their consent to the district evaluation the student. (T of father; T of mother)

40. On August 10, 2018, approximately one and a half hours after the district issued the permission to evaluate form, the student's father, by counsel, provided counsel for the district with a copy of the abbreviated intake evaluation of the student that had already been performed, requested reimbursement for that evaluation and additionally requested an independent psychiatric evaluation. (P-6)

41. On August 12, 2018, the school district filed a due process complaint contesting the parent's entitlement to independent educational evaluations at public expense. (S-17)

42. The student was evaluated by an independent certified school psychologist on August 24, 2018. The psychologist issued a report on September 21, 2018. (S-29; P-18)

43. The psychologist issued an addendum on November 3, 2018 to add input received from teachers on rating scales. (P-24)

44. The independent evaluation by the certified school psychologist included one observation of the student in one of the student's classrooms and observations of the student on two occasions at the office of parent's counsel. The independent school psychologist did not make additional observations of the student at school because of time constraints; the evaluator needed to complete the report prior to the first session of the due process hearing. The independent psychologist was unable to obtain any records from the school where the student had attended general education classes for kindergarten and first grade prior to completing the report. The evaluator did not observe the student in the home of the mother or the home of the father. (T of independent school psychologist; S-29)

45. The independent school psychologist did not consider any records from the school that the student attended for kindergarten and first grade other than some grades supplied by the parents. Although the evaluator called the school a number of times, the school officials did not call back and the evaluator took no further measures to obtain the records. (T of independent school psychologist)

46. The school psychologist administered the WISC-V test of cognitive functioning and found the student's full scale IQ to be 96 which is in the average range. The evaluator administered the WIAT-III assessment of academic achievement which

resulted in all scores in the average range. The evaluator administered the Conners and BASC-3 assessments and determined that based upon the parents' responses, the student had elevated levels of inattention, hyperactivity/impulsivity and aggression. (S-29)

47. The report of the independent school psychologist concludes that the student meets the "DSM-5" criteria for attention deficient hyperactivity disorder; hyperactive/impulsive type. The report concludes that the student's ADHD has the potential to impact academic progress for the student based upon a "D" grade that the student received in science for one marking period. Based upon this conclusion, the report notes that the student meets eligibility requirements for specially designed instruction under the category of other health impairment. The report suggests specially designed instruction to address inattention, hyperactivity and impulsivity. The evaluator also recommends a number of modifications and accommodations for the student's instruction. (S-29)

48. In the addendum to the report by the independent school psychologist, the evaluator notes that the teacher ratings concerning the student's behavior are highly discrepant from the parent ratings and the single classroom observation by the evaluator. Because of the discrepancy, the evaluator concludes that the student meets the eligibility requirements for specifically designed instruction under the category of

other health impairment. The addendum report cautions that because a teacher rating was missing 26 items, "results should be interpreted with caution." (P-24)

49. On October 19, 2018, the school district convened a meeting with a special education liaison, a school psychologist, a school counselor, and a general education teacher. The parents of the student were not invited to this meeting. At this meeting, the participants considered the abbreviated intake evaluation report prepared by the independent school psychologist and behavior analyst on April 10, 2018, as well as the report of the independent school psychologist prepared on September 21, 2018. At the conclusion of this meeting, the participants concluded that the student was not eligible for special education. (T of special education liaison)

CONCLUSIONS OF LAW

Based upon the arguments of counsel, all of the evidence in the record, as well as independent legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. A parent has a right to an independent educational evaluation, if the parent disagrees with an evaluation obtained by the public agency. 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 without unnecessary delay to show that its evaluation is appropriate; or (ii) ensure that an

independent educational evaluation is provided at public expense. 34 C.F.R. § 300.502(b)(1) and (2).

2. If a parent obtains an independent educational evaluation at public expense or shares with a public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. 34 C.F.R. § 300.502(c).

