

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

DUE PROCESS HEARING

Name of Child: C.K.

ODR #3420/12-13-KE

Date of Birth:
[redacted]

Date of Hearing:
October 26, 2012

CLOSED HEARING

Parties to the Hearing:

Parent

Lakeland School District
1593 Lakeland Drive
Jermyn, PA 18433

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Heather Hulse, Esquire
30 Cassatt Avenue
Berwyn, PA 19312

Glenna Hazeltine, Esquire
King, Spry, Herman, Freund & Faul
One West Broad Street Suite 700
Bethlehem, PA 18018

November 15, 2012

November 25, 2012

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is a high school aged former resident of the Lakeland School District [District] who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the classification of Emotional Disturbance and consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504], as well as the federal and state regulations implementing those statutes.

The current matter addresses the Parent's assertion that the District denied Student a free appropriate public education [FAPE] through procedural and substantive violations of the IDEA.

Issues

Did District deny Student a free appropriate public education through procedural and/or substantive violations?

Did District fail in its child find obligations to Student?

Did District fail to offer Student an appropriate program/placement?

Was the District's evaluation of Student appropriate?

Findings of Fact

1. Student was a resident in the District after Student's mother delegated custody and educational decision making to Student's sister, who is a District resident. [NT 93-94; S-12, S-18, S-23]
2. Student had been identified by a neighboring school district as a special education student as documented in an Evaluation Report [ER] dated November 8, 2010. [S-10]
3. The family member who enrolled Student in the District on December 21, 2010² indicated on the Registration Form that Student was a special education student.³ [S-11]
4. Records sent from the previous neighboring school district were received in the District on January 19, 2011 but did not include an Evaluation Report or an IEP. [NT 42; S-1]
5. At the time of Student's enrollment Student was placed in a partial [day] psychiatric hospitalization program. The District's Special Education Coordinator was aware that Student was placed in a partial psychiatric hospitalization program. [NT 22-24; S-5]

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² Student's residency in the District was confirmed on January 11, 2011. [NT 94-95]

³ In a separate document dated February 9, 2011 that was unrelated to Student's enrollment in the District another family member indicated that Student was a regular education student. [S-13]

6. The records that were received from the previous school district contain the information that Student's report card for the first quarter of the 2009-2010 [8th grade] school year indicated failing grades in Math, Science, History, and Health/Fitness. [NT 33, 35; S-2]
7. Student's Spring 2010 PSSAs test results were Below Basic in Science and Basic in Mathematics and Proficient in Reading. [S-4]
8. A Discharge Summary and Recommendations form dated June 14, 2010 from an Alternative Education Program Student attended indicated Student continued to act out aggressively throughout the placement, had many verbal and physical altercations with peers and staff in the classroom and outside of school, and that Student's behavior was a hindrance to educational progress despite the potential to thrive and succeed in the classroom. [S-5]
9. The Discharge Summary and Recommendations contained a recommendation for a thorough "educational and behavioral evaluation to determine the best placement for the upcoming school year, i.e. center-based or school-based partial program. This recommendation is made due to [Student's] continued violent and aggressive behaviors which make [Student's] placement in a regular education classroom inappropriate at this time". [NT 37-40; S-5]
10. The District's guidance department reviewed the Registration Form and records, and despite the family's notation on the Registration Form that Student was a special education student, advised the District's Special Education Coordinator that Student was a regular education student. [NT 28-29]
11. Other than a written records request issued on December 21, 2010 there is no written documentation in the form of a telephone log or other notes about further efforts anyone in the District may have made to learn whether Student was in fact identified as a special education student or not⁴. The Special Education Coordinator did not contact the previous school district.⁵ [NT 54-57; S-1]
12. The District's Special Education Coordinator did not contact the director of special education at the previous district about Student, although she had other conversations with that individual. [NT 50]

⁴ The Special Education Coordinator testified that the guidance department made phone inquiries after receiving the records, but no one from the guidance department testified. If the guidance department made telephone inquiries, it is not known how specific the inquiry might have been regarding the discrepancy between the Registration Form and the records received and/or whether the person[s] they contacted was/were special education administration/coordination staff.

