This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order
ODR No. 21408-18-19

CLOSED HEARING

Child's Name:
S.E.

Date of Birth:
[redacted]

Parent:
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
02/11/2019

Introduction

This special education due process hearing concerns the educational rights of the Student.[1] The Student's parents (the Parents) requested this hearing against the Student's school district (the District), alleging violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.* Specifically, the Parents allege that the District violated its "Child Find" duty by failing to identify the Student as a child in need of special education, and that the District violated the Student's right to a free appropriate public education (FAPE) by failing to offer an individualized education program (IEP) that meets the Student's needs.

Issues

The period of time in question is November 6, 2016, through the present, excluding periods of time during which the District was not the Student's local educational agency (LEA). For the period of time in question, the issues are:

1. Did the District violate its Child Find obligations?

2. Did the District violate the Student's right to a FAPE?

For remedies, the Parents demand compensatory education to remedy the Child Find and FAPE violations, and changes to the Student's IEP.

Findings of Fact

The Student is currently in 9th grade. The record of this case creates a history of the Student's education going back to 2nd grade. As noted above, the period of time in question is from November 6, 2016, through the present. Evidence of events before November 6, 2016, is relevant to the issues presented, and provides necessary background and context.

Both parties' attorneys presented their cases efficiently. That efficient presentation was helpful as I reviewed the record of this matter in its entirety. Even so, I make findings of fact only as necessary to resolve the issues before me. Consequently, not all evidence entered into the record is referenced herein.

I find as follows:

I. Placement History[2]

1. The 2013-14 school year was the Student's 4th grade year. The Student attended one of the District's schools for the entirety of the 2013-14 school year.

2. The 2014-15 school year was the Student's 5th grade year. The Student attended one of the District's schools from the start of the 2014-15 school year through mid-November 2014. From mid-November 2014 through the end of the 2014-15 school year, the Student attended a Pennsylvania cyber charter school (the Cyber School).

[1] With the exception of the cover page, identifying information is omitted to the extent possible.
[2] No facts in this sub-section are disputed.

3. The 2015-16 school year was the Student's 6th grade year. The Student attended a private religious school (the Religious School) during the 2015-16 school year.

4. The 2016-17 school year was the Student's 7th grade year. The Student attended one of the District's schools during the 2016-17 school year. The period of time in question in this hearing starts during the 2016-17 school year on November 6, 2016.

5. The 2017-18 school year was the Student's 8th grade year. The Student started the 2017-18 school year attending one of the District's schools. The Student was hospitalized for one week following an incident of suicidal ideation on October 30, 2017. After the hospitalization, the Student attended the Cyber School for the remainder of the 2017-18 school year.

6. The 2018-19 school year was the Student's 9th grade year. The Student attends one of the District's schools, starting at the beginning of the 2018-19 school year through the present.

II. The 2013-14 School Year (4th Grade)

7. Prior to the 2013-14 school year, the Student received accommodations help the Student with auditory integration and prosodic deficits. Those hearing problems were identified in an evaluation report dated February 27, 2012. The accommodations were provided pursuant to a Section 504 Service Plan.[3]

8. The Student began to express a dislike for school starting in 2nd grade. It also took the Student a long time to complete homework, even with significant parental help. The Parents also perceived that the Student was frequently sad and did not have friends. This continued into and throughout the 2013-14 school year.

9. The Parents took the Student to a psychologist for counseling. The psychologist diagnosed the Student with anxiety and depression. *See, e.g.* NT 29-35.

10. On November 23, 2013, the Parent reported to the District that the Student was diagnosed with anxiety and depression.[4] The Parent requested special education services from the District to address the Student's anxiety and depression. S-1.

11. The District evaluated the Student to determine eligibility for special education and completed an Evaluation Report on February 6, 2014 (the ER). S-1.

12. Through the ER, the District found that the Student's intellectual ability was in the average range. The District found that that the Student's academic achievement was also in the average range in all domains except for math fluency, which was one point below the average range (74 standard score). Both intellectual ability and academic performance were measured by well-regarded, standardized, normative assessments. S-1.

13. Through the ER, the District also assessed the Student's behavior and emotional functioning using standardized rating scales that were completed by two of the Student's teachers and one of the Student's parents. The evaluator urged caution when interpreting the results of

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[3] The 504 Plan from the 2012-13 school year is not part of the record of this case. There is no dispute, however, that the Student had a 504 Plan before the 2013-14 school year. The date of the 2012 audiological evaluation is found in P-1.

[4] More specifically, the psychologist diagnosed the Student with Generalized Anxiety Disorder and Dysthymia.

one rating scale, as both the Parent and one of the teacher's scores triggered a validity warning. Generally, one of the teachers and the Parent rated the Student's emotional problems as more significant than the other teacher. Nevertheless, the District concluded that the Student was at a high risk for anxiety and depression. The evaluator noted those conclusions were consistent with the medical diagnoses that the Student received before the ER. S-1.

