

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.

Pennsylvania
Special Education Hearing Officer

CLOSED HEARING
ODR Case #22050-18-19

Child's Name: P. C. **Date of Birth:** [redacted]

Parents:
[redacted]

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School District:
Hempfield School District
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Date of Decision:
August 6, 2019

Hearing Officer:
Michael J. McElligott, Esquire

INTRODUCTION

Student (“student”)¹ is a high school student who resides in the School District (“District”).

The parties dispute whether the student is a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)². The student’s potential identification as a student with a disability under IDEIA—whether or not the student should have been considered a thought-to-be-eligible student— was at issue in a separate special education due process proceeding in light of a disciplinary incident in January 2019.³

In the instant matter, the parties dispute the question of whether the student should have been identified as a student with a disability under IDEIA not just as such an identification might relate to the January 2019 disciplinary incident but more broadly as to whether the student should have been so identified at all.

For the reasons set forth below, I find that the District failed in its overall duty to identify, and program for, the student as a special education student with a health impairment.

¹ To protect the confidentiality of the student, the generic use of “student”, rather than a name or gender-specific pronouns, will be employed and will be substituted in direct quotes throughout the decision.

² It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-162.

³ See final decision at ODR file number 21969-1819KE finding that prior to January 11, 2019 the District did not know, nor should it have known, that the student should have been considered thought-to-be-eligible in light of the disciplinary incident.

ISSUES

Did the District fail to identify the student
as an eligible student under the terms of IDEIA?

If so,
was the student denied a free appropriate public education (FAPE)
because of the District's handling
of a manifestation determination process?

If the first question,
and potentially the answer to the second question,
is/are "yes", is the student entitled to remedy?

FINDINGS OF FACT⁴

1. The student has attended District schools since kindergarten. (HO-2 at pages 7-24 [transcript pages therein at 18-86]).
2. [redacted]
3. In the elementary grades, on every report card over the student's 1st – 5th grade years, areas for improvement consistently included being "attentive during instruction", "(organizing) materials and possessions", "staying on task", and "follows directions". The student did markedly better in these areas in 6th grade. (P-2 at pages 10-22).

⁴ In the prior special education due process hearing at 21969-1819, parents' complaint was entered into the record as Hearing Officer Exhibit ["HO"]-1. In the instant matter, the parties stipulated that all party exhibits from 21969 would be entered into the record in their entirety, with any new exhibits added and numbered sequentially. The transcript from 21969 is also made part of this hearing record as HO-2.

4. The student's 3rd grade year was described as particularly challenging for the student. (P-11, P-12 at page 11).
5. In March 2012, the spring of the student's 4th grade year, the student was evaluated privately by a community mental health provider. The evaluation noted the reasons that the family sought the evaluation were: forgetfulness about homework, misplacing things, messy desk, and tardiness. Other notes indicated additional concerns which, to an objective reader, cannot be easily deciphered. (P-12, generally, and at page 12).
6. The evaluator made a provisional diagnosis of adjustment disorder, with indications for further rule-out for attention-deficit hyperactivity disorder ("ADHD"), adjustment disorder, anxiety disorder, and mood disorder. The evaluation was not shared with the District at that time, and the evaluator did not testify at the instant hearing, or in the proceedings at 21969-1819. (P-12 at page 12; HO-2, generally, and at pages 7-24 [transcript pages therein at 18-86]).
7. In middle school, multiple teachers noted incomplete assignments, lack of organizational skills, and unsatisfactory homework completion. (P-2 at pages 6-9; School District Exhibit ["S"]-9 at pages 6-9).
8. Throughout elementary school and middle school, the student performed well academically. (P-2 at pages 6-22; S-9 at pages 6-9).