3. A child shall be exited from early intervention services based upon one or more of the following criteria:

(1) the child has reached the age of beginners and is therefore no longer eligible for early intervention services authorized under the Act,

(2) the child has functioned within the range of normal development for four months, with an IEP, as verified by the IEP team, or

(3) the parent or guardian withdrew the child from early intervention for other reasons.

22 Pa. Code § 14.157(a).

4. The rules regarding transition from Part C pertain only to students who are participating in early intervention. 34 C.F.R. § 300.502(c).

5. School districts are required under the IDEA child find requirement to identify and evaluate all students who are reasonably suspected of having a disability. P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 738 (3d Cir. 2009); Perrin ex rel JP v

Warrior Run Sch. Dist. 66 IDELR 225 (MD Penna 2015) adopted at 66 IDELR 254 (MD Penna 2015); 34 C.F.R. § 300.111; 22 Pa. Code § 14.121. But a formal special education evaluation is not required every time that a child posts a poor grade, struggles in school, or misbehaves. Ridley Sch. Dist. v. MR and JR ex rel. ER, 680 F. 3d 260, 58 IDELR 271 (3d Cir. 2012); DK by Steven K. and Lisa K. v. Abington Sch. Dist., 696 F. 3d 233, 59 IDELR 271 (3d Cir. 2012).

6. To be eligible for special education and to be entitled to a free appropriate public education, a student must be a child with a disability. A child with a disability must have one of the enumerated conditions, and by reason thereof needs special education and related services. 34 C.F.R. § 300.8(a); 22 Pa. Code § 14.101.

7. Whether a student is eligible for special education is determined by a team of "qualified professionals and the parent of the child." 34 C.F.R. § 300.306.

8. IDEA requires that parents be provided meaningful participation in the process. 34 C.F.R. § 300.322; Deal v. Hamilton County Board of Education, 392 F. 3d 840, 43 IDELR 109 (6th Cir. 2004); Stepp ex rel MS v Midd West Sch. Dist. (JG) 65 IDELR 46 (MD Penna 2015); JD v. Kanawha County Board of Education, 48 IDELR 159 (S.D.W.V. 2007).

9. The school district is not required to pay for the independent educational evaluations requested or obtained by the parent.

10. The school district did not violate IDEA by failing to evaluate the student when the student began kindergarten.

11. The school district did not violate its child find obligations in this case.

12. The school district did not deny the student a free appropriate public education.

13. The school district violated the parents' right to meaningful participation in the process by determining that the student was not eligible for special education at a meeting to which the parents were not invited.

DISCUSSION

1. Did the school district respond appropriately to the parent's request for three independent educational evaluations and if not, is the parent entitled to IEEs at public expense?

The federal regulations allow parents an independent educational evaluation at public expense where the parent disagrees with a school district evaluation unless the school district files a due process complaint to prove that its evaluation was appropriate. In this case, the parents do not object to a specific school district evaluation. The IDEA regulations clearly contemplate that the school district will get the first crack at evaluating a student. A district is not responsible for paying for an IEE where parents are not challenging a district evaluation. P.P. v. West Chester Area Sch. Dist 585 F.3d

727, 53 IDELR 109 (3d Cir. 2009); See, DZ v. Bethlehem Area Sch. Dist. 54 IDELR 323 (Penna Commonwealth Ct 2010).

The parent's brief cites Warren G ex rel Tom G v Cumberland County Sch. Dist. 190 F.3d 80, 31 IDELR 27 (Third Cir. 1999) to contest the proposition that the school district should have the first crack at an evaluation. The cited case is distinguishable, however, because there the district did conduct an evaluation of the child before the parent requested an independent evaluation. The parent's argument regarding the cited case is rejected.

In the instant case, the parent jumped the gun by having the student evaluated by independent evaluators before the district had a chance to evaluate the student. Because the parent did not give the district a chance to evaluate the student before requesting an independent educational evaluation at public expense, the parent does not have a valid claim for reimbursement.

