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

DECISION

Student's Name: A.S.

Date of Birth: [redacted]

ODR No. 2547-11-12-KE

OPEN HEARING

Parties to the Hearing:	Representative:
Parents	Pro Se
Upper Moreland Township School District 2900 Terwood Road Willow Grove, PA 19090-1431	Carl A. Romberger, Jr., Esquire Sweet, Stevens, Katz & Williams, LLP 331 East Butler Avenue New Britain, PA 18901

Dates of Hearing: January 9, 2012, February 24, 2012

Record Closed: March 6, 2012

Date of Decision: March 15, 2012

Hearing Officer: William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The Student named in the title page of this decision (Student) is a resident of the school district named in the title page of this decision (District), who is currently served under a service agreement pursuant to section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). Student is not identified as a child with a disability under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) (NT 8-10.)

Student's Grandparents[1], named in the title page of this decision, brought this Complaint for a due process hearing, asserting that the District failed to comply with its Child Find obligations and failed to provide a free appropriate public education (FAPE) to Student during a period beginning in 2007 and continuing to the present time. (NT 18-34.) Parent requested tuition reimbursement for two different settings in which Student had received services and compensatory education for other periods in which Student was enrolled in the District or in a charter school.

The District raises the bar of the IDEA statutory limitation period for the period from 2007 to November 16, 2009 (two years prior to filing of the present due process Complaint Notice), and also argues that the doctrine of res judicata bars my consideration of any issues decided or that could have been decided by a previous hearing officer decision dated December 28, 2011. The District asserts that it had no reason to evaluate the Student for special education eligibility before it did so in 2011, and that it was not given an opportunity to offer a FAPE to Student before Parents placed Student in a treatment facility, which it contends is an inappropriate educational placement.

[1] Grandparents, who adopted and exercise educational rights regarding Student, will be referred to herein as "Parents."

The hearing was concluded in two sessions. The parties submitted written summations, and the record closed upon receipt of those summations.

ISSUES

1. Did the District withhold information from the Parents that it was obligated to provide pursuant to Part B of the IDEA, and did the District by withholding such information prevent the Parents from filing their due process complaint within the two year time frame set forth in the IDEA?

2. Did the District fail to perform its Child Find obligation by inappropriately failing to evaluate or identify the Student as a child with a disability during all or any part of the period for which IDEA permits Parents' claims to be decided?

3. Was the District's evaluation of November 2011 appropriate?

4. Did the District fail to provide a free appropriate public education (FAPE) to Student during all or any part of the period for which IDEA permits Parents' claims to be decided?

5. Did the District commit procedural violations of the IDEA during all or any part of the period for which IDEA permits Parents' claims to be decided?

6. Should the hearing officer order the District to provide tuition reimbursement for all or any part of the tuition charged to Parents on account of Student's admission to the private treatment facility or the private therapeutic boarding school identified by Parents?

7. Should the hearing officer order the District to provide compensatory education for all or any part of the period for which IDEA permits Parents' claims to be decided?

FINDINGS OF FACT

1. On December 28, 2010, Special Education Hearing Officer Jake McElligott, Esquire, rendered a decision concerning claims made by Parents in a due process Complaint Notice. The hearing officer concluded that, during the time encompassed by that decision, the Student was not a child with a disability because, despite suffering from a disability, the Student had achieved in school at all times commensurate with Student's ability. The hearing officer also concluded that the Student was disabled within the meaning of section 504 and should have received accommodations under a section 504 service plan as of April 23, 2008. The hearing officer also concluded that the District had

not during the time encompassed by that decision discriminated against Student by reason of Student's disability of ADHD. (S-1.)[2]

2. The hearing officer's decision made findings of fact extending to the beginning of the 2007-2008 school year, when Student was first enrolled in the District. The decision made extensive findings of fact concerning Student's disciplinary history. (S-1.)

3. Student has a history of the death of one natural parent (Student has reported that both parents died, though the record does not support this) and abandonment by the other natural parent, all when Student was at a young age. Student's grandparents adopted Student and make educational decisions for Student. (NT 507-509; S-45, 50, 68.)