⁵ The correct information was readily available. Notably once the District received the due process complaint the District's Special Education Coordinator called the special education department in the previous school district and it was confirmed that Student had been identified as a special education student as of November 8, 2010. [NT 46-48]

13. The District's Special Education Coordinator did not review Student's Registration Form, or the records sent by the previous school district. [NT 27, 32]
14. The District's Special Education Coordinator did not contact the partial psychiatric hospitalization program in which Student was placed, but relied on the guidance department to make this contact. [NT 29]
15. The District comprises a total of only three school buildings: two elementary schools serving students in grades Kindergarten through Grade Six, and one junior/senior high school serving Grade Seven through Grade Twelve. [NT 86]
16. The District had employed an acting school psychologist who was responsible for reviewing Student's educational records. [NT 30, 32]
17. The Special Education Coordinator testified that the District's protocol is to issue a Permission to Evaluate to determine eligibility for any student coming in to the District already placed in an acute partial program. [NT 30, 32, 111, 116-117]
18. Despite its own protocol regarding students attending an acute partial psychiatric hospitalization program, and despite the family's indication on the Registration Form that Student was a special education student, the District failed to seek permission to evaluate Student for special education until April 4, 2011 and did not complete an educational evaluation until June 1, 2011. [NT 31, 37-40; S-5, S-15, S-16]
19. The District's special education department was not involved in the development of Student's program and placement in the partial hospitalization program, did not have any communications with the partial hospitalization program concerning Student's possible special education needs, did not observe Student in the partial hospitalization program, did not receive progress reports from the partial hospitalization program about Student's social and emotional functioning, and only received one one-page academic progress report⁶ from the cyber learning program in which Student participated while in the partial hospitalization program. [NT 67, 69, 103-106; S-13, S-14]
20. The District's June 1, 2011 evaluation did not include any assessments of Student's social/emotional functioning via behavior rating scales, a functional behavioral assessment, input from teachers, input from the family, or a classroom observation. Nevertheless the District's evaluation resulted in a classification of Emotional Disturbance. [NT 72-73; S-16]
21. The District's ER indicated that only an intelligence test and an achievement test were administered. The ER contained four grids into which the subtest scores for the Wechsler Intelligence Scale for Children – Fourth Edition [WISC-IV] Index Scales were to be entered. The District's acting psychologist neglected to fill in these grids, leaving them blank. [S-16]

⁶The Special Education Coordinator had difficulty explaining the progress report when asked to do so. [NT 67-69]

22. Although the District's June 1, 2011 ER identified Student as eligible for special education, an IEP meeting was not scheduled until September 20, 2011. The District did not attempt to identify a program/placement within a District public school; the District's intended recommendation was to be continued placement in the partial psychiatric hospitalization program. [NT 73-75, 77; S-16, S-17]
23. The District's Special Education Coordinator holds the belief that a District cannot offer a program and placement to a special education student in a less restrictive environment than one that is recommended by a mental health agency. [NT 78-80, 96]
24. The District is aware that some students are placed in partial psychiatric hospitalization programs not because of mental health issues per se, but because of family problems. The District was aware that Student had left Student's mother's home and was residing with a sister. [NT 116-117]
25. The District's ER concludes that "the IEP team and the partial hospitalization program will determine the level of special education service". [S-16]
26. The District's ER also concludes that Student "has solid academic skills which need to be considered as an important part of [Student's] recovery plan. [Student's] future will depend on [Student's] ability to keep up academically". [S-16]
27. Student withdrew from the District on September 9, 2011. [S-17, S-18]

Legal Basis

Burden of Proof:

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome determining rule applies only when the evidence is evenly balanced in "equipoise," as otherwise one party's evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parent requested this hearing and was therefore assigned the burden of persuasion pursuant to *Schaffer*, and in this matter the Parent also accepted the burden of production even though case law does not clearly assign same to either party. In this matter the evidence was not in equipoise so an outcome governed by *Schaffer* was not reached.

Credibility:

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary

responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). The sole witness in this hearing was the District’s Special Education Coordinator, called by the Parent. Testimony the witness offered could not be credited for offering a cogent explanation for the District’s inactions/actions and instead served to support the Parent’s case.