Moreover, the school district tried to evaluate the student, but the parents failed to cooperate with the evaluation. On August 10, 2018, the school district issued a permission to evaluate to the parent's counsel to begin the evaluation process. If the parents had given their consent, this would have begun the process of a comprehensive school district evaluation, but parent's counsel did not respond to the permission to

evaluate form. The father testified at the hearing that he had never seen the permission to evaluate form before the hearing.

In the parent's post-hearing brief, the parent objects to the language of the permission to evaluate form because it refers to ruling out the need for specialized instruction and not to an analysis of the student's educational needs. The parent's argument in this regard appears to be somewhat disingenuous. The portion of the PTE form quoted in parent's posthearing brief involves the answer on the top of the second page to the question on the bottom of the first page concerning reasons for rejecting other options - here the option of not evaluating the student. The PTE clearly states the purpose of the evaluation as "to determine if the student is eligible…and provide recommendations on using … (the student's) strengths to improve…academic performance."

The adoption by the parent of this clearly erroneous reading of the permission to evaluate form undermines his credibility. The testimony of the parent's independent school psychologist also adopts this same dubious argument that the permission form was somehow invalid because the purpose was to "rule out…." The focus of the independent school psychologist on this bogus argument and clearly inaccurate reading of the form severely undermines the credibility and persuasiveness of the independent school psychologist's testimony.

Moreover, any initial evaluation under IDEA must be conducted by a school district in order to determine two things: whether the student is a child with a disability, as defined by law, and the educational needs of the child. 34 C.F.R § 300.304(b). Thus, regardless of the language used on the permission to evaluate form, any IDEA evaluation would necessarily include a determination as to whether the student is a child with a disability and if so, the child's educational needs. The parent's argument concerning the language of the permission to evaluate form being somehow inappropriate is rejected. It would appear that the parent was determined to thwart the ability of the school district to evaluate the student. It would be inequitable to find that the district was responsible for paying for independent evaluations where the parents obstructed the reasonable efforts of the district to conduct a comprehensive evaluation of the student.

Despite the fact that the parent does not challenge a specific school district evaluation, the school district did file a due process complaint in this matter. The parent argues in its post-hearing brief that the filing by the district on August 12, 2018 was not "without unnecessary delay," as required by the federal regulations. It is concluded that filing a due process complaint within 30 days of a request for an independent educational evaluation is quite reasonable and clearly does not constitute unnecessary delay. The parent's argument is rejected.

The parent raises one additional argument concerning this issue in its post-hearing brief that needs to be addressed. The parent refers to one of the federal regulations that allows a hearing officer to order an independent educational evaluation at public expense in order to help resolve a due process hearing.

The regulation in question, 34 C.F.R. § 300.502(d) is interpreted by the parent to allow independent educational evaluations on an equitable basis. The regulation quoted by the parent involves cases where a hearing officer determines that an independent evaluation would help to resolve a due process complaint. That is not the case here.

Although a hearing officer clearly does have broad equitable powers to order relief that is appropriate upon the finding of a violation of IDEA, including ordering an evaluation at public expense where appropriate, there must be a violation of IDEA before any such equitable remedy is awarded. The parent has not shown any violation of IDEA by the school district in handling the parent's request for independent educational evaluations. The argument is rejected.

To the extent that the testimony of the witnesses favorable to the parents is contradicted by the testimony of the school district witnesses concerning this issue, the testimony of the district witnesses is more credible and persuasive than the testimony of the parent's witnesses.

The district has proven that the parent is not entitled to reimbursement for the independent educational evaluations in question.

2. Should the school district have evaluated the student upon entry into kindergarten?

The parent contends that the school district erred by not evaluating the student upon arrival in kindergarten. The parent's posthearing brief refers to a "botched transition," and the parent contends that the student was already eligible for special education because the student had received speech therapy under an IFSP.