4. Student has a history of [redacted] prior to July 2011. (S-45, 50.)

5. Student was withdrawn from the District in April 2009 and enrolled in a cyber charter school, where Student received final marks of "B" for tenth grade and much lower passing marks, including a "D+" and N "F", for eleventh grade. Student passed all courses except "SAT". (NT 188-191, 282; S-20, 32.)

6. Parents placed Student at a [redacted] facility on March 31, 2011, until April 22, 2011, and again on May 16, 2011 until May 23, 2011. (S-19.)

7. In July 2011, Student [redacted] was hospitalized for eight days. Student was diagnosed with Oppositional Defiant Disorder and [redacted]. (S-34.)

8. From the hospital, Student was transferred to a therapeutic boarding school in another state in July 2011. (S-19, 26, 36, 44.)

9. On August 10, 2011, the Parents enrolled Student in the District and requested an evaluation for special education. At the same time, Parents notified the District that they intended to keep Student at the therapeutic boarding school. (S-19, 20, 76-78.)

10. The District mailed a Permission to Evaluate form to Parents on August 22, 2011. (S-19, 24, 25.)

11. Parents formally requested tuition reimbursement from the District on August 23, 2011. (S-25.)

12. Parents signed and returned the Permission to Evaluate on or about August 27, 2011, and signed specific releases for various treatment and educational agencies by August 21, 2011. (S-28 to 31, 72.)

13. Upon receipt of appropriate releases in August 2011, the District began gathering pertinent educational and medical records. (S-28-31, 33, 37.)

[2] All exhibits of both parties were admitted into evidence by stipulation. (NT 39-41, 649-651.)

14. Student was not presented to the District for evaluation, but remained out of state and inaccessible to District personnel who were not authorized to travel to Student for evaluation purposes. (NT 125-126, 190-194, 202-204.)

15. The school district in which the Student's therapeutic boarding school was located issued an evaluation report on October 26, 2011, based upon an evaluation on October 11, 2011. (S-44.)

16. The evaluator for the district of residence was an experienced, doctoral level school psychologist certified in the state of residence with administrative experience. (NT 451-452, 537-540.)

17. The district of residence evaluation addressed suspected disabilities including Other Health Impairment due to ADHD and Emotional Disturbance. The evidence for depression was mixed. (NT 458-460, 480-481, 495-500, 542-544.)

18. The district of residence evaluation report was based upon teacher and student report forms for the Behavior assessment for Children, Second Edition (BASC), interview with Student, Woodcock Johnson Tests of Achievement, Third Edition (WJ-III), informal teacher reports and review of educational records. This included a review of two reports provided by the District, one in 2009 and one in 2010. The 2009 report had noted academic skills commensurate with ability, diagnosed ADHD and Conduct Disorder and recommended a section 504 plan. The 2010 report had diagnosed ADHD but questioned the 2009 diagnosis of Conduct Disorder. (NT 491-492, 526, 530-532; S-44, 68.)

19. The evaluator spoke to the Parents as part of the evaluation. (NT 456-457.)

20. The 2009 report included results of cognitive testing that showed average ability with markedly slow processing speed, possibly secondary to [redacted]. (S-44, 50.)

21. Student cooperated initially with the local district's evaluator and was interviewed and tested partially; however, Student refused a second interview and testing session. This did not invalidate either the testing or the overall evaluation, based upon the standards of the evaluator's profession. The evaluator judged Student's self report to be valid, but was prevented from follow-up testing due to Student's refusal. (NT 460, 462, 475-476; S-44.)

22. The WJ-III scales indicated average to superior academic achievement. (S-44.)

23. BASC teacher scales, though one of them was of questionable validity due to incomplete responses by one teacher, showed several areas of clinical significance or "at-risk" status. Student also self-rated with several areas "at-risk" and several areas of clinical significance. The scores were assessed according to the publisher's instructions, including assessment of validity scales. (NT 553-556; S-44.)

24. Teachers at the therapeutic boarding school reported that Student's performance was variable, with frequent lack of motivation and underperformance compared with Student's ability. (S-44.)

