

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: C. H.

Date of Birth: [redacted]

Dates of Hearing: 3/22/2016, 4/26/2016, 7/6/2016, and 7/7/2016

Closed HEARING

ODR File No. 17316-15-16

Parties to the Hearing:

Representative:

Parents

Parent[s]

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Date of Decision:

September 1, 2016

Hearing Officer:

Charles W. Jelley Esq. LL.M.

Procedural History

The Parents filed a Complaint alleging the District failed to identify, locate, and evaluate the Student.¹ This type of Parent Complaint is commonly called a child find violation. [redacted] The Parties agree the Student is a person with Autism. The Parties disagree whether because of the Student's Autism disorder the Student needs special education as provided for under the Individual with Disabilities Education Act. The Parties also disagree if the Student is a person with a disability pursuant to Section 504 of the Rehabilitation Act who is believed to need special education.²

The District filed a Motion to Dismiss the Parents' Complaint contending the child find claims were untimely. The District contended the Parents knew of the alleged child find violation, in 2011, after providing the District with a private evaluation identifying the Student as Autistic [redacted]. The Parents responded arguing that they were not aware the Student could receive an Individual Education Program (IEP) [redacted]. This hearing officer granted the District's Motion and limited the Parents' child find claim to alleged violations that occurred during the 2013-2014 and 2014-2015 school years up to the Student's enrollment in the charter school. (A copy of the Ruling is part of the record).

In reaction to the favorable Ruling dismissing claims from 2011-2013, the District now contends the Parents cannot establish an ongoing child find violation as the Parents' knowledge in 2011 prevents any future relief for any other child find violations not subject to the Ruling dismissing the 2011-2012 and 2012-2013 school year claims. To support this contention, the District relies on its [redacted], report cards, standardized state assessments results, and testimony from the staff. The Parents answer back arguing that during the 2013-2014 school year until the Student withdrew, warning signs were present to establish the Student needed specially-designed instruction.

The Parents further argue the [redacted] teachers over emphasized Student's [redacted] abilities and test scores. By over emphasizing the [redacted] abilities and test scores the District failed to acknowledge the Student's strengths as "mitigating measures" that otherwise masked the Student's need for special education. The Parents implicitly

¹ But for the cover page of this Decision, in the interest of confidentiality and privacy, the Student's name and gender, and other potentially identifiable information are not used in the body of this decision. The following District Exhibits #1, through #53 were admitted into the record. The Parties conferred and agreed to use the same exhibits. The Hearing Officer placed five exhibits into the record.

² The fact finding in this action was complicated by fact that when the Parties explained how the dispute arose the Parties included statements about disagreements relating to the Student's siblings [redacted]. At times, the disagreements about one sibling's needs spilled over into discussion about this Student.

contend had the [District] factored out [redacted], as a “mitigating measure” the IDEA and Section 504 eligibility factors would therefore weigh in favor of identifying the Student as needing special education services. In support of their contentions, the Parents point to a series of independent ongoing uncontested events that support the Student’s need for special education.

ISSUE

Did the District fail to identify the Student as a person with a disability in need of specially designed instruction? If yes, what appropriate relief should be ordered to correct the alleged violation?

After a careful and thorough review of the testimony, the exhibits, and each Party’s closing arguments, whether or not specifically mentioned in this decision, I find the District failed to locate, identify, and evaluate the Student in 2013. The child find errors violated the Student’s IDEA and Section 504 child find rights. The child find violations also violated the Parents’ procedural due process rights and interfered with the Parents’ participation in the development of the Student’s individualized program.

Statement of the Facts

1. The Student resides in the District and at all relevant times attended school as follows: a. First grade in 2010-2011 (S#17, p.2); b. Second grade in 2011-2012 (S#10, p.1); c. Third grade in 2012-2013 (S#11, p.1); d. Fourth grade in 2013-2014 (S#12, p.1); and, e. Fifth grade in 2014-2015 (S#34).
2. Based on the results of a private 2011 evaluation conducted by a certified school psychologist the parent requested a [redacted] child find evaluation (S#11).
3. In the [redacted] evaluation report prepared by the District, the parent input noted the Student “cannot write ideas as fast as [Student] thinks of them...has a lot of anxiety,” and Asperger’s.” [Student] is behind Student’s peers socially . . . does not like change in [Student’s] routine. [Student] is hard to calm down when [Student] is upset,” “physical abilities are nowhere near [Student’s] advanced intellectual abilities” (S#7, p.2; N.T. 86; 184). The Parents’ input section-included comments about the Student’s social skills, diagnosis of Asperger syndrome, anxiety, and poor handwriting skills (S#7; N.T. pp.56-57; p.90).
4. The 2011-2012 school year [redacted] evaluation, incorporated the parents’ input as well as the results of the private evaluation report (S#8, N.T. pp.80-81; pp.86-87, p.134, p.232). [That] evaluation described the Student’s present levels, and [redacted] strengths. [That] report did not include recommendations from the

evaluator about the need for specially designed instruction for the Student's Autism exceptionality [redacted] (S#8; N.T. pp.134-135; p.324).

