

[REDACTED]

STUDENT

v.

PRINCE GEORGE'S COUNTY

PUBLIC SCHOOLS

* BEFORE TAMEIKA LUNN-EXINOR,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-PGEO-OT-18-32028

* * * * *

DECISION

STATEMENT OF THE CASE
ISSUES
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ORDER

STATEMENT OF THE CASE

On October 11, 2018, [REDACTED] (Parent), on behalf of her child, [REDACTED] (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 Prince George's County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A.¹ § 1415(f)(1)(A) (2017).

On October 25, 2018, the parties participated in a resolution session. On November 9, 2018, the OAH received notice from the parties that the resolution session occurred but the matter was not resolved. I held a telephone prehearing conference on November 27, 2018. The Parent and Student were represented by Kimm Massey, Esquire. Gail Viens, Esquire, represented

¹ "U.S.C.A." is the abbreviation for the United States Code Annotated. The U.S.C.A. is published by Thomson Reuters and contains the general and permanent laws of the United States, as classified in the official United States Code (U.S.C.) prepared by the Office of the Law Revision Counsel of the House of Representatives. Unless otherwise noted, all references hereinafter to the U.S.C.A. are to the 2017 bound volume.

the PGCPS. By agreement of the parties, the hearing was scheduled for December 12, 2018 and December 14, 2018. On November 28, 2018, I issued a Prehearing Conference Report and Order. The Parties filed various Motions and responses from November 30, 2018 through December 10, 2018. On December 10, 2018, I held a second telephone prehearing conference to hear from the Parties on their Motions. I ruled on the Motions on the record and on December 11, 2018, I issued a Second Prehearing Conference Report and Order.

I held the hearing on December 12, 2018 and December 14, 2018. Kimm Massey, Esquire, represented the Parent and Student. Jeffrey A. Krew, Esquire, represented the PGCPS. 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) (2018); Md. Code Ann., Educ. § 8-413(e)(1) (2018); 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 Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Did the PGCPS appropriately adhere to its Child Find obligation to locate, identify, and evaluate the Student in the 2016-2017 and 2017-2018 school years?
2. Did the PGCPS fail to conduct an initial evaluation of the Student after requests were made by the Parent pursuant to the IDEA?

SUMMARY OF THE EVIDENCE

Exhibits²

I admitted the following exhibits on behalf of the Parent(s):

Parent Ex. 1 - Progress Reports/Report Cards

Pg. 1 NOT OFFERED

Pg. 2 [REDACTED] 2017-2018, 4th Quarter Report Card

Pg. 3 SchoolMax version of the [REDACTED] 2017-2018, 4th Quarter Report Card

Parent Ex. 2 - Reading Assessments

Pg. 4-5 STAR Early Literacy Assessment, September 29, 2015

Pg. 6 STAR Early Literacy Assessment, September 15, 2016

Pg. 7 STAR Early Literacy Assessment, December 15, 2016

Pg. 8 STAR Early Literacy Assessment, February 14, 2017

Pg. 9-10 STAR Early Literacy Assessment, February 15, 2018

Parent Ex. 3 - NOT ADMITTED (Pg. 11)

Parent Ex. 4 - Emails

Pg. 12-14 NOT OFFERED

Pg. 15-19 Emails between Parent and [REDACTED] dated September 5, 2018 and September 11, 2018

Pg. 20 Emails between Parent and [REDACTED] dated June 9, 2018 and June 15, 2018

Pg. 21 Response to Intervention (RTI) Progress Note, February 12, 2018

Pg. 22 i-Ready Diagnostic and Instruction Assessment Report, January 29, 2018

Pg. 23-24 Emails between Parent and [REDACTED] February 20, 2018

Pg. 25-26 Emails between Parent and [REDACTED] February 16, 2018

Pg. 27-31 Emails between Parent and [REDACTED] January 2, 2017 and January 3, 2017

Pg. 32-33 Emails between Parent and [REDACTED] December 12, 2016

Pg. 34 NOT OFFERED

Pg. 35-36 Emails between [REDACTED] and [REDACTED] November 14, 2016

Parent Ex. 5 - 504 Plan

Pg. 37-40 NOT OFFERED

Pg. 41-42 PGCPS Section 504 Team Meeting Minutes, April 18, 2018

² There are some exhibits that were offered but not admitted as evidence. Those offered exhibits were retained to preserve the record.

Parent Ex. 6 - Withdrawal Documents

Pg. 43-46 Maryland Student Withdrawal/Transfer Record, July 16, 2018

Parent Ex. 7 - RTI Policy

Pg. 47 NOT ADMITTED

Pg. 48-57 PGCPs Administrative Procedure, Student Intervention Team and Student Support Team, September 29, 2017

Parent Ex. 8 - Resume/CV - [REDACTED] (Pg. 58-60)

Parent Ex. 9 - NOT ADMITTED (Pg. 61-68)

I admitted the following exhibits on behalf of PGCPs:

PGCPs Ex. 1 - Email from Parent to [REDACTED] December 12, 2016

PGCPs Ex. 2 - NOT OFFERED (Pg. 1)
Email from [REDACTED] to Parent, December 12, 2016 (Pg. 2)

PGCPs Ex. 3 - Letter from [REDACTED] Pediatricians & Assoc., LLC, January 31, 2018
Letter from [REDACTED] Center, March 4, 2018

PGCPs Ex. 4 - 504 Plan Materials, March 9, 2018 and April 18, 2018

PGCPs Ex. 5 - Student Attendance Document, 2015-2016, 2016-2017, and 2017-2018 School Years