25. The district of residence report concluded that neither Student's ADHD, nor Student's hyperactivity, nor anxiety were "significantly" affecting Student's classroom performance. The evaluator considered any possible effect of [redacted] on Student's behavior and achievement. The report opined that a residential setting was unnecessary for Student's educational needs, though a structured setting was needed due to Student's ADHD. (NT 463-469; S-44.)

26. The district of residence's evaluator considered and ruled out emotional disturbance as an educational classification because there was insufficient evidence that emotional disturbance was interfering with Student's ability to access the curriculum in the classroom. (NT 473-474; 540-542.)

27. Evaluation at the therapeutic boarding school showed no evidence of psychosis, though there was some evidence of depression, and a diagnosis of Depressive Disorder. The evaluation indicated that Student "may" need special education. (S-50.)

28. [Redacted] can affect the emotions. (NT 2.)

29. Student's grades at the therapeutic boarding school were generally passing, but there were several failing grades for monthly assessments in mathematics, chemistry, English and one special subject. (S-52.)

30. The District issued its evaluation report on November 14, 2011. The report found that Student is not a "child with a disability" as defined in the IDEA, because Student, despite the disability of ADHD, was functioning at grade level and succeeding in school to the extent that Student was willing to make a sufficient effort. Student was found to exhibit symptoms of Conduct Disorder. The evaluation ruled out Emotional Disturbance as defined in the IDEA and its implementing regulations. The evaluation ruled out Specific Learning Disability. The report recommended consideration of a section 504 plan of accommodations in school. (NT 132, 137-138, 143-145, 265, 342-343, 395-396, 410-411, 416-417; S-45.)

31. On November 14, 2011, the District convened a meeting of a group of qualified professionals and the Parents to discuss the evaluation report. This group did not decide whether or not the District would provide tuition reimbursement for Student's stay at the therapeutic boarding school; this was decided by the Superintendent. (NT 114-115, 137-138, 213-215, 255.)

32. On November 14, 2011, the District issued a Notice of Recommended Educational Placement (NOREP), placing Student in regular education. (S-46.)

33. In December 2011, when the Student's return from the therapeutic boarding school was imminent, the District offered to meet with Parents to plan for Student's return to school. (NT 419-421; S-49.)

34. Student returned to school on or about January 3, 2012. Due to miscommunication, there was no transition planning meeting prior to Student's arrival. The District offered to place Student in an alternative placement with more structure than the general education

high school setting, but the Student declined any specialized placement and was only willing to return to the high school. District personnel deemed it inappropriate for Student to attend school full time because Student did not need a full roster to graduate, and because Student needed counseling and treatment. (NT 126-135, 146-147, 154-156, 222-236, 243, 246-247, 272-275, 306, 396-398, 421-422, 530.)

35. In January 2012, the District offered a section 504 plan or "service agreement" to Parents for the Student. (S-75.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[3] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[4] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier

[3] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).
[4] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of their claim, or if the evidence is in "equipoise", the Parents cannot prevail under the IDEA or the Pennsylvania Code provisions for special education.

STATUTE OF LIMITATIONS: WITHOLDING OF INFORMATION EXCEPTION

The IDEA at 20 U.S.C. 1415(f)(3)(C) is subject to only two explicit exceptions, set forth at 20 U.S.C. §1415(f)(3)(D):

> The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—
>
> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
> (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

Parent, seeking the application of these statutory exceptions, is required to prove such misrepresentations and withholding. Parent must also show that such behavior "prevented" the Parent from filing for due process. School District of Philadelphia v. Deborah A., 2009 WL 778321 at *4. The plain language of the IDEA indicates that misrepresentations and withholding of information alone are not sufficient without proving their causal relationship to the failure to timely file for due process.