5. The District's school psychologist prepared the [redacted] report (NT p.173).
6. The [evaluation] team did not review the private evaluator's assessment results or recommendations. The District psychologist decided what scores from the private evaluation would be shared with the other team members (NT p.173).
7. Aware of the private evaluator's assessment of the Student's anxiety, the District's evaluator after probing for signs of anxiety asked the Student two questions and then concluded the Student's anxiety did not interfere with the District's assessment. These questions asked the student why Student coughed when nervous, and whether Student felt nervous during testing. (S#4; S#8 p.1; N.T. p.89)
8. The District school psychologist did not include the types of assessments or the objective anxiety measurements S#4; S#8 p.1; N.T. p.89.
9. The parent did not object to the results or the recommendations in the District's [redacted] Report (N.T. p.90).
10. The parent attended a meeting to discuss the District's [redacted] Report (N.T. pp.88, 95, pp.146-147, p.185; p.194).
11. The District gave the mother the notice of parents' rights [redacted] at each [redacted] meeting (S#16; N.T. p.151, pp.170-171; pp.262-263). The [redacted] notice of parents' rights does not mention the Section 504 or the Individual with Disabilities Education Act's child find duties or each statutes' additional procedural safeguard rights. *Id.*
12. Throughout 1st through 5th grade, the parent was aware the Student's anxiety, social skills, and poor handwriting skill deficits were not included in any of the [redacted] (N.T. pp.57-58; S#7).
13. In her September 2011 report, the private evaluator recommended Behavioral Health Rehabilitation Services (BHRS) Mobile Therapy supports (S#4, p.3; N.T. 44).
14. The Student received in home therapeutic support services (TSS) services for six months during the 2012-2013 and 2013-2014 school year (N.T. 445; N.T. 525). The Student also received approximately six months of TSS services in the spring of 2015 (N.T. 445-446; 524-526).
15. The TSS services provided social skills training; some of the TSS services were provided as a group to all of the Student's siblings. The student was discharged (twice) because Student met the TSS goals (N.T. 445-446; 524-526). In July 2016, Student was reevaluated for BHRS and TSS services (N.T. 504; 526). The Student attended [redacted], a social group for children with Autism for more than one

year (N.T. 523). The student stopped attending [the social group] in January 2015 (N.T. 504; 522-523). The mother reported that Student no longer attends [the social group] because there “was a lot of issues going on with certain kids and I didn’t really feel that they were getting much benefit from it” (N.T. 523).

16. The comprehensive [redacted] Report assessed the Student’s present levels, abilities and strengths S#8; N.T. 134-135; 324, (S#8, N.T. 80-81; 86-87, 134, 232. The [report] did not include any measures of the Student’s social, behavioral, emotional, or communications skills. *Id.* The District did not ask the teachers or the mother for any additional information about the concerns the private evaluator identified related to the Autism [redacted] exceptionality, anxiety, depression, social skills, and handwriting. The teachers did not fill out any disability based checklist or screening measures about the Student’s academic, emotional, social or behavioral needs (N.T. 96, 148-150; 194).
17. The District psychologist agreed the private diagnosis of Autism was accurate (S#4; S#8; N.T. 88-89). Without the benefit of any formal testing, checklists, or an observation, the District psychologist concluded the outside diagnosis of Autism does not meet the IDEA or Section 504 eligibility standards (N.T. 119; S#4).
18. All the teachers were aware of the Student’s Autism, anxiety, and Obsessive Compulsive Disorder (S#33 p.1; S#32).