14. One of the emotional and behavioral rating scales that the District used was designed specifically to assess risk for Emotional Disturbance. The results of that assessment were interpreted by the evaluator to suggest that the Student has an emotional disturbance that could impact upon the Student's educational performance. S-1.

15. The evaluator concluded that the Student was not eligible for special education as a student with a Specific Learning Disability (SLD), Other Health Impairment (OHI), or an Emotional Disturbance (ED), because there was no discrepancy between the Student's intellectual ability and academic performance. More specifically, the evaluator concluded that the lack of difference between ability and achievement established both the absence of SLD, and that the Student's emotional problems did not impact upon the Student's educational performance. S-1.[5]

16. The evaluator also concluded that the Student's 504 Plan was working, and should be continued. S-1.

17. The Parents and District met on February 12, 2014, to discuss the Student's Section 504 Plan. The District proposed a continuation of the Section 504 Plan, which included accommodations for the Student's auditory deficits. The Section 504 Plan does not reference the Student's emotional problems. P-1.

18. The Parents approved the Section 504 Plan on February 26, 2014.

19. The Student continued 2013-14 school year under the Section 504 Plan. The Student finished the 2013-14 school year meeting expectations in core academic subjects, and exceeded expectations in music and computer literacy.[6] S-27. On the 4th grade PSSA, the Student received "Basic" scores in math and reading, and "Advanced" in science. S-28.

III. The 2014-15 School Year (5th Grade)

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[5] The Parents testified that District employees told them around that the Student's grades were too good to qualify for special education, and that the Student would only qualify if the Student was three years behind academically. The Parents testified that the District repeated this information through the period of time in question. The District denies this. It is a *per se* violation of special education laws for any LEA to adopt such a practice, either through implementation of policy or otherwise. My task in this hearing, however, is not to determine whether the District's policies and practices comport with IDEA mandates. Rather, my task is to determine whether the Student's rights were violated. If the Student needed special education and did not receive special education, the Student's rights were violated regardless of how the District made its decision. Consequently, the District's policies and practices are not relevant and I make no finding of fact in this regard.

[6] In 4th grade, the District scored the Student on a scale from 4 to 1 in several domains. A score of 3 indicated that the Student consistently met expectations and a 2+ indicated that the Student demonstrated increased consistency. The Student received a 3 or a 2+ in all core academic domains.

20. The Student started the 2014-15 school year under the Section 504 Plan that was continued in February 2014. Although the exact date is uncertain, the Student was seen by a psychiatrist and started taking anti-anxiety medications and a sleep aid sometime after the ER was completed and before the start of the 2014-15 school year. NT 40.

21. At the start of the 2014-15 school year, the Parents continued to perceive the Student as sad and friendless, and the Student had difficulty sleeping. The Student also would become upset when completing homework, which still took a long time even with parental assistance. The Student would also cry when getting on the bus to school. NT 40-42.

22. On September 5, 2014, the Student's teacher sent an email to the Parents saying that the Student was upset, tired, and distracted. The teacher attributed this to adjusting to the start of school. The Parents replied that the Student has school-related anxiety, was receiving therapy from the psychologist, and "loses steam with math." P-8.

23. Also on September 5, 2014, the Parents spoke by phone with another teacher, and requested a meeting. A meeting was scheduled for September 15, 2014. That would be the first of at least five meetings between the Parents and the District between September and and November 2014. In each of those meetings, the Parents asked for more help for the Student. P-8, NT *passim*.

24. The Student's treating psychologist asked teachers to complete an additional behavior rating scale to get more information about the Student's distractibility in school. Based on the results of that rating scale, the psychologist added Attention Deficit Hyperactivity Disorder (ADHD), predominately inattentive presentation, to the Student's anxiety and depression diagnoses. P-2.

25. The psychologist informed the District of the new diagnosis via a letter faxed to the District on November 13, 2014. The same letter explains that the psychologist was seeing the Student "on a bi-weekly basis to address mood concerns and executive functioning deficits."[7] P-2.

26. The District and Parents had a Section 504 Meeting scheduled for November 13, 2014. The District received the fax from the psychologist just before the meeting started. Even so, the District revised the Student's Section 504 Plan during the meeting to note the psychologist's letter and all three diagnoses. The revised Section 504 Plain also noted that the Student's diagnoses "may negatively impact [Student] in the areas of concentration and organization." P-3. Three accommodations were added: one to ensure that the Student kept complete and accurate notes, another to provide copies of PowerPoint presentations, and a third giving the Student the option for an "alternate lunch location."[8] P-3.

27. During the November 13, 2014, Section 504 Meeting, the Parents again expressed their belief that the Student qualified for special education as a student with OHI. *See* P-8 at 4.

28. On November 14, 2014, (the day after the Section 504 Meeting) the Parents sent an email to District administrators explaining that they were removing the Student from the District and enrolling the Student in a Pennsylvania public cyber charter school (the Cyber School).