9th Grade/2016-2017

9. In December 2016, the student was given detention for unexcused tardiness, an academic infraction, and a class-cut. (S-11 at page 2).
10. In January 2017, parents presented to the District a diagnosis of ADHD by a community mental health provider (different from the individual who evaluated the student in 4th grade), along with a request for a Section 504 accommodation plan. (P-8, P-13; S-1).
11. At that time, parents also presented to the District, for the first time, the March 2012 evaluation. (P-6 at page 6; S-1).
12. In March 2017, the District developed a Section 504 plan to address the student's "focus, attention, and organization" due to ADHD. (P-6 at pages 6-8; S-2).
13. The March 2017 Section 504 plan contained accommodations to address focus, attention, organization, and assignment-completion. (P-6 at pages 6-7; S-2).
14. In 9th grade, the student experienced multiple incidents involving lack of organization, timely completion of assignments, poor class engagement, and absences from class or assigned time, the majority of those after the development of March 2017 Section 504 plan. (P-13 at pages 1-77).

15. In 9th grade, the student showed the need to improve timely completion of coursework and being prepared for class in algebra, English, music, and foreign language. (P-2 at pages 4-5).
16. In 9th grade, the student continued to perform well academically. (P-2 at pages 4-5; S-9 at pages 1, 4-5; S-10 at pages 1-2).

10th Grade/2017-2018

17. In August 2017, a psychologist, dually licensed as a clinical psychologist and certified as a school psychologist, privately evaluated the student (different from the individuals who evaluated the student in 4th grade and earlier in 2017). (S-3; Notes of Transcript ["NT"] at 20-114).
18. The private psychologist determined that the student was mis-diagnosed with ADHD. Instead, the private psychologist diagnosed the student with mild Asperger's Syndrome, attributing the student's needs with "procrastination difficulties" and "challenges with mental flexibility" to this diagnosis, rather than ADHD or other diagnoses rooted in attention/concentration disorders. (S-3, *generally*, and at page 16; NT at 20-114).
19. The private psychologist made recommendations for the home and community settings but not an educational setting. (S-3 at pages 17-18; NT at 20-114).

20. In September and October 2017, the student continued to experience multiple incidents involving lack of organization, timely completion of assignments, poor class engagement, and absences from class or assigned time. (P-13 at pages 78-94).
21. In November 2017, the private psychologist communicated by letter with the District, providing the August 2017 private evaluation report. (P-9; S-3 at page 1; HO-2 at pages 24-25 [transcript pages therein at 86-92]).
22. The private psychologist recommended continued implementation of a Section 504 plan. He opined in the letter that [the] diagnosis of mild Asperger's Syndrome "can adversely impact upon (the student's) ability to interpret social and affective states of others and can result in inappropriate responses to teachers and other individuals in (the student's) social environment. (The student's) responses may not line up with what one would view typically, the reaction of peers (the student's) same age in similar circumstances." (S-3 at page 1; P-9; NT at 20-114).
23. The private psychologist's recommendations and accommodations, however, did not include any recommendation or accommodation geared toward social interaction, affect, or response-to-others. The private psychologist's recommendations related only to test-taking: extended time on state, local, and

- classroom-based assessments/tests and distraction-free test-taking environments. (S-3 at page 1, P-9).
24. In November 2017, based on the private psychologist's report and recommendations, the student's Section 504 plan was revised. (P-6 at pages 4-5; S-4 at pages 1-2).
25. The November 2017 Section 504 plan continued to recognize that the student has needs in focus, attention, and organization, with accommodations geared to those needs. The November 2017 Section 504 plan, based on the August 2017 private evaluation, noted in bold "It is important to note that (the student) does not have attention deficit issues as previously diagnosed." (S-4).
26. In March 2018, in the spring of the student's 10th grade year, at the annual Section 504 team meeting, multiple accommodations in the student's Section 504 plan were revised. (P-6 at pages 1-3; S-5).
27. In the spring of 10th grade, even after the March 2018 Section 504 plan meeting, the student continued to struggle with lack of organization, timely completion of assignments, poor class engagement, and absences from class or assigned time. (P-13 at pages 97-).
28. In 10th grade, the student showed the need to improve timely completion of coursework and being prepared for class in geometry, foreign language, and music. The student showed the

need to improve class participation and engagement in learning in algebra, foreign language, and music. (P-2 at pages 2-3).