I find no evidence in this record that the District withheld information required under Part B of the IDEA to be provided to Parents, and no evidence that the District by any such

withholding of information caused Parents to not file for due process on any claim that they have alleged. Therefore, I will not decide any matter involving District action or inaction allegedly occurring prior to November 16. 2009, which is two years prior to the filing date of the present matter.[5]

ADMINISTRATIVE RES JUDICATA

Administrative hearing officers are governed by and required to follow the doctrine of administrative res judicata. This doctrine applies to bar re-litigation of either a claim or a factual assertion that was made in another proceeding and on which another administrative fact finder has made a final[6] decision. Callowhill Center associates LLC v. Zoning Board of Adjustment, 2 A.3d 802 (Cmwlth Ct. 2010); Merkel v. W.C.A.B., 918 A.2d 190 (Cmwlth Ct. 2007). Res judicata applies when the factual subject matter, the legal "claim", the parties and the capacity of the parties to litigate are the same in both matters. In short, matters are identical when the subject matter and the ultimate issues to be decided are the same in each matter. Merkel, 918 A.2d at 192-193. Under such circumstances, a finding of fact or conclusion reached as part of the decision in the previous matter cannot be re-litigated in the subsequent matter. Matters that

---

[5] As noted above, the IDEA's limitation of actions is a "look forward" limitation; that is, the claim must be made within two years going forward from the date of knowledge or notice of the act or omission of the district that is the subject of the complaint. Nevertheless, in this matter, the provision operates as a practical matter to bar all claims for actions or omissions that allegedly occurred or did not occur more than two years before the filing date in this action.

[6] I conclude that the decision of Hearing Officer McElligott cited in this matter was final for purposes of applying the res judicata doctrine. The decision of a special education hearing officer is final according to the IDEA. 20 U.S.C. §1415(i)(1)(A). District counsel disclosed that Parents had filed an action in state court, later removed to federal court and dismissed, which could arguably have been viewed as an appeal from the hearing officer's decision; this, in turn is pending appeal to the Third Circuit Court of Appeals. (NT 29-30.) However, the District Court's opinion dismissing the parents' court complaint makes it clear that the Parents did not appeal Hearing Officer McElligott's decision, and that, even if they intended to do so, their complaint was unavailing as an appeal because they did not follow the IDEA's procedures for appealing a hearing officer's decision. Sher v. Upper Moreland Township School District, 2011 WL 3652474 (E.D.Pa 2011). (S-7, 8, 11, 21, 38.) Moreover, appeal does not contradict finality for res judicata purposes. In Pennsylvania law, a judgment is final for res judicata purposes unless and until reversed on appeal. Allen v. Pa. Soc. For Prevention of Cruelty to Animals, 488 F.Supp.2d 450, 466-467 (M.D. Pa. 2007).

could have been litigated in the previous matter, but are brought for the first time in the subsequent matter, are also precluded. Merkel, 918 A.2d at 193.

Regarding the present matter, res judicata bars re-litigation of many of the Parents' allegations of fact. The factual assertions made in this matter overlapped with many raised before and decided by Hearing Officer McElligott. Parents' claims of disability discrimination in disciplinary matters, inappropriate failure to identify Student under the IDEA and inappropriate failure to provide a FAPE under the IDEA were all litigated before and resolved by Hearing Officer McElligott. (FF 1,2.) In addition, the hearing officer made findings of fact regarding disciplinary actions. (FF 2.) The parties' ability to fully litigate those claims was the same then as it is now. The underlying subject matter was virtually identical regarding the discrimination and discipline claims, the allegations of a failure to evaluate and identify Student, and the allegations of a denial of a FAPE.

Therefore, I will not make any findings of fact that were addressed already in Hearing Officer McElligott's decision dated December 28, 2010. On issues decided by Hearing Officer McElligott in that decision, I will not consider evidence relating to the time from Student's entry to the District in 2007 until the last day of hearing before Hearing Officer McElligott, November 22, 2010. (FF 1, 2.) This includes not only the findings and conclusions regarding the above listed issues, but also any other claim that could have been raised in that due process proceeding. Under these circumstances, I can make no inference about present day attitudes of the District toward Student based upon disciplinary or other actions that were part of the factual basis for the hearing officer's decision.