The evidence reveals, however, that the student's mother had withdrawn the student from early intervention services under the IFSP and refused to consent to the speech services that "weren't doing … (the student) any good." Under state law, withdrawal by a parent exits the child from early intervention. 22 Pa. Code § 14.157(a). Thus it is clear that the student was not already eligible when entering kindergarten.

Under the IFSP, the student did not attend a preschool. Instead, speech language therapy services were delivered to the student in the student's mother's home. The student's father was not aware that the student had an IFSP or that the student was receiving early intervention speech services until the speech provider called him one

day concerning the student missing sessions. The student's mother did not involve the father in the speech services.

The documentary evidence reveals that the student's mother withdrew the student from services under the IFSP. The documentary evidence is supported by the testimony of the mother. The mother testified that the early intervention speech language services received by the student "were not doing anything" for the student. The student's mother stopped the speech language services after only two or three sessions. Thus, it is clear that the student was withdrawn by the student's mother from early intervention services under the IFSP. The mother also did not answer the questions on the kindergarten enrollment intake form concerning whether the student had received early intervention services. Neither parent alerted the school district officials that the student had previously had speech issues or an IFSP.

The early intervention services provider correctly notified the school district that the student had been withdrawn from any services by the student's mother. The rules regarding transition from Part C pertain only to students who are participating in early intervention. 34 C.F.R. § 300.502(c), and the school district, therefore, was not required to evaluate the student upon entering kindergarten.

The parent's brief points to testimony by a special education liaison of the district that if the liaison had known that the student's IFSP called for reevaluation in two years,

the liaison would most likely have taken steps to have the student evaluated. Although the testimony of the liaison may be consistent with best practice, the parent has not offered any legal authority to support the proposition that the district was required by law to evaluate the student.

The parent also cites 22 Pa. Code § 14.153(5) for the proposition that an MDT must be convened to determine continued eligibility for early intervention services. The parent's argument, however, ignores the fact that the mother withdrew the student from services and terminated the student's eligibility by refusing to permit the student to participate in the services. The parent's argument in this regard is rejected.

To the extent that the testimony of the witnesses favorable to the parents is contradicted by the testimony of the school district witnesses concerning this issue, the testimony of the district witnesses is more credible and persuasive than the testimony of the parent's witnesses.

The parent has not proven that the district was required to evaluate the student upon the student's entering kindergarten.

3. Did the school district breach its child find obligation?

A school district has an obligation to identify students reasonably suspected of having a disability. Also referred to as the child find duty, a school district is required under the IDEA to identify and evaluate all students who are reasonably suspected of having a disability. The child find requirement does not, however, require a formal special education evaluation every time that a child posts a poor grade, struggles in school, or misbehaves.

In the instant case, the student was performing academically at or above grade level during the student's entire time in the school district. Also, the student showed no anxiety or abnormal behaviors while at school. As a result, the school district did not have a reasonable basis to suspect that the student was a child with a disability.

The student's kindergarten teacher testified credibly and persuasively that the student did have some speech issues, particularly with regard to pronunciation, early in kindergarten, but that the issues improved and that the student began actively participating in classroom discussions. This testimony is corroborated by the testimony of the student's mother that the student's speech problems resolved early in kindergarten. The student's first and second grade teachers testified credibly and persuasively that the student did not have any speech/language issues in class.

The one potential red flag in this case was that on April 6, 2018, the student was pulled on the arm, scratched and slapped by a substitute teacher after the student

objected to the teacher hitting and/or yelling at another student. The student's mother and the father's girlfriend testified that the student had a number of behavioral episodes at home after the incident with the substitute teacher, especially involving reluctance to go to school. The student's mother and the father's girlfriend, however, did not tell school officials about the behavior incidents at home.

However, the student's teachers, the assistant principal, the counselor and the school climate officer all testified credibly and persuasively that the student's behaviors at school were not any different after the April 6, 2018 incident. The school district staff also testified that they did not see any increase in anxiety in the student after the incident with the substitute. The documentary evidence supports the testimony of the school district witnesses.