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[7] Bi-weekly, a term that should be avoided when specificity matters, means one time every two weeks in this instance.

[8] The need for an alternate lunch location is not explained on the record.

The Parents explained that they were doing this because they believed that the Student was not receiving appropriate services from the District. P-8.

29. On November 19, 2014, the Parents signed the revised Section 504 Plan, indicating that they agreed to the accommodations. The Parents also wrote on the approval form that they also believed the Student qualified for special education as a child with OHI, and would do better with an IEP. *See* P-3 at 4.

30. On November 25, 2014, the Student transferred to the Cyber School. S-4. There is no dispute that the Cyber School became the Student's LEA upon that transfer.

31. The Student was enrolled in the Cyber School for the remainder of the 2014-15 school year. The Student's mother, who is a teacher and math specialist in another school district, took a half-year sabbatical and worked as the student's instructional coach while the Student was enrolled in the Cyber School. The Student thrived emotionally and academically under those conditions. S-6, S-7, NT 49-50. During that time, the Cyber School did not propose a special education evaluation for the Student and the Parents did not request a special education evaluation. NT 89.

32. In May 2015, the Parents wrote to the District again stating their belief that the Student is eligible for special education, and requesting a "comprehensive re-evaluation" to determine eligibility and needs. P-4. The District replied, stating its belief that it provided a FAPE for the Student at all times, and listing a chronology of events that occurred during the Student's enrollment in the District. Moreover, the District declined to evaluate the Student because the Cyber School, not the District, was the Student's LEA. P-5. The Parents responded by adding their perspective to the District's chronology.[9]

33. The Student's mother testified that she hoped the District would evaluate the Student and offer an IEP so that the Student could re-enroll in the District for the start of the 2015-16 school year. *See, e.g.* NT 52. However, regarding possible re-enrollment, the May 2015 letter says only that the Parents, "will not give up on [the District's] ability to provide for my child's basic educational needs." P-4 at 1.

IV. The 2015-16 School Year (6th Grade)

34. The Student enrolled in a private religious school (Religious School) for the 2015-16 school year. The end of the Mother's sabbatical and the District's refusal to evaluate were significant factors in withdrawing the Student from the Cyber School and choosing the Religious School over the District. *See* NT 52-53.

35. The Student attended the Religious School for the entirety of the 2015-16 school year. The Student earned 80s and 90s in all academic subjects, and was on the honor roll each quarter. The Student also scored in the average range in all academic areas on the 6th grade TerraNova 3 assessment.[10] S-7.

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[9] The dates on exhibits P-4 and P-5 are confusing, and are listed differently in the parties' briefs. The Parents' letter requesting an evaluation is dated May 18, 2015, and is stamped as received on May 20, 2015. P-4 at 1. The District's response is also dated May 18, 2018, and notes an email from the Parents on May 18, 2018. P-5 at 1. It appears that the Parent sent copies of the same document by mail and email on May 18, and that the District replied the same day. The Parents' response is dated May 19, 2018.

[10] The TerraNova 3 is a standardized, normative achievement assessment.

36. There were no written communications between the District and the Parents while the Student attended the Religious School.

V. The 2016-17 School Year (7th Grade)

37. In the summer of 2016, a psychiatrist saw the Student and diagnosed the Student with Autism Spectrum Disorder (ASD). The psychiatrist completed a one-page form listing the Student's diagnoses (ASD, ADHD, anxiety, and depression) and medications, but providing no other information, on July 8, 2016. For clarity, the form listed ASD as a new diagnosis without providing any information about how that diagnosis was determined or any medical or educational recommendations. S-8.

38. The Student has an interest in computers, which are not available at the Religious School. The Parents decided to re-enroll the Student in the District for the 2016-17 school year so that the Student could have access to computers in school. *See* NT 53-54.

39. On July 9, 2016, the Parents sent an email to the District saying that the Student was recently diagnosed with ASD, that they had completed the online portion of the enrollment application, that their appointment to finish the enrollment process was scheduled for July 25, and that they wanted an evaluation for special education services. P-8.

40. The Student re-enrolled in the District on July 25, 2016. S-9.

41. The Parents had a private evaluator assess the Student after receiving the ASD diagnosis. The private evaluation took place between August 8 and 16, 2016. The evaluator then drafted a report, which is undated, but was delivered to the Parents very shortly after the evaluation. The Parents sent a copy of the report to the District upon receipt of very shortly thereafter. S-10, NT 56.

42. The private evaluator concluded that the Student's intellectual ability and academic achievement were both still in the average range according to standardized, normative assessments. The Student's math ability was also now in the average range.[11] S-10.