PGCPs Ex. 5a - NOT OFFERED

PGCPs Ex. 6 - [REDACTED] Academy Progress Report, November 5, 2018

PGCPs Ex. 7 - Communications between Parent and [REDACTED] September 4, 2018 through October 10, 2018

PGCPs Ex. 8 - NOT OFFERED

PGCPs Ex. 9 - NOT OFFERED

PGCPs Ex. 10 - NOT OFFERED

PGCPs Ex. 11 - Letters from Gail Viens, PGCPs Deputy General Counsel, November 5, 2018 and November 26, 2018

PGCPs Ex. 12 - Expert Resumes
[REDACTED] Resume (Pg. 1-3)
NOT OFFERED (Pg. 4-10)

██████████ Resume (Pg. 11)
NOT OFFERED (Pg. 12-20)
NOT ADMITTED (Pg. 21-22)

PGCPS Ex. 13 - NOT OFFERED

PGCPS Ex. 14 – NOT ADMITTED

PGCPS Ex. 15 - Parent's Due Process Complaint, October 11, 2018

PGCPS Ex. 16 - MSDE Letter to ██████████ December 20, 2017

PGCPS Ex. 17 - NOT ADMITTED

Testimony

The Parent testified and presented the following witness:

- ██████████ admitted as an expert in Special Education Program Administration

The PGCPS presented the following witnesses:

- ██████████ admitted as an expert in Neuro Psychology and School Psychology
- ██████████ admitted as an expert in Elementary Education
- ██████████ admitted as an expert in Elementary School Administration
- ██████████ Principal at ██████████ Public Charter School
- ██████████ former Academic Facilitator and Assistant Principal at ██████████ Public Charter School
- ██████████ Math and Science Teacher at ██████████ Public Charter School
- ██████████ Principal at ██████████ Academy

FINDINGS OF FACT

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

1. The Student is an eight-year-old boy who attends Prince George's County Public Schools.

Kindergarten

2. The Student attended ██████████ Public Charter School for Kindergarten during the 2015-2016 school year.

3. On September 29, 2015, the Student was assessed for reading and the results indicated that he was an emergent reader.

4. The Student received a grade of PR, which means Progressing in every subject, at the end of the 2015-2016 school year.

5. During the Kindergarten year, the PGCPS marked the Student absent twenty-three days and tardy fifty-three days out of 178 instructional school days.

First Grade

6. The Student attended [REDACTED] Public Charter School for First Grade during the 2016-2017 school year.

7. On September 15, 2016, the Student's reading assessment indicated the Student was reading at a level greater than 47% of other First grade students. The Student's reading level was average.

8. On November 14, 2016, after a meeting with the Parent, Ms. [REDACTED] Assistant Principal at [REDACTED] sent an email to Ms. [REDACTED] the Student's First grade teacher, about implementing specific strategies in the classroom to redirect the Student when he engaged in inappropriate behavior. Ms. [REDACTED] mentioned that the Student was being assessed for Attention Deficit Disorder (ADD)

9. On December 12, 2016, the Parent emailed Ms. [REDACTED] asking for assistance for the Student because his Reading, Science, and Oral & Written Communication grades decreased from a PR (Proficient) to ND (Needs Development) from First Quarter to Second Quarter. The Parent inquired if the Student needed an Individualized Education Plan (IEP) in order to receive more time to complete his assignments.

10. On December 12, 2016, the Parent stated that she did not feel that an IEP was a good solution since the Student's problem was with focusing.

11. On December 12, 2016, Ms. [REDACTED] responded to the Parent's email and referred her to the school counselor, Ms. [REDACTED]. Ms. [REDACTED] also stated they could have a meeting to discuss and brainstorm additional strategies to help the Student during class.

12. On December 15, 2016, the Student's reading assessment indicated the Student was reading at a level greater than 33% of other First grade students. The Student's reading level was average.

13. On January 2, 2017, the Parent informed Ms. [REDACTED] that the Student's pediatrician did not diagnose him with Attention Deficit Hyperactivity Disorder (ADHD). The Parent also requested suggestions for helping the Student get through the remainder of the school year when he had problems completing his classwork.

14. On January 2, 2017, Ms. [REDACTED] responded to the Parent's email. She suggested that the Student receive breaks and use a personal timer to see if it helped him complete his classwork. Ms. [REDACTED] suggested implementing these strategies for two weeks and if there was no growth they could schedule a School Instructional Team (SIT) meeting to discuss further strategies.

15. On February 14, 2017, the Student's reading assessment indicated the Student was reading at a level greater than 31% of other First grade students. The Student's reading level was average.

16. Some of the Student's end year grades for First grade were as follows: Oral and Written Communication – ND; Reading Level – below level (BL); Reading 1 – ND; Social Skills 1 – ND; and Work Habits 1 – ND.

17. During the First grade year, the PGCPs marked the Student absent twenty-three days and tardy seventy-eight days out of 180 instructional school days.

18. The Parent asserts that the number of absences for the Student's First grade year was 13 not 23. The Parent contested PGCPS' records of attendance for First grade but the record was not changed or updated by PGCPS.

Second Grade

19. The Student attended [REDACTED] Public Charter School for Second Grade during the 2017-2018 school year.

20. On January 29, 2018, the Student completed the i-Ready online assessment for reading and his overall reading performance was approaching level 2 (Second grade).

21. On or about January 31, 2018, the Student was diagnosed with ADHD.

22. On February 12, 2018, the RTI Progress Note for the Student indicated that on the Fountas & Pinnell test, the Student scored at a higher First grade level. The Progress Note encouraged the Student to use Kids A-Z at home.

