

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

## **Pennsylvania Special Education Hearing Officer Final Decision and Order**

### **Closed Hearing**

#### **ODR File Number:**

25847-21-22

#### **Child's Name:**

E.J.

#### **Date of Birth:**

[redacted]

#### **Parent:**

[redacted]

#### **Counsel for Parent:**

Leigh Loman, Esquire  
Ellen Connally, Esquire  
301 Grant Street, Suite 270  
Pittsburgh, PA 15219

#### **Local Education Agency:**

South Allegheny School District  
2743 Washington Boulevard  
McKeesport, PA 15133

#### **Counsel for LEA:**

Christina L. Lane, Esquire  
424 South 27<sup>th</sup> Street, Suite 210  
Pittsburgh, PA 15203

#### **Hearing Officer:**

Cathy A. Skidmore, Esquire

#### **Date of Decision:**

03/24/2022

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, E.P. (Student),<sup>1</sup> is an early elementary school-aged student who resides and attends school in the South Allegheny School District (District). In late November 2021, the Parent filed a Due Process Complaint against the District,<sup>2</sup> claiming that it failed to meet its obligation to identify Student as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>3</sup> and Section 504 of the Rehabilitation Act of 1973.<sup>4</sup> As remedies, the Parent demanded compensatory education, a referral to a private school placement, and other relief beyond the authority of this hearing officer. The expedited issues were bifurcated and previously decided.

The case proceeded to an efficient due process hearing.<sup>5</sup> The Parent sought to establish the District's noncompliance with IDEA mandates in failing to identify Student, commonly referred to as child find. The District maintained that it had no reason to immediately suspect that Student had

---

<sup>1</sup> In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> The Parent also challenged a disciplinary action by the District that was decided in January 2022 and bifurcated. CITE

<sup>3</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>4</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>5</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. The transcripts of the sibling's non-expedited hearing have been marked as Hearing Officer Exhibits (HO-) 1 (session of January 31, 2022) and HO-2 (session of February 22, 2022).

disability under the IDEA, that it did not delay an evaluation, and that no remedy was due.

Following review of the record and for all of the reasons set forth below, the claims of the Parent cannot be sustained and must be denied.

## **ISSUES**

1. Whether the District violated its obligations to Student under the IDEA and Section 504 with respect to special education evaluation;
2. Whether the District denied Student a free, appropriate public education;
3. If the District did deny Student a free, appropriate public education, whether Student should be awarded compensatory education; and
4. Whether the District should be ordered to place Student in an appropriate educational placement?

## **FINDINGS OF FACT**

1. Student is a kindergarten student residing in the District. At the time of the due process hearing, Student was attending a cyber-school program through the District. (P-8 at N.T. 7-8.<sup>6</sup>)

---

<sup>6</sup> P-8 and P-9 are transcripts from the expedited hearing that were admitted by agreement of the parties. *E.P. v. South Allegheny School District*, 25771-2122AS (Skidmore, January 13, 2022), at 3-7.

2. Student began kindergarten in a District elementary school building at the start of the 2021-22 school year. It was the same building that housed the pre-kindergarten program Student had attended through the local Intermediate Unit (IU). (N.T. 130; P-8 at N.T. 29, 43; P-9 at N.T. 213-14, 236.)
3. When Student was in preschool, the IU reported that Student engaged in problematic behaviors such as physical aggression toward property, and sometimes sought support from District staff. (P-8 at N.T. 46; P-9 at N.T. 224-25.)
4. Because of the COVID-19 pandemic, the District did not conduct its usual screening of new kindergarten students to determine readiness. (P-8 at N.T. 45-46.)
5. Beginning on the first day of Student's kindergarten year, the District noted Student's problematic behaviors, which included noncompliance with directives, work refusal, physical aggression toward property, physical aggression toward staff, running around the classroom and other areas, and elopement from the classroom and the school building. The District considered Student's behaviors to be indicative of difficulty making the transition to school-age programming, which is not uncommon, particularly in light of the disruptions during the COVID-19 pandemic the prior school year; however, a number of staff were needed to intervene with Student's behaviors. (N.T. 82-83, 146-48, 151-52; P-6; P-8 at N.T. 13, 15, 31, 49-52, 75, 85, 129; P-9 at N.T. 188, 204; P-10.)
6. Before the end of August, 2021, Student's kindergarten teacher created a behavior chart for Student that utilized positive reinforcement for appropriate behaviors, something not typically done for kindergarten students. Student was also provided opportunities for

frequent breaks and had preferential seating in the classroom. (P-8 at N.T. 120-22, 125-26, 132-33; P-9 at N.T. 191 ; S-1.)