43. The private evaluator also had the Parents complete two standardized ratings scales designed to assess ASD. The first was the Gilliam Asperger's Disorder Scale (GADS). The GADS asks responders to rate children across different domains. That data is then used to generate an Asperger's Disorder Quotient. An Asperger's Disorder Quotient of 80 or higher indicates a high probability of Asperger's Disorder, which is now falls under the ASD diagnosis. The Student was rated at a 67, indicating that there is a low probability that the Student meets diagnostic criteria for Asperger's Disorder. Deeper analysis revealed, however, that the Parents endorsed problematic behaviors that are consistent with an ASD diagnosis – most notably social skills and pragmatics — but not at a frequency that would have elevated the Quotient. S-10.

44. The other ratings scale was the Social Responsiveness Scale - 2 (SRS-2). Like the GADS, the SRS-2 reduces to a single score called a T-score. A T-score on the SRS-2 of 76 or higher is in the "severe" range, indicating "deficiencies in reciprocal social behavior that are clinically significant and lead to severe interference with everyday social interactions. Such

[11] Normative assessments rate the Student in comparison to same-age peers. Staying in the average range over time indicates that the Student has made the same amount of progress that one would expect from an average peer of the Student's age over the same period of time.

scores are strongly associated with the clinical diagnosis of autism spectrum disorder." The Student's T-score was 78. The Parents' rating also indicated "particular difficulty" with "Restricted Interests and Repetitive Behavior." S-10.

45. The private evaluator diagnosed the Student with ADHD and ASD (Level 1, requiring support). S-10.

46. The private evaluator recommended that the family attempt to receive "supports from the county" that could come into the classroom, and used mobile therapists and behavioral specialists as an example. The private evaluator said nothing, however, about seeking supports emotional or behavioral directly from the District or any other educational agency or school. S-10.

47. The private evaluator also recommended telling the Student about the positive conclusions of the academic testing as a way to boost the Student's self esteem. However, the private evaluator identified math weakness relative to the Student's other academic abilities (despite the fact that all academic abilities were assessed to be squarely in the average range) and recommended "additional math support" without specifying a type or amount. S-10.

48. On September 16, 2016, the District sought the Parents' consent to conduct an evaluation to determine what accommodations the Student may require under Section 504. The proposed evaluation would consist of parent and teacher input, and a review of educational and medical records. The Parents provided consent. S-11.

49. The parties met at a Section 504 Meeting on September 19, 2016, concluded that the Student required accommodations, and then drafted a Section 504 Plan. S-11.

50. The 2016 Section 504 Plan referenced the Student's educational history in the Cyber School and Religious School, the private evaluation, and all current diagnoses. The accommodations listed on the 2016 Section 504 Plan are nearly identical in substance to the prior Section 504 Plan from 2014. Both provided copies of class notes, study guides, checks for understanding, and seating proximate to the teacher. The 2016 Section 504 Plan, however, removed accommodations calling for a visual schedule in the classroom and an alternative lunch room. *C/f* P-3, S-11.

51. During the Section 504 Meeting, the parties discussed the special education evaluation the Parents had requested in writing a bit more than 10 weeks prior. The parties agreed to implement the 2016 Section 504 Plan and reconsider the need for a special education evaluation should circumstances change. NT 116. The Parent approved the 2016 Section 504 Plan on September 19, 2016, without any qualifiers. S-11.

52. Although the date is uncertain, there is no dispute that the Student became upset in school during a day in the fall of 2016. The Student went to the guidance counselor's office. The Student's regular guidance counselor was not in that day, and so the Student spoke with another guidance counselor. The Student was crying and "inconsolable."[12] The guidance counselor called the Student's mother, who picked up the Student at school. NT 62, 233.

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[12] The Parents argue that the Student became overwhelmed in school. The District argues that the Student was upset about something that happened at home. There is no preponderant evidence in the record to support either of these conclusions. The guidance counselor who met with the Student testified both that

53. At the time of the incident, the District did not believe that the Student was a threat to self or others, and did not recommend crisis intervention. NT 236. The Parents did not seek any additional or emergency mental health interventions following the incident. NT *passim*. The incident did not trigger additional evaluations or revisions to the 2016 504 Plan.

54. The incident in the fall of 2016 was the only incident of its kind in school during the entirety of the 2016-17 school year. NT *passim*.

55. Around the same time, the Student made a comment to the Parents about wanting to walk out into the woods. NT 62, 106, 238-239. It is not clear if this comment was made in school or at home. The Parent took this as the Student's expression of a desire to avoid circumstances that increase anxiety, as opposed to suicidal ideation. *See,* NT 62.

56. On October 7, 2016, the Student's guidance counselor checked in with the Student's teachers by email. Teachers reported that the Student was doing very well academically and stood out as polite, respectful, attentive, and an active participant in class. The Student also participated in the school's fall play. S-14.

57. Although not documented in the 2016 Section 504 Plan, there is no dispute that the Student participated in a social skills group for the first half of the 2016-17 school year. On December 6, 2016, the Parents wrote to the District asking to discontinue the social skills group. At that time, the Parents reported that the Student was "really enjoying the … School and [the Student's] team," but "is very uncomfortable [in the social skills group] and would much rather remain in an activity period." S-14. The District honored the request, although the social skills instructor noted that the Student was the "best participant" in the group. S-14.