23. On February 15, 2018, the Student's reading assessment indicated the Student was reading at a level greater than 2% of other Second grade students. The Student's reading level was below-average.

24. The Student's instruction level for reading was at a pre-kindergarten level, which is a pre-emergent reader developing foundation skills

25. On February 16, 2018, the Parent sent an email to Ms. [REDACTED] Assistant Principal at [REDACTED] in which she stated her concerns about the drastic decline in the Student's reading ability and requested a 504 plan.

26. On February 16, 2018, the Parent stated she did not believe the Student's decline in reading was the fault of his current teachers at [REDACTED] - Ms. [REDACTED] and Ms. [REDACTED]

27. On February 16, 2018, Ms. [REDACTED] informed the Parent that [REDACTED] had the resources to implement a 504 Plan for the Student.

28. On March 4, 2018, [REDACTED] M.Ed, LCPC³ at [REDACTED] Center, sent a letter to the PGCPs Administration with a list of the following accommodations for the Student:

Environmental Accommodations

- Allow the Student to incorporate sensory breaks during class
- Change seating
- Provide a daily "To Do List" for each class – outlining what is needed for success per class

Organizational Accommodations

- Implement Behavioral/Academic Contracts (having a clear understanding of expectations is key)
- Write out homework assignments and have teacher sign
- Use positive verbal and non-verbal reinforcements
- Color code notebooks/folders
- Place the Student on a Daily Progress Report – to be signed by Parent

Evaluation Accommodations

- Provide a sample test
- Time adjustment
- Provide an oral test option

Assignment Accommodations

- Modify amount of work
- Break assignments into chunks
- Use written directions to supplement oral directions

Teacher Presentation of Lesson Accommodations

- Highlight main ideas and /or key portions of text
- Provide written notes
- Provide peer tutoring for the Student
- Ask the Student to repeat/paraphrase material to access understanding
- Provide material in the Student's preferred style of learning

PGCPS Ex. 3, pp. 2-3.

29. On April 18, 2018, a 504 Plan Meeting was held for the Student and it was determined that he was eligible for a 504 plan with the following accommodations: (1) Behavior chart with expectations – using kind words to peers, wait your turn to unpack, positive reinforcement; (2) Extended time and fewer questions for classroom assessment; (3) Extended time, strategic breaks, PARCC/STAR and strategic; and (4) Teachers should attempt to correct behavior one-on-one.

³ Licensed Clinical Professional Counselor.

30. Some of the Student's end year grades for Second grade were as follows: Oral and Written Communication 2 – C; Reading Level – below level; Reading 2 – D; Social Skills 2 – D; Social Studies 2 – E; Work Habits 2 – D; Physical Education –A; Integrated Core Tech 2 – A; Math – B; Science – A; Art – A; Music – A; and Health – A.

31. During the Second grade year, the PGCPs marked the Student absent thirty-four-and-a-half days and tardy eighty-five days out of 180 instructional school days

32. On June 9, 2018, the Parent received an RTI Progress Note dated February 12, 2018 and sent an email to Ms. [REDACTED] asking for recommendations for a summer reading program for the Student.

33. On June 15, 2018, Ms. [REDACTED] responded to the Parent's email with recommendations on programs for the Student to utilize during the summer. Ms. [REDACTED] also indicated that the Student would continue to be monitored.

34. On June 15, 2018, the Parent informed [REDACTED] by email that the Student would not be returning to the school for the 2018-2019 school year.

Third Grade

35. The Student currently attends [REDACTED] Academy for the 2018-2019 school year.

36. On September 5, 2018, the Parent sent an email to [REDACTED] the Academic Counselor at [REDACTED] Academy, in which she referred to the Student's 504 plan and her desires to start a good relationship with his teachers at [REDACTED]

37. On September 11, 2018, after back to school night at [REDACTED] Academy, the Parent sent a second email to Ms. [REDACTED] asking for a meeting to discuss the Student's reading problems. The Parent indicated that she was desperate for a solution for the Student.

DISCUSSION

The Legal Framework

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2017)⁴; 34 C.F.R. pt. 300 (2018)⁵; Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01. The IDEA requires “that all children with disabilities have available to them a FAPE⁶ that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C.A. § 1400(d)(1)(A); *see also* Educ. § 8-403.

To be eligible for special education and related services under the IDEA, a student must meet the definition of a “child with a disability” as set forth in section 1401(3) and the applicable federal regulations. The statute provides as follows:

(A) In General

The term “child with a disability” means a child –

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance...orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

20 U.S.C.A. § 1401(3)(A); *see also* Educ. § 8-401(a)(2); 34 C.F.R. § 300.8; and COMAR 13A.05.01.03B(78).

Local education agencies are mandated under IDEA Child Find provisions to ensure 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). Locating children in need of special education and related services

⁴ “U.S.C.A.” is the abbreviation for the United States Code Annotated. The U.S.C.A. is published by Thomson Reuters and contains the general and permanent laws of the United States, as classified in the official United States Code (U.S.C.) prepared by the Office of the Law Revision Counsel of the House of Representatives. Unless otherwise noted, all references hereinafter to the U.S.C.A. are to the 2017 bound volume.

⁵ “C.F.R.” is the abbreviation for the Code of Federal Regulations. Unless otherwise noted, all references hereinafter to the C.F.R. are to the 2018 bound volume.

⁶ Free, appropriate public education.

may occur as a result of various circumstances. For instance, a student's teacher may observe that a child's academic performance continuously falls below grade level or that the student's behaviors are consistently unusual or unexpected. Similarly, a parent may suspect that a student has a disability based upon the child's academic or behavioral performance at home or notice the student's grades have significantly decreased without explanation.