Special Education:

Free Appropriate Public Education: Students who are found eligible for special education are entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education statutes at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). The term “free appropriate public education” means *special education and related services* that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program [IEP] required under section 1414(d) of this title.

Child Find: Pursuant to the requirements of the implementing regulations of the IDEA and Pennsylvania’s Chapter 14, school districts have an absolute obligation “to establish a system of screening...to”, *inter alia*, “identify students who may need special education services and programs.”⁷ School districts are explicitly granted the authority to seek permission from parents to evaluate a student that the school district suspects might qualify as a student with a disability.⁸ “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.

In this case, the District had more than good reason to suspect that the Student had a disability, likely Emotional Disturbance, as it had knowledge upon enrollment on December 21, 2010 that Student was being treated in a partial psychiatric hospitalization program, and on January 19, 2011 had access to records from an alternative educational placement’s June 2010 discharge summary describing Student’s troubling behavioral and social/emotional status. The IDEA defines the disability category of Emotional Disturbance to include *inter alia* an “inability to build or maintain satisfactory interpersonal relationships with peers and teachers,” and “inappropriate types of behavior or feelings under normal circumstances”. 34 C.F.R. § 300.8(c)(4)(i)(B)-(E). The District also had documentation in the form of Student’s first quarter report card for the year 2010-2011 in the previous district that Student’s academic performance was being seriously impeded. Thus the District had sufficient reason to suspect that Student met both prongs of the two-prong test for eligibility for special education: that Student had a disability and that the disability was having a deleterious effect on Student’s education.

⁷ 34 C.F.R. §300.111; 22 PA Code §14.122(3)

⁸ 34 C.F.R. §§300.300(a), 300.301(b).

In some instances failure to comply with the requirements of Child Find is a procedural but not necessarily a substantive violation of a child's entitlement to FAPE. See *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). However, procedural violations can give rise to substantive denials of FAPE for which compensatory education may be owed. See 20 U.S.C. § 1415(f)(3)(E)(ii). Recent Third Circuit case law follows established principle that "a procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits." *D.K. v. Abington School District*, 696 F. 3d 233 (3d Cir. 2012).

Although the District in the instant matter argues that even if it failed in its Child Find obligations it committed only a procedural violation, I find that its procedural violations with regard to Child Find and its failure to develop an IEP in a timely manner – combined with its untimely and inadequate evaluation - resulted in the substantive loss of educational opportunity, a deprivation of educational benefits, and deprived the Parent and/or Guardian of their participation rights. The testimony of the sole witness in this matter, the Special Education Coordinator, presents a progressive illustration of the District's failures in its responsibility to Student.

Paperwork received from Student's previous District presented a combined picture of a student with significant behavioral problems in an alternative educational setting, and failing grades in the public high school, that should have started red flags waving upon review by the guidance department. Moreover, since she already knew Student was in a partial psychiatric hospitalization program, as an administrator in a very small District with only three schools it was puzzling that the Special Education Coordinator did not herself review the records that arrived from the previous District. Had she reviewed the records, she no doubt would have recognized the red flags, and also noted the discrepancy between the information on the Registration Form and the lack of a special education evaluation in the records received. Even given that she relied on the guidance department to conduct the record review, it is incomprehensible that once she was informed that the registration paperwork was not matching the records received she did not directly contact her counterpart special education administrator in the previous District to get to the bottom of the matter. Further, given her testimony that the District's protocol was to evaluate students who upon enrollment were already placed in partial hospital settings, the failure to ensure that the acting psychologist followed up on a reported conversation and actually issued a Permission to Evaluate was a violation of the District's own standards as well as a violation of the IDEA's mandate that LEAs evaluate students when they have reason to *suspect* that the student may be eligible for special education. Both the acting psychologist's significant delay in issuing a PTE and the Special Education Coordinator's not following up with the acting psychologist earlier than late March or early April regarding the status of an evaluation is inexplicable.

