

XXXX XXXX,

STUDENT

v.

PRINCE GEORGE'S COUNTY

PUBLIC SCHOOLS

*** BEFORE KERWIN A. MILLER, SR.,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH No.: MSDE-PGEO-OT-17-28850**

* * * * *

DECISION

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STATEMENT OF THE CASE

On September 12, 2017, XXXX XXXX (Parent), on behalf of her child, XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by the Prince George's County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).¹

I held a telephone prehearing conference on October 19, 2017. The Parent was represented by Kimm Massey, Esquire. Gail Viens, Esquire, represented the PGCPS. By agreement of the parties, the hearing was scheduled for November 1 through November 3, 2017 and November 7, 2017.

¹ U.S.C.A. is an abbreviation for United States Code Annotated.

I held the hearing on November 1 through November 3, 2017.² Kimm Massey, Esquire, represented the Parent. Gail Viens, Esquire, represented the PGCPs.

The September 12, 2017 Complaint marks the start of the thirty-day resolution period. 34 C.F.R. § 300.510(b) (2017). At that prehearing conference, the parties informed me that a resolution meeting was held on September 20, 2017, but it did not resolve the matter. The parties notified the OAH on October 11, 2017 that they could not resolve their dispute, which I advised, and the parties agreed, is the triggering event of the forty-five day timeframe for a decision. 34 C.F.R. § 300.510(b)(2).

The hearing dates requested by the parties fell within forty-five days after the triggering events described in the federal regulations. My decision is due on or before the forty-fifth day. In this case, the forty-fifth day is Saturday, November 25, 2017. My decision is therefore due by the last preceding business day, Wednesday, November 22, 2017.³ 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a).⁴

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2017); 34 C.F.R. § 300.511(a) (2017); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2017); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 13A.05.01.15C; COMAR 28.02.01.

² The November 7, 2017 hearing date was canceled because the hearing concluded on November 3, 2017.

³ November 23, 2017 is Thanksgiving Day and November 24, 2017 is American Indian Heritage Day.

⁴ C.F.R. is an abbreviation for Code of Federal Regulations.

ISSUES

The issues are:

1. Did the PGCPS fail to comply with its Child Find obligation to conduct an initial evaluation of the Student pursuant to IDEA;
2. Did the PGCPS fail to comply with IDEA's disciplinary procedures;
3. Did the PGCPS fail to comply with evaluation, eligibility and Individualized Education Program (IEP) timelines after the Parent's request for an initial evaluation;
4. Did the PGCPS fail to provide access to the Student's education records; and
5. Is the Parent entitled to the relief sought in the Complaint or other appropriate relief?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parent:⁵

- Parent Ex. 1 – Student Report Cards, May 22, 2017; May 15, 2017; February 28, 2017; November 4, 2016; June 29, 2016; October 2, 2015; July 1, 2015, and June 25, 2014
- Parent Ex. 2 – Individual Treatment Plan, July 22, 2017
- Parent Ex. 4 – Psychiatric Diagnostic Interview, March 23, 2016
- Parent Ex. 5 – Emails Between Parent and the PGCPS, March 30, 2016; April 19, 2016; April 20, 2016; April 25, 2016; May 3, 2016; May 4, 2016; June 6, 2016; October 25, 2016; October 26, 2016; November 3, 2016; November 14, 2016; and January 12, 2017 (excluding pages 29 and 30, and the top of pages 35 and 37)
- Parent Ex. 6 – Notices of IEP Team Meetings, November 4, 2016 and July 1, 2017
- Parent Ex. 7 – Emails Regarding Attendance between the PGCPS and Parent, January 13, 2017; January 17, 2017; January 30, 2017; January 31, 2017; February 1, 2017; and March 20, 2017
- Parent Ex. 8 – Attendance Report, August 25, 2015 through June 20, 2016 (excluding page 68)
- Parent Ex. 9 – Student Discipline Reports, May 16, 2016; September 20, 2016; October 14, 2016; November 7, 2016; December 19, 2016; February 8, 2017; May 3, 2017; May 8, 2017; May 22, 2017; and May 23, 2017
- Parent Ex. 10 – Functional Behavioral Assessment, January 28, 2017

⁵ Parent Exhibit 3 was offered but not admitted on relevance grounds. Parent Exhibits 17, 18, and 19 were offered but not admitted based on a five-day discovery rule violation and improper impeachment grounds.

- Parent Ex. 11 – Behavioral Intervention Plan, January 28, 2017
- Parent Ex. 12 – Emails between Parent and the PGCPS, June 6, 2016; October 25, 2016; October 26, 2016; November 3, 2016; November 14, 2016; January 12, 2017; January 13, 2017
- Parent Ex. 13 – Documents for December 13, 2016 IEP Meeting, including Prior Written Notice; Excusal from Individualized Education Program (IEP) Team Meeting; and Notice of No Assessment Needed, December 13, 2016
- Parent Ex. 14 – Emails between the PGCPS and Parent, November 14, 2016
- Parent Ex. 15 – 504 Plan, including Section 504 PARCC Accessibility & Accommodations Form; Section 504 Team Minutes; Section 504 Meeting Summary Report; Section 504 Meeting Invitation; and Student Attention Deficit Hyperactivity Disorder (ADHD) Diagnosis, May 4, 2016 and April 27, 2016
- Parent Ex. 16 – IEP, including Draft Eligibility Report; and Prior Written Notice, April 26, 2013

I admitted the following exhibits on behalf of the PGCPS:

- PGCPS Ex. 1 – XXXX XXXX Curriculum Vitae, undated
- PGCPS Ex. 2 – IEP Team Meeting Invitations, November 4, 2016; December 1, 2016; April 24, 2017; July 1, 2017; August 15, 2017; and July 1, 2017⁶
- PGCPS Ex. 3 – December 13, 2016 IEP Meeting Documents, December 13, 2016
- PGCPS Ex. 4 – Parental Rights Procedural Safeguards Notice and Verification, December 13, 2016
- PGCPS Ex. 5 – Student Report Cards, June 25, 2014; July 1, 2015; June 29, 2016; and June 22, 2017
- PGCPS Ex. 6 – Testing Data for Kindergarten through Second Grade, 2014-2015 and 2015-2016⁷
- PGCPS Ex. 7 – 504 Plan, including Student ADHD Diagnosis; Section 504 Meeting Invitation; and Section 504 Meeting Summary Report, dated May 4, 2016 and April 27, 2016
- PGCPS Ex. 8 – Correspondence between Parent, the PGCPS, and XXXX XXXX, including June 1, 2017 contract for services between the Parent and Ms. XXXX, November 14, 2016; April 13, 2017; April 24, 2017; June 13, 2017; August 14, 2017; August 15, 2017; August 23, 2017; September 5, 2017; September 6, 2017; and September 11, 2017 (excluding page 68)
- PGCPS Ex. 9 – Attendance Records, including Attendance Letter, August 26, 2014 through June 23, 2015; August 25, 2015 through June 20, 2016; January 6, 2016; and August 23, 2016 through June 13, 2017
- PGCPS Ex. 10 – Attendance Letter, January 4, 2017

⁶ This meeting invitation date appears to be the incorrect date as this invitation was issued after the August 15, 2017 meeting invitation.