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). A student with a suspected disability who may need special education shall be referred, *in writing*, to a public agency. An initial referral may be initiated by the student's parent or a representative of a public agency. COMAR 13A.05.01.04 (emphasis added). Once the public agency receives parental consent for evaluation, the public agency must conduct the evaluation within sixty days. As applicable to this matter, "assessment" is "the process of collecting data in accordance with Regulation .05 of this chapter, to be used by the IEP team to determine a student's need for special education and related services." COMAR 13A.05.01.03B(3).

Under section 300.301 of the federal regulations, before a local education agency may begin providing special education services to a child with a disability, it "must conduct a full and individual initial evaluation" to establish whether a disability exists and the nature of the suspected disability. 34 C.F.R. § 300.301; *see also* 20 U.S.C.A. § 1414(a)(1)(A). Once the local education agency determines that it is appropriate to evaluate a student, it must use:

(2) A variety of assessment tools and strategies . . . to gather sufficient relevant functional, cognitive, developmental, behavioral, academic, and physical information, and information provided by the parent to enable [an] IEP team to determine:

- (a) If the student is a student with a disability;
- (b) The student's educational needs;
- (c) The content of a student's IEP, including information related to enabling the student to be involved in and progress in the general curriculum . . . ; and
- (d) Each special education and related service needed by a student, regardless of whether the need is commonly linked to the student's disability.

COMAR 13A.05.01.05B(2). Upon conclusion of the assessments, the local education agency must provide the student's parent(s) with a written report of the procedures and assessments it used to determine whether the student has a disability and the "[i]nstructional implications for the student's participation in the general curriculum." COMAR 13A.05.01.05D. Furthermore, once the local education agency has conducted the appropriate and relevant assessments and identified a student as eligible for special education and related services, an IEP team must convene and develop an IEP designed to address the student's identified disability, including goals and objectives and services and accommodations designed for the student to make meaningful educational progress.

In this instance, PGCPs did not suspect the Student had a disability and it did not pursue assessment of the Student on its own accord. Rather, the Parent suspected the Student had a disability that was impacting the Student's academic performance and contributing to the Student's increasing negative behaviors. Throughout the Student's First and Second grade school years, the Parent requested assistance from the PGCPs to provide resources and information to help the Student complete his classwork, focus in class, develop his reading skills and help with behavior concerns.

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, in this matter the Parent has the burden of proving PGCPs violated its obligation to locate, identify and evaluate the Student for a disability during the 2016-2017 and 2017-2018 school years and that the PGCPs failed to conduct an initial evaluation after requests were made by the Parent pursuant to the IDEA.

The Contentions of the Parties

The Parent contends that the PGCPs violated its Child Find obligation to the Student when it failed to identify, locate, and evaluate him during the 2016-2017 and 2017-2018 school

years. The Parent asserts that the Student's declining reading level and declining grades in reading, work habits, oral and written communication, social skills, and social studies should have triggered the PGCPs to evaluate the Student for a disability under the IDEA. The Parent asserts the Student's diagnosis of ADHD in January 2018 coupled with other health concerns such as sleep apnea and asthma should have also triggered an evaluation for the Student.

The Parent also contends that PGCPs failed to perform an initial evaluation for the Student after the Parent made numerous requests for assistance. The Parent asserts that her emails to teachers and administrators during his First and Second grade school years should be considered as a written request for an initial evaluation. As remedies for the alleged violations by PGCPs, the Parent requests the following:

- reimbursement to the Parent for the ADHD assessments she obtained from outside physicians;
- Funding for Independent Psychological, Educational, Speech and Language, and Functional Behavioral Assessments;
- Convene an eligibility meeting within fourteen days of receipt of the independent assessment reports and determine the student eligible for special education and related services with a disability classification of Other Health Impairment (OHI) and/or Specific Learning Disability (SLD);
- Schedule all meetings conducted as a result of this Complaint through the Parent's Educational Consultant;
- Finalize an IEP and a Behavioral Intervention Plan (BIP) for the Student within 10 days of the eligibility meeting;
- Fund 150 hours of compensatory academic tutoring to be provided by Education Due Process or another provider of the Parent's choice;
- Pay the Parent's attorney's fees; and
- Provide such other and further relief as is appropriate.

PGCPs Ex. 15.

The PGCPs contend that it did not violate its Child Find obligation to the Student because the PGCPs implemented interventions for the Student based on his needs, however, they argue that they could not properly facilitate the interventions because of the Student's poor attendance in school. PGCPs assert that the Student's tardiness and absences during the 2016-2017 and 2017-2018 school years were excessive and negatively affected the Student's ability to access the

curriculum. PGCPS also contends that the Parent's numerous emails and oral requests for assistance for the Student cannot be construed as a written request for evaluation under IDEA. PGCPS asserts that the Parent did not make a written request for the Student to be evaluated.

Testimony

Student's educational progress from Kindergarten to 3rd Grade

Parent's Witnesses

Parent

The Parent testified that the Student has been attending PGCPS since the 2015-2016 school year when he was in the Kindergarten. In Kindergarten, the Student was progressing in reading and his reading level was average. However, in the First grade, the Student's reading level and grades in reading, work habits, and oral and written communication began to decline. She testified that by the Second grade, the Student's reading level was below average. The Parent also had concerns about the Student's behavior in class and his inability to complete classwork. The Parent continuously communicated with the Student's teachers and administrators about his decrease in reading level and his focus issues beginning in the First grade through this school year (Third grade). As evidence, the Parent provided the reading assessments for the Student, which show a steady decline in his reading levels between Kindergarten and Second grade. The Parent testified that her level of concern increased substantially when in February 2018, the Student's reading assessment showed that he was reading in the second percentile despite having interventions.