58. The Student finished the 2017-18 school year with 80s and 90s in all academic subjects (grades were higher in some specials). S-27. The Student scored squarely in the "basic" range in Mathematics and the "Proficient" range in English/Language Arts on the 7th grade PSSA. S-28.

VI. The 2017-18 School Year (8th Grade)

59. The Student started the 2017-18 school year receiving accommodations in accordance with the 2016 Section 504 Plan.

60. On September 26, 2017, the Parents wrote to the Student's guidance counselor and reported that the Student was "beginning to really feel the pressures of school lately." The Parent reported that the Student does well academically but is exhausted, depressed, and had difficulty making and keeping friends. The Parents also reported that the Student was once again seeing the psychologist (it is not clear when the Student stopped seeking the psychologist). The Parents also requested a meeting. S-17.

61. Prompted by the Parents' email, the guidance counselor met with the Student. The Student reported feeling overwhelmed and stressed by the transition from 7th to 8th grade. The quantity of work and expectations for the Student to complete that work independently had both increased. The guidance counselor suggested that the Student would benefit from a

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the Student could not articulate what was so upsetting, and that the cause was something that happened at home. The Parents conclusion that the Student was upset about something that happened at school is supported only by hearsay.

break in the day in the guidance office, and also invited the Parents to a meeting to discuss the Section 504 Plan. S-17.

62. On October 6, 2017, the parties met and revised the Students Section 504 Plan. Two accommodations were added. First, the Student could take breaks as needed. Second, teachers were to break long term assignments into smaller parts, specify a due date for each part, and then check for completion of each part. S-15.

63. Although not reflected in the 2017 Section 504 Plan, the District also placed the Student into a class designed to help with study skills, organization, and test prep. S-17.

64. On October 30, 2017, the Student expressed suicidal ideation at home. The Parents brought the Student to a mental health center for crisis intervention. The Student was evaluated and then admitted to an in-patient mental health program from October 31 through November 3, 2017. P-6, S-17.

65. Following the mental health hospitalization, the Parents withdrew the Student from the District and re-enrolled the Student in the Cyber School. S-17.

66. The Student attended the Cyber School for the remainder of the 2017-18 school year. The Student's mother did not leave work to become the Student's coach this time. In the first quarter of the 2017-18 school year, the Student earned 80s and 90s in district classes. S-27. Without a coach, the Student's grades fell to Bs and Cs in the Cyber School. S-21.

67. The Parents asked the Cyber School to evaluate the Student for special education eligibility. The Cyber School completed its evaluation and issued an evaluation report in May 30, 2018 (the 2018 ER). S-21. The 2018 ER included a comprehensive review of all prior testing, additional cognitive and academic testing, a re-issuance of some of the previous behavior ratings scales, and additional assessments of anxiety and depression.

68. The cognitive and academic testing was similar to all prior testing. Assessments of anxiety and depression were significantly elevated compared to prior assessments. The Cyber School's evaluation concluded that the Student was in need of special education as a child with a primary disability category of Emotional Disturbance (ED) and a secondary category of OHI. S-21.

69. Through the 2018 ER, the Cyber School made recommendations to the Student's IEP team. These included participation in a social skills group, development of independent work skills, development of coping strategies, building the Student's self confidence, and continuation of the accommodations in the 2017 Section 504 Plan. The 2018 ER provided no specific guidance as to how any of those objectives should be accomplished. S-21.

70. Although the 2018 ER found that the Student's academic performance was average and commensurate with the Student's intellectual ability, the 2018 ER notes that the Parents described math as a weakness, and recommended unspecified math supports. The 2018 ER also noted that listening comprehension was a weakness relative to reading comprehension, and recommended specific strategies to compensate. S-21.

71. On June 25, 2018, the Parents met with the Cyber School to develop an IEP for the 2018-19 school year. S-23. The resulting IEP included a math goal, a reading goal, a goal to improve the Student's organization and ability to work independently, and two social skills goals. S-23.

72. Both the math and reading goals called for the Student to improve upon baseline levels that indicate the Student was already completing grade-level work. S-23.

73. The organization goal called for the Cyber School to measure the Student's organizational skill using a rubric at the beginning of the 2018-19 school year to determine a baseline, and then improve from there. S-23.

74. Neither of the social skills goals are baselined. One social skills goal called for the Student to look at a picture or "take in … verbal scenarios" and then describe the non-verbal information in the picture with 85% accuracy across five consecutive sessions. The other called for the Student to maintain a non-preferred topic of conversation for three to five turns with a peer with 85% accuracy over five conductive sessions. S-23. No evidence suggests that the student was unable to perform the skills monitored by the social skills goals at the time that the IEP was drafted.