7. Student was suspended from school on September 13, 2021, for a period of three days. That suspension was extended pending an informal hearing, and Student did not return to school thereafter. (P-6.)<sup>7</sup>
8. Student began attending the District's general education cyber program in mid- to late October 2021. That program is self-paced by the individual student but the District provides a device for accessing the platform. There are also paper packets provided at the elementary school level. (N.T. 28-30, 36, 40, 57-60, 62-63, 65-66.)
9. The District thereafter sought permission to evaluate Student and the Parent provided consent on December 21, 2021. (P-9 at N.T. 247.)
10. The Parent has attempted to have local private schools consider Student for placement, but most required referrals from the District. The District agreed to provide records to placements that request them and investigated other settings for Student. (N.T. 104-05, 119-21; S-4.)
11. The District's evaluation of Student was underway at the time of the due process hearing. (N.T. 35, 46, 91-93, 105.)

---

<sup>7</sup> Although not an exhibit for this hearing, as set forth in the January 22, 2022 expedited decision, Student was expelled from school in early October 2021. *E.P., supra* n. 6, at 7 ¶ 19.

## **DISCUSSION AND APPLICATION OF LAW**

### **General Legal Principles**

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. The latter 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). Accordingly, the burden of persuasion in this case must rest with the Parent who filed for this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in " equipoise." *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be generally credible as to the facts. The weight accorded the evidence, however, was not equally placed; the documents admitted were overall very probative of the claims to be decided.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

## **General IDEA Principles: Substantive FAPE**

The IDEA requires that states provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. States, through local educational agencies (LEAs), meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted).

## **Substantive FAPE: Child Find and Evaluation Requirements**

The IDEA and state and federal regulations further obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The statute itself sets forth two purposes of the required evaluation: to determine whether or not 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).

The obligation to identify students suspected as having a disability is commonly referred to as “child find.” LEAs are required to fulfill the child find mandate within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). More specifically, LEAs are required to consider evaluation for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to “conduct a formal evaluation of every struggling student” or identify a disability “at the earliest possible moment.” *Id.* (citations omitted).

In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1).

### **The Parent’s Claims**

The first, and ultimately dispositive, issue is whether the District violated its child find obligation to Student. Student entered the District in kindergarten at the start of the 2021-22 school year. As of the first day of school, and continuing thereafter almost daily, Student exhibited very concerning behaviors that presented a threat to the safety of Student and others. The District responded quickly, reaching a decision to expel Student several weeks into the school year.

In the expedited decision, this hearing officer concluded that the District had reason to suspect a disability for purposes of the disciplinary protections in the IDEA. But that determination is different than the test for a child find obligation. Even assuming for purposes of this decision that, as of September 14, 2021, the District had reason to take steps to obtain permission to conduct a special education evaluation of Student, the law provided sixty calendar days to complete that process and convene a team to determine special education eligibility. Then, and only then, would an Individualized Education Program be developed to address the identified needs.

Here, the evaluation process is underway, and there has not to this hearing officer’s knowledge been any determination made on whether Student is or is not eligible for special education. The abbreviated nature of the record (which is understandable given Student’s very brief tenure at the



District's schools) does not permit her to make any informed decision on that question herself. Once that process has occurred, the Parent will be given notice of the procedural safeguards available if she wishes to challenge the District's conclusions and any actions taken. For these reasons, it would be premature to attempt to address the remaining issues at this time. Moreover, this hearing officer's jurisdiction is limited to administrative complaints for children with disabilities. *See generally* 22 Pa. Code §§ 14.162, 15.8.

This hearing officer could, and may even be tempted to, opine on the decision to expel Student. She declines to do so, however, since that is a matter for another forum. It is nonetheless noteworthy that the parties have been exploring potential alternative placements for Student, and it may well be that such would be appropriate rather than for Student to return to the District's schools. The parties are encouraged to continue their collaborative decision-making whether or not Student is found eligible for special education.

### **CONCLUSION OF LAW**

1. The District did not violate its child find obligation to Student.
2. There is no basis to order any remedy.

## **ORDER**

AND NOW, this 24<sup>th</sup> day of March, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not violate its child find obligation to Student.
2. The District is not ordered to take any action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

*/s/ Cathy A. Skidmore*

---

Cathy A. Skidmore, Esquire  
HEARING OFFICER  
ODR File No. 25847-21-22