The record indicates that the student had an increase in absences after the April 6, 2018 incident, but that fact alone is not sufficient to cause the district to reasonably suspect that the student had a disability. The student had a long history of absences and was, nonetheless, consistently performing well in all classes and not exhibiting any unusual or inappropriate behaviors at school any more than other students of that age.

Although the parent's posthearing brief does not expressly raise the issue, it is implicit that the parent contends that the district should simply have accepted the conclusion of one of the independent evaluators that the student has a disability under

IDEA. This argument must be rejected because an evaluator cannot simply prescribe special education. Perrin ex rel JP v Warrior Run Sch. Dist. 66 IDELR 225 (MD Penna 2015) adopted at 66 IDELR 254 (MD Penna 2015). IDEA eligibility determinations are made by properly constituted eligibility teams.

There are additional problems with this argument. First, the first independent evaluator did not conclude that the student had a disability or needed special education. Second, although the independent school psychologist did testify that the student had an IDEA disability, the credibility and persuasiveness of this witness is impaired by the fact that the witness went to great lengths in order to misread the district's evaluation permission form. By taking out of context the "rule out" language under the box for reasons for rejecting the option of not evaluating the student, and by ignoring the clear statement of the purpose of the evaluation, the independent school psychologist greatly weakened the weight to be accorded to the psychologist's conclusions.

Moreover, the independent school psychologist did not provide a clear explanation in the report of evaluation or in testimony concerning why the student's ADHD caused the student to need special education. The first report focuses upon one "D" grade in a single class. The addendum to the report focuses upon discrepancies between teacher ratings and parent ratings. Neither of these items show that the student

needed specialized instruction "by reason thereof". 34 C.F.R § 300.8(a)(1). The evaluator does not adequately support this conclusion.

The conclusions of the independent school psychologist are also impaired by the fact that the evaluator did not make a reasonable effort to obtain or review records from the school attended by the student for first and second grade. Finally, the testimony of the psychologist reveals that the report was rushed in order to have it ready for the hearing. Accordingly the testimony of the independent school psychologist that the student needed special education is not credible. The implicit argument that the conclusion by the independent evaluators triggered a child find duty is rejected.

The parent may however invite the psychologist and any other independent evaluators to, and/or supply the reports of independent evaluators at, future school meetings concerning the student, and the district is required to consider any input which the evaluators may provide.

To the extent that the testimony of the witnesses favorable to the parents is contradicted by the testimony of the school district witnesses concerning this issue, the testimony of the district witnesses is more credible and persuasive than the testimony of the parent's witnesses.

It is concluded that the school district did not breach its child find duty in this case.

4. Did the school district deny a free appropriate public education to the student, and if so, is the student entitled to compensatory education?

In order to be entitled to a free appropriate public education (hereafter sometimes referred to as "FAPE"), the student must first be a child with a disability, as defined by IDEA. In other words, a student must have one of the enumerated disabilities under the statute, and by reason thereof, must be in need of special education. 34 C.F.R § 300.8(a)(1).

In the instant case, the student has not been found eligible for special education; in other words, the student is not a child with a disability, as defined by the statute. In addition, given the student's good academic performance and lack of behavior issues at school, it is quite probably unlikely that the student would be eligible for special education. Accordingly, the student is not entitled to FAPE and therefore is not entitled to an award of compensatory education.

The parent's post-hearing brief raises one additional concern that needs to be addressed pertaining to this issue. The parent alleges that multiple teachers were coached concerning their testimony at the due process hearing. There is no evidence

to support this allegation in the record with the exception of the testimony of one teacher that an input rating sheet that the teacher gave to one of the independent evaluators hired by the parent contained information that was not in the teacher's handwriting and not consistent with the responses the teacher would have given. It appears that there was some mistake or miscommunication concerning the input from that particular teacher, but the mistake is clearly not as sinister as the conclusion drawn by the parent. One teacher input form contained errors, but it would require a big leap of logic from that fact to conclude that witnesses in the due process hearing were improperly coached. Any such coaching would obviously be a serious violation of IDEA and the ethical obligations of those involved and could not be tolerated, but there is no evidence of such coaching in the record in this case.

