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: L.J.

Date of Birth: [redacted]

ODR No. 3402-1213KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent	Michael J Connolly Esq. Connolly, Jacobson & John LLP 99 Lantern Drive, Suite 202 Doylestown, PA 18901
Coatesville Area School District 545 East Lincoln Highway Coatesville, PA 19320-5404	Stephanie DiVittore Esq. One South Market Square, 12th Floor PO Box 1146 Harrisburg, PA 17108

Dates of Hearing:	11/28/2012, 12/10/2012, 12/12/2012, 01/22/2013, 04/19/2013.
Record Closed:	May 13, 2013
Date of Decision:	May 28, 2013
Hearing Officer:	Brian Jason Ford

Introduction/Issues

This matter arises under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1400 et seq. (IDEA) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (Section 504). The Parent claims that the Student was denied a free appropriate public education (FAPE) between July 23, 2010 and January 3, 2012. The Parent claims that the District violated the IDEA's Child Find provisions by failing to propose an evaluation when the District should have suspected the Student had a disability. The Parent further claims that the Student's evaluations, IEPs, and substantive programs and placements were all inappropriate until the District placed the Student in the approved private school (APS) that the Student currently attends. The Parent demands compensatory education as a remedy.

Findings of Fact

2008-09 School Year (Kindergarten)

1. Prior to entering kindergarten the parents completed a student health history form. (P-38 at 8-10). On that form the Parent indicated the following areas of concern: the Student is high strung or easily upset, feelings easily hurt, temper tantrums, lying, fighting with other children. *Id*.

2. Kindergarten school health records notes behavioral issues, student's medication for the same, and a recommendation for a psychological evaluation. (P-38 at 1-2).

2009-10 School Year (1st Grade) – Summer of 2010

3. The Student began receiving behavioral health rehabilitation services (BHRS), including support from a Behavior Specialist Consultant (BSC) in April of 2010. (P-1).

4. It is unclear when the Student and Parent began to receive services from a Case Manager from Child Guidance Resource Center (CGRC). The Case Manager's services started at least by April of 2010 with BHRS, but possibly earlier.

5. The Student underwent psychological evaluation from CGRC on July 7, 2010, to determine the medical necessity for continued BHRS. The district summarized that report [in a] subsequent evaluation as follows: "concerns included [the Student's] difficulty with being around large groups of people, outbursts at home, self injurious behaviors, aggression towards others, defiance, noncompliance, leaving home without permission, and reports of distressing events [redacted]." (P-1). The report also includes a diagnosis of Attention Deficit Hyperactivity Disorder - combined type (ADHD) and that the Student meets diagnostic criteria for Oppositional Defiant Disorder (ODD).

6. 1st grade report cards indicate that the Student "is working on coping skills and making good choices." The "Personal Growth and Development" section of the

report card shows “developing skills” in almost all areas over three trimesters. This indicates neither progress nor serious concerns. No other behaviors were noted on the report cards. (P-36).

7. A BSC from CGRC observed the Student in school once every six day cycle. During these observations, the BSC would discuss the Student’s behavior and behavioral strategies to help the Student at home and in school. (Parent Exhibit 48, at 1; N.T., 109-111, 127-130, 740- 741)

8. The Student was hospitalized in August of 2010 at [redacted] due to verbal and physical aggression at home towards [the Student’s] mother and towards peers at camp.

2010-11 School Year (2nd Grade)

9. According to a subsequent CGRC evaluation in November of 2010, summarized by the District in an evaluation report of January 2011, is as follows:

> “The recommendation upon discharge from [redacted] was for TSS 30 hours per week in school and 10 hours per week in the home, in addition to a BSC and NT. At the time, only 15 hours of TSS per week was approved. The explanation for denial of intensive services was due to this not being “the most clinically appropriate and least restrictive necessary to address the noted concerns.” It was recommended that the development of an IEP and specific classroom modifications be explored. The recommendations from the psychologist reevaluation are 440 hours of TSS services, 10 in the home and 30 at school. Resource case management, regular medication management, and another psychological reevaluation to determine the medical necessity for continued BHRS. Diagnosis from this evaluation include ADHD, Combined Type and disruptive behavior disorder, NOS.” (P-1 at 7).

10. From the start of the 2010-11 school year, the Student was accompanied by a TSS in school.

11. During the first half of the 2010-11 school, the Student engaged in several significant behaviors, which included [aggression]. (N.T., 165-171).

12. The Student’s [aggressive behavior] occurred during the first month of the 2010-11 school year. The District referred the Student to the Instructional Support Team (IST) for assistance on September 23, 2010. The initial IST team meeting occurred on October 5, 2010. (P-41).

13. The purpose of the IST process is to provide structured regular education interventions with progress monitoring to curb the student’s behavior. Regular education interventions thought to be successful at that time included coordination

with the parents and caseworker, use of the timeout area, reinforcement of appropriate behavior, elimination of privileges, and setting goals. (P-41).

14. IST documents indicate the following interventions were unsuccessful: “changing seating, changing groups, use of learning aids, provide space with limited distractions, ignoring behavior, increase positive comments, use modeling, contracts with consistory words, self-monitoring.” (P-41)

15. The Student was suspended twice during the first half of the 2010-11 school year. Moreover, the Student was scheduled for two disciplinary hearings before the School Board.

16. The student’s initial evaluation, described in detail below, includes this statement of the Student’s behaviors in second grade (to the date of the evaluation):

> “[Student] has missed 21 days of school, 20 of which were due to disciplinary violations that resulted in suspensions and Board hearings. One day was excused absence. [Student] had 8 early dismissal’s, 2 of which were at the principal’s request for behavioral issues. Two Board hearings were required due to the following incidents. The first hearing happened as a result of [an incident in class.] After returning to school for that suspension, [Student] went for 9 days before having another outburst. [involving the] teacher. The resulting Board hearing requested that [Student] only be in school when [Student’s] TSS was present and until a comprehensive evaluation to be completed.” (P-1 at 17).