The Parent further testified that in December 2016, she initiated ADHD testing for the Student and his pediatrician ruled out an ADD or ADHD diagnosis for the Student. However, in January 2018, the Student was diagnosed with ADHD by [REDACTED] LCPC (Licensed Clinical Professional Counselor). The Parent testified that in February 2018 she had a meeting with Ms.

██████████ at ██████████ to discuss her concerns about the Student's school performance and behavior issues. The Parent did not see any changes in his classwork, homework, test scores, or behavior despite the interventions put in place by the PGCPS. She stated that after the meeting, she requested a 504 plan and in April 2018, a 504 Plan was implemented at ██████████ to assist the student with behavior, allowing him more time to complete assignments and assessments, taking breaks, and breaking his work down into smaller segments.

On cross-examination, the Parent testified that the Student's pediatrician and the counselor that diagnosed the Student with ADHD did not recommend an IEP for the Student. Instead, the counselor sent the school accommodations for a 504 plan. The Parent testified that she was involved in the 504 process and once the plan was written for the Student, she did not object to the plan or appeal the plan. The Parent also clarified that she initiated the ADHD testing for the Student and was not instructed by PGCPS to have her son tested for ADHD.

██████████
██████████ testified as an expert in Special Education Program Administration. She testified that she was familiar with the Student's academic records and has assisted the Parent as an advocate for the Student. Ms. ██████████ testified that the PGCPS has an obligation to identify, locate and evaluate children with needs in its jurisdiction. She stated that the Student has asthma, sleep apnea, and ADHD which under the IDEA is specifically identified as an OHI and if the OHI impacts a child academically, it should trigger PGCPS to evaluate the Student. She testified that the RTI process that the Student was involved in for First and Second grades is a pre-child find tool but once the interventions do not result in progress for the student, the school system should be triggered to evaluate the student. Ms. ██████████ stated that RTI is an

acknowledgement that the Student had behavioral and/or academic problems and was in need of interventions.

On cross-examination, Ms. [REDACTED] testified that she has not met the Student but has met with the Parent. She has not attended any programming meetings at PGCPs for the Student but she attended the resolution session meeting held for this matter on October 25, 2018.

PGCPs' Witnesses

Dr. [REDACTED]

Dr. [REDACTED] testified as an expert in Neuropsychology and School Psychology. Dr. [REDACTED] testified that he attends more than fifty IEP meetings per year that involve children with an ADHD diagnosis. He stated that a diagnosis of ADHD does not automatically make a child eligible for special education services. The ADHD must have a direct educational impact on the Student's learning. He also stated that there needs to be a determination of whether the child has a performance deficit or a skills deficit so the PGCPs first tries a 504 plan with accommodations, including differential instruction to decipher the type of deficit. He testified that the student's medical professional will usually initiate the evaluation for a disability and the school system assists the medical professional with necessary information for a diagnosis. He stated that it is the Parent's responsibility to initiate and fund testing for ADHD and that PGCPs does not initiate such testing for its students as there is no medical professional on staff who can make a diagnosis of ADHD. He testified that as a Psychologist he does not feel comfortable diagnosing children with ADHD and prefers the diagnosis to come from the child's pediatrician.

Dr. [REDACTED] testified that in this case, the question is whether the Student's behavior is causing the deficit or does the Student have a learning deficit. He states that beyond the diagnosis of ADHD, a child's learning problems can also be caused by oppositional behavior, emotional issues, health issues, and attendance. He testified that just because a child performs

below grade level and has ADHD does not result in a learning disability. He stated that neither the counselor that diagnosed the Student nor the Student's pediatrician referred the Student for an evaluation under the IDEA. He also testified that the accommodations established by the counselor that diagnosed the Student with ADHD were for a 504 plan. Dr. [REDACTED] testified that the PGCPs employed a 504 plan at the request of the Parent, PGCPs reviewed the accommodations suggested by the counselor, Ms. [REDACTED] and implemented the 504 plan including accommodations that were important for the Student. Dr. [REDACTED] stated that the Student's 504 plan captures the spirit of the accommodations suggested by Ms. [REDACTED] but not every accommodation was implemented. He stated that most doctors and counselors do not work in the school system so they do not have the knowledge of how the accommodations are implemented throughout the school day. He opined that the PGCPs is better equipped to decide which accommodations are best for the Student.

On cross-examination, Dr. [REDACTED] testified that a school psychologist can render a diagnosis of ADHD after a comprehensive evaluation; however, he would send his diagnosis to a medical professional to rule out other medical conditions. He stated that he is the school psychologist advisor and lead for PGCPs and he advises all of the school psychologists to do the same. He also stated that Child Find is not always triggered by a medical professional and that psychologists are usually not part of the 504 plan assessments and implementation. He stated that it is possible that the school psychologist for the Student has not reviewed his ADHD diagnosis.

[REDACTED]
[REDACTED] testified as an expert in Elementary Education. She testified that she began teaching at [REDACTED] Public Charter School [REDACTED] in December 2017 and she overlapped with the prior long term substitute that was teaching the Student's reading and social studies block. She testified that she officially started as a full-time classroom teacher on

January 2, 2018 and she stayed until the end of that school year. Ms. [REDACTED] stated that the Student was in her morning group. She testified that her instruction would begin between 8:35 a.m. and 8:40 a.m. after the morning announcements. She began each day with independent reading practice for 20 minutes during which she would have small group interventions with the problem readers. Ms. [REDACTED] testified that the small group would be no more than four kids and that the Student was a part of this morning intervention group. She stated that after the first 20 minutes, she would begin her general reading curriculum. Ms. [REDACTED] testified that she used the first twenty minutes of the day to have 1 to 1 time with students and perform assessments. She explained that the twenty minute session at the start of class was important to help students catch up if they were behind and it also helped the students access the general reading curriculum.