⁷ Kindergarten testing data was undated.

Testimony

The Parent testified and presented the following witnesses:

- XXXX XXXX, Educational Consultant, admitted as an expert in Special Education Identification and Evaluation
- XXXX XXXX, III, Therapist, XXXX Health Services, admitted as an expert in the Field of Social Work
- XXXX XXXX, Executive Director, XXXX, admitted as an expert in General Psychology
- XXXX XXXX, Secretary II, [School 1] ([SCHOOL 1])
- XXXX XXXX, Physical Education Teacher, [SCHOOL 1]

The PGCPS presented the following witnesses:

- XXXX XXXX, School Psychologist, PGCPS, admitted as an expert in School Psychology
- XXXX XXXX, Special Education Resource Teacher, [SCHOOL 1], admitted as an expert in Special Education
- XXXX XXXX, Assistant Principal, admitted as an expert in Special and General Education
- XXXX XXXX, Compliance Specialist for the PGCPS, admitted as an expert in Special Education and Special Education Compliance

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. The Student is presently ten years of age, having been born in XXXX 2007.

2. The Student is currently in the fourth grade at [SCHOOL 1]. He has attended [SCHOOL 1] since kindergarten.
3. [SCHOOL 1] is a PGCPS school.
4. The Student attended pre-kindergarten at XXXX School (XXXX) located in XXXX.
5. The Student had an IEP, dated April 26, 2013, while attending XXXX. Pursuant to that IEP, the Student was classified as having a speech and language impairment. The Parent did not provide a copy of the XXXX 2013 IEP to the PGCPS until January 12, 2017.
6. The Student was enrolled in kindergarten at [SCHOOL 1] for the 2013/2014 academic year.
 - a. He received grades of mostly “Proficient” for the 2013/2014 academic year.
 - b. The Student was absent twenty days and late two times during the 2013/2014 academic year.
7. The Student was enrolled in first grade at [SCHOOL 1] for the 2014/2015 academic year.
 - a. He received grades of mostly “Proficient” and “In Process.”
 - b. Comments made by teachers were: Health – does not complete assignments; Math – lacks understanding of concepts; Reading – has difficulty applying skills; Work Habits – modified curriculum/requires constant supervision/easily distracted; Oral & Written Communication – does not complete assignments; and Social Skills – does not follow rules/does not accept responsibility.

- c. The Student was absent twenty-three days and tardy fifty-two times during the 2014/2015 academic year. The PGCPs 2014/2015 academic year consisted of 178 instruction days.
8. The Student was enrolled in second grade at [SCHOOL 1] for the 2015/2016 academic year.
 - a. He received grades of mostly A's, B's, and C's.
 - b. Comments made by teachers were: Math – modified curriculum; and Social Skills – lacks respect for others/does not follow rules/does not accept responsibility.
 - c. On September 29, 2015, the PGCPs created and implemented a Functional Behavioral Plan (FBA) and a Behavioral Intervention Plan (BIP) for classroom strategies/interventions.⁸
 - d. On March 23, 2016, the Student was evaluated by XXXX XXXX, M.D., XXXX Health Clinic. The Student has Attention Deficit Hyperactivity Disorder (ADHD) – Combined Type.
 - e. On April 27, 2016, the Parent gave Dr. XXXX's letter documenting the Student's ADHD diagnosis to the PGCPs.
 - f. On May 4, 2016, the PGCPs developed a 504 Plan to accommodate the Student as a result of his diagnosis of ADHD. The participants of the meeting included the Parent; XXXX XXXX, school counselor; Ms. XXXX,⁹ the Student's second grade math teacher; Mr. XXXX,¹⁰ the Student's social studies, science, art, and

⁸ Although, the parties used the terms FBA and BIP for convenience, it is a term of art under the IDEA, 34 CFR § 300.530(f) (2017), and in this case it is not an FBA or BIP as that term is used in the IDEA. Therefore, I will use behavior plan instead. No additional information was provided by the parties regarding the creation and implantation of the September 29, 2015 behavior plan, other than the December 2016 IEP team determined that it was no longer effective and needed to be revised.

⁹ Ms. XXXX's first name was not identified.

¹⁰ Mr. XXXX's first name was not identified.

work habits teacher; and Ms. XXXX,¹¹ identified as “teacher” on the section 504 meeting summary report.

- g. The Student was absent forty-five days and late twenty-six times during the 2015/2016 academic year. The PGCPs 2015/2016 academic year consisted of 177 instruction days.
 - h. One of the Student’s absences during the 2015/2016 academic year was due to a one-day suspension on May 6, 2016 for attacking another student in the bathroom.
 - i. On January 6, 2016, the PGCPs notified the Parent via a letter that the Student had twenty-two absences at that time. The letter also advised the Parent that she needed to ensure that the Student attended school daily.
9. The Student was enrolled in third grade at [SCHOOL 1] for the 2016/2017 academic year.
- a. The Student received mostly A’s, B’s, and C’s.
 - b. Comments made by teachers were: Math – does not complete assignments/lacks understanding of concepts/lacks basic fact recall strategies.
 - c. The Student’s first quarter grades were the only 2016/2017 academic year grades available for the Student by December 13, 2016.
 - d. Two of the Student’s three full-time teachers for the 2016/2017 academic year resigned from [SCHOOL 1] and were replaced by multiple substitute teachers by December 13, 2016.
 - e. The Student was absent sixteen days and late two times during the first quarter of the 2016/2017 academic year.

¹¹ Ms. XXXX’ first name was not identified.

- f. Three of the Student's absences during the first quarter of the 2016/2017 academic year were due to a two-day suspension for fighting on September 20, 2016 and a one-day suspension for pushing staff on October 17, 2016.
 - g. On January 4, 2017, the PGCPS notified the Parent via a letter that the Student had a total of nineteen absences and was late to school two times. The letter also advised the Parent that she needed to ensure the Student's regular attendance in school.
10. On October 25, 2016, the Parent sent an email to the PGCPS requesting an IEP meeting to be held for the Student.
11. On October 26, 2016, the PGCPS contacted the Parent via email to arrange an IEP meeting.
12. On November 4, 2016, the PGCPS contacted the Parent via a phone call to invite her to an IEP team meeting scheduled for November 15, 2016 at [SCHOOL 1]. The purpose of the meeting was to review the Student's progress in school and to determine whether there was a need to gather additional data.
13. On November 14, 2016, the Parent contacted the PGCPS via email and phone call to cancel the November 15, 2016 IEP meeting due to an unexpected work commitment. In the same email, the Parent requested that the PGCPS reschedule the IEP meeting.
14. On December 1, 2016, the PGCPS sent the Parent a written notice via the Student inviting her to an IEP team meeting scheduled for December 13, 2016 at [SCHOOL 1]. The purpose of the meeting was to review the Student's progress in school and to determine whether there was a need to gather additional data.
15. On December 13, 2016, the PGCPS convened the scheduled IEP team meeting.