Thus, of the various allegations that the Parent raised during the present hearing, I must decide the above listed issues for the period of time from November 22, 2010 to the last day of

hearing in the present matter, February 24, 2012. This encompasses part of the time during which Student was enrolled in a cyber charter school, (FF 5-9), although that school is not a party, and all parental claims are directed to the District. I must determine whether or not the District had any responsibility to Student while Student was not enrolled in the District but was enrolled in the cyber charter school, as well as while Student was enrolled in the therapeutic boarding school. (FF 8.) Then I must decide whether or not the District's evaluation in November 2011 was appropriate. I must determine whether or not the District, during the above stated period of time, failed to provide appropriate special education services to Student pursuant to the IDEA, ort accommodations under section 504. I must determine whether there was any procedural deficiency during the stated period of time, and I must determine whether any relief is appropriate, either by way of tuition reimbursement or compensatory education.

DISTRICT RESPONSIBILITY FOR PERIOD OF TIME WHEN STUDENT WAS ENROLLED IN CYBER CHARTER SCHOOL-LEGAL STANDARD FOR TUITION REIMBURSEMENT

In Forest Grove School District v. T.A., __ U.S. __, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009), the Supreme Court held that tuition reimbursement can be awarded to a parent whose child has never attended a public school. However, The IDEA provides that a hearing officer can order tuition reimbursement when a parent places a child in a private facility, only if the local education agency failed to offer a FAPE in a timely manner prior to enrollment. 20 U.S.C. §1412(a)(10)(C); 34 C.F.R. §300.148(c). Moreover, charter schools are considered the responsible party for provision of all IDEA and section 504 services to students with disabilities – in effect, the charter school is the local education agency (LEA) for these purposes. 24 P.S.

17-1747-A(13), 24 P.S. 17-1749(b)(8); 22 Pa. Code §711.3(a). Thus, the local school district's obligations to provide a FAPE are limited according to its opportunity to do so.

The record shows that the Student was enrolled in a charter school from April 2009 to August 10, 2011. (FF 5, 9.) Student was not enrolled in the District at that time. Therefore, if any entity could have been charged with responsibility for tuition reimbursement (and I do not conclude that any entity was responsible in that way), it would have been the charter school. Parents should have notified the charter school of any obligations that it may have failed to fulfill under that law.

In the present matter, it is uncontested that the Student was not enrolled in the District when the Parent unilaterally placed Student in a private treatment facility and subsequently in a private therapeutic boarding school. (FF 5-9.) Under these circumstances, the Parents did not afford the District an opportunity to evaluate Student or offer a FAPE to Student prior to the date on which Parents unilaterally placed Student in those facilities.[7] In consequence, the District could not have been obligated to evaluate Student or to offer a FAPE to Student during Student's admissions to private facilities until - at the earliest – the date on which it received notice of Parents' re-enrollment of Student in the District and request for evaluation.[8] (FF 9-12.)

Parents argue that the District was paying for the cost of the Charter School; they reason that the District was thus responsible for any failure to provide a FAPE and consequent obligation to provide tuition reimbursement. This argument is flatly inconsistent with the above cited regulations that make the charter school responsible for providing FAPE to their enrolled students. All charters are funded through their school districts. If that made them ultimately

[7] This is not to imply any criticism of Parents' decision in this regard, which was made under arguably emergent circumstances and for the most compelling of reasons. The above facts are cited solely in order to determine whether the District is obligated to pay for that decision by the Parents.
[8] I will discuss the period of time subsequent to that date below.

responsible for the provision of FAPE to all charter school students, the above regulations allocating responsibility to charter schools for special education services would be meaningless. I therefore decline to accept Parents' argument that the District was responsible by reason of its funding of the charter school in the usual course.

In sum, I deny the Parents' request for tuition reimbursement for the private treatment and school placements from the summer of 2011 until August 10, 2011, when the Parents re-enrolled Student in the District and requested that the District evaluate Student again for special education.

As to the period of time between August 10, 2011 and the last day of hearing in this matter, February 24, 2012, the District can be ordered to pay tuition reimbursement only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private placement. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program legally adequate? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay?[9] The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007).

As discussed below, I find that the District's actions subsequent to Student's enrollment in August 2011 did not deprive Student of any rights under the IDEA, and did not deprive

[9] To the extent that Parents may think that the District must pay tuition reimbursement due to their denial of a section 504 FAPE from April 23, 2008 to October 8, 2009, as decided by Hearing Officer McElligott, I note that such a claim is precluded by the doctrine of res judicata as discussed above. The hearing officer found that the denial of a section 504 FAPE did not deprive Student of academic progress or merit any equitable order of a compensatory nature at the time. (S-1.)