29. In 10th grade, the student continued to perform well academically. (P-2 at pages 2-3; S-9 at pages 1-3).

11th Grade/2018-2019

30. In the period September – December 2018, the student continued to experience multiple incidents involving lack of organization, timely completion of assignments, and poor class engagement. On multiple occasions, the student was absent from class or assigned time increased to multiple incidents, often because of class-avoidance and/or because the student was not prepared for class. (P-13 at pages 124-153).
31. In December 2018, the student received a detention for a class-cut. (S-11 at page 1).
32. In January 2019, [redacted], a disciplinary incident arose which was a violation of the code of student conduct, which ultimately led to a 10-day suspension and expulsion from the District. (S-6 at page 1, S-11, S-13).⁵
33. In 11th grade, through the second marking period, the student showed the need to improve timely completion of coursework and being prepared for class in chemistry and

⁵ See decision at ODR file number 21969-1819.

government/politics. The student showed the need to improve class participation and engagement in learning in chemistry. (P-2 at page 1).

34. In 11th grade, through the second marking period, the student continued to perform well academically. (P-2 at page 1).
35. In March 2019, the District performed an evaluation of the student. Contemporaneously with these March events, parents filed the special education due process complaint which led to these proceedings and to the affiliated proceedings at 21969-1819. (S-7; HO-1, HO-2).
36. The District's March 2019 evaluation report ("ER") found that the student is not a student with a disability. The March 2019 ER moved away from the District's long-held position, as reflected in the prior Section 504 plans, that the student has ADHD. The [District] relied on standardized assessments for attention/behavior/emotional health to find that the student does not have the health impairment of ADHD. (S-7, S-8).
37. In the March 2019 ER, six of eight teachers who provided input noted varying degrees of work not being completed, the student's organizational abilities impacting academic achievement, or class-cutting/absence. (S-7 at pages 3-5).⁶

⁶ Nine teachers proved input. One teacher, the student's [redacted] teacher, provided supplemental [redacted] services and did not provide direct assignments or graded work—therefore, her input explicitly noted that she could

38. In the March 2019 ER, eight teachers who provided input noted that the student had appropriate and sociable interactions with adults and peers. (S-7 at pages 3-5).⁷
39. The District's March 2019 ER found that the student was not a student with autism. (S-7).
40. The District's March 2019 ER found that the student was not a student with an emotional disturbance. (S-7).
41. In June 2019, the private evaluator who issued the August 2017 evaluation report issued a re-evaluation report. The evaluator testified in these proceedings. (P-18; S-3; NT at 20-114).
42. The June 2019 private report diagnosed the student with autism spectrum disorder and recommended that the student be identified as a student with autism. (P-17)
43. Throughout the student's high school years prior to January 2019, the parents have been diligent and effective communicators regarding the student's education generally and, specifically, regarding the student's organization needs. (P-13).

not opine about homework. That teacher, who provided those supports throughout high school reported "Academically, I have seen some highs and lows." The student's intellectual ability has never been doubted by any evaluator or educator. In conjunction with the extensive email exhibit at P-13, where the [redacted] support teacher was a correspondent with parents and other educators, these 'ups and downs' were always related to assignment completion, missing work, or not being accounted for in classes or assigned spaces. (S-7).

⁷ One teacher did not provide input on socialization, one way or the other.

44. The student participates ardently and effectively in [a community youth organization], including recognition through a peer-selected honor [redacted]. (NT at 116-187).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162).

Child-Find

School districts are under a “child-find” obligation to identify students who may potentially qualify under IDEIA as students with disabilities. (34 C.F.R. §300.111; 22 PA Code §§14.121, 14.123). Where a student may potentially qualify as a student with a disability, that student must undergo an appropriate evaluation process—once parental permission has been obtained—to see if the student should be identified as an eligible student under IDEIA. (34 C.F.R. §§300.300, 304-306; 22 PA Code §§14.102(a)(2)(xxiv-xxv), 14.123).