Evaluations

The purpose of an evaluation is to determine whether the child meets any of the criteria for identification as a "child with a disability" as that term is defined in 34 C.F.R. §300.8, as well as

to provide a basis for the contents of an eligible child's IEP, including a determination of the extent to which the child can make appropriate progress "in the general education curriculum." C.F.R. §§300.8, 300.304(b)(1)(i), (ii). The general standards for an appropriate evaluation are found at 34 C.F.R. §§300.304—300.306. The District is required to 1) "use a variety of assessment tools"; 2) "gather relevant functional, developmental and academic information about the child, including information from the parent"; 3) "Use technically sound instruments" to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using "any single measure or assessment as the sole criterion" for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). Furthermore, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be "sufficiently comprehensive to identify all of the child's special education and related service needs" and provide "relevant information that directly assists" in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). An initial evaluation [which the District believed it was conducting] must also include, if appropriate: 1) A review of existing evaluation data, if any; 2) local and state assessments; 3) classroom-based and teacher observations and assessments; 4) a determination of additional data necessary to determine whether the child has an IDEA-defined disability, the child's educational needs, present levels of academic achievement and related developmental needs, whether the child needs specially-designed instruction and whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(1),(2). 305(a)(1),(2). Once the assessments are completed, the qualified District professionals and the child's parents determine whether he/she is a "child with a disability" and his/her educational needs. 34 C.F.R. §300.306(a). If it is determined that the child meets the criteria for IDEA eligibility *i.e.*, is a child with a disability and is in need of specially designed instruction, an IEP must be developed. 34 C.F.R. §§300.306(c)(2). The regulations require that the evaluation procedures "assist in determining ... the content of the child's IEP." 34 C.F.R. §300.304(b)(1). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs" 34 C.F.R. §300.304(c)(6). One federal court has interpreted the IDEA to require that the evaluation be "sufficient to develop an appropriate IEP" *Brett S. v. West Chester Area School District*, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The acting psychologist's evaluation was inadequate and inappropriate, and particularly so given that the District was considering it an initial evaluation. If the acting psychologist did not follow IDEA's requirements for an evaluation, at least, once the ER was issued, the Special Education Coordinator should have noticed that despite classifying Student with an Emotional Disturbance the acting psychologist did not utilize any evaluation procedures addressing social emotional or behavioral needs, did not include any interview with the Parent and/or Guardian or with the partial psychiatric hospitalization staff, did not indicate that she reviewed records from the partial program and omitted large blocks of data from the ER's printed format. Given the District's attempt at the hearing to establish that Student was receiving an appropriate educational program at the partial hospitalization program despite the lack of an IEP and District involvement, it is ironic that in the ER the acting psychologist noted "N/A" under "Sources of Evaluation Data: Recommendations by Teachers".

FAPE: IEP Given that the ER was issued on June 1, 2011 there was no rationale given as to why an IEP was not immediately developed by a team that would consider academic needs [such as mathematics calculation and reading comprehension], potential Extended School Year eligibility for summer 2011, transition planning for Student's reintegration back into a public school setting, and Least Restrictive Environment considerations. Waiting until September 20, 2011 to have an IEP meeting for a student who very well could be entering a District building for a summer 2011 ESY program or at the beginning of September 2011 for full or part day instruction was the final instance of the District's egregious disregard for Student's rights under IDEA.

The connection between the procedural and the substantive violations is very clear. As a timely identified eligible student as of mid-January 2011, Student would be entitled to an IEP. The Parent/Guardian would have been part of developing that IEP and would have received regular reports of movement toward or away from the goals. Even if it were implemented in whole or in part in the partial hospitalization setting, that IEP would contain academic, behavioral and social goals that were measurable and progress-monitored. Student's receiving scientifically-based, peer reviewed specially designed instruction/intervention in academic, social and behavioral areas would be documented and delivery would be mandated with legally-enforceable consequences for non-implementation. Student would have had the opportunity for consideration for ESY services to begin to repair the failing grades previously received.