Student of services mandated under section 504. Therefore, the first step of the above "Burlington-Carter" analysis is not satisfied and the Parents' claim for tuition reimbursement must fail. In light of this determination, I do not reach the second and third steps of that analysis, as they are unnecessary.

When Student was re-enrolled in August 2011, Student was not identified as a child with a disability, nor was Student ready to attend school in the District. (FF 1, 2, 9, 30.) Student was still in the therapeutic boarding school. (FF 14, 15.) For both these reasons, the District was not obligated to provide any services other than evaluation to the Student until Student arrived at school in January, 2012. (FF 34.) This leaves for consideration the period of time between January 3, 2012, when Student arrived for school, and February 24, 2012, the last day of hearings in this matter. As discussed below, I find that the District was not obligated to provide special education under section 504, nor did it fail to offer or provide appropriate section 504 services during that period of time. These conclusions are based upon my conclusion that the District provided an appropriate evaluation to the Student in November 2011.

LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF EVALUATION

The IDEA sets forth two purposes of the educational evaluation: to determine whether a child is a child with a disability as defined in the law, and to "determine the educational needs of such child … ." 20 U.S.C. §1414(a)(1)(C)(i). Logically, the eligibility determination is the primary purpose of the evaluation, because if the child is not eligible, then there is no IEP for which the evaluation's conclusions on educational need would be required. See, 34 C.F.R. §300.39(b)(3)(i)(specially designed instruction purpose is to address needs that result from

disability). Therefore, the first question is whether or not the District's evaluation appropriately addressed eligibility as defined under the IDEA.

An eligible child is defined as a "child with a disability": one who has been evaluated to have one of the enumerated disabilities, 34 C.F.R. §300.8(a), "and who, by reason thereof, needs special education and related services." Ibid. Thus it is necessary but not sufficient that a child exhibit an enumerated disability; to be eligible for special education the child also must "nee[d] special education and related services." Ibid.

The obligation to evaluate the child's need for special education requires a determination of whether or not the child needs services in order to access the general curriculum and meet the agency's educational standards. Special education is defined as "specially designed instruction …", 34 C.F.R. §300.39(a). "[S]pecially designed instruction" is defined as "adapting … instruction", to address the unique needs of the child, 34 C.F.R. §300.39(b)(3)(i), and "[t]o ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children", 34 C.F.R. §300.39(b)(3)(ii).

These definitions are consistent with the fundamental purpose of the IDEA, which is to provide a free appropriate public education (FAPE) to children with disabilities. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE consists of those services that are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). Thus, special education services are those that provide a "basic floor of opportunity" – not the "optimal level of services." Mary Courtney T. v. School District of

Philadelphia, 575 F.3d 235, 251 (3d Cir. 2009); Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

In sum, the District's obligation in this matter was to determine (assuming that the Student has a disability cognizable under the IDEA) whether or not the Student needed special education services in order to be able to access the District's curriculum sufficiently to receive meaningful educational benefit. The question before me is whether or not the District conducted an appropriate re-evaluation for that purpose. I must therefore determine, in light of the above standards, whether or not the District's re-evaluation was "sufficiently comprehensive to identify all of the child's special education and related services needs … ." 34 C.F.R. §300.304(c)(6). This does not mean every educational need no matter what its nature; it does not mean all educational needs for service to enable the child to maximize potential. It means all needs that rise to the relatively low level of needing special education and related services in order to access the curriculum.

The IDEA regulations prescribe in detail the procedures to be used in order to fulfill this requirement. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U.S. Dist. Lexis 20646 (W.D. Texas 2002). These procedures must include the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information … ." 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency may not use "any single measure or assessment" as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2).