17. The foregoing description of the Student’s behavior is consistent with testimony. However, over the course of the 2010-11 school year, the Student was suspended from school for a total of 37 days. (P-39 at 8).

18. The Student underwent a second psychological evaluation from CGRC on November 3, 2010, again to determine the medical necessity for continued BHRS. (P-1). This report describes serious acts of physical aggression towards other students and teachers in school, and summarizes the Student’s disciplinary history.

19. The District proposed an initial evaluation on November 2, 2010. The Parent provided consent on November 3, 2010. The district received the consent form back from the Parent on November 4, 2010. (P-1).

20. As part of the initial evaluation, the Parent received, completed and returned a Parent Questionnaire, providing demographic information, information about the Student, and a review of the Student’s educational, social and physical history. (P-1).

21. Through the questionnaire, the Parent reported a number of social concerns including the Student’s inability to “deal with” with others and inclination towards tantrums. (P-1). The Parent also reported the Student’s ADHD diagnosis, current

medication for ADHD and that the Student receives supports from a TSS, BSE and case manager. (P-1).

22. In connection with the evaluation, the Parent was also interviewed, and completed behavior rating scales. The Parent also shared psychological evaluations completed by see CGRC. (P-1).

23. The District's initial evaluation (ER) report is dated January 3, 2011. (P-1). The report specifically notes that the Student was referred for comprehensive evaluation as a result of disciplinary proceedings. The purpose of the evaluation to determine whether the Student's behaviors were due to an emotional disturbance, and whether the student required special education and related services. *Id*.

24. The ER recognizes the Student's love of learning and strong academic skills, particularly in reading. This is consistent with standardized assessments conducted as part of the ER that revealed no academic weaknesses. Intellectual and achievement testing included a WISC-IV and a Woodcock-Johnson III. A VMI also revealed no areas of concern. (P-1).

25. Standardized assessments of social and emotional functioning, including Achenbach behavior rating scales obtained from the Parent, teachers, and Student's TSS revealed clinically significant or borderline clinically significant problems in multiple areas (anxiety, depression, social problems, thought problems, problems of an aggressive nature, rule breaking behaviors and more). (P-1).

26. The ER includes information from the Student's teachers. The Student's second grade teacher reported no academic needs but listed behavior concerns as follows:

> "behavioral concerns that include yelling, talking back to the teacher or other adults, refusing to do things, leaving the room, [and other aggression. Interventions have included] use [of] a behavior chart, a system to let me know when [the Student is] upset, getting angry, and or needs a break. These interventions have not been successful or minimally successful." (P-1 at 8)

27. The student's arts, physical education and library teachers reported that the Student requires significant redirection and displays appropriate peer interactions and behaviors only "inconsistently" or "sometimes." (P-1)

28. The ER includes anecdotal notes from the Student's IST teacher and reports of an observation from the District's School Psychologist. These notes and observations describe the Student as off task and misbehaving almost constantly, and frequently and is often removed from class.

29. The school psychologist includes her observation report as follows:

> "[Student] needs frequent and multiple cues through out the observation period of about 30 minutes. For some redirection, [Student] needed a

minimum of six cues before student complied with the direction. [Student] became aggressive towards [Student's] teacher by [redacted]. [Teacher] remained calm throughout the morning and kept a calm voice with specific directions when [Student] needed redirection."

30. The behavioral incident described during the Psychologist's observation is in addition to the behavioral incidents that triggered the ER itself.

31. A Functional Behavioral Assessment (FBA) was completed as part of the ER. (P-2). The FBA reports behaviors consistent with those described in the ER, but also describes an inconsistent response to stimuli (i.e. the same stimulus does not always produce the same behavior, making it more difficult to know what will trigger an outburst). *See id.*

32. In conclusion, the ER notes that the Student "currently receives significant amounts of mental health services" from CGRC but, in school, demonstrates "oppositional, disruptive and aggressive behaviors under normal circumstances" and "is not easily redirected when [Student] compensates and, at times, [Student] takes a long time to recover from minor setbacks. Other times, it is like a switch is flipped and [Student] can recover quickly, as if nothing had happened." (P-1 at 19).

33. The ER found that the Student is IDEA-eligible with a primary disability category of Emotional Disturbance (ED) and a secondary disability category of Other Health Impairment (OHI).

34. On January 11, 2011 the District invited the Parent to attend an IEP team meeting scheduled on January 25, 2011. (P-3).

35. The IEP team meeting convened as scheduled and an IEP was drafted. (P-3). The Parent, District's School Psychologist, Special Education Teacher, Principal, Guidance Counselor, and Regular Education teacher all attended. People who worked with the Student from CGRC also attended the meeting, including the BSC, MT, TSS and Case Manager.

36. The IEP targeted the Student's behaviors and included four behavioral goals with baselines to be established during the first two weeks of IEP implementation. The goals were:

    1. [Student] will follow directions with no more than 2 prompts 85% of the time for 3 consecutive months.

    2. When angry or frustrated, [Student] will use positive coping skills (ex. counting, deep breath, asking for timeout appropriately) 85% of the time for 3 consecutive months.

    3. [Student] will not display verbal or aggressive behaviors with peers or adults 95% of the time for 3 consecutive months.

4. [Student] will use appropriate means for expressing [Student's] needs in the classroom (ex. raising hand, waiting to be called on, not being disruptive with actions or words) 95% of the time for three consecutive months.