To the extent that the testimony of the witnesses favorable to the parents is contradicted by the testimony of the school district witnesses concerning this issue, the testimony of the district witnesses is more credible and persuasive than the testimony of the parent's witnesses.

The parent has not shown that the student was entitled to a free and appropriate education.

5. Were the parents provided with meaningful participation in the process?

The parent contends that he was denied meaningful participation by the school district concerning the student. Most of the parent's allegations as to this issue concern the student's entry into kindergarten. Such concerns have been analyzed and rejected in the preceding sections of this decision.

One additional point raised by the parents, however, merits further discussion. On October 19, 2018, the school district convened a meeting to review the independent educational evaluations submitted by the parent. The attendees at this meeting did not include the parents; the parents were not invited to this meeting. The school district contends in its post-hearing brief that the parents were not required at this meeting because it was merely a meeting to review documents. The district's argument ignores the fact, however, that at the conclusion of the meeting, the school district staff attending the meeting determined that the student is not eligible for special education. The parents are necessary and very important members of any team convened under IDEA to determine eligibility. They should be equal members of the team and their input should be seriously considered. It is highly inappropriate to conduct an eligibility meeting without inviting the parents of the student. This is clearly a violation of IDEA as it substantially impaired the parents' right to meaningful participation.

To the extent that the testimony of the school district witnesses is contradicted by the testimony of the witnesses favorable to the parents concerning this issue, the

testimony of the parent's witnesses is more credible and persuasive than the testimony of the district witnesses.

RELIEF

An IDEA hearing officer has broad equitable powers to remedy a violation of the Act. Forrest Grove Sch. Dist. v. TA 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (U.S. 2009); Stapelton v. Penns Valley Area SD 71 IDELR 87 (MD Penna 2017); In Re Student With A Disability 52 IDELR 239 (SEA WV 2009).

In the instant case, only one of the violations of IDEA alleged by the complaint has been sustained. The parents have demonstrated that the district personnel violated the parents' right to participate in the process by determining that the student was not eligible at a meeting which the parents were not invited to attend.

The appropriate relief for the violation of IDEA by the district in this case involves both training and a future meeting to determine the student's eligibility that in

fact includes the parents. The training is necessary because it is clear that district personnel need a refresher on parental participation rights. Concerning the future meeting, the parents will need to consent and permit the school district to evaluate the student to determine whether the student is eligible for special education and if so, what the student's educational needs are. The later eligibility committee meeting will also necessarily include due consideration of any independent educational evaluation reports which the parents have already obtained or may obtain in the future and any other input from independent evaluators.

Because equitable IDEA relief should be flexible and because IDEA is a collaborative process, Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (2005), the parties shall have the option to agree to alter the relief awarded, so long as both parties and their lawyers agree in writing

ORDER

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. In the event that a parent consents and signs any appropriate forms, the district shall conduct an evaluation of the student. Within thirty days of the report of said evaluation, but no more than 60 days after a parent signs the consent form, the

district is ordered to convene an eligibility meeting to determine whether the student is eligible for special education and if so what the student's needs are. The parents must be invited to the eligibility meeting and any independent evaluation reports or other input the parents submit must be duly considered;

2. Within 180 days of the date of this decision, the school district shall conduct training for all staff who normally participate in special education eligibility meetings concerning meaningful participation by parents in such meetings;

3. The parties may adjust or amend the terms of this Order by mutual written agreement signed by all parties and all counsel of record; and

4. All other relief requested by the instant due process complaint is hereby denied.

IT IS SO ORDERED.

ENTERED: January 23, 2019

James Gerl

James Gerl, CHO
Hearing Officer