16. The participants of the December 13, 2016 meeting included the Parent, XXXX XXXX, Assistant Principal; XXXX XXXX, School Psychologist; XXXX XXXX, Special Education Resource Teacher; and Mr. XXXX,¹² the Student's third grade math teacher.

17. During the December 13, 2016 meeting, the IEP team considered the information shared by the Parent, information shared by Mr. XXXX about his interactions with and observations of the Student, as well as the Student's attendance and behavioral records, 504 Plan and behavior plan.

18. During the December 13, 2016 IEP team meeting, the IEP team determined that the Student was not suspected of being a child with a disability or a child with a developmental delay. The IEP team also determined that no additional data/information was needed. The PGCPs issued a Notice of No Assessment Needed on the same date. The PGCPs wrote that its decision was based on the following:

- a. The Student has a 504 Plan and a behavior plan to address his challenging behaviors;
- b. The suspension/attendance data indicated nineteen days for absences and two days late;
- c. The IEP team did not suspect a disability;
- d. The Parent did not suspect a disability; and
- e. The IEP team recommended revising the behavior plan to address the Student's current problematic behaviors.

19. On December 13, 2016, the Parent was provided a copy of the No Assessment Needed and Prior Written Notice.

¹² Mr. XXXX's first name was not identified.

20. On December 13, 2016, the Parent signed a verification form indicating that she received a copy of Parental Rights, Maryland Procedural Safeguards Notice; verbal and written explanation of Parents' Rights and responsibilities in the Individualized Education Program Process; and verbal and written explanation about access to habilitative services.

21. On January 28, 2017, the Student's behavior plan was revised by a team that included the Parent; general education teachers Mr. XXXX and Ms. XXXX,¹³ Ms. XXXX, Ms. XXXX, XXXX XXXX, and XXXX XXXX, School Counselor.

22. The behavior plan was revised as follows:

a. Behavior(s) of Concern/Target Behavior(s)

- i. Physical aggression and intimidation with classmates.
- ii. Off-task behaviors.
- iii. Express and manages emotions inappropriately.

b. To Increase Appropriate Behavior(s)

- i. Give the Student verbal praise when social behavior is appropriate.
- ii. Vary grouping/preferential seating. Provide high interest activities to prevent distractibility.
- iii. Model to the Student how to express emotions appropriately through role playing scenarios and have him tell you the correct way to handle the situation.
- iv. Complete daily behavior sheet on the Student. Parent must sign and return.

c. Decrease Inappropriate Behavior(s)

¹³ Ms. XXXX's first name was not identified.

- i. Repeat expectations and consequences if not followed for all the target areas.
 - ii. Maintain maximum supervision of the Student.
 - iii. Complete the daily behavior chart to communicate behavior to parents.
 - iv. Close proximity to the teacher/follow the student code of conduct and procedures.
- d. Alternative Skills to be Taught
 - i. Self-control.
 - ii. Problem solving.
 - iii. Anger management and calming techniques.
 - iv. Express thoughts and emotions appropriately.
 - v. Follow directions and reviewing school rules and expectations.
- e. Supports Needed to Implement the Program at School/Home/Community
(Persons Responsible)
 - i. All teachers and specialist to sign the daily behavior chart.

23. On March 7, 2017, the Parent met with Mr. XXXX and Ms. XXXX as a follow up to the December 13, 2016 IEP team meeting to discuss revisions to the Student's behavior plan.

24. The Parent notified the PGCPS via email on April 13, 2017 that she was requesting a second IEP meeting for the Student after Spring break. The Parent advised that she wanted her advocate to attend the meeting.

25. On April 24, 2017, the PGCPS notified the Parent via email that it was already coordinating the scheduling of a meeting before Spring break to review the Student's 504 Plan so

that it could better serve the Student's academic and behavioral needs. The PGCPs advised the Parent in the same email that the IEP team would contact her with a date for an IEP meeting.

26. On April 24, 2017, the PGCPs invited the Parent to an IEP team meeting scheduled for May 9, 2017 at [SCHOOL 1]. The Purpose of the meeting was to review the Student's progress in school and to determine whether there was a need to gather additional data.

27. The Parent called [SCHOOL 1] and canceled the May 9, 2017 IEP team meeting on the morning of May 9, 2017.

28. On July 1, 2017, the PGCPs invited the Parent via email to an IEP team meeting scheduled for July 11, 2017 at [SCHOOL 1] to review the Student's progress in school and to determine whether there was a need to gather additional data. The PGCPs canceled the meeting prior to July 11, 2017 due to not having a full IEP team available for the meeting.

29. On August 14, 2017, the PGCPs invited the Parent via email to an IEP team meeting scheduled for September 1, 2017 at [SCHOOL 1]. The Purpose of the meeting was to review the Student's progress in school and to determine whether there was a need to gather additional data. The Parent advised via email on August 14, 2017 that she would attend the meeting.

30. On August 23, 2017, XXXX XXXX, Parent's advocate, canceled the September 1, 2017 meeting via email citing the Parent's and Ms. XXXX' unavailability. In the same email, Ms. XXXX requested that the meeting be rescheduled.

31. On September 6, 2017,¹⁴ the PGCPs notified the Parent via email that an IEP team meeting was scheduled for September 26, 2017 at [SCHOOL 1]. The purpose of the

¹⁴ The invite for this meeting indicates a notice date of July 1, 2017. This is clearly erroneous as the email correspondence between the Parent and the PGCPs confirm that the September 26, 2017 meeting date was agreed to by the Parent on September 5, 2017 and confirmed by the PGCPs on September 6, 2017.

meeting was to review the Parent's request for special education services. The Parent advised the PGCPS via email on September 5, 2017 she would attend the meeting.

32. On September 11, 2017, the Parent canceled the September 26, 2017 IEP team meeting via email and did not request that the meeting be rescheduled.

33. On September 12, 2017, the Parent filed a due process complaint against the PGCPS.

34. In early June 2017, the Parent's advocate contacted the PGCPS via email to review the Student's educational records on the Parent's behalf. On June 13, 2017, the PGCPS notified the Parent via email that the records were available and requested that she provide a date and time she planned to conduct her review.

35. On September 11, 2017, the Parent acknowledged in an email that the PGCPS informed her that the Student's educational records were available since June 2017 but stated that she was unable to retrieve the records before school closed. In the same email, she requested the records again.

36. On September 11, 2017, the PGCPS advised the Parent that the Student's records were available for the Parent to review when she was ready.

37. Neither the Parent nor her advocate provided the PGCPS with an authorization for release of the Student's educational records with the Parent's original signature on it.

DISCUSSION

Legal Framework

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487 (2017), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (Supp. 2017), and COMAR 13A.05.01. The IDEA provides that all

children with disabilities have the right to a free, appropriate public education (FAPE). 20 U.S.C.A. § 1412. Courts have defined the word “appropriate” to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. *See In Re Conklin*, 946 F.2d 306 (4th Cir. 1991).

At issue in the case at hand are the IDEA provisions pertaining to “Child Find” and the claims that the PGCPS failed to conduct an initial evaluation; failed to comply with evaluation timelines after the Parent’s initial request for evaluation; failed to determine whether the Student’s suspensions were a manifestation of a disability; and failed to allow the Parent’s advocate access to the Student’s education records.