37. The IEP included the following program modifications and specially designed instruction, all of which were to take place in all classes daily except as noted:

    a. Predictable and routine schedule, preview of changes in schedule.

    b. Clear expectations of performance.

    c. Positive reinforcement with immediate rewards and incentives.

    d. Small group testing as assessments are given.

    e. Scheduled breaks three times per day.

    f. Behavior chart of the shape and monitor appropriate behaviors.

38. As related services, the Student was to receive counseling two times every six-day cycle for 30 minutes per session, a classroom aide, and curb-to-curb transportation. Regular education teachers, special area teachers, the School Psychologist, Principal, and Vice Principal were all to collaborate weekly as a support for school personnel.

39. Based on the amount of time the Student was to receive special education and related services, the IEP called for an itinerant level of emotional support, placing the Student in regular education in 89% of the school day.

40. The IEP also included a positive behavioral support plan (PBSP) that was drafted during the IEP team meeting. The PBSP includes much of the same information contained in the FBA and IEP. However, the PBSP specifies that scheduled breaks should occur for five minutes every two activities and, more importantly, that the Student will receive a one-on-one (1:1) aide in all classes, daily. (P-3 at 43). Testimony reveals, however, that the District did not provide a 1:1 aide, but rather expected the Student's TSS to fulfill that function.

41. A notice of recommended educational placement (NOREP) was presented to the Parent during the IEP team meeting. The Parent signed the NOREP the same day, approving IEP.

42. No evidence suggests that the Student's behaviors changed in any way subsequent to the implementation of the IEP. In fact, the Student continued to exhibit serious behavioral problems in school, resulting in additional discipline for continued physical aggression towards adults and peers. (P-5).

43. Student engaged in a serious behavioral incident in early May of 2011[redacted]. As a result of this incident, the Student was scheduled for a School Board disciplinary hearing for a suspension.[1]

44. This resulted in a Manifestation Determination meeting on May 17, 2011. The team concluded that the misconduct was a manifestation of the Students disability. (P-6).

45. On May 11, 2011, *before* the Manifestation Determination, the District issued a NOREP recommending instruction in the home for the remainder of the school year. The NOREP indicates that a supplemental level of emotional support was considered and rejected because "student requires more than to be offered through regular education supplemental aids and services."

46. To whatever extent the NOREP lists programming place and recommendations and other placements as considered, that consideration was not made by the Student's IEP team. The Manifestation Determination had yet to convene, let alone any IEP team meeting.

47. The May 2011 NOREP contains no other description of the home-based instruction Student was to receive.

48. The School Board disciplinary hearing (which would have been the Student's third) did not convene because the incident was determined to be a manifestation of the Student's disability. Newly-involved school administrators, working in cooperation with the Student's advocates, were able to stop the hearing.[2]

49. An IEP team meeting convened on May 24, 2011 (the same date that the school board meeting will have otherwise convened). (S-14).

50. Just prior to the IEP meeting, the Parent requested an independent educational evaluation (IEE) in writing. The Parent's advocate help the Parent draft this request. (P-9).

[1] The length of the suspension is not clear, but the record suggests that the Student would be suspended for more than 15 days as a consequence for the behavioral incident.

[2] The District argues that it was not required to stop the School Board hearing, but did so anyway. This assertion is difficult to comprehend. At no point did the District attempt to move the Student to a 45 day IAEP. The District does not allege that the incident in question involved use of a weapon or resulted in serious bodily injury. Absent these factors, the District would have been unable to suspend the Student who, at that time, had already accumulated well over 15 days of disciplinary suspensions. I do not understand why the District is adamant that it had the right to convene a hearing to impose discipline that would have resulted in a nearly *per se* violation of the IDEA. The only legally-permissible outcome of the Board hearing would be to *not* impose discipline. School administrators testified as to their efforts to stop the Board hearing because, in part, they were not confident of that outcome.

51. During the May 2011 IEP team meeting several placement options were discussed. Ultimately the team agreed that the Student should be placed in a behavioral program run by the Intermediate Unit (IU).[3] (P-15).

52. During the May 2011 IEP team meeting, the Student's lay advocate proposed the number of interventions, including 2 to 1 support, that could be provided in the school. The Parent explicitly rejected this. The Parents explicitly rejected any return to the Student's neighborhood school during the remaining weeks of the 2010-11 school year. The Parent also explicitly rejected instruction in the home during the same time. The Parent expressed her belief that the Student should remain home, out of programming, during the few weeks that remained in the school year until summer ESY programming at the IU started. (P-15).

53. During the May 2011 IEP team meeting, the team discussed the fact that the Student would be evaluated by the IU upon entry into the program. In light of this, some evidence suggests that the Parent abandoned the request for an IEE at that time. (P-15). Regardless, the District agreed to fund an IEE if the Parent would identify an evaluator, and if the evaluator's credentials satisfied the District. (NT at 1154, 1174).

54. The Student received a psychiatric evaluation from an IU psychiatrist on May 31, 2011. (P-10). This evaluation, and resulting report, were part of the Student's admission to the IU program. *Id*. The Psychiatrist confirmed Axis I diagnoses of ADHD and also found Intermittent Explosive Disorder. More testing was recommended to rule out Pervasive Developmental Disorder, NOS. The Psychiatrist recommended placement in the IU program. *Id*.

55. Prior to starting the CCIU program, the Parent signed a NOREP on June 8, 2011, agreeing to a change in placement to the IU, and IEP revisions that would bring the IEP in line with the IU program. The revisions are a standard list of revisions that is proposed to all students entering the IU program.[4] (P-12).