FAPE: LRE: Once an IEP is developed, a plethora of case law supports IDEA's mandate that education must occur in the least restrictive environment appropriate for the individual child. The expectation of least restrictive environment is so rigorous that the courts have held, for example, that a school district is prohibited from placing a child with disabilities outside of a regular education classroom if educating the child in the regular classroom with supplementary aids and support services can be achieved satisfactorily. If the district fails to offer the student a program and placement which occurs in the least restrictive environment, it has failed to offer FAPE. The two concepts (LRE and FAPE) are inextricably intertwined. See *Millersburg Area School District v. Lynda T.*, 707 A.2d 572 (1998) [children who are not provided with educational services in the LRE appropriate to their needs are not provided FAPE]; also, "If the school has given no serious consideration to including the child in a regular class with supplementary aids and services and modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive." *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993), 19 IDELR 908.

In the instant matter, the IEP team would have to first acknowledge Student's presumptive entitlement to a placement in a regular education setting with appropriate supports and services, and if for good cause full-time regular education with supports and services were not appropriate, then determine the extent to which Student could appropriately be included in the public high school for portions of the day or the week.

Remedies:

It is both a procedural and a substantive violation that for all the months in which Student was its responsibility, the District left Student's special education entitlement unattended, relying solely on the mental health system to provide Student with FAPE, and once it issued its [albeit inappropriate] ER, it did not swiftly move to develop an IEP. There was no credible evidence that Student received FAPE in the partial psychiatric hospitalization setting on the District's watch. In this case, the Parent has met her burden of proving that the District committed procedural and substantive violations that gave rise to a denial of FAPE. Student is therefore entitled to relief which will be fashioned so as to be directly helpful to Student in moving forward toward adulthood.

The IDEA authorizes hearing officers and courts to award "such relief as the Court determines is appropriate" 20 U.S.C. § 1415(h)(2)(B), and compensatory education is an appropriate remedy when a school district has failed to provide a student with FAPE, *Lester H. v. Gilhool*, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the school district's failure. [*Id.*] Compensatory education is an equitable remedy. [*Id.*] *B.C. v. Penn Manor Sch. Dist.*, 805 A.2d 642 (Pa. Commw. 2006) provides instruction for awarding compensatory education, counseling an award that would bring a student to the point where the student would be had FAPE been offered.

As a mid-teen high school aged child with a disrupted educational history Student needs to be helped to find an area of interest and aptitude that promotes a solid transition to adult living and independence. As the first part of an equitable remedy, given the poor evaluation the District produced and given Student's need to establish a vocational path in high school and post high school, I will order that Student receive a thorough independent vocational/transitional battery of interest, aptitude and other testing deemed necessary by an agency specializing in evaluating high school students and young adults for transition planning.

In addition, given that through the District's inactions/actions Student did not receive specially designed instruction under an IEP I will order a specified number of hours of compensatory education. I calculate these hours as follows: On January 19th, the District received Student's school records from the previous District. Given the significant behavioral and academic deficits documented therein, the District should have immediately and vigorously pursued the question of whether Student had already been evaluated as information on the Registration Form would suggest. I will allow the District a 30 calendar day grace period to resolve the discrepancy. Therefore the period of recovery in this matter shall be from February 19, 2011 through the last day of the school year in June 2011, a total of about four months. Given that Student likely derived some behavioral/emotional benefit while participating in the partial psychiatric hospitalization program, I will not award full days, but will award Student 3 hours per day for every full or partial school day the District's high school was open; snow days, in-service days, and planned spring breaks shall be excluded.

The compensatory education hours shall be used at the discretion of the Student and the Parent/Guardian to cover educational or therapeutic services that contribute toward Student's reaching IEP goals.

Order

It is hereby ordered that:

The [Redacted] School District denied Student a free appropriate public education because of procedural and substantive violations.

The [Redacted] School District failed in its child find obligations to Student.

The [Redacted] School District failed to offer Student an appropriate program/placement.

The [Redacted] School District's evaluation of Student was not appropriate.

The [Redacted] School District shall fund a complete independent vocational/transitional evaluation of Student.

The [Redacted] School District shall provide Student with compensatory education in the amount of three [3] hours per school day for every day the District's high school was in session from February 19, 2011 through the last day of school in June 2011.

Any claims not specifically addressed by this decision and order are denied and dismissed.

November 25, 2012

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official