19. Although the Student complained to the teachers and the mother, about how during hand writing activities the Student's hands would hurt, the teachers never asked for an occupational therapy evaluation (NT p.295). The teachers were aware the Student took medication to manage and mitigate the effects of anxiety and depression (NT pp.261-262; S#34 p.2). [redacted] (NT pp.265-266).
20. The Parent signed and approved [redacted] the District's proposed services (S#10, 11, 12, 13, p.2; S#14, p.2; S#15, p.2; N.T. p.59).
21. The District did not issue a permission to evaluate for special education services under IDEA or Section 504 for Student (N.T. 95, 197).
22. Student's report cards from First Grade, Second Grade, Third Grade, and Fourth Grade reported grades of "Advanced" and "Exceeds Expectations" in every area. (S#17; NT 539).
23. The mother described four or more specific concerns about how the Student's disorder adversely affected the Student's education: (1) the Student displayed signs of anxiety (N.T. 56-57; 90; 451; 538; 587; 657); (2) the Student needed support to develop social skills (N.T. 459; 463; 467); (3) the Student was diagnosed with Asperger's; and (4) the Student needed support for written expression and writing (N.T. 545; 607; 610; 617; 628). More specifically:
 - (a) The Student displayed Asperger's related and social skills deficit areas:
 - (b) Poor peer relations with another 4th grade student (N.T. 459);
 - (c) The Student was rude to other students in class (N.T. 463);
 - (d) Low ratings of the Student's social skills in both the 2011 and 2014 private evaluations (S#4).
24. Examples of anxiety concerns included: (a) the Student coughing when anxious (N.T. 451); (b) the Student became anxious when Student's sibling was "leaving the room" for Learning Support (N.T. 587, 657); and, (c) At the start of Fifth grade, the 2014-2015 school year, the Student was "so anxious and a ball of nerves ... a totally different kid" upon learning about the assigned teacher (N.T. 538).
25. Examples of Student's written expression issues included: the Student resisting writing at home (N.T. 610, 617) and becoming obsessed, anxious, and offended when asked by the Fourth Grade [redacted] Math teacher to provide longer answers to math questions (N.T. 607). From August 2014 until January or February 2015, the parent home schooled the Student N.T. p.339.
26. The [redacted] teacher was aware of the Student's Autism, anxiety, dysgraphia, and the Student's limited social skills repertoire (NT p.321).
27. As early as the 2011-2012 school year the Student was working with a private therapist to address anxiety, peer relations, and social skills S#4. For the past three (3) years, the Student worked with a play therapist on anxiety and social

- deficiencies (S#30; N.T. pp.60-61, p.333). The District was aware of the Student's participation in private playgroup sessions (NT pp.332-334).
28. The District staff was aware of the Student's written expression weaknesses, as well as a rigid thinking pattern (NT pp.346). The District staff was aware that the Student's anxiety increased if the Student received negative teacher comments when the Student failed to provide the work product to support the correct answer (NT p.346; S#39 pp.6-9).
29. Each school year the Student's reading levels improved (S#17).

The 2014-2015 Fifth Grade School Year

30. Prior to the 2014-2015 school year, Mother emailed the District regarding placement for the Student's sibling (S#25). The sibling's IEP team met, and the District refused to place the sibling with a different learning support teacher (N.T. 140-141, 143; 161; 509). The general discussion at the meeting was about what teachers the sibling would have for that school year.
31. The mother withdrew the Student and [redacted] siblings prior to the Student's [redacted] meeting (N.T. 692).
32. The mother felt that the District was missing signs of Student's anxiety and social pragmatic issues (N.T. 555).

The [Cyber School] evaluation

33. On March 9, 2015, Mother enrolled Student in a cyber school (N.T. 340; 699) because the Student and siblings "needed services...with the cyber school"
34. The [cyber school] Permission to Evaluate (PTE) notes a private evaluation from August 2014, which concluded the Student's disorders included Autism, an Anxiety disorder, and "new" Depressive Disorder (S#40, p. 2).
35. [redacted]
36. In February of 2015, the Student enrolled at [cyber school] (N.T. pp.70-71; p.340).
37. The Parent enrolled the Student at [cyber school] because "I could get those supports that the [children] need, but they could still be at home with me where they are safe" (N.T. p.340).
38. The [cyber school] Permission to Evaluate (PTE) states: "Parent has requested an evaluation because she feels as though [Student] has a learning disability. She also would like [Student] considered for specially designed instruction due to [Student's] diagnosis of Autism Spectrum Disorder, as well as, Student's diagnoses of anxiety and depression. The [cyber school] PTE states: [redacted] (N.T. p.31).

39. The [cyber school]’s evaluation identified the Student as having a speech and language impairment. At [cyber school], the Student IEP provides speech as a direct service and occupational therapy as a related service (S#40 to S#46; N.T. p.130, p.344; p.363).