56. Revisions to the IEP included the following SDIs (P-12 at 7):

- Small, structured classes. Patience, consistent rules and predictable routine
- Visual point system in place to self monitor behaviors and receive privileges and incentives
- Rules and expectations reviewed on a regular basis

[3] The specific name of the program changes at various points throughout the record. It appears that when the team first considered the program, it used the program name for a particular age group. The Student was actually in a different age group, and so the name of the program is incorrect in some meeting notes. The programs are identical but for the name. The program is referred to as the IU program throughout this decision.

[4] The record is somewhat unclear that the revisions are boilerplate, but I find this to be the case. The document includes un-filled blanks for the Student's name and dates in the program.

- Visual daily schedule reviewed
- Direct instruction in anger management and social skills
- Daily communication note sent home daily [sic]
- "Cooldown" area available in classroom
- Age range exception appropriate [sic]
- "When _____ places ___self or others at risk (i.e. aggression, throwing objects, etc.) or creates a significant disruption to the classroom (i.e., not able to regain control of behavior), the crisis plan will be implemented."[5]
- "Crisis Plan: if _____ is continuing to demonstrate unsafe behaviors and is not responsive to verbal de-escalation techniques, staff will initiate a safety assist (restraint technique) or two arm control assist (restraint technique) to maintain _____ safety and the safety of others."[6]

57. Related services were amended to include "up to 20 hours per week group/individual therapy based on students needs," one hour per month of psychiatric services, and transportation to and from this IU program. *Id*.

58. While attending the IU program, the student had no interaction with typical peers. However the Student's IEP was amended to list supplemental emotional support as type of the students placement. *Id* at page 9.

59. The Student attended an ESY program at the IU, from June 27 through July 29, 2011. (P-12, P-14). During that time, despite lower expectations in summer programming, the Student's behaviors fell well below what was expected in ESY Goals. (P-14).

2011-12 School Year (3rd Grade)

1. During the entirety of the Student's tenure in the IU program, the Student engaged in a variety of behaviors similar to those expressed in the prior District placement (e.g. disrespect to staff and peers, inappropriate language/gestures, arguing, yelling, noncompliance, teasing, and verbal threats). (Parent Exhibit 24, at 9, 11-12; N.T., at 372-374) Although the Student did not assault staff at the IU (perhaps because the IU staff was quicker to restrain the Student), the severity and intensity of the behaviors increased. *Id*.

2. The Parent wrote to District administrators, expressing concern regarding the Student's worsening behaviors in the IU program on September 21, 2011. In the

[5] The blank appears in the exhibit.
[6] The blank appears in the exhibit.

same letter, the Parent renewed her request for IEEs, and listed her preferred evaluators by name, indicating their organizations as applicable. (P-17).

3. The District issued the NOREP approving the parents request for an IEE on October 18, 2011. (P-20) The actual evaluators selected by the parent are not the same as reflected in the letter of September 21, 2011. The delay from September 21 to October 18, 2011 is attributable to the Parent finalizing what evaluators should be selected.

4. The Student was restrained in the ESY program, shortly before the start of the 2011-12 school year at the IU. This triggered an IEP team meeting on August 2, 2011. (P-15). No changes were made to the Student's IEP or PBSP at that meeting. (P-15, P-16).

5. The Student was restrained again as a result of a behavioral incident on September 16, 2011. (P-17).

6. The students IEP team met again on September 22, 2011. Notes from that meeting clearly indicate that the Parent's increasing concern. (P-18). The parent expressed that she would allow a TSS to accompany the Student in the IU program. That request was denied by the IU, as IU staff pressed to continue their program. Again, no changes to the IEP were made, but the team agreed to meet in mid October, 2011 to develop a new IEP. (P-19).

7. The Student was restrained again on October 6, 2011. (P-21). An IEP meeting convened on October 16, 2011 as a result of that restraint.

8. This IEP meeting also coincided with the prior plan to revise the Student's IEP in mid-October of 2011. A draft IEP was circulated at the meeting. (P-21).

9. The draft IEP calls for continued placement in the IU program. The draft IEP was written by IU staff and describes the Student's behaviors from September 14, 2011 through September 29, 2011 (and therefore misses the October 6 restraint). During those 10 reported school days, the IU reported that the Student:

> "had 14 reported incidence of disrespect with staff or peers; 13 reported incidence of teasing/talking peers; nine reported incidents of cursing; four incidents of inappropriate comments and/or gestures with staff or peers; one reported incident of arguing and one reported incident of yelling/screaming. Antecedents to [the Student's] behaviors are [varied]. Incidents occurred during instructional/therapy time; ... when [Student] is redirected; during unstructured times...; when [Student] feels that a [peer] had said something about [Student] was looking [at Student] in a certain way; and during transitions. ... Of the 10 days present from 9/14 – 9/29/2011 [Student] has needed to be removed from the classroom to de-escalate on 6 of those days. On one of those days, [Student] needed to be physically restrained due to unsafe and aggressive behaviors." (P-21 at 14).

10. The draft IEP also reported that the Student was suspended on September 21, 2011 as the result of an altercation with three other students. The length of the suspension is not reported. (P-21).

11. The draft IEP includes two behavioral goals (decrease disrespectful behavior from 24 to 15 incidents per week; decrease work refusal from 5 incidents per week to 2 or less per reporting period). The draft IEP also includes two writing goals that are responsive to benchmark testing in the fall of 2011.

12. The draft IEP was not approved during the IEP team meeting. Rather, copies were sent home with team members and input was solicited.

13. The Student was restrained again on October 21 and 25, 2011. (P-22). An IEP team meeting was scheduled to convene on October 28, 2011 as a result. The Parent requested to move the meeting to November 11, 2011. *Id*.