Ms. [REDACTED] testified that in order to read, a child needs phonemic awareness, the ability to manipulate sounds within words, blend sounds to read words, the ability to chunk sounds to read words, and knowledge of high frequency words. She testified that once a child can read fluidly then they can read to comprehend. She stated that a child cannot read phonetically without the building blocks to reading and that if a child lacks phonemic awareness skills, it would be impossible to access the Second grade reading level. She explained that children learn to read in kindergarten and First grade but they read to learn in Second grade and beyond. Ms. [REDACTED] testified that in the Student's Second grade class 80% of the students were on or above Second grade reading level. She stated that the 20% that were below level would meet with her during the first twenty minutes of class and they also received RTI reading sessions a few times per week.

Ms. [REDACTED] testified that as an accommodation for the Student, she sent his missed classwork and incomplete classwork home but only 25% of what she sent home would come back to school completed. She spoke with the Parent about the missing assignments and the

Parent would say it was in the Student's backpack but the work rarely made it back to school. She testified that the Parent was trying to help the Student complete the work and have better attendance but it just never improved. She testified that the Student's homework was completed more often than the take home class work. Ms. [REDACTED] testified that because of the Student's poor attendance record, she could not gauge his ability to do the work. She stated that he was rarely available for her to work with in small group so she did not have a clear picture of his true abilities. She stated that when he came to class late, he would become overwhelmed and exhibit negative behaviors. Ms. [REDACTED] testified that the Student completed more work and exhibited better behavior in his math and science classes because those subjects were later in the school day and the Student was present for those subjects. Ms. [REDACTED] stated that the Student's grades in social skills, his reading level, reading 2, social studies, oral and written communication and work habits continued to decline during Second grade.

Ms. [REDACTED] also testified that the Student's behavior got in the way of him progressing. She stated that at least one time per week he would get aggressive and shut down, argue with her, push his books off of the desk or move his chair around. Ms. [REDACTED] testified that she implemented the Student's 504 plan to the best of her ability despite the Student's poor attendance rate but one of the intervention was a behavior sticker chart. She stated that she did not suspect a specific learning disability. Ms. [REDACTED] testified that if the 504 plan could be fully implemented she would be able to truly assess the Student's learning ability.

On cross-examination, Ms. [REDACTED] testified that the Student was receiving RTI while she was his reading teacher. She stated that he would be pulled out of either the writing or social studies block during her morning session for 30 minutes of RTI for reading. She stated that the Student was reading below grade level prior to her becoming his teacher and she stated that by the Second semester of his Second grade year the Student should master the foundational skills

to read. She stated that his lack of progress did not concern her because the Student was already in the RTI process so she believed the “ball was rolling” with getting him the help he needed. Ms. [REDACTED] testified that any interventions that were recommended in the 504 plan, she implemented for the Student. She stated that had she been able to implement the interventions as necessary and she did not see any improvement, then she would have been concerned. Ms. [REDACTED] stated numerous times that she was not able to fully implement interventions such as small group work because the Student was not available due to tardiness and absences. She testified that she was tasked with helping the Student with decoding during the first twenty minutes of class but he was rarely available during that timeframe. As for his reading level, she testified that he read at a mid-kindergarten level and therefore he could not access the Second grade curriculum independently.

[REDACTED] is the Academic Facilitator and Assistant Principal at [REDACTED] Public Charter School. She worked in the same capacity during the 2017-2018 school year when the student was in the Second grade. She testified that the Student began with RTI on January 31, 2018 (Second Grade) after there was a SIT meeting. She stated that he was not receiving RTI prior to January 31, 2018. When asked why his attendance records from Kindergarten have RTI listed after the Student’s name, she stated that once a student is identified as RTI in the records, it shows up on every page of their record no matter when the RTI started. She testified that the Student would not receive RTI in Kindergarten because he was proficient in reading in Kindergarten.

Ms. [REDACTED] testified that after the SIT meeting on January 31, 2018, the team decided to implement interventions to address the Student’s behavior and academics. Ms. [REDACTED] testified that the Parent had no complaints with the interventions that were implemented but on February

16, 2018, the Parent requested a 504 plan for the Student. She states that when the Parent requested the 504 plan she immediately contacted the counselor, Ms. [REDACTED] to begin the 504 process. She testified that if at any time the Parent requested special education evaluations, the 504 process would have ceased in order to pursue evaluation for IEP purposes. Ms. [REDACTED] testified that even after the completion of the 504 process and the 504 plan was implemented on April 18, 2018, the Parent did not complain or appeal the 504 plan. Ms. [REDACTED] testified that the Student's final report card for Second grade clearly shows that the Student is able to learn since he received a B in Math, an As in Science, Art, Music, Health, Physical Education and Integrated Core Tech. She testified that the Student's attendance was an impediment to his learning during his first block of the day, which included his reading class.

On cross-examination, Ms. [REDACTED] clarified that RTI is a subsection of SIT. She stated that the Student had completed the first tier of RTI which involved various interventions and 4 to 6 weeks of progress monitoring and was in the Second tier of RTI when they stopped RTI to start the 504 process for the Student. She stated that the Parent requested a 504 plan on her own initiative as it was never an option that was discussed with the Parent.