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information

provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(ii), (iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

I conclude that the District's evaluation meets the above standards. The District's evaluation of the Student was sufficiently comprehensive to identify all of the Student's special education and related services needs. (FF 17, 26, 27.) It also met the IDEA's procedural requirements, as discussed below. Therefore, I conclude that the District's evaluation was appropriate, and that the Student was not entitled to special education services under the IDEA. As the District offered to produce a section 504 service plan, (FF 35), I conclude that it did not fail to offer a FAPE to Student under section 504.

The evidence is preponderant that the District's evaluators complied with the IDEA's requirements for evaluation procedures[10]. The evaluators utilized a variety of assessment tools

[10] This is not to discount the apparent lateness of the Evaluation Report, which I conclude did not deprive Student of any educational benefit, service or opportunity, because Student was still in the therapeutic boarding

and strategies, including review of cognitive testing, achievement testing, curriculum based test scores, teacher reports, Parent reports, and review of educational and medical records; the evaluators relied upon no single measure or test in reaching their conclusions. (FF 18.) Evaluators reviewed evaluations proffered by Parents and responded to parental input. (FF 13, 18, 19.) The record is preponderant that all instruments and tests used by the evaluators were technically sound and were used as directed by the publishers. (FF 13-31.) All personnel and contractors who administered tests and instruments were appropriately qualified and trained. (FF 16.)

Parents argue that they have obtained private evaluations of the highest quality, and that the evaluations provided by the District have been perfunctory and not of equal quality. However, this argument does not come to grips with the fact that none of the private evaluations have assessed Student according to the two part test that the law requires for IDEA special education. The reports have confirmed that Student suffers from mental disabilities, but they do not confirm that Student's mental disabilities have prevented Student from achieving on grade level and therefore from accessing the regular education curriculum. (FF 18, 22, 24, 26, 29, 30.) Access to the curriculum is the second part of the IDEA two part test, and Parents' evidence does not outweigh the evidence in this record that Student has been able to access the curriculum despite Student's mental disabilities.

---

school until long after the evaluation report was delivered in November 2011. There is one other exception: the failure of the evaluating school psychologist to do a classroom observation; however, this was ameliorated through teacher reports and was made impossible by Student's oppositional behavior. (FF 18, 23, 24.)

DENIAL OF A FAPE

The parent raised questions about the propriety of the District's providing alternatives to Student's return to school full time, because one of the alternatives, part time attendance and getting a job, would not have led to Student being unsupervised for half of the school day. (FF 32-35.) I conclude that the District offered a series of reasonable alternatives to full time high school attendance, because Student needed only two courses in order to graduate, and full time attendance was believed reasonably to be counterproductive for Student. While this resulted in Student not being in school for a number of days, the record as a whole does not prove preponderantly that the Student's non-attendance was caused by any inappropriate failure of the District to offer accommodations called for by Student's disability as defined in section 504. Since there was no identification, special education as defined in the IDEA was not required. Student's absences were due to Student's choice, not due to any failure of the District to provide special accommodations required by law.

The District, despite offering to meet and plan for Student's transition from therapeutic boarding school to the District's general education high school, (FF 33), was not given that opportunity, (FF 34). Student arrived without forewarning, and the District was forced to react immediately, and to plan while Student was in need of services. I conclude that it did its planning diligently and offered a range of placements and configurations of services, none of which Student accepted.

The Parent sought to show that the District demonstrated discriminatory animus toward Student upon Student's return, by refusing to expunge seventeen out of twenty disciplinary actions taken against Student during the period of time addressed by Hearing Officer McElligott. I find no basis in the record to reach such a conclusion, for two reasons. First, I will not make

findings of fact regarding the disciplinary actions themselves, because any such fact finding or conclusions of law would be barred under the doctrine of res judicata, as discussed above. It follows that I cannot raise any inference about discriminatory animus based upon these disciplinary actions – Hearing Officer McElligott already decided that issue. Second, any consideration of expungement was raised solely in the context of settlement negotiations, and thus raises no inference as to the District's intentions or animus. Settlement is not to be considered an admission of guilt in this matter, and any evidence of settlement discussions cannot be the basis for an inference to that effect.