14. On November 2, 2011, the District entered into a contract with an Independent Neuropsychologist to complete the above-referenced IEE.

15. The IEP team convened on November 11, 2011. An IEP was circulated at that meeting that is fundamentally the same as the prior draft IEP, but with updated information through October 19, 2011 (the updates report similar or worsening behaviors). (P-24).

16. The Student received a one-day bus suspension on November 14, 2011 for being "Repeatedly out of [Student's] seat while the bus is in motion. Yelling on the school bus. Threatening other students." (P-26).

17. The Student was restrained again on November 11, 15, and 17, 2011. (P-27, P-28)

18. In November of 2011, the District and Parent began to consider other options for the Student. Referrals were sent to a number of Approved Private Schools (APSs).

19. The Student was accepted at an APS on December 9, 2011. (P-29). The District received notice of the acceptance on December 15, 2011. The Parent offered programming at the APS via a NOREP of December 14, 2011. The Parent accepted the NOREP on December 16, 2011. The Student started at the APS in January of 2012 (after the mid-year break).

20. By all accounts, the Student is making progress in the APS under an appropriate IEP.

Legal Principles

Child Find

In *D.K. v. Abington School District*, --- F.3d ---, 2012 WL 4829193 (3rd Cir., 2012), the Third Circuit provided a clear, comprehensive description of an LEA's Child

Find obligations by synthesizing and summarizing the applicable laws and jurisprudence. I cannot write a better or more concise explanation than what the court has already provided:

> "School districts have a continuing obligation under the IDEA and § 504"—called "Child Find"—"to identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 738 (emphasis added); accord 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111. A school's failure to comply with Child Find may constitute a procedural violation of the IDEA. *E.g., D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist*., 629 F.3d 450, 453 (5th Cir.2010)(calling the Child Find requirement a "procedural regulation[ ]"); *Bd. of Educ. of Fayette Cnty., Ky. v. L.M*., 478 F.3d 307, 313 (6th Cir.2007) (characterizing noncompliance with Child Find as a procedural violation).
>
> Child Find extends to children "who are suspected of [having] ... a disability ... and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c)(1); a*ccord Bd. of Educ. of Fayette Cnty., Ky. v. L.M*., 478 F.3d 307, 313 (6th Cir. 2007); *Taylor v. Altoona Area Sch. Dist.*, 737 F.Supp.2d 474, 484 (W.D.Pa. 2010). As several courts have recognized, however, Child Find does not demand that schools conduct a formal evaluation of every struggling student. *See, e. g., J.S. v. Scarsdale Union Free Sch. Dist*., 826 F.Supp.2d 635, 661 (S.D.N.Y.2011)("The IDEA's child find provisions do not require district courts to evaluate as potentially 'disabled' any child who is having academic difficulties."). A school's failure to diagnose a disability at the earliest possible moment is not per se actionable, in part because some disabilities "are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all." *A.P. ex rel. Powers v. Woodstock Bd. of Educ*., 572 F.Supp.2d 221, 226 (D.Conn.2008).

D.K. at *9.

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School,* ODR No. 8960-0708KE (2009):

> Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or

de minimis educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

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 a meaningful educational benefit to the Student in the least restrictive environment.

Compensatory Education

Hearing Officer Skidmore has provided the best distillation of current compensatory education jurisprudence in Pennsylvania:

> It is well settled that 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). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education "should aim to place disabled children in the same position that the would have occupied but for the school district's violations of the IDEA.")) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

M.J. v. West Chester Area Sch. District, ODR No. 01634-1011AS (Skidmore, 2011)

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 their 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 Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

Discussion

I. Parental Agreement with Programming and Placement, Jurisprudence

Throughout this hearing, the District has called attention to evidence and testimony that the Parent was in agreement with the programs and placements that the District provided. The evidence in this case, including much of the Parent's own testimony, supports this contention. At a minimum, the Parent voiced no concerns about the IEPs that the District offered at the time they were issued and, more likely, expressed agreement with them.

The fact that the Parent did not demand services before they were provided, and then agreed with and consented to the services that were offered, does not constitute a defense. The District's Child Find obligation is not dependent upon any parental action. Under Child Find, it is the District's duty to propose an evaluation; it is not the Parent's obligation to request one. Similarly, the District's obligation to provide a FAPE is not altered in any way when parents approve programming and placement (either through an IEP or the IST process). Long-standing jurisprudence makes it clear that "a child's entitlement to special education should not depend upon the vigilance of the parents." *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999)(quoting *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3d Cir. 1996)). As such, the District cannot rely upon the Parent's silence or approval of its actions as a defense. Rather, the Parent's actions and inactions do not diminish the Student's rights under the IDEA, including the right to be identified under Child Find and the right to a FAPE.[7]

The record establishes that the Student was first placed in the IST process, then evaluated for IDEA eligibility, found eligible, and placed in a series of increasingly-restrictive placements. The parties agree that the Student's current placement, a behavioral APS, is appropriate. This current placement is the most restrictive in the progression of the Student's placements.

[7] This is not to say that parental actions or inactions are irrelevant in all IDEA cases. LEAs can only act upon what they know (or should know). When parents actively withhold or conceal information from LEAs, an LEA cannot be liable for failing to act upon what was intentionally hidden. *See, e.g. Cumberland Valley SD v. NM*, ODR No. 13612-1213KE (Ford, 2013). Similarly, many cases highlight the importance of parental input in IEP development; and parents have a near-absolute right to reject special education services. None of these circumstances are present in this case.