The Student's Attendance Records

Parent's Witnesses

Parent

As for the Student's attendance records, the Parent testified that there were various reasons he was late or absent from school. The Parent testified that the Student has ADHD, asthma, and sleep apnea. Other ailments that have affected the Student's attendance are frequent headaches, stomach issues, bronchitis, the flu, tick bites, pink eye, adenoid removal surgery, and sleep terrors. She testified that she sent an email to the [REDACTED] in May 2017, his First grade year, contesting many of the absences the school recorded for the Student. She stated that

she provided documentation from ClassDojo⁷ showing that there were ten marked absences where the Student was actually in school. The Parent testified that she does not believe the PGCPS attendance records are accurate. On cross-examination, she testified that she was responsible for transporting the Student to [REDACTED] on Joint Base [REDACTED] and she also had a stepson that she transported to [REDACTED] Creative and Performing Arts Academy. She testified that the two schools were ten minutes apart and that she dropped off the Student first.

On cross-examination, the Parent testified that the Student's reading class has been during the First period of his school day since First grade. The Parent stated that her son would be late or absent from school because of various illnesses and his ADHD. She testified that it is difficult to get him ready to go out the door in the morning. The Parent testified that she does not believe that the Student's attendance record affected his ability to access the reading curriculum and she stated that there is no data to support that the Student missed instruction due to his attendance. She testified that PGCPS never told her that the Student's attendance was an issue until the 504 meeting on April 18, 2018. She stated that she was responsible to drop off her stepson only one or two days per week but that his school started at 9:15 a.m. and did not conflict with the Student's start time.

PGCPS' Witnesses

Dr. [REDACTED]

Dr. [REDACTED] testified that he reviewed the Student's attendance record and there were an excessive amount of absences and tardiness that are significant for a young child such as the Student. He testified that there are studies that correlate attendance with learning to read in early education. He stated that the more a child attends school, the more they connect and learn. He

⁷ ClassDojo is a communication app for the classroom. It connects teachers, parents, and students who use it to share photos, videos, and messages through the school day. They use ClassDojo to work together as a team, share in the classroom experience, and bring big ideas to life in their classrooms and homes. (www.classdojo.com/about/, last visited December 21, 2018)

stated that when a child misses school or instruction in school, their development is limited, therefore attendance is important for learning. Dr. [REDACTED] also testified that a child can become psychologically disconnected because they are not learning alongside their peers and it affects their confidence. Dr. [REDACTED] testified that there is no way that PGCPs can disentangle this Student's attendance record from his performance in school. Educational impact cannot be assessed without reviewing attendance. He stated that a lack of opportunity and lack of instruction does not lead an educator to evaluate for a learning disability. The Student's attendance should be the first priority for the PGCPs before testing for disability. Dr. [REDACTED] also stated that the Student's attendance record affects the RTI or any reading program that is implemented for the Student because the Student's scores will be lower if he is not in school.

On cross-examination, Dr. [REDACTED] testified that over nine days of absences per year is concerning to him because there is a difference in the educational requirements from Kindergarten to Third grade. He states that there are different skills acquired in each grade and it is all additive.

[REDACTED] testified that [REDACTED] is a public charter school in the PGCPs and it is located on [REDACTED] Force Base. She stated that she is a military wife and that her kids attend [REDACTED]. She explained that the non-military families that have children who attend [REDACTED] have to obtain a yearly pass from security for entry onto the base. Ms. [REDACTED] testified that there are armed guards at the gates and there can be lines to enter the base in the morning that could result in a fifteen-minute wait time. Ms. [REDACTED] testified that the Student was in her Second grade morning group. She stated that the bell would ring at 8:30 a.m. and her instruction would begin at 8:35 a.m. or 8:40 a.m. after the morning announcements.

Ms. [REDACTED] testified that the Student had poor attendance for the first twenty minutes of class when she would have small group or individual reading help for the students that were

struggling with reading. She stated that the Student was late at least three times per week and completely missed the twenty-minute reading intervention session. Ms. [REDACTED] testified that when the Student was late to class, he was usually twenty to thirty minutes late which caused the Student to fall further behind in reading. She stated that when the Student would arrive late, it would take him an additional ten minutes to get ready for class, focus and acclimate himself to the lesson that was in progress. She stated that he would often show up in the middle of instruction. Ms. [REDACTED] agreed with the PGCPs attendance record which indicated that the Student was absent thirty-four-and-a-half times and late eighty-five times during the Second grade school year. She testified that his attendance was the worst amongst all the Second grade students. Ms. [REDACTED] testified that she spoke with the Parent about the Student's attendance and explained that it compounded his learning and behavioral issues. She stated that the Parent indicated that she understood Ms. [REDACTED]'s frustrations about attendance. However, Ms. [REDACTED] testified that the Student's attendance record did not improve. She testified that she and Ms. [REDACTED] (the Student's math and science teacher) switched his afternoon classes to the morning a few days per week so that the Student could sometimes take advantage of being present for his entire reading block if he was late to school. She stated that they were trying to even out the subjects he was missing due to his attendance issues.

On cross-examination, Ms. [REDACTED] testified that although she spoke with the Parent about the Student's tardiness and absences, they did not have a conversation about what the school could do to help with this issue.

[REDACTED]
[REDACTED] is the Principal at [REDACTED] Public Charter School. He testified that he has no personal communication with the Parent about the Student's attendance. However, he stated that he spoke to the Student's math and science teacher, Ms. [REDACTED] and she

told him that the Student was often late for school because the Parent had multiple children to drop off in the mornings.