Child Find requires that “[a]ll children with disabilities residing in the State . . .and who are in need of special education and related services are identified, located, and evaluated” 20 U.S.C.A. § 1412(a)(3); 34 C.F.R. § 300.111(a)(1)(i). Under 34 C.F.R. § 300.301, a public agency “must conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability” *See also* 20 U.S.C.A § 1414(a)(1)(A). A request for an initial evaluation may be initiated by either the parent of a child or by the public agency. 34 C.F.R. § 300.301(b). Once the public agency receives parental consent for evaluation, the public agency must conduct the evaluation within sixty days.

Under 34 C.F.R. § 300.530, “[a]fter a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services” *See also* 20 U.S.C.A § 1415(k)(1)(B). “Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct . . . the child’s IEP team . . . must review all relevant information in the student’s file . . . to determine if the conduct in question was caused

by . . . the child’s disability . . . or the conduct in question was the direct result of the LEA’s failure to implement the IEP.” 34 C.F.R. § 300.530(e); 20 U.S.C.A§ 1415(k)(1)(E).

Pursuant to 34 C.F.R § 300.613, “[e]ach participating agency must permit parents to inspect and review any education records related to their children . . . without unnecessary delay.” The parent’s right to inspect and review education records includes the right to have a representative of the parent inspect and review the records. 34 C.F.R § 300.613(3).

The Student seeks “compensatory education.” Although the IDEA does not explicitly authorize the award of compensatory education, the IDEA “. . . authorizes the court to ‘grant such relief as the court determines appropriate.’” *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Todd A.*, 79 F.3d 654, 656 (7th Cir. 1996) (quoting 20 U.S.C.A. Section 1415(3)(2) (now at 20 U.S.C.A. Section 1415(i)(2)(c)(iii)). *See also, Bd. of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 316 (6th Cir. 2007) (“An award of compensatory education is an equitable remedy that a court can grant as it finds appropriate.”).

Arguments of the Parties

Central to the Parent’s due process complaint is the allegation that the PGCPS failed to comply with its Child Find obligation to conduct an initial evaluation of the Student pursuant to IDEA on its own initiative and after the Parent’s request for an initial evaluation. The Parent contends that the Student’s March 23, 2016 ADHD diagnosis and disciplinary record for the 2015/2016 and 2016/2017 academic years triggered the PGCPS’ Child Find obligation to conduct an initial evaluation. The Parent argued that her October 25, 2016 and April 13, 2017 emails to the PGCPS requesting IEP testing also triggered the PGCPS’ Child Find obligation.

The Parent also alleges that as a direct consequence of the Student’s behavioral issues, the Student has been suspended more than ten times during the 2016/2017 academic year without

the PGCPS conducting a manifestation determination review as required by IDEA. Finally, the Parent contends that on September 11, 2017, the PGCPS denied her request to review and inspect the Student's education records by denying her advocate the opportunity to inspect and review the Student's education records on her behalf.

The PGCPS contends that it had no basis to suspect that the Student had a disability prior to the Parent's October 25, 2016 email requesting IEP testing. In response to that email, the PGCPS convened a December 13, 2016 IEP team meeting in which the team, which included the Parent, determined that the Student was not suspected of having a disability and no further assessments were needed. The PGCPS further argued that because the IEP team determined that the Student did not have a suspected disability at the December 2016 meeting, it had no basis to suspect that the Child had a disability until the Parent's April 13, 2017 email to the PGCPS requesting IEP testing. In response to that email, the PGCPS scheduled several IEP team meetings, three of which the Parent canceled before filing her due process complaint.

The PGCPS maintains that it was never required to conduct a manifestation determination review subsequent to any of the Student's suspensions because at no time was the Student identified as having a disability. Finally, the PGCPS argued that it made the Student's education records available for the Parent's review and inspection upon both of her June and September 2017 requests for review and inspection. Therefore, the PGCPS contends that it met its Child Find obligation with respect to the Student.

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parent has the burden of proving that the PGCPS failed to comply with its Child Find requirements and that she is entitled to compensatory education at public expense. The burden of proof on these issues is by a

preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009).

Factual Analysis

The Student began his academic career in pre-kindergarten at XXXX during the 2012/2013 academic year. He had an IEP while at XXXX and began receiving special education related services for a speech and language impairment on or about April 20, 2013.

The Parent transferred the Student to [SCHOOL 1] for the 2013/2014 academic year where he was enrolled in kindergarten. It is undisputed that the Parent did not provide the PGCPS with the XXXX IEP at the time he was enrolled. The Student has remained at [SCHOOL 1] since the 2013/2014 academic year and is currently in the fourth grade.

The Student experienced some behavioral issues at [SCHOOL 1] during the 2015/2016 and 2016/2017 academic years. The evidence presented by the Parent established that he was suspended eleven days from school and received four disciplinary referrals during that two-year period.

The Student was diagnosed with ADHD by Dr. XXXX XXXX, XXXX Health Clinic, on March 23, 2016 and this diagnosis was provided to the PGCPS on April 27, 2016. Additionally, the Student began receiving therapeutic counseling services from XXXX Health Services on or about March 2016 to assist the Student with social skills in and outside of the school environment. To that end, XXXX Health Services developed an Individual Rehabilitation Plan (IRP) and an Individual Treatment Plan (ITP) for the Student. To accommodate the Student's ADHD diagnosis, the PGCPS developed a 504 Plan. The Parent did not give a copy of the IRP or the ITP to the PGCPS. The Parent testified that the PGCPS did not specifically request the IRP or the ITP and Ms. XXXX, the Parent's advocate, testified that she did not think it was important for the PGCPS to have them. The Parent's position is illogical. The Parent was concerned

enough about her son's behavior that she obtained counseling for him. She also knew that the school was trying to improve his behavior by developing strategies to eliminate the negative behaviors and encourage the positive ones. It does not make sense that the Parent would not work collaboratively with the PGCPS and share the documents from the Student's therapist with the PGCPS.