In the abstract, the sequence of events (the move from informal interventions to IST to IEPs with increasingly restrictive placements) is consistent with legal mandates. It is often prudent to determine if a student will respond to regular education interventions before a special education evaluation is proposed. For students with specific learning disabilities, this concept now appears in the IDEA itself through recognition of the RTI model. There are some analogies between the RTI model for specific learning disabilities and the IST process for students with behavioral needs. The analogy is imperfect, but instructive. The availability of RTI does not diminish an LEA's Child Find obligation, and RTI cannot be used to delay the provision of special education to IDEA-eligible students. The same must be true for the IST process and students with behavioral needs. If Child Find is triggered, an LEA cannot wait until the IST process is exhausted before proposing an evaluation. If a student is IDEA-eligible, an LEA cannot wait for the conclusion of the IST process before offering an appropriate program and placement through an IEP.

The IDEA's LRE obligation functions in a nearly-identical way. The IDEA establishes a continuum of placements from least to most restrictive, and requires placement in the LRE to the maximum extent appropriate with supplementary aids and supports. *Oberti v. Board of Education of the Borough of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993); 34 C.F.R. §300.114. Importantly, however, the IDEA does not require a student to fail in an inappropriate placement simply because the inappropriate placement is less restrictive than an appropriate placement on some *per se* basis. Rather, the IDEA acknowledges that several placements could be appropriate for any student, and requires LEAs to choose the least restrictive of all potentially-appropriate placements.[8]

An equally long line of IDEA case law also clearly establishes that IEPs are not judged in hindsight.[9] *See, e.g. Fuhrmann on Behalf of Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d. Cir. 1993), *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995). Evidence that a student did not make meaningful progress is not *prima facie* evidence that an IEP is inappropriate. Rather, considering what the District knew or should have known, the question turns upon whether the IEP was reasonably calculated to provide a meaningful educational benefit at the time it was offered. Evidence of actual progress becomes part of the analysis after this initial inquiry. If a student fails to make progress despite a "reasonably calculated" IEP, the LEA is obligated to act when it learns that the program and placement are not resulting in the expected benefit to the student. Conversely, evidence of actual progress despite the fact that an IEP is not "reasonably calculated" is a mitigating factor and can reduce deficiencies in an IEP document to procedural errors.

[8] The Parent avers that the District has a practice, if not a policy, under which it will not refer students to an out-of-district placement unless the Student has appeared before the School Board for a disciplinary hearing at least three times. Some evidence supports this contention, but it is ultimately irrelevant. My inquiry does not concern whether the District acted consistently with its own policies or practices. Rather, I must determine whether the Student's rights were violated, whatever the District's policies and practices may be. Consequently, if the Student required a more restrictive placement in order receive a FAPE, the reason why such a placement was not offered is irrelevant.

[9] It is sometimes said that the IDEA does not permit "Monday morning quarterbacking" in IEP analysis.

II. Child Find

Under the forgoing framework, the first question is whether the District violated its Child Find obligation by failing to propose an initial evaluation. The period of time in question for a potential Child Find violation is July 23, 2010[10] (the summer between 1st and 2nd grade) through November 2, 2010 (when the District proposed a special education evaluation). There is some evidence to suggest that the Student exhibited some behavioral problems in kindergarten and 1st grade. The evidence that the behavioral problems were elevated to the same extent as they were in second grade is not preponderant. This, taken with evidence of the Student's strong academic performance in kindergarten and 1st grade, compels me to reject the Parent's claim that the Student should have been evaluated for IDEA eligibility before second grade.

The situation is different in second grade. In *first* grade, the District had actual knowledge that the Student was receiving services from CGRC (i.e. the BSC that would visit once every six day cycle). At the very start of second grade, the District had actual knowledge that CGRC's services were increased (i.e. the TSS). I also accept the Parent's contention that the District knew or had reason to know of the Student's hospitalization in the summer of 2010. To hold otherwise would be to hold that the addition of a TSS prompted no inquiry whatsoever on the District's part, and would also disregard substantial evidence that the Parent communicated openly and frequently with the District on all occasions. Moreover, the Student engaged in a pattern of serious behavioral incidents at the start of second grade. This resulted in a referral to the IST process in September of 2010.

The IST process was not successful. In the light most favorable to the District, the IST documents required the District to provide increased coordination with the Parent and caseworker, use of the timeout area, reinforcement of appropriate behavior, elimination of privileges, and setting goals.[11] The level of coordination at that time was already high, and the thought-to-be successful strategies were already in place. Consequently, the IST process did not yield any substantive changes in the Student's regular education program and resulted in no changes in the Student's behaviors.

Although the IST process cannot be used to delay an evaluation for special education services, in most cases it is prudent for LEAs to review IST data prior to a special education referral. In this case, the Student was referred to IST in name only. There were no changes in the Student's actual programming, and so the District cannot point to the start of IST to excuse any delay. Moreover, at the time of the IST referral – though early in the school year – the Student was exhibiting a pattern of severe behaviors on the heels of a behavioral hospitalization, and despite increased services from CGRC. These behaviors were quite different than those exhibited in prior years in both frequency and intensity. These are red flags that the District should have

[10] The date of the complaint less two years.
[11] In IST documents, these are presented as interventions that were thought to be effective (as opposed to services that the District was consistently providing with progress monitoring).

recognized by September 23, 2010 when the IST referral was made. The District could be forgiven for wanting to try IST first but, again, there is no evidence that any additional regular education interventions were provided. The District knew it had to do something but, despite the IST referral, nothing substantively changed. Knowing that something must change for a regular education student, but making no inquiry as to what must change and, in fact, changing nothing is the essence of a Child Find violation.