The August 2014 private evaluation

40. In August of 2014, prior to leaving the District, the Student had a second private evaluation (S#39). The evaluator made the following observations and opinions:
- a. The Student reported frustration at home and school, “feeling as though [Student] has little to say about [Student’s] experiences and [Student’s] choices” (S#39 pp6-9).
 - b. The [Student] described difficult interactions with family members and the frustration that accompany this” (S#39. p.7). No one other than the Parent and the student rated the Student’s behavioral needs (S#39, p.9).
 - c. The August 2014 evaluation identified a new diagnosis of a depressive disorder (S#39 p.9).
 - d. The Student displayed elevated levels of panic symptoms.
 - e. The Student was likely internalizing symptoms of anxiety, and panic. The internalization of panic and anxiety are limiting the Student’s performance in a variety of settings (S#39 pp7-.9).
 - f. [Redacted] the Student’s Full Scale Intelligence Quotient (“FSIQ”) and General Ability Index (“GAI”) decreased from the initial assessment in 2011 (S#4 pp.2-4;S#3; S#39 pp.3-5).
 - g. The Student experienced a decrease in processing speed that was not commensurate with Student’s working memory, perceptual reasoning, and verbal comprehension. This decrease in processing speed adversely affects and substantially limits the Student’s speed and accuracy (S#4 pp.2-4; S#39, pp3-5). The Student performed lower on tests measuring attention, graphomotor or writing skills (S#4 pp.2-4; S#39 pp.3-5).
 - h. While the Student’s immediate verbal and delayed memory skills are well developed, the Student’s immediate visual and delayed memory skills are now an area of weakness (S#4 pp.2-4; S#39 pp.3-5).
 - i. The Student’s executive functioning, attention, and retrieval fluency abilities are weaker now when tasks require both speed and accuracy.
 - j. These significant changes and weaknesses appear to substantially limit academic tasks, and they may be exacerbating the Student’s anxiety, depression, and/or other factors (S#4 pp.2-4; S#39 pp.3-5).

- k. The 2014 private evaluation report described how the Student's Autism affects the Student's social interactions, causes perseveration, distress during transitions, triggers display of a rigid thinking pattern, sensitivity to noises, as well as anxiety and mood disturbances (S#4 pp.1-3; S#39 pp.6-9).
41. When the 4th grade started, the Parent had a meeting with the District staff about the Student's sibling. The record is not clear if the Parent provided the District with the second evaluation report (N.T. 105, 142, 333-334). The record is clear the [District] team never discussed the 2014 report or had a meeting prior to approval of the home school plan. *Id.*
42. Aware of the dispute about the Student's and the sibling's dispute over the proper program for the 2014-2015 school year the Superintendent signed off on the Parents' Affidavit to supervise the Student's home school program (S#31).

Applicable Legal Principles and Discussion

Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party asking for the hearing. If the moving party provides evidence that is equally balanced, or in equipoise, then the party asking for the hearing cannot prevail, having failed to present sufficient evidence.³ In this case, the Parents asked for the hearing and thus bore the burden of proof. There were instances of conflicting testimony where credibility and persuasiveness determinations were made to establish a fact. Some witnesses were, however, more persuasive on some points than others. In each instance, this hearing officer was able to draw inferences from which one could ultimately determine the facts.

Credibility and Persuasiveness

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence, assessing the persuasiveness of the witnesses' testimony and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. In the course of doing so, hearing officers have the plenary responsibility to make express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.⁴

³ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3^d Cir. 2012).

⁴ *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution*,

Thus, all of the above findings are based on a careful and thoughtful review of the transcripts, a reading of all of the exhibits and a direct observation of each witness; therefore, the decision is based upon a preponderance of the evidence presented. While some of the material evidence is circumstantial, the hearing officer can derive inferences of fact from the witnesses' testimony and the record as a whole is preponderant. On balance, despite inconsistencies, the hearing officer found all of the witnesses' testimony represents their complete recollection and understanding of the events.

IDEA's Child Find and FAPE Requirements

The IDEA guarantees children with disabilities "free appropriate public education."⁵ To achieve this goal the statute mandates that states receiving federal funds under the statute provide "special education and related services" to students who qualify as children with disabilities.⁶ *Id.* All determinations regarding eligibility arise out of the identification and the evaluation of the student as a "child with a disability."⁷

The question here is whether the Student as "child with a disability" of Autism who, by reason thereof, needs special education and related services. *Id.* IDEA eligibility determinations proceed in two steps. The first question is does the child have an exceptionality-- here, Autism 34 C.F.R. 300.8(c)(1). This point is conceded, and not in dispute by the parties. The second determination, at issue here, requires the team to decide if the Student with a qualifying exceptionality "needs" special education and related services because of that disorder.⁸

"Special education" is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including ... instruction conducted in the classroom, in the home ... and in other settings," as well as "instruction in physical education." "Related services" means "transportation, and such developmental, corrective, and other supportive services (including ... psychological services, physical and occupational therapy, ... medical services ...) as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A). Neither the statute nor the agency regulations implementing the regulation specify the object or the scope of the "in need of" determination.⁹

Quakertown Community School District, 88 A.3d 256, 266 (Pa. Commw. 2014); *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003)

⁵ 20 U.S.C. § 1400(d)(1)(A).