PROCEDURAL VIOLATIONS

Parents argue that the District's superintendent predetermined that the District would not provide tuition reimbursement for Student's stay at the therapeutic boarding school, taking the decision out of the hands of the group of qualified professionals (otherwise known as the multidisciplinary team or MDT) who met with Parents on November 14, 2011. (FF 31, 32.) I do not find this to be a procedural violation. Nothing in the IDEA, its regulations or Chapter 14 of Pennsylvania Code, governing procedures for special education, requires such a decision to be made by the MDT or IEP team. Rather, the IDEA's regulations and Chapter 14 require that an MDT and the Parents collaborate to determine whether or not the child is eligible for special education, and that the IEP team determine whether or not additional data are needed. 34 C.F.R. §300.305, 300.306; 22 Pa. Code §14.123. Although the IDEA does not require a meeting for this purpose, the November 14 meeting was called for this purpose. (FF 31.)

The law does require that the evaluation report be presented to the parent within 60 calendar days of the district's receipt of written permission to evaluate. 34 C.F.R. §300.305,

300.301(c)(1)(i); 22 Pa. Code §14.123(b). By this standard, the evaluation report was late by 19 days. (FF 12, 30.) Arguably, this was a procedural violation of the IDEA and state regulations.[11]

This possible procedural violation did not result in a substantive denial of a FAPE, either as defined in the IDEA or as defined in section 504. The Student was not available for school in the District, but remained at a private facility out of state. Student did not return to the state until December, and was not present for school in the District until January 2012. Thus, the District would not have had the opportunity to provide a FAPE during the nineteen days in question. Since the delay did not deprive Student of a FAPE, and since any violation was in the past under unusual circumstances not likely to be repeated in this matter, I will not order a remedy. 34 C.F.R. §300.513(a).

CONCLUSION

I conclude that the IDEA's statutory limitation of actions and the doctrine of res judicata preclude my consideration of claims that arose prior to November 22, 2010. I conclude that the District was not obligated to Student under either the IDEA or section 504, during the period before August 10, 2011, when Student was enrolled in a cyber charter school, not the District. I conclude that the District was not obligated to provide special education or accommodations to Student before January 3, 2012, when the Student arrived at school, and that its evaluation finding Student not eligible under the IDEA was appropriate. Finally, I conclude that the District

[11] Arguably, there was no procedural violation, because the Parent did not make the Student available to the District for testing and observation. 34 C.F.R. §300.301(d)(1). The Parent kept the Student out of state at the therapeutic boarding school (the record shows that there were fundamentally sound reasons for doing so), and did not transport the Student – indeed, the record is clear that it would have been imprudent to do so, given Student's propensity and motivation to escape from or avoid treatment. (FF 14.) Nevertheless, this effectively rendered Student unavailable for evaluation, and arguably absolved the District of the procedural timeframe for evaluation. In light of my conclusion that the lateness of the report did not result in a denial of a FAPE, I find it unnecessary to resolve this legal issue of whether or not there was a procedural violation in this instance.

did not fail to offer or provide a FAPE under section 504 from January 3, 2012 to February 24, 2012.[12] Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District did not withhold information from the Parents that it was obligated to provide pursuant to Part B of the IDEA, and did not prevent the Parents from filing their due process complaint within the two year time frame set forth in the IDEA.

2. The District did not fail to perform its Child Find obligation by inappropriately failing to evaluate or identify the Student as a child with a disability during all or any part of the period for which IDEA permits Parents' claims to be decided.

3. The District's evaluation of November 2011 was appropriate.

4. The District did not fail to provide a free appropriate public education (FAPE) to Student during all or any part of the period for which IDEA permits Parents' claims to be decided.

5. The District did not commit a procedural violation of the IDEA that resulted in any deprivation of rights, benefits, opportunity or parental participation during all or any part of the period for which IDEA permits Parents' claims to be decided.

6. The hearing officer will not order the District to provide tuition reimbursement for all or any part of the tuition charged to Parents on account of Student's admission to the private treatment facility or the private therapeutic boarding school.

7. The hearing officer will not order the District to provide compensatory education for all or any part of the period for which IDEA permits Parents' claims to be decided.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

March 15, 2012

[12] In making all findings and reaching these conclusions, I have found all witnesses to be both credible and reliable.