The Parent requested an IEP meeting for the Student on October 25, 2016 via email to the PGCPS. In response to the Parent's request, the PGCPS scheduled an IEP team meeting for November 15, 2016. That meeting was eventually rescheduled to December 13, 2016 after the Parent canceled the November appointment. The Parent testified that the only participants at the meeting were the Parent, Ms. XXXX, and Ms. XXXX. Therefore, according to the Parent, a full IEP team was not present and an actual IEP meeting was not conducted. The Parent's testimony regarding the participants of the December IEP team meeting was contradicted by the testimony of Ms. XXXX, Ms. XXXX, and Mr. XXXX. According to Ms. XXXX, the participants of the December IEP team meeting included the Parent, Ms. XXXX, Mr. XXXX, Ms. XXXX, Mr. XXXX, a general education teacher she believed to be Mr. XXXX, and Ms. XXXX. According to Ms. XXXX, the participants of the December IEP team meeting included the Parent, Ms. XXXX, Mr. XXXX, Ms. XXXX, and Mr. XXXX. She also believed that a substitute teacher participated as well but was not positive. Mr. XXXX testified that the participants of the December IEP team meeting included the Parent, Mr. XXXX, Ms. XXXX, Ms. XXXX, and Mr. XXXX. I find the testimony of Ms. XXXX, Ms. XXXX, and Mr. XXXX regarding the participants of the December IEP team meeting to be more credible than the Parent's. All three were very detailed regarding the matters discussed at the meeting and referenced reviewing notes taken contemporaneously with the meeting in preparation for the due process hearing. The

Parent's testimony did not contain the same level of detail so it is more likely that her recall was not as precise as Ms. XXXX's, Ms. XXXX's, and Mr. XXXX's memory. Additionally, I find the fact that Ms. XXXX canceled the July 11, 2017 IEP team meeting because she could not seat a full team supports the conclusion that she would not have continued with the December IEP team meeting if she did not have a full team. I also find that Ms. XXXX's testimony regarding the school counselor being present at the meeting was not accurate given the testimony of Ms. XXXX and Mr. XXXX. Based on Ms. XXXX's and Ms. XXXX's testimony, it is possible that a second general education teacher was present at some point during the meeting. However, whether or not a second general education teacher was present does not negate the fact that the presence of the other participants constituted a full team.

The discussion at the December IEP team meeting included the Student's grades; his chronic absenteeism; the number of times he was late to school throughout his academic career at [SCHOOL 1]; Parent input; teacher input and observations; the Student's 504 Plan; and his behavioral interventions. The IEP team also discussed the fact that some of the Student's absences were attributed to suspensions. The Parent reported to the team that the Student was not having behavioral concerns at home and that he was able to focus and complete tasks. She advised that she did not believe that the Student had a disability but that the Student's issues at school were the result of conflicts with another student. At the conclusion of the meeting, the IEP team determined that the Student was not suspected of having a disability and no evaluations to collect additional data about a suspected disability were necessary. The IEP team did, however, recommend a revision of the Student's behavior plan to address his behavioral issues. The Parent met with the PGCPS on January 28, 2017 to follow-up on the December IEP meeting and to discuss revisions to the Student's behavior plan. The Student's behavior plan was revised at that

time without objection from the Parent. The other participants of this meeting were Mr. XXXX and the school counselor.

Although the Student was suspended from school for five days after January 28, 2017, the Parent did not contact the PGCPS concerning his behavior until April 2017. On April 13, 2017, the Parent requested an IEP meeting for the Student via email to the PGCPS. In response to the Parent's April 2017 IEP request, the PGCPS scheduled another IEP team meeting for May 9, 2017. The Parent was aware of the meeting but called to cancel it on the morning of May 9, 2017 just as the meeting participants were convening. At the Parent's request, the meeting was rescheduled to July 11, 2017. However, as stated earlier, the PGCPS had to cancel and reschedule the July 11, 2017 meeting because it could not convene a complete team due to teachers being off for summer vacation. The PGCPS rescheduled the meeting for September 1, 2017. The Parent agreed to that date but her advocate canceled it on her behalf and asked that it be rescheduled. The PGCPS rescheduled the meeting again to September 26, 2017 but the Parent canceled that meeting on September 11, 2017 and did not request that it be rescheduled. The Parent filed her due process complaint on September 12, 2017.

The Parent retained the services of education advocate XXXX XXXX on June 1, 2017 to assist her in navigating through the IEP process. Ms. XXXX testified that there were many instances throughout the Student's time at [SCHOOL 1] that triggered the PGCPS' Child Find obligation. She testified that a review of the Student's report cards from first through third grade revealed that his academic skills and ability to access the curriculum decreased through the years and should have alerted the IEP team that testing was warranted. I am unpersuaded that the Student's grades should have alerted the PGCPS that educational testing was necessary. At the time of the Student's December 13, 2016 IEP meeting, a review of his grades for the 2015/2016

academic year reveal all A's, B's and C's, with the exception of two D's in the second and third quarters and one D in the fourth quarter. Additionally, the Student received an "Above Grade Level" for reading for all four quarters. With respect to the first quarter for the 2016/2017 academic year, the Student received similar grades, with the exception of an E in math and a "Below Grade Level" in reading. During the 2015/2016 academic year and the first quarter of the 2016 academic year, the Student missed significant periods of time from school by missing the entire day or being late to school. The fact that there was not a consistent area of weakness supports the conclusion that when the Student did receive a poor grade it is more likely than not that it was attributable to his absenteeism than having a learning disability. For example, in the four quarters of the 2015/2016 academic year, the Student was reading at an "Above Grade Level" but in the first quarter of the 2016/2017 academic year, he was reading at a "Below Grade Level." Significantly, the Student was absent sixteen times during the first quarter.

Ms. XXXX also testified that the increase in the Student's negative behaviors from first through third grade resulting in numerous disciplinary referrals and suspensions was another instance that triggered the PGCPs' Child Find obligation. The Student was suspended for one day during the 2015/2016 academic year and for three days prior to the December 13, 2016 IEP team meeting in the 2016/2017 academic year. This number of suspensions alone was insufficient to trigger the PGCPs' Child Find obligation. Especially in light of the disruption caused by the Student being absent sixteen times during the first quarter of the 2016/2017 academic year and two of his three permanent teachers being replaced with substitute teachers during the same period of time.

Ms. XXXX also opined that the PGCPs failed in its obligation to conduct a required manifestation determination review after the Student's tenth suspension for each of the

2015/2016 and 2016/2017 academics years to determine if his suspensions were related to a disability. However, a manifestation determination is only required if a student has been identified as needing special education services. In this case, the Student was not identified as a student with a disability and, therefore, a manifestation determination was not required by the IDEA. 34 C.F.R. § 300.530. Moreover, a review of the Student's disciplinary record (Parent Exhibit 9) reveals that Ms. XXXX's testimony is not supported by the record. The Student was suspended for one day in the 2015/2016 academic year and for ten days in the 2016/2017 academic year.

Ms. XXXX testified that the Student's ADHD diagnosis was another instance that triggered the PGCPS' Child Find obligation. XXXX XXXX, PGCPS Compliance Officer, testified that a student with ADHD does not necessarily qualify for special education services and require an IEP. I am persuaded by her expert testimony that the decision whether a child is eligible for special education services is not based on a diagnosis alone but is made on a case by case basis of whether the impact of the student's ADHD results in the child being unable to access the regular education curriculum. Ms. XXXX did not believe that the Student's ADHD diagnosis gave rise to such impact because he continued to test above grade level on his benchmark assessments. The combination of the Student testing above grade level on his benchmark assessments and being suspended from school for only one day between the period of time that he was diagnosed with ADHD and the beginning of the 2016/2017 academic year supports the conclusion that the Student's ADHD diagnosis did not result in him being unable to access regular education curriculum.