⁶ 20 U.S.C. §§ 1401(3)(A)(ii); § 1412(a)(1)(A).

⁷ 20 U.S.C. § 1401(3)(A).

⁸ 20 U.S.C. § 1401(3)(A)(ii).

⁹ *Mr. and Mrs. DOE, v. Cape Elizabeth School District*, 68 IDELR 61, 116 LRP 33 (1st Cir August 5, 2016) (when a student's strong academic performance masks the presence of a disability, the evaluation team

When the Student's overall high levels of academic performance mask specific factors related to the eligibility determination, the regulations included a requirement that the evaluators "[u]se technically sound instruments that may assess the *relative contribution of cognitive ... factors*" (emphasis added). The U.S. Department of Education further advises that a disability must be determined "on a case-by-case basis, depending on the unique needs of a particular student."¹⁰

This eligibility inquiry must take into account a broad array of measures. It must "[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior."¹¹ The evaluation must include "standardized, individualized testing (not just criterion-based testing or functional assessments)," The comments to the regulations note, "Nothing in the [IDEA] or ... regulations would preclude the eligibility group from considering results from standardized tests when making eligibility determinations."¹² Stated simply, just as no single assessment or measure could support a finding of a disability, no single assessment or measure may undermine a finding of "in need of special education" where other measures or factors could support such a finding.¹³

The statute specifies that a child must "need []" special education "by reason [of]" the disorder as identified under, 20 U.S.C. § 1401(3)(A)(ii), and that special education must be designed "to meet the *unique needs* of [the] child with a disability," *id.* § 1401(29) (emphasis added). The regulations, however, are not clear as to how the "need for" inquiry works, when like here, during the assessment the need for specially designed instruction is masked by [redacted]. Therefore, insofar as the disability impedes the child's "significant learning" in school, or the "meaningful educational benefits" that a child derives from school, the mitigating effects [redacted] must be factored into the child find process. This is axiomatic since quite obviously, if the [redacted] eliminates the "need"

should consider how the academic measures in question relate to the student's alleged deficit and whether a more specific measure indicates a possible impairment).

¹⁰ Letter from Alexa Posny, to Catherine D. Clarke, Director of Education and Regulatory Advocacy, American Speech and Hearing Association, U.S. Dep't of Educ. (Mar. 8, 2007)

<https://www2.ed.gov/policy/speced/guid/idea/letters/2007-1/clarke030807disability1q2007.pdf>

¹¹ 34 C.F.R. § 300.306(c)(1)(i); § 300.304(b)(1) (noting that the evaluation of whether the child is a child with a disability must "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child")

¹² " Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,651 (Aug. 14, 2006)

¹³ See generally 34 C.F.R. § 300.304(c)(2) (emphasizing "assessments and other evaluation materials [to] include those tailored to assess specific areas of *educational need* and not merely those that are designed to provide a single intelligence quotient").

that would ordinarily flow from the disability also present, than such is really not a “need” at all.

[Redacted]

When a district evaluates a student or refuses to evaluate a student the district must provide the parents with prior written notice of the district action 20 U.S.C. § 1415(b)(3).

Accordingly, the inquiry here should focus on whether the District assessed the Student in all areas of unique need, and if the warning signs placed the District on inquiry notice of a student in need of special education [redacted]. While the IDEA is one source of assistance, assuming the student is not IDEA eligible, the District must also inquire if the Student is a person with a disability under Section 504.¹⁴

[Redacted]

Section 504 Denial of FAPE

Section 504’s implementing regulations provide a detailed scheme for fashioning FAPE for students with a qualifying Section 504 disability. 34 C.F.R. §104.30-104.36. Similar to the IDEA requirements, Section 504 requires districts to conduct a comprehensive evaluation of the student’s needs 34 CFR §104.33, and provide FAPE, including regular and special education, in the least restrictive educational environment 34 CFR §§104.33-104.34. When the parties disagree about the provision of FAPE, the District must provide procedural safeguards 34 CFR §104.36.¹⁵

The Section 504 regulations provide that the implementation of an IEP under the IDEA may also meet the substantive FAPE requirement of Section 504, but not necessarily all of Section 504 FAPE requirements of 34 CFR 104.33 (b)(1)(ii) and 34 CFR 104.33(b)(2).