75. The Cyber School IEP was not implemented in the 2017-18 school year, because the school year had ended.

76. The Student finished the 2017-18 school year with Bs and Cs from the Cyber School. S-21.

VII. The 2018-19 School Year (9th Grade)

77. The Parents re-enrolled the Student in the District for the 2018-19 school year. *See, e.g.* NT 75.

78. From the start of the 2018-19 school year, the Student has attended a small, co-taught math class. The class teaches at a slower pace. Both of the Student's current math teachers agree that the pace of the class, as opposed to its size, is a key factor in the Student's current success in math. The Parents also agree that the Student is currently successful in math, but attribute that success to the pace, size of the class, and practices of the teachers. NT *passim, see e.g.* NT 269-280.

79. On September 25, 2018, the District convened an IEP team meeting for the Student. During the meeting, the District proposed an IEP that was a modification of the IEP drafted by the Cyber School. S-25.

80. The District's IEP kept the reading goal, and the social skills goal calling for the Student to maintain a topic of conversation. The social skills goal now had baseline data, however, showing that the Student needed prompting to stay on topic when the topic was not of interest to the Student. S-25.

81. The District modified the organization goal slightly, and added a baseline. As assessed by the District's organization rubric, the Student scored 20 out of 20 as a baseline. However, the District continued the goal, which now called for the Student to maintain at least 18 out of 20 for an entire quarter. S-25.

82. The District removed the math goal and the other social skills goal that were in the Cyber School's IEP. S-25.

83. The District's IEP provided several program modifications and specially designed instruction (SDI). This included an "opportunity to participate in" a social skills group once per week for 40 minutes per session. Several testing accommodations. Several accommodations to gain and maintain the Student's attention without calling attention to the Student, a pre-test

anxiety self assessment, and (substantively if not literally) all of the accommodations in the 2017 Section 504 Plan. S-25.

84. On October 25, 2018, the District issued a Notice of Recommended Educational Placement, formally proposing its IEP.[13] The Parents rejected the NOREP on October 27, 2018. At the time, they stated that they were rejecting the IEP because it did not provide necessary reading and math supports. S-26.

85. The Parents requested this due process hearing on November 6, 2018.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *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).

In this case, all witness testified credibly. There was very little dispute concerning the underlying facts. To the very small extent that testimony from one witness contradicted another, the witnesses simply recalled facts differently.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent the party seeking relief and must bear the burden of persuasion.

Child Find

In the parlance of special education law, "child find" is a term of art describing a school's obligations under 34 U.S.C. § 300.111 and 22 Pa. Code § 14.121. Those regulations require LEAs to have in place procedures for locating all children with disabilities, including those suspected of having a disability and needing special education services although they may be

[13] No issues concerning the delay between the IEP team meeting and the issuance of a NOREP are before me.

"advancing from grade to grade." 34 U.S.C. §300.111(c)(1). Once identified, schools have an obligation to determine if children suspected of having a disability require special education. Schools typically satisfy that obligation by proposing to evaluate children who are suspected of having a disability.

Eligibility

The IDEA and its implementing regulations establish a two-part test to determine eligibility. First, a student must have a qualifying disability. Second, by reason thereof, the Student must require specially designed instruction (SDI). See 34 C.F.R. § 300.8.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1,* 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." Id at 3015.

Historically the Third Circuit has interpreted Rowley to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark,* 336 F.3d 260 (3rd Cir. 2003).

LEAs are not required to maximize a child's opportunity; it must provide 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). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that 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. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, 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).

In *Endrew F.,* the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimis*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics — as is clearly evident in this case.

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Compensatory Education

Compensatory education is an appropriate remedy where a 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 Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia,* 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting Reid and explaining that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the

evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996).

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Discussion

I. The 2016-17 School Year (7th Grade)

Although I make findings of fact concerning the 2013-14 school year through the present, the period of time at issue in this case starts on November 6, 2016, towards the middle of the Student's 6th grade year. In terms of the District's liability, the periods of time during which the Cyber School was the Student's LEA are also excluded. The inquiry, therefore, begins at the start of the 2016-17 school year when the Student returned to the District from the Religious School for 7th grade.

At the start of 7th grade, the District knew that the Student had successfully completed 6th grade at the Religious School, but was now diagnosed with ASD in addition to anxiety and depression. The District also had the report from the private evaluator and the Parent's written request for a special education evaluation. In response to this information, the District convened a Section 504 meeting. There, the Parents agreed to forgo the special education evaluation and

continue the Section 504 Plan. The District also put a social skills group in place, but did not reference that fact in the Section 504 plan.

These circumstances do not give rise to a child find violation. The District took action in response to information indicating that the Student may have a disability. Specifically, it considered all available information, including the private evaluation, and concluded that the Student had a disability but did not require special education. The Child Find obligation is not violated when LEAs complete an evaluation (or accept an evaluation from a third party) and conclude that a child is not eligible for special education. Child Find specifically refers to the duty to determine whether a child who is suspected of having a disability actually has one and requires special education. Any flaws in the evaluation process or subsequent programming may violate other IDEA obligations, but do not indicate a breach of the Child Find duty.