Ms. XXXX testified that some of the Parent's emails to the PGCPS triggered the PGCPS' Child Find obligation because they contained direct requests for an IEP meeting. Ms. XXXX

testified that the Parent requested an IEP meeting via email on two different occasions, October 25, 2016 and April 13, 2017. In response to the October 25, 2016 request, Ms. XXXX testified that the PGCPS scheduled IEP meetings for November 15, 2016 and December 13, 2016. With respect to the April 13, 2017 request, Ms. XXXX testified that the PGCPS scheduled IEP meetings for May 9, 2017, July 11, 2017, September 1, 2017, and September 26, 2017.

The Parent's email containing the XXXX IEP was identified as another instance that triggered the PGCPS' Child Find obligation according to Ms. XXXX. She testified that it established that the Student had already been found eligible to receive special education services and, therefore, the PGCPS was obligated to get all of the relevant XXXX IEP records, implement the IEP, and/or conduct evaluations. However, the Parent testified that she did not provide the XXXX IEP to the PGCPS until January 12, 2017 via email. By not providing the XXXX IEP during the December 13, 2016 IEP team meeting, or informing the IEP team that her son was receiving services pursuant to an IEP in XXXX, the Parent deprived the IEP team of the opportunity to consider this information. Additionally, an IEP team never had the opportunity to consider the XXXX IEP because the Parent never attended an IEP meeting after providing the XXXX IEP to the PGCPS on January 12, 2017.

Ms. XXXX also testified that the PGCPS denied the Parent access to the Student's education records by denying Ms. XXXX' request to review the records on September 11, 2017. The June 1, 2017 service contract between the Parent and Ms. XXXX contained an authorization for the release of records. The contract contained the Parent's electronic signature and not her handwritten signature. Ms. XXXX testified that she attempted to obtain the Student's educational records from the PGCPS on September 11, 2017 and was denied access to the records by Mr. XXXX. Mr. XXXX countered Ms. XXXX' testimony by advising that the Parent contacted him

via email on September 11, 2017 requesting the Student's records and that he emailed the Parent back the same day to let her know that the records were ready for her to review.

The Parent sought the aid of a therapist to help address the Student's behavior issues. XXXX XXXX, III has been the Student's therapist at XXXX Health Services since March 2017. He described the Student's ADHD diagnosis as the Student having challenges with staying on task and being easily distracted in class or doing chores. He further testified that the Student's ADHD manifests through having a very short temper. He developed an ITP to address the Student's diagnosis. The goal of the ITP was to help the Student gain insight into his behaviors, as well as develop the proper coping skills to manage his emotions and to successfully complete his age appropriate responsibilities, including his school assignments and chores three out of five days a week.

Mr. XXXX testified that the Student's involvement in extra-curricular activities that are physical in nature, like XXXX, has been a good coping method to help the Student address his ADHD and has been a good outlet for his aggressive feelings. He further advised that he taught the Student calming techniques such as deep breathing exercises, communicating with the trigger of his aggression to express how he is feeling and removing himself from a particular situation. He opined that the Student's behavioral issues at [SCHOOL 1] are a manifestation of his ADHD and that the coping skills that he is teaching the Student could help address the behaviors.

Mr. XXXX testified that the Student receives treatment from a psychiatrist, and a psychiatric rehabilitation program worker at XXXX Health Services. He testified that the Student could benefit from being linked to a mental health professional who is on-site at [SCHOOL 1] because his behaviors could be addressed more efficiently and effectively if there was someone there to de-escalate him and remind him of his coping skills while he was still in

the moment.

I do not find Mr. XXXX's testimony and opinion dispositive to deciding whether the PGCPs failed to comply with its Child Find obligation for several reasons. First, Mr. XXXX based the ITP on the problems that were identified through counseling that took place outside of the school setting and were never shared with the IEP team. The Parent has not advanced any explanation as to why she did not inform the IEP team that the Student was working on issues with the therapist that involved his behavior in both the school and home setting. Therefore, that information was unavailable to the IEP team when it was considering whether the Student had any suspected areas of disability. The IEP process is meant to be a collaborative process between the Parent and the school. Mr. XXXX did not visit [SCHOOL 1] or consult with any of the Student's teachers to get a complete understanding of the Student's behavior in the school environment or to share with them his observations of the Student in a clinical setting. Moreover, Mr. XXXX's testimony concerning the strategies contained in the ITP were never shared with the IEP team, nor was it ever made available to the PGCPs. Finally, Mr. XXXX testified about his work with the Student starting in March 2017 and continuing through the time that the PGCPs was trying to hold a second IEP meeting in response to the Parent's April 13, 2017 email. Therefore, his testimony encompasses observations from his work with the Student in the spring and summer of 2017. This information was never made available to the IEP team because the Parent never attended an IEP team meeting in the summer or fall of 2017.

The Parent also offered the testimony of Dr. XXXX XXXX.¹⁵ Dr. XXXX testified that based on his review of the Student's ADHD diagnosis, behavioral plan, 504 Plan, disciplinary records, and report cards from the 2013/2014 academic year through the 2016/2017 academic year, the PGCPs' determination at the December 13, 2016 IEP team meeting that the Student did

¹⁵ Dr. XXXX's testimony was presented via telephone.

not have a disability and therefore no additional evaluations were needed was incorrect. He stated the information that the PGCPS reviewed to make its decision was sufficient, they just reached the wrong determination. He stated that in order to determine if additional evaluations should have been conducted, you have to look at the frequency and intensity of the problematic behavior. He further testified that the Student's behavior plan indicates that the Student's behavior impacts his academic achievement. It also indicates that he displays physical aggression towards children and adults, challenges teachers, and creates altercations. Based on the frequency and intensity of the Student's behavior, Dr. XXXX stated that additional evaluations were required to determine if the Student met the criteria for special education.

Based on his review of the documents contained in the Parent's Exhibits, Dr. XXXX opined that had he been part of an IEP team, he would classify the Student as having an emotional disability because he has demonstrated behavior that has been occurring for a long period of time and that is having an impact on his educational performance in terms of academics, but also social and behavioral. He continued by stating that the number of disciplinary suspensions, the frequency in which he disrupts the classroom, his interaction with children and adults and the regression in his academic performance from the 2013/2014 academic year to the present support the classification of an emotional disability.

Ms. XXXX disagreed with Dr. XXXX's emotional disability diagnosis. She opined that after review of both the Parent's and the PGCPS' Exhibits, she did not suspect that the Student had an emotional disability. She testified that an emotional disability usually manifest itself in students having difficulty making friends, or depression across both the school and home environment and there was no evidence of those symptoms present in the Student at the December 13, 2016 IEP team meeting.

Dr. XXXX opined that he would have also classified the Student as having an other health impairment because of his ADHD. He testified that the behavior plan indicates that the Student has a great deal of difficulty staying focused, is out of his seat a lot and exhibits impulsive behavior. It is his belief that these aspects of the Student's ADHD are impacting his function in the classroom.

Ms. XXXX also disagreed that the Student had a suspected other health impairment in December 2016. She testified that despite his behavior issues and chronic absenteeism, the fact that the Student achieved above level reading scores suggest that there may have been other factors that were affecting him. For example, during the 2016/2017 academic year, the Student's school environment was disrupted because two out of three of his permanent teachers had resigned.