Section 504 evaluation, identification, and eligibility determinations

A school district must conduct an evaluation of any individual who because of a disability "needs or is believed to need" special education or related services. 34 C.F.R. §

¹⁴ [Redacted]

¹⁵ 34 CFR §104.34 (a); *Letter to Williams*, 21 IDELR 73 (OSEP 1994) (Section 504 requires districts to educate students with disabilities in the LRE); *In re: Student with a Disability*, 113 LRP 42334 SEA NY 2013) (concluding that a violation of Section 504's LRE requirement at 34 CFR §104.34, requiring comparable services and activities, is not analogous to any IDEA regulations).

104.35(a). An individual evaluation must be conducted before any action is taken with respect to the student's initial placement, or before any significant change in placement is made. 34 C.F.R. § 104.35. At the time of the evaluation, the district must provide procedural safeguards before making a significant change in placement determination. After a complete evaluation, the student may not need supplemental aids and services or special education, however when such a decision is made the Student is still a person with a disability. [redacted]

When the evaluation establishes the student does not need FAPE services, the student is still protected by Section 504's general nondiscrimination prohibitions and Title II of the ADA's statutory and regulatory requirements. See 28 C.F.R. § 35.130(b); 34 C.F.R. §§ 104.4(b), 104.21-23. Therefore, even though a school district does not identify the student as needing special education or related services, knowing the student is a person with a disability, the district must still consider whether the student is entitled to a reasonable modification of policies, practices, or procedures. *Id.*

The district's obligation to make Section 504 accommodations or modifications is fact-dependent and requires a case-by-case analysis. For example, the student may have controlled asthma and not need FAPE services in the classroom, but may require a modification of the district's policy precluding students from carrying medication throughout the school day. The latter is an example of a person with a disability who needs modifications of school policies unrelated to FAPE services.¹⁶

Once the district makes the eligibility decision, the district must inform the student's parents of its decision and of the parent's procedural safeguards rights 34 C.F.R. § 104.36. This safeguards provision requires a school district to establish a system of procedural safeguards for the identification, evaluation, and education of persons who, because of a disability, need or are believed to need special education or related services.¹⁷ "A school district that denies a parent's request for a Section 504 evaluation of a student, regardless of the grounds for the denial, must inform the student's parent of its decision, and of the parent's procedural safeguard rights, as set forth in the Section 504 regulations."¹⁸

¹⁶ *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 67 IDELR 189 (OCR 2015).

¹⁷ *Dear Colleague Letter*, 116 LRP 31313 July 26, 2016, (Dear Colleague Letter and Resource Guide on Students with ADHD pp.32-33) (school districts must provide parents and students with procedural safeguards).

¹⁸ *New Hanover County (NC) Schs.*, 114 LRP 14971 (OCR 12/24/13) (OCR reasoned that from the start of the school year, the district had ample reason to believe that the student may have needed special education or related aids and services based on the student's diagnosis); *Oakland (CA) Unified Sch. Dist.*, 113 LRP 27902 (OCR 04/16/13) (teachers erred by continuing with unsuccessful ad hoc

Application and Analysis of Legal Principles

The Student's 2011-2012 and 2012-2013 IDEA and 504 claims are time barred. Discrete acts, which are time barred, "cannot be resurrected by being aggregated and labeled continuing violations."¹⁹ The District extends this limited holding, arguing here that the Parents' prior 2011 knowledge of the alleged violations, precludes a finding that a new 2013 ongoing violation is not otherwise actionable. I disagree. In an analogous situation in *AMTRAK v. Morgan*, 536 U.S. 101, 113 (2002), the court held the existence of past time barred acts and the plaintiff's prior knowledge of their occurrence, did not bar the plaintiff from filing new claims about related acts that continue into the present. To be actionable, the new claims, however, must be new independent, ongoing violations. The complainant must address alleged violations that are themselves timely filed. Moreover, prior acts are admissible as background evidence in support of a timely filed claim. *Id.* Similarly, the IDEA statute of limitations should not bar a parent from using prior acts as background evidence in support of a timely claim. An ongoing child find violation occurs "over a series of days or perhaps years,"²⁰ and "is based on the cumulative effect of a thousand cuts, rather than on any particular action taken by the defendant"²¹ Although an alleged child find violations must be raised within the applicable statute of limitations period, acts establishing ongoing violations can occur at any time so long as they are linked to actions which continue into the applicable limitations period.²² Therefore, the new timely filed child find claims are timely and actionable. Passing this initial threshold test, I will now turn to the merits of the alleged child find claims.