Here, the District failed to meet its child-find obligations in identifying the student as a student with a disability. Throughout the student’s time at the District, even in elementary and middle school, two salient characteristics were consistently present: (1) the student

[redacted] and exhibited strong academic achievement, and (2) the student's attention, organization, task-approach, and task-completion skills impacted the student's educational performance. These characteristics were present as the student entered high school in the 2016-2017 school year and, as might be expected, surfaced in high school in the student's 9th grade year.

By the spring of 9th grade, the parents had shared with the District an ADHD diagnosis (following on the heels of an earlier suspicion of ADHD by a separate evaluator). The District accepted this diagnosis, explicitly noted, as the basis for a Section 504 plan for attention, focus, and organization. Even with accommodations, the student continued to struggle with these needs at the outset of 10th grade.

Here, the District accepted the private evaluator's opinion that the student did not have ADHD but had autism. The student's needs in attention, focus, and organization remained, as did the accommodations that addressed those needs. This is a critical inflection point in the District's failure to identify the student because the private opinion seemingly distracted, or at least diminished, the District's understanding of the student's needs related to attention, focus, and organization. As with all prior school years, in 10th grade, the student's educational performance consistently showed the impacts of the student's needs, but the District should have perceived that it was not meeting the student's needs and should have requested permission to evaluate the student (see

below). In 11th grade, prior to the January 2019 disciplinary incident, the student's struggles with focus, attention, and organization continued, and the District continued to note the ADHD diagnosis.

What is striking about the record is that irruption of the January 2019 disciplinary incident in the parties' portrayal of the student. Prior to that incident, the District noted the ADHD diagnosis and the student's needs in focus, attention, and organization. After that incident, that diagnosis and those terms are entirely absent from the March 2019 Section 504 plan. Prior to that incident, the parents communicated extensively about those very issues, and only those issues. After that incident, parents—for the first time on this record—embraced the autism diagnosis in educational terms. None of this is to impute to either party bad faith or deluded thinking; but it is impossible to read the documentary evidence prior to the January 2019 incident, and after the January 2019 incident, and not see stark differences in that evidence vis a vis the positions of the parties in terms of the student's educational needs.

And that leads to the evidence that is most prevalent and consistent in understanding the student's educational needs—the communications, report card comments, and evaluation input of the student's teachers. Clearly, year after year and in multiple, disparate subjects, the student needs supports in organization and task-approach/task-completion skills. By March 2018, after one year under

the terms of the first Section 504 plan, the District should have realized that its regular education Section 504 supports were not effectively addressing the student's organizational needs. An evaluation process by the District should have been undertaken at that time, leading to an identification of the student as a student with the health impairment of ADHD, a health impairment that requires specially-designed instruction. The exact chronology of this evaluation/identification/IEP process is laid out in the *Compensatory Education* section below.

The assessments of the two prior professionals (one suspecting ADHD and one diagnosing it) stand in contradistinction to the private evaluator rejecting that and the District's school psychologist relying on assessment results. But, again, the record is replete with the day-to-day educators working with the student in high school (and consistently even in elementary and middle school) voicing the struggle the student had in organization and work completion—late assignments, incomplete assignments, assignments never completed, projects not being understood, tasks going uncompleted, cutting classes or avoiding test-taking. This is a record where the testing does not tell the tale—the teachers do.

And while this decision does not speak to the diagnosis by the private evaluator of autism, aside from that one person's assessment-based view, the record in its entirety leads to doubt about the strength of such a view. The student communicates appropriately, clearly, and

well—both expressively and receptively, the student does not exhibit pragmatic deficits. The student does not engage in perseverative behaviors and does not exhibit any sensory-focused or sensory-seeking behavior. The student does not exhibit any difficulties in socializing or with social exchange. Said in the negative, absent that one individual's view, it is this hearing officer's considered opinion that nothing in this record would lead any reader to conclude that the student might be diagnosed with autism (mild or otherwise). Again, this is not to say it is not possible; but it will not be part of the conclusion or order in this decision.

Finally, another factor that obscures much of the District's failure to identify the student's special education needs related to ADHD is [redacted]. The student [redacted] has always earned good grades. As is sometimes the case [redacted] grades can mask the need for necessary supports. And that is the case here. Here, this is not a bright student who needs some regular education supports to help with homework. The student requires goal-driven instruction in organization, task-approach, and task-completion related to the student's ADHD health impairment.