Dr. XXXX testified that a comprehensive psychological evaluation would be necessary to determine if the Student had an emotional or other health disability. Additionally, Dr. XXXX opined that, based on his review of the Parent's Exhibits, the PGCPS' Child Find obligation was triggered based on the frequency, intensity and length of time of his negative behaviors and activities. Dr. XXXX also testified that after review of the Parent's Exhibits, the Student's behavior plan and 504 Plan were insufficient given the severity and frequency of the Student's behaviors.

I am not persuaded by Dr. XXXX's testimony and opinion regarding the alleged failure by the PGCPS to meet its Child Find obligation. First, Dr. XXXX has never met or evaluated the Student, nor has he spoken to any of the Student's teachers to get a full understanding of the Student's behavior inside the school environment. He has never observed the Student in the classroom setting. Additionally, Dr. XXXX's testimony is based on information contained in the

Parent's Exhibits that was not available to the December IEP team such as the additional suspensions and disciplinary referrals, the XXXX Health Clinic psychiatric diagnostic interview with medical management report, and the XXXX Health Services' ITP and IRP. Had this information been available to the December IEP team, perhaps the team would have arrived at a different conclusion.

The PGCPS offered the testimony of school psychologist, Ms. XXXX. Ms. XXXX explained the difference between an initial evaluation and an assessment. She testified that an initial evaluation is the IEP team coming together to review existing data, whereas an assessment is formal testing after a consensus amongst the team as to a disability or a suspected disability. Ms. XXXX testified that she reviewed the Student's cumulative folder,¹⁶ which included first quarter grades for the 2016/2017 academic year, and his limited access folder¹⁷ in preparation for the December IEP team meeting. She testified that a review of the Student's report cards in his cumulative folder showed he had the ability to succeed in core subjects. Ms. XXXX advised that an oral presentation of the Student's disciplinary issues were made by Mr. XXXX, but no documents were presented during the December IEP team meeting

Ms. XXXX testified that a review of the Student's attendance record throughout his time at [SCHOOL 1] revealed a significant issue, chronic absenteeism. She testified that chronic absenteeism has an adverse effect on elementary school kids. More specifically, Ms. XXXX testified that the Student's attendance records show that he was truant for first and second grade, as well as the first quarter of third grade.

Ms. XXXX testified that the IEP team discussed multiple factors at the December meeting, including those in and outside of the school setting. The first factor discussed was

¹⁶ General education folder.

¹⁷ Special education folder.

teacher input where she indicated that the Student's reading teacher discussed that when the Student had an opportunity to roam, he would engage in problematic behavior. Additionally, the math teacher believed that the Student has the ability to control his behavior and that he was making a choice in order to achieve a desired outcome. This type of behavior was described as "purposeful behavior." An example the teacher gave regarding the Student's purposeful behavior was that the Student may make a rude comment or have an outburst when he wanted classmate or peer attention.

The IEP team also considered how the Student's numerous days late affect his behavior. Ms. XXXX testified that when the Student is tardy, he misses out on the opportunity to facilitate social and emotional learning. She further testified that usually warm-up has already started prior to the Student's arrival and the Student would have missed out on the instruction for that subject or subjects. Ms. XXXX testified that the IEP team considered the fact that the Student was missing two of his three teachers and some of his classes had to be taught by substitute teachers until two additional teachers could be hired. She further explained that the team considered how the substitute teacher situation impacted the structure, consistency and predictability that all students need, but especially students who have characteristics of ADHD.

Likewise, Ms. XXXX opined that based on the information available to her on December 13, 2016, she did not suspect the Student was a child with a disability or needed specialized instruction at that time. She added that the team looked at what was going on inside and outside of school, multiple teacher reports, and all of the Student's records. Based on those factors, she testified that there were several confounding variables such as purposeful behavior, the significant attendance issues, and the classroom structure with substitutes that may have caused or escalated the Student's areas of concern.

The PGCPS offered the testimony of XXXX XXXX. Ms. XXXX testified that an initial evaluation is the process when the IEP team convenes to discuss and address concerns regarding the student. They look at the student's math and reading levels, as well as his behavioral and attendance records. They also consider parent and teacher input. They consider all available information regarding the student and as a team determine whether they suspect a disability and need to collect additional data. She further testified that an assessment is the process of obtaining standardized testing, such as cognitive, psychological and behavioral assessments, for the student for whichever areas recommended by the IEP team. Ms. XXXX was clear in her testimony that an IEP team does not have to recommend additional testing if it does not suspect a disability after an initial evaluation. She also testified that if a student is having behavior issues, behavioral interventions can be put in place instead of special education testing.

The PGCPS offered the testimony of XXXX XXXX. Mr. XXXX testified that the first step in the special education process is the convening of an IEP team meeting to conduct an initial evaluation of available data to determine whether or not a student has a suspected disability. If a disability is suspected, then formal assessments are requested. If no disability is suspected, then no formal assessments are requested.

Mr. XXXX testified that he has been responsible for signing off on suspensions for the past two years and that Parent's Exhibit 9 properly reflected the Student's suspensions for the 2016/2017 academic year. Mr. XXXX also opined that because the Student did not have two out of three permanent teachers in core subjects, the lack of stability and consistency contributed to the Student's behavioral issues. I found Mr. XXXX's testimony regarding the lack of stability and consistency that occurs through the use of substitute teachers which often results in challenges for students, to be a well-reasoned opinion.

The PGCPS offered the testimony of XXXX XXXX who testified that the initial evaluation is the cornerstone of IDEA and that an IEP team can come to a conclusion no suspicion exists and no assessment is necessary. Ms. XXXX added that the IEP team is comprised of experts from different disciplines and the suspicion of a disability and the need for assessments could not be made outside the IEP process.

Legal Analysis

Child Find and Initial Evaluation

The PGCPS, as a local education agency (LEA), has Child Find obligations under the IDEA:

(3) Child Find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C.A. § 1412(a)(3) (2017). An LEA's failure to timely evaluate a child who it should suspect of having a disability constitutes a procedural violation of the IDEA.

Although the court in *Jana K. ex rel. Tim K. v. Annville-Cleona School Dist.*, 39 F.Supp.3d 584, 603 (2014) found that the LEA missed the student's "glaring needs," including suicidal ideations expressed to the school counselor, "clearly declining" emotional well-being and academic performance, it recognized that "[a] school district is not obligated to conduct a formal evaluation of every struggling student and it may be prudent to offer other interventions before rushing to a special education identification." In that case, the school only had a

“patchwork” of “uncoordinated and intermittent” interventions that relied on the student to take the initiative to access them. *Jana K.*, 39 F. Supp. 3d at 604.

The obligation of Child Find does not require an LEA to evaluate every struggling student or put a student in special education at the earliest possible time it is applicable:

Child Find extends to children “who are suspected of [having] ... a disability ... and in need of special education, even though they are advancing from grade to grade.” 34 C.F.R. § 300.111(c)(1); *accord L.M.*, 478 F.3d at 313; *Taylor v. Altoona Area Sch. Dist.*, 737 F.Supp.2d 474, 484 (W.D.Pa.2010). As several courts have recognized, however, Child Find does not demand that schools conduct a formal evaluation of every struggling student. *See, e.g., J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635, 661 (S.D.N.Y.2011) (“The IDEA’s child find provisions do not require district courts to evaluate as potentially ‘disabled’ any child who is having academic difficulties.”). A school’s failure to diagnose a disability at the earliest possible moment is not *per se* actionable, in part because some disabilities “are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all.” *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F.Supp.2d 221, 226 (D.Conn.2008).