[Redacted] The Chapter 14 regulations provide detailed procedures to assess a student's eligibility and need for specially designed instruction as a person with a disability. In this instance, the evidence is preponderant the District did not follow Chapter 14. The evidence is also preponderant the District did not administer any formal

accommodations instead of referring the student for an evaluation); *Lakeview (MI) Pub. Schs.*, 114 LRP 15872 (OCR 12/06/13) (OCR found sufficient evidence of a 504 violation when the district only considered IDEA eligibility in its decision to terminate a middle school student's IEP was a denial of FAPE); *Prince William County (VA) Pub. Schs.*, 63 IDELR 139 (OCR 2013) (OCR concluded that the district failed to properly and timely evaluate a student with "borderline" ADHD. OCR also concluded that the district denied the student FAPE by delaying its evaluation of the student for months and then failing to apply the correct eligibility standard. Focusing on the disability evaluation, OCR explained that the determination of whether a student has a disability is "not based solely on a medical diagnosis, but instead on an assessment of whether [the] student is substantially limited in a major life activity.")

¹⁹ Cf. *O'Connor v. City of Newark*, 440 F.3d 125, 129 (3d Cir. 2006); *D. K. v. Abington School. Dist.*, 696 F.3d 233, 243 (3d Cir. 2012).

²⁰ *Morgan*, 536 U.S. at 115

²¹ *O'Connor* 440 F.3d at 127-128.

²² *O'Connor*, 440 F.3d at 127.

or informal assessments to evaluate or rule out the whether the Student's disability "adversely affected" the Student's education or the disability "substantially limits" a major life functions. The District psychologist while aware of the Student's anxiety did not administer any formal or informal measurements. The psychologist did not observe the Student in the classroom. Instead, she asked the Student two questions about the anxiety related behavior, and when the Student provided a glib answer, she moved on concluding the Student was not eligible, without the benefit of a "variety of assessments." [redacted] When confronted with warning signs, the instructional staff instead brushed off the manifestations of the Student's disability attributing the Student's disorder to being a "perfectionist." This type of rigid thinking pattern is one of the hallmarks of a high functioning person with Autism. The peer-to-peer problems with participation in [redacted activity] were instead redirected to the mother for being overbearing. When the Student and the Parent complained about hand writing difficulties the staff pointed to the Student's high-test scores as a justification for moving on. The Student's handwriting, letter formation, organization and the length of the sentences are inconsistent with the Student's abilities and achievement. The mother testified that the 3rd grade teacher made modifications to the reading materials to keep the Student on task. The teacher's informal practices were in reality low grade forms of specially-designed instruction, modifications or accommodations that while keeping the Student engaged also masked the Student's needs. When the Student did cry in frustration, at the beginning of 4th grade, the staff once again pointed to the mother as the source of the Student's discontent.

Likewise, the Student's depression, anxiety, and Autism went unnoticed because the [District] team relied on ability measures contrary to the black law requirements that the team use a "variety" of measures to gauge the need for specially designed instruction. Everyone knew the Student was fixated on the sibling's classroom troubles. Yet no one thought it advisable to conduct an observation or develop an intervention to address a series of behaviors that were interfering with Student's learning. The entire staff was aware the Student was taking several medications for anxiety and depression. No one discussed whether the medications were "mitigating measures" that masked the known disorders. [redacted]

Finally, the evidence is preponderant that only one person, the psychologist, not a team of knowledgeable individuals, read the entire 2011 private evaluation. The fact that the [redacted] team members were not aware of the underlying data used by the private evaluator [redacted] created a defacto team of one, the psychologist. The [District] team members could not comment on what they did not read. When the team did not review and discuss the evaluator's suggested recommendations for specially designed instruction [redacted] the Student lost a chance for a FAPE. Instead, the special education director acquiesced to the psychologist's summary statements that curiously omitted the relevant diagnostic data and suggested specially designed instruction. This decision making

process interfered with the Parents rights, [and] the evaluation team members' duties and is contrary to [redacted] Chapter 14, the IDEA and Section 504 as well as their respective implementing regulations.

The District infers the [cyber school] evaluation report, finding that the Student IDEA eligible, is flawed [redacted].

The District, relying on its speech therapist, also attacks the [cyber school] IDEA initial evaluation report's finding the Student is Speech Language Impaired. The District's speech therapist's review of the test results is insufficient, inadequate, and fatally flawed. The District's speech therapist did not observe the Student, did not evaluate the Student, did not review the [cyber school] therapist's raw data, and she did not contact the [cyber school] evaluator. Absent direct contact with the Student, under these facts, the therapist's opinions are not persuasive.