Upon re-enrollment in 7th grade, it was reasonable for the District to conclude that the Student had a disability but was not in need of special education. An additional evaluation was not necessary at that time because the private evaluation had just been completed. The District accepted that evaluation. As a technical matter, the Parents agreed to not pursue a special education evaluation less than 60 days after they requested one in writing.

To the District's knowledge, the Student had successfully completed 6th grade at the Religious School without special education. No academic, social, or emotional difficulties in 6th grade were reported to the District. Further, the Student's academic performance was in line with the Student's intellectual ability — both in the average range. The same evaluation showing that the Student was performing as expected academically did not indicate that the Student required special education from the District. The report suggested that the Student may require interventions for the Student's emotional wellbeing but, again, the Student completed 6th grade without those supports without incident.

The District's offer to monitor the Student and reconsider the need for a special education evaluation is consistent with IDEA mandates. More importantly, the District did what it offered to do. It monitored the Student's academic progression and need for emotional support. The Student's academic performance was strong. With the exception of the emotional incident in the fall of 2016, the Student showed no signs of emotional problems at school. There is no dispute that the incident in the fall of 2016 was isolated and uncharacteristic for the Student at that time.

It is unfortunate that the District did not document the Student's participation in the social skills group. Participation in a social skills group is not typically considered to be a regular education intervention. Consequently, if the Student required the social skills group to obtain a meaningful educational benefit, the Student required special education and should have had an IEP. However, there is no evidence that the Student actually required the social skills group, or that the District thought that the Student's participation in the social skills group was necessary. To the contrary, evidence shows that the Student, Parents, and District all agreed that the Student was ultimately better off participating in regular school activities than participating in the social skills group. Some evidence suggests that the Student was outperforming peers in that group.

The Student's mother, however, painted a very different picture of the Student through her testimony. It is somewhat difficult to pin down the Student's mother's testimony in time, as it was not always clear what school year she was testifying about. Taken as a whole, the Student's mother testified credibly that the Student was persistently sad and anxious at home during 7th grade. There is little to no evidence supporting that the Parents made the District aware of their perceptions. Rather, the Parents told the District that the Student was enjoying school. This is consent with the Student's participation in extracurricular activities, academic performance, and

the praise that the Student earned from teachers. I am quite sure that maintaining those grades and in-school behavior took considerable effort from both the Student and Parents. That, by itself, does not evidence a breach of any IDEA obligation.

I also find that the Student's Section 504 Plan was appropriate during 7th grade. The purpose of a Section 504 Plan is to provide accommodations so that the Student can access the curriculum to the same extent as the Student's non-disabled peers. There is no evidence that the Student was unable to access or benefit from the District's regular education curriculum in 7th grade.

II. The 2017-18 School Year (8th Grade)

The analysis for the portion of the 2017-18 school year during which the District was the Student's LEA is more complex. The Parent and Student both reported increased anxiety at the start of the school year. This prompted inquiry into the Student's coping abilities and a meeting with the Parents and District. During the meeting on October 6, 2017, the parties agreed to revise the Student's Section 504 Plan to include breaks as needed. A study skills class was also added at that time, but is not referenced in the Section 504 Plan.

I find that the Student's disabilities were impacting upon the Student's education to the point that District had reason to know that specially designed instruction may have been required. The District concluded that the Student required both breaks during the day and participation in a study skills class in order to tolerate the day and continue the Student's academic success. It was appropriate for the District to put those interventions in place immediately with parental consent. The District should have also proposed a special education evaluation because the services that the District now viewed as necessary — particularly breaks to compensate for the Student's emotional state — are not regular education accommodations. As discussed above, education includes much more than academics. Even if the Student was academically successful, the District's actions evidence its conclusion that the Student may have required a higher level of support. As such, the District knew that the Student had multiple qualifying disabilities and may have required special education. Consequently, the District was obligated to propose a special education evaluation but did not do so. This is a Child Find violation.

The District's Child Find violation did not result in a substantive denial of FAPE in this case. Starting on October 6, 2017, the District had a reasonable period of time to rectify the problem by proposing an evaluation. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996). Unfortunately, the Student was hospitalized 24 days after the District had reason to suspect that the Student required special education. Moreover, 28 days after the meeting, the Student left the District and the Cyber School became the Student's LEA. Even if the District had proposed an evaluation on October 6, 2017, the District would have been under no obligation to complete the evaluation and make an eligibility determination until December 5, 2017. 22 Pa Code § 14.123.