D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (2012). The school district in *D.K.* provided interventions for the student short of special education evaluation and services. Schools are empowered to take proactive steps and try different interventions so that it need not “rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment.” *D.K.*, 696 F.3d at 252. *See, Bd. of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 314 (2007) (no violation if other interventions attempted before suspecting a learning disability prompting an IDEA evaluation). Child Find is “not an absolute liability statute.” *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635, 660 (2011). *See also, A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F.Supp.2d 221, 225 (2008) (“... IDEA is not an absolute liability statute and the Child Find provision does not ensure that every child with a disability will be found.”). This idea is particularly relevant because after the Student’s ADHD

diagnosis on March 23, 2016 and implementation of a 504 Plan, but before the Parent's October 25, 2016 request for IEP testing, he continued to test above average on his benchmark assessments. Additionally, he had only been suspended from school once at the end of the 2015/2016 academic year and twice at the beginning of the 2016/2017 academic year. No basis existed for an initial evaluation until the Parent's October 25, 2016 email requesting IEP testing. Likewise, no basis existed for an initial evaluation after the December 13, 2016 meeting finding of no suspected disability until the Parent's April 13, 2017 email requesting IEP testing. Per the recommendations of the December 13, 2016 IEP team meeting, the Student's behavior plan had been amended to better suit his needs and he had been suspended from school one time between December 13, 2016 and the Parent's April 13, 2017 email. It is undisputed that after the Parent's April 13, 2017 email requesting an IEP, the PGCPS scheduled a meeting for May 19, 2017, which the Parent canceled as the meeting was set to begin; July 11, 2017, which the PGCPS canceled because it was unable to seat a complete IEP team; September 1, 2017, which the Parent canceled and asked to be rescheduled; and September 26, 2017 which the Parent canceled, opting to file a due process complaint instead. In other words, the PGCPS met its Child Find obligation in response to the Parent's April 2017 email by scheduling the initial evaluation meeting. It was the Parent who failed to follow through on actually attending the meeting and allowing the IEP team to conduct the initial evaluation to address the Parent's concerns and determine if the Student had a suspected disability at that time.

Therefore, the Parent did not meet her burden of proving that the PGCPS failed to comply with its Child Find obligation to timely conduct an initial evaluation pursuant to IDEA.

IDEA's Disciplinary Protections

IDEA's disciplinary protections apply only to children having or suspected of having a

disability. 34 C.F.R. § 300.530. I find the periods of suspected disability for the Student established by the evidence were October 25, 2016 through December 13, 2016 and April 17, 2017 through September 12, 2017. October 25, 2016 through December 13, 2016 represents the period of time between the Parent's October 2016 request for IEP testing and the December 2016 initial evaluation where the IEP team, including the Parent, determined that the Student did not have a disability. April 17, 2017 through September 12, 2017 represents the period of time between the Parents April 2017 request for IEP testing and the date the Parent filed her due process complaint. After reviewing the evidence for the number of days the Student was suspended for the periods of suspected disability during the 2016/2017 academic year, I find that the Student was suspended two days: November 7, 2016 for one day which constituted the October 25, 2016 through December 13, 2016 suspected disability period; and May 3, 2017 which constituted the April 17, 2017 through September 12, 2017 suspected disability period. Because the evidence does not establish that the Student was a child suspected of a disability suspended more than 10 times in a year, the disciplinary protections of IDEA are not applicable.

Access to the Student's Records

Both the Parent and the PGCPs agree that a Parent has the right to inspect and review the educational records of a student and that right includes the review of such records through a representative. 34 C.F.R § 300.613(3). The evidence is clear that the Parent requested to review the Student's education records in June 2017 and then again on September 11, 2017. The evidence is equally clear that the PGCPs advised the Parent on June 13, 2017 and September 11, 2017 that the records were available for her review. What is not as clear is the allegation in the due process complaint that the Parent advocate's September 11, 2017 request to review the Student's education records was denied by the PGCPs. Though there was no evidence as to

when the PGCPS received the service contract between the Parent and Ms. XXXX, the PGCPS acknowledged that it did receive it. Nonetheless, the PGCPS advised that it was concerned that the contract contained an electronic signature and not the Parent's hand-written signature. Given the nature of the records being sought, the PGCPS responded directly to the Parent's September 11, 2017 email requesting the records by informing her that the records were available for review on the same date. I find that the PGCPS's actions on September 11, 2017 were entirely appropriate under the circumstances and did not constitute a denial of the Parent's request to review the Student's education records. The Parent could have accompanied Ms. XXXX to review the records on September 11, 2017 or responded to the PGCPS' September 11, 2017 email by requesting that the PGCPS grant Ms. XXXX access to the records. There is no credible evidence before me that the Parent did either. Therefore, I do not find that the PGCPS denied the Parent's September 11, 2017 request to review the Student's records.

Compensatory Education

Compensatory services are "educational services ordered ... to be provided prospectively to compensate for a past deficient program." *G ex rel. RG v. Ft. Bragg Dependent Sch.*, 343 F.3d 295, 308 (4th Cir. 2003). Based on my findings that the Student was not denied FAPE in the 2015/2016 and 2016/2017 academic years, I find the Parent has not demonstrated that an award of compensatory education is warranted.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

1. The PGCPS did not fail to comply with its Child Find obligation to properly conduct an initial evaluation of the Student on its own initiative and after the Parent's October 25,

2016 and April 17, 2017 requests for initial evaluation. 20 U.S.C.A. § 1412(a)(3) (2017); *Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist.*, 39 F.Supp.3d 584 (2014) ; *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (2012); *Schaffer v. Weast*, 546 U.S. 49 (2005).

2. The PGCPS did not fail to comply with the disciplinary protections of IDEA by suspending the Student for more than ten days without conducting a manifestation determination review. 34 C.F.R. § 300.530(e); U.S.C.A. § 1415(k)(1)(E).
3. The PGCPS did not violate the Parent’s right to inspect and review the education records of the Student. 34 C.F.R § 300.613(3).
4. The PGCPS is not required to provide compensatory education to the Student as there was no failure to properly conduct an initial evaluation of the Student on its own initiative and after the Parent’s October 25, 2016 and April 17, 2017 requests for initial evaluation. *Bd. of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 316 (6th Cir. 2007); *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Todd A.*, 79 F.3d 654, 656 (7th Cir. 1996); 20 U.S.C.A. § 1415(i)(2)(c)(iii).

ORDER

I **ORDER** that the Complaint is **DENIED** and **DISMISSED**.

November 22, 2017
Date Decision Issued

Kerwin A. Miller, Sr.
Administrative Law Judge

KAM/cmg

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the

issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2017). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.