Accordingly, I find the District's failure to identify, locate, and evaluate the Student violated the IDEA.²³ Assuming *arguendo*, the failure to perform an IDEA evaluation was harmless error, believing the District's evaluation is complete and the staff are correct in their observations the failure to consider the Student's 504 eligibility is legal error. The IDEA and Section 504 eligibility are very different. The [redacted] team did not consider how the Student's Autism disability substantially limited the Student's major life functions under Section 504. The District never satisfactorily explained the basis of its decision denying eligibility. The District on two occasions failed to evaluate, locate, and identify the Student as a person with a disability. While I find the District violated its child find duties, the record does not establish the nature of the harm, the lost educational benefits, or the degree these culminating ongoing violations interfered with the Parent's due process rights. Although the Parents seek compensatory education, the record therefore does not support the requested relief.

Instead, the record does, however, support the need for a comprehensive evaluation, in all areas of unique need, including but not limited to writing, social, language, and behavioral needs. The July 2014 evaluation noted a new disorder, yet it does not reconcile how the disorder affects the Student's education, learning, thinking, and concentration. The 2014 evaluation noted the Student was "sad." The Student had very elevated scores measuring humiliation and or rejection. The Student self-reported elevated social anxiety and generalizing anxiety measures. On a disturbing note, the

²³ *P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 2009 U.S. App. LEXIS 23976 (3d Cir. 2009) (school districts have a continuing obligation under the IDEA and § 504 to identify and evaluate all students who are reasonably suspected of having a disability under the statutes (citation omitted)).

Student also had elevated levels of a measure of panic warning signs. The July 2014 evaluators opined the Student was likely internalizing symptoms of anxiety and panic. The 2014 evaluators concluded these symptoms/disorders were limiting the Student's performance in a variety of settings. [Redacted], the evaluators noted the Student's Full Scale Intelligence Quotient ("FSIQ") and General Ability Index ("GAI") decreased from the initial assessment in 2011. The Student also experienced a decrease in processing speed that was not commensurate with Student's working memory, perceptual reasoning, and verbal comprehension. This decrease greatly affected the Student's speed and accuracy. Previously, the Student's immediate verbal and delayed memory skills were well developed. As of 2014 however, the Student's immediate visual and delayed memory skills were considered areas of weakness. The Student's executive functioning, attention, and retrieval fluency abilities are weaker now when tasks require both speed and accuracy. While these significant changes and weaknesses appear to be substantially limited to academic tasks, they are intertwined and may be exacerbated by anxiety, panic, humiliation, depression or some other factor. These uncontested test results create a series of unanswered questions that merit an independent educational evaluation. The record does not suggest what amount of compensatory education services are needed to place the Student on the right path. Accordingly, the District is Ordered to pay for a comprehensive Independent Educational Evaluation (IEE).²⁴

The basis for ordering this IEE is not the frequent situation of a parental request based on formal disagreement with the District's evaluation. Rather, here the District's evaluation was so fatally flawed as to obscure, either on a qualitative or quantitative basis, what the student should have been receiving. That not only resulted in a denial of FAPE due to the resulting programmatic deficiencies, but also prevented the parents from knowing the extent of what their child should have been receiving in the context of claiming relief. Further, the seriousness and overall deficiency of the District's evaluation process make it highly unlikely that it would be able to appropriately reevaluate this student, posing the significant likelihood that attempting to do so would waste precious educational time for this student. Parenthetically, it should also be noted that during this hearing parents' evidence implicitly showed clear disagreement with the District's evaluation, the very basis of their claim for denial of FAPE and consequent compensatory education relief. In any event, the District is being ordered to pay for an evaluation, but the parents' claim for compensatory education will be denied.²⁵

²⁴ 34 C.F.R. §300.508(d)

²⁵ N.M. v. Wyoming Valley School District ODR FILE #16242-1415KE (McElligott August 4, 2015)

ORDER

And Now, this September 1, 2016, it is hereby **ORDERED** as follows:

1. The District is Ordered to pay the costs for a comprehensive evaluation in all areas of unique need, including but not limited to an evaluation of the Student's abilities, achievement, academics, social, behavioral, and transition needs.
2. The District is Ordered to pay the cost for a certified behavioral analyst to evaluate the Student's behavioral needs. The results of the comprehensive behavioral evaluation will assist the team in determining what behaviors, if any, are impeding the Student's progress.
3. Once the evaluation(s) are completed, the District is directed to prepare an evaluation report. Once the evaluation report is completed, the District shall prepare an IEP.
4. The Parents' claim for compensatory education is dismissed without prejudice, with the right to refile another request for a due process hearing.

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer

September 1, 2016