The Student's hospitalization is, of course, a significant red flag. There can be no question that the District was obligated to propose an evaluation after the hospitalization. However, the Parents enrolled the Student in the Cyber School upon discharge from the hospital. At that point, the District was no longer the Student's LEA and was not responsible for evaluating the Student to determine special education eligibility.[14]

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[14] I acknowledge that the Student's mother testified that she would have kept the Student in the District after the hospitalization if the District had proposed an evaluation. Although the Student's mother

There are some similarities between the facts of this case and those in *I.H. ex. rel. D.S. v. Cumberland Valley School District*, 842 F. Supp. 762 (M.D. Pa. 2012). In *I.H.*, the student's guardian placed the Student in a cyber school following a dispute with Cumberland Valley about the services that the Student should receive. Under those circumstances, Cumberland Valley was obligated to offer the Student an IEP, despite having no FAPE obligation, so that the family could know what services the Student would receive if the Student were to return to Cumberland Valley. This case is different in two important ways. First, at the time the Student withdrew from the District, the Student was entitled to an evaluation, not an IEP. Also, in *I.H.* there was clear evidence that the dispute over the Student's program compelled the guardian to seek programming from a different LEA. In this case, there is no evidence that the Parents demanded an evaluation at the time of the withdrawal, or that the District refused to evaluate. It is clear that the Parents were increasingly dissatisfied with the District, and they left believing that the Student's circumstances would not change if they stayed. These honest but subjective impressions are not the same as the clear evidence of a dispute prompting withdraw that the court considered in *I.H.*[15]

In sum, I find that the District violated its Child Find obligation by not proposing an evaluation when it knew that the Student had a disability and may be in need of special education. Under the specific facts of this case, I find that the Child Find violation did not result in a substantive denial of FAPE. The Student had a right to be evaluated, but the Student left the District before the evaluation timeline expired. Under some circumstances, the Student's transfer to the Cyber School may not completely terminate the District's obligations. Those circumstances are not present in this case.

III. The 2018-19 School Year (9th Grade)

The Student came back to the District for the start of 9th grade as a child with a disability who had an approved-but-never-implemented IEP. The District does not challenge the Cyber School's evaluation or its conclusion that the Student qualifies for special education as a child with an Emotional Disturbance (ED) or OHI. Rather, from this point, the dispute shifts to the appropriateness of the District's offered IEP. The Parents claim that the IEP is inappropriate because it fails to provide support in math or address the Student's needs in reading comprehension. Regarding math in particular, the Parents argue that the Student is currently receiving appropriate supports in math, but those supports are not documented in the District's offered IEP.

Analysis of this issue *should be* straightforward. There is no preponderance of evidence that the Student requires specially designed instruction in order to derive a benefit from reading or math instruction. Evaluations have shown that those domains are weaknesses for the Student. But those weakness are relative to the Student's strengths, small in absolute terms, and statistically insignificant as measured by normative assessments. Consequently, it should be simple to conclude that specially designed instruction in math and reading comprehension are not necessary components of FAPE for the Student and, therefore, need not be drafted into the Student's IEP.

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testified credibly, I give that testimony little weight because of its speculative nature, given with the benefit of hindsight.

[15] In *I.H.*, the guardian insisted upon a particular special education placement and Cumberland Valley insisted upon another special education placement. As such, the dispute prompting the cyber school placement in *I.H.* was clearly defined.

The reason why the analysis is *not* so straightforward flows from the District's history of providing undocumented accommodations to the Student. The District provided participation in a social skills group and a study skills class with the Parents' consent but without any documentation. These failures in the past do not expand the Student's rights going forward. They do, however, compel me to take extra precautions that the services that the Student actually receives are documented somewhere. Consequently, I will order the District to document the supports that the Student is currently receiving in math in the "Present Levels of Academic Achievement and Functional Performance" section of the IEP, or in any other section that the parties agree to. I will further order the District to provide written notice to the Parents before changing those supports. This will ensure that the IEP accurately reflects the program in which the Student currently participates, and supports the Parents' meaningful participation in the IEP development process.

To be clear, I do not hold that the current math supports are SDIs, or are a necessary to ensure the provision of FAPE. The District need not obtain parental consent before changing or discontinuing those services. I hold only that the IEP must reflect those services, and the Parents must be notified before any change.

An order consistent with the above follows.

ORDER

Now, February 11, 2019, it is hereby ORDERED as follows:

1. In accordance with the accompanying decision, the District violated the IDEA's Child Find obligations between October 6, 2017 and the Student's enrollment in a Cyber School in the fall of 2017.

2. In accordance with the accompanying decision, the District shall document the math supports that the Student currently receives in the Present Levels of Academic Achievement and Functional Performance section of the IEP, or in any other section to which the parties mutually agree.

3. In accordance with the accompanying decision, the District shall provide written notice to the Parents fourteen (14) calendar days before changing or discontinuing any math supports that the Student currently receives.

4. In accordance with the accompanying decision, the District need not obtain parental consent before changing or discontinuing any math supports that the Student currently receives.

5. The District did not violate the Student's substantive right to a FAPE, and compensatory education is not owed.

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

/s/ Brian Jason Ford
HEARING OFFICER