Manifestation Determination

In their closings, the parties took legal positions about whether or not, as a student with a Section 504 plan, the student was entitled to a manifestation determination meeting, as a result of the January 2019 incident. That issue, however, is mooted by the conclusion that, by

January 2019, the student should have been identified as eligible for special education. Therefore, the question becomes whether or not the District denied the student FAPE by not holding a manifestation determination process. Here, there was no denial of FAPE.

Even assuming that the student had been identified appropriately under IDEIA, the January 2019 incident was not a manifestation of the student's ADHD.⁸ Therefore, the lack of a manifestation determination meeting under the terms of 34 C.F.R. §300.530 was a procedural violation.

This decision should not be read to support the notion that not holding a manifestation determination meeting for a student with a disability is a "mere" procedural violation. (*See, e.g.*, 34 C.F.R. §300.513(a)(3)). But at the end of the day, the student's ADHD, with its basis in organization and task-approach/completion, could not have supported a conclusion that the January 2019 disciplinary incident was a manifestation of the student's disability. This, then, would render the lack of a manifestation determination process a procedural violation and not a substance violation. And, as a procedural violation, across both this record and the record at 21969-1819, that did not lead to a denial of FAPE. (34 C.F.R. §300.513(a)(1-2)).

⁸ This is the critical factor in the finding at 21969-1819. While the District failed to identify the student's special education needs, nothing in the student's background, or in the evidentiary record developed at 21969, would lead the District to conclude that the student was thought-to-be-eligible in a way that would intersect or impact the January 2019 disciplinary incident.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)).

In this case, the District failed in its obligation to identify the student as a student eligible for special education under IDEIA. Compensatory education is an equitable remedy and, here, it is difficult to provide a concrete calculation of compensatory education. [Redacted.]

On balance, here the student exhibited, over multiple school years and regardless of subject matter, marked and persistent needs in organization, task-approach, and task-completion. These needs were directly related to the student's ADHD and required modifications/instruction beyond regular education interventions. The District failed to identify appropriately those needs and to program effectively for those needs. Specifically, as of March 2018, with the student's Section 504 plan in place for one year at that time, the District should have known that the regular education interventions in that plan were not effective. Therefore, compensatory education will be awarded.

Within ten days of the March 8, 2018 Section 504 meeting, the District should have secured permission to evaluate the student.

Therefore, by May 17, 2018, the District should have issued an evaluation report finding that the student was eligible for special education as a student with a health impairment, based on the deep, consistent need for goal-driven, specially designed instruction to address the student's needs in organization and task-approach/completion. (22 PA Code §14.123(b)). An IEP, then, should have been in place by the end of 11th grade.

While an award of compensatory education cannot be definitively concrete, there is a template one can employ to get at a sense of the accommodations and instruction that might have been employed. It seems appropriate that the student should have received, on some schedule, a weekly hour of goal-driven instruction (perhaps two 30-minute sessions)—outside of regular education— on organization, task-approach, and task-completion. And a daily, mandatory check-in at the end of the school day meeting with a special education professional (perhaps even as part of consistent progress monitoring) would allow the student to employ the instruction on a daily basis. Therefore, it is the considered opinion of this hearing officer that the student should be awarded 80 hours of compensatory education.⁹

⁹ This figure represents approximately 2.25 hours weekly (one hour of instruction and 15 minutes per school day—one hour and fifteen minutes per week—for the daily modification for check-in) over the approximately 36 school weeks for the entirety of 12th grade, the 2018-2019 school year.

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's future IEPs, or identified educational needs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and otherwise as to any use of the compensatory education hours.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student qualifies for special education and related services as a student with a health impairment (ADHD). Within 10 calendar days of the date of this order, the student's IEP team shall meet

to develop goal-driven instruction to address the student's needs in organization, task-approach, and task-completion.

Additionally, the student is awarded 80 hours of compensatory education.

Any claim not specifically addressed in this decision and order is denied.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

August 6, 2019