For the forgoing reasons, the District violated its Child Find obligations by failing to propose an evaluation for special education eligibility from September 23, 2010 (when it should have proposed an initial evaluation) through November 2, 2010 (when the evaluation was proposed).

III. The Initial Evaluation

The Parent argues that the initial evaluation did not comply with evaluation criteria set forth in the IDEA and its implementing regulations. *See* 34 CFR §§300.301 – 300.310. These regulations require LEAs to use "a variety of assessment tools" to evaluate "all areas of suspected disability." The Parents allege that the ER did not evaluate all areas of suspected disability because it failed to assess the Student's potential language disability, sensory and auditory processing needs. The Parents argue that all of these needs should have been suspected because of the Student's social skill deficits.

I respectfully disagree. At the time of the ER, the Student's problems were behavioral. Evidence of a potential autism spectrum diagnosis does not appear in the evidence until much later (the "rule out" PDD-NOS diagnosis from the IU's psychiatrist). Teachers reported anecdotally that the Student was pleasant and socially appropriate when behaviors were under control – despite the severity, frequency, and unpredictability of the behaviors.

To assess *the* suspected area of disability, the District used a verity of tools.[12] The Parent acknowledges two of these: the behavior rating scales and the FBA (the Parent argues that the latter is sub-par). The ER utilized more than that, though. Parental input beyond the ratings scales was actively solicited, as was input from all of the Student's teachers. Observations by multiple evaluators (albeit with varying degrees of formality) were completed. Moreover, I am persuaded that the FBA itself was not flawed. The FBA does hypothesize the function of the Student's behaviors while acknowledging the seeming randomness of the Student's behavioral triggers.

For the foregoing reasons, the initial ER was appropriate.

IV. 2nd Grade – January 24, 2011 through June 27, 2011

Although the initial ER was appropriate, the initial IEP was not. Moreover, the IEP was not reasonably calculated to provide a meaningful educational benefit at the time it was

[12] Other assessments were included to assess the Student's intellectual ability and academic achievement, although neither of these were concerns at the time.

offered. Statements of the Student's present educational levels are accurate. The behavioral goals, viewed in isolation, target the Student's areas of need, and are objectively measurable. But an IEP must do more than say where the Student is and where the Student should be in a year's time. The IEP must clearly say what services the District will provide to enable the Student to make the progress anticipated in the goals. This is where the Student's IEP falls short.

The program modifications and specially designed instruction (i.e. the special education that the Student will receive) are included strategies that were tried, and failed, during the IST process. For example, the IEP called for clear expectations of performance and positive reinforcement with immediate rewards and incentives. Reinforcing positive behaviors and setting specific goals were already tried via IST without success (to say nothing of the fact that including these interventions in IST was no change from pre-IST interventions). The IEP also called for small group testing, scheduled breaks and a behavior chart of the shape and monitor appropriate behaviors. These are similar to the "unsuccessful interventions" listed in IST documents. The only *new* service provided by the IEP was 30 minutes of counseling, twice per six day cycle.[13] These services are modest to the point of triviality, and are not calculated to enable the Student to achieve the success anticipated in the IEP goals.

For these reasons, the Student's 2nd grade IEP was inappropriate. As a result, the Student did not make progress during second grade. There is a dearth of evidence concerning the Student's actual progress towards IEP goals. The District did present a monthly behavioral point summary. (S-5). It is exceedingly difficult to decipher this document even after hearing testimony about it and, on its face, lacks a connection to IEP goals. Moreover, all testimony indicates that the Student's behaviors did not change. The testimony, taken as a whole, paints a clear picture that Student still exhibited negative behaviors on a frequent basis, elevated to extreme levels on multiple occasions, in response to inconsistent triggers. The purpose of the IEP was to address these behaviors, and the IEP failed in this regard.

Finally, during the final weeks of the 2010-11 school year, the Student received no programming at all. This termination of services was in response to the Parent's wishes but, as described above, acquiescence to parental demands is not a defense. District believed that home programming was necessary, as evidenced by the pre-manifestation determination, pre-IEP team meeting NOREP. This NOREP was rejected *because* the IEP team had not yet met. (*See* P-5 at page 3). After the IEP team met, the District never offered home programming or any other services. This is not a paperwork failure. This is the result of the District agreeing with the Parent that the best thing for the Student was a withdrawal from all programming. It is one thing for a District to be persuaded by information provided by parents during an IEP team meeting. It is something else for a District to agree to terminate services completely, just as it is

[13] The IEP also calls for the inclusion of a classroom aide, who was present prior to the IEP, and an increase in communication between District personnel.

coming to the conclusion that a higher level of services are needed, in response to nothing more than a parental wish.[14]

For the foregoing reasons, the District violated Student's right to a FAPE from January 24, 2011 (the implementation of the IEP) until June 27, 2011 (the start of ESY).

V. IU Programs – Summer 2011 ESY and 3rd Grade Through APS Placement

Changes were made to the Student's IEP just prior to entry into the IU behavioral program in the summer of 2011. The Parent argues that these changes should not be considered IEP revisions because they happened outside of the IEP process. I disagree to an extent. The changes did occur outside of a formal IEP team meeting, but with the Parent's knowledge and consent. What matters more is that the changes were entirely inappropriate.

It is clear from the face of the document itself that the changes were designed for the sole purpose of bringing the IEP into conformity with the Student's new placement at the IU. It is true that the IEP team was already committed to the IU by the time of these revisions. This fact reveals another failure. The IDEA requires a careful assessment of the Student's needs, a determination of what services the Student requires, and then a decision as to where the Student should be educated. The program must drive the placement, not vice versa. In this case, despite Parental agreement with (if not enthusiasm for) the IU program, the District violated the IDEA by selecting the Student's placement and then fitting a program to that placement. This is the opposite of what the IDEA requires.

The changes to the IEP were program specific, not student specific. As a result, the Student's IEP was not individualized. In fact, the document with the amendments is unedited boilerplate, complete with unfilled blanks for the Student's name and program duration. An Individualized Educational Program that is un-individualized to this extreme cannot comply with the IDEA.

It is also clear that the IEP was an immediate and catastrophic failure. What little data there is suggests that the Student made no progress towards ESY goals in the summer of 2011. Moreover, despite lowered expectations in summer programming, the Student was restrained in August of 2011. The situation rapidly deteriorated further at the start of the 2011-12 school year. The Student was restrained twice again in September, and was suspended for fighting with other students during the first month of school. A pattern of restraint, followed by IEP team meetings in which no changes were made, was well established within the first month of school. This pattern is consistent with conditions in place during summer 2011 ESY. To be sure, the IU pressed for a continuation of the Student's current IEP, and then for an IEP that would maintain

[14] This is not to invalidate the importance of parental input. However, when a parent's desire is contrary to a LEA's assessment of a student's needs (as well as all objective information about the Student), it is unwise for an LEA to simply acquiesce.

programming and placement at the IU. However, the IU was the District's placement, and so the District is responsible for the provision of FAPE at the IU.

Typically, an LEA is given a reasonable amount of time to recognize that an IEP is not working before liability accrues through inaction. It is not fair for the District to rely on that principle in this case. The District provided a boilerplate IEP for a placement that was decided before any programmatic considerations. That placement – the IU – started in the summer of 2011 with a preview of the third grade program. The Student did not make progress in that summer program and was restrained in early August. The Student's behaviors worsened when the program's intensity increased at the start of the 2011-12 school year. Under these conditions, it is not equitable to afford the District a period of time to watch the Student deteriorate before taking action.

It is not disputed that the Student's condition worsened while attending the IU program. The Student's IEP in that program was not reasonably calculated to provide a meaningful educational benefit. The District was responsible for the provision of FAPE during this time, and so I find that the District violated the Student's right to a FAPE from June 27, 2011 (the start of ESY) through the Student's matriculation to the APS that the Student currently attends.

VI. Compensatory Education

As discussed above, the remedy for a denial of FAPE is compensatory education. The Student was denied a FAPE (as a result of a Child Find violation) from September 23, 2010 through November 2, 2010. The Student was denied a FAPE again (as a result of an inappropriate IEP) from January 24, 2011 until June 27, 2011. Finally, the Student was denied a FAPE again (as a result of another inappropriate IEP) from June 27, 2011 through the Student's matriculation to the APS in January of 2012.

Neither party presented any evidence as to what amount of compensatory education is needed to put the Student in the position that the Student would be in but for the denial of FAPE. Therefore, an hour-for-hour approach is necessary. But even an hour-for-hour calculation is difficult in this case. As noted above, the Parent proved that the Student needed services, did not receive services and was harmed as a result. The Parent did not present evidence as to how many hours of services the Student should have received.

Both parties agree that the Student's current IEP in the APS is appropriate. That IEP was included in the Parent's exhibit binder and referenced in the Parent's closing brief, but was not entered as evidence in the hearing. *See* NT at 1315. Although I cannot consider the Student's current IEP for this reason, I note that the APS program was generally described as a full-time emotional support program. Full-time programming is 80% or more of instructional time. With no better evidence, I will calculate compensatory education as follows:

- September 23, 2010 through November 2, 2010: The Student is entitled to 48 minutes of compensatory education for each hour that school was in session. This is 80% of the time that school was in session.
- January 24, 2011until June 27, 2011: The Student is entitled to 48 minutes of compensatory education for each hour that school was in session. This is 80% of the time that school was in session.
- June 27, 2011 through the Student's matriculation to the APS in January of 2012: The Student is entitled to one hour of compensatory education for each hour that school was in session. The IU placement was entirely inappropriate; the IEP was, literally, boilerplate, a placement was decided before program, and a pattern of physical restraint started during the comparatively relaxed ESY program.

Dicta

Despite the serious problems described above, I was genuinely impressed with the decorum and demeanor of both parties throughout this hearing. By all outward indications, the parties appreciate each other. This goes beyond disagreement without being disagreeable. Both parties made an active choice to highlight their agreement about the Student's current program and placement. Both the Parent and the District's Supervisor of Special Education stand out in this regard, as does the Supervisor's diligence and organization. Through their actions, the Student is attending a program and placement that all agree are appropriate. The parties are cognizant that their disagreement lies in the past, and have not allowed this hearing to disrupt their otherwise good, working relationship. I applaud the team's current efforts.

ORDER

And now, May 28, 2013, it is hereby **ORDERED** as follows:

1. The District violated Child Find, resulting a substantive denial of FAPE for the Student from September 23, 2010 through November 2, 2010. The Student is entitled to 48 minutes of compensatory education for each hour that school was in session during this time.
2. The District provided an inappropriate IEP, resulting in a substantive denial of FAPE, from January 24, 2011until June 27, 2011. The Student is entitled to 48 minutes of compensatory education for each hour that school was in session during this time.
3. The District provided an inappropriate IEP, resulting in a substantive denial of FAPE, from June 27, 2011 through the Student's matriculation to the APS in January of 2012. The Student is entitled to one hour of compensatory education for each hour that school was in session, including ESY programming in the summer of 2011, during this time.
4. The Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student's current or future IEPs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that

should appropriately be provided through the Student's IEP to assure meaningful educational progress

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

/s/ Brian Jason Ford
HEARING OFFICER