[REDACTED]
[REDACTED] was the Academic Facilitator and Assistant Principal at [REDACTED] Public Charter School during the 2016-2017 school year. She testified that she spoke with the Parent about the Student's tardiness during his First grade year and the Parent explained that the Student was tardy because she had an infant at home and she had other people dropping off the Student for school.

[REDACTED]
[REDACTED] was the Student's math and science teacher at [REDACTED] in the Second grade. She testified that she spoke with the Parent about the Student's tardiness and was told that the Parent has a difficult time getting the Student dressed and ready for school in the morning and that she also has to drop off other children to school which could cause the Student to be late. Ms. [REDACTED] stated that the Student would sometimes show up an hour late into his reading lesson with Ms. [REDACTED]. Ms. [REDACTED] testified that the Student's attendance issues were discussed during the 504 planning meeting in April 2018.

[REDACTED]
[REDACTED] testified that she became aware of the Student in Second grade because she would see his mom dropping him off, and he was usually late. She also testified that she was a member of his SIT. Ms. [REDACTED] testified that if a child arrives to school late, they are required to come to the office so that the registrar can mark them late and give them a pass to go to class. She reviewed the Student's tardy and absence record for Second grade and testified that the records appear to be accurate to her and that she has no reason to believe that they are not accurate. Ms. [REDACTED] testified that thirty-four-and-a-half absences during Second grade is

chronic. She testified that the Student missed a large portion of the foundational continuance for reading when he was not available to access the curriculum. She recalls that the Student would be between thirty to ninety minutes late to school. She testified that on average, the Student was forty-five minutes late to school. She stated that she spoke with the Parent about attendance at the SIT meeting and she stated that the Student was a slow starter and she had another child to drop off to school. She testified that PGCPS staff coordinate and discuss attendance issues with parents but that attendance issues are not handled within a 504 plan.

Parent's Requests for Assistance – K through Third Grade

Parent's Witnesses

Parent

The Parent testified that during Kindergarten, she requested assistance with the Student from his homeroom teacher, Ms. [REDACTED]. In the First grade year, she spoke with the Assistant Principal, Ms. [REDACTED] and the school counselor, Ms. [REDACTED]. The Parent testified that staff at [REDACTED] knew that her son had sleep apnea and asthma during his First grade year. During the Second grade year, the Parent spoke with the Response to Interventions specialist, Ms. [REDACTED], the Student's reading teacher, Ms. [REDACTED], the Student's math teacher, Ms. [REDACTED], the Assistant Principal, Ms. [REDACTED] and the school counselor, Ms. [REDACTED]. During this school year, she testified that she had requested assistance from Ms. [REDACTED], Ms. [REDACTED] and Ms. [REDACTED] all teachers at [REDACTED] Academy.

The Parent testified that she did not know that requesting special education services was an option for her when her son was in Kindergarten, First grade or Second grade. She thought that the 504 plan was a form of special education and that she was doing what was best for the Student when she requested the 504 plan. She stated that PGCPS never offered the student testing for a disability and they never gave her any information about the special education process.

On cross-examination, the Parent testified that she never made a written or oral request to PGCPs to evaluate the Student for a disability. She testified that during the Second grade year, she made a request for a 504 plan in writing and requested that the school assess the Student's learning abilities but there was no written request for an evaluation for disabilities under IDEA. She admitted that in December 2016, when the Student's pediatrician ruled out ADD as a diagnosis, she did not believe an IEP was a good solution for her son.

PGCPs' Witnesses

██████████ testified that the Parent did not request educational evaluation or referral for special education assessments from her. She believes that Ms. ██████████ would tell her if the Parent requested an evaluation from her because she and Ms. ██████████ worked as team for all of the Second graders. She testified that she communicated extensively with the Parent during her time teaching the Student and she did not construe any of the Parent's requests for help or assistance as a request for special education evaluations.

██████████ is the principal at ██████████ Academy. Ms. ██████████ testified that if her staff members want specific learning disability or special education screening for a student, they would ask her and she would let the Special Education coordinator know about the request. She testified that no one from her staff has requested any evaluation for the Student. She also stated that the Parent has not made a request to her for special education evaluations. Ms. ██████████ is aware of communications between her school counselor and the Parent and requests for strategies to help the Student with reading. She stated that she does not construe a request for help with reading to be a request for special education screening. Ms. ██████████ also testified that the Student's teacher suggesting that he be held back in Second grade due to his reading inability

also does not mean that the Student needs screening for special education, especially since there is a 504 plan in place for the Student. Ms. [REDACTED] stated that a request for help in a specific subject should not be construed as a need for special education screening. She testified that PGCPS tries other interventions such as small groups to determine the student's deficits before they begin special education screening of a student.

[REDACTED]
Ms. [REDACTED] testified that she was present for the entire SIT meeting when the 504 accommodations were discussed with the Parent. She testified that the Parent did not request special education evaluations or special education screening at the meeting. She also testified that none of the PGCPS SIT team members believed that the Student had an educational disability. The team was aware that the Student had a diagnosis of ADHD.

Analysis

PGCPS did not fail to comply with its Child Find obligation to properly conduct an initial evaluation of the Student on its own initiative

The first issue in this case involves Child Find and PGCPS obligation to identify, locate and evaluate the Student for special education services on its own initiative. The Parent asserts that there were various triggers for the Student that should have prompted the school system to evaluate the Student. The Parent asserts that some triggers were the Student's declining grades in reading, reading below grade level, behavior, attendance record, and his ADHD diagnosis. The school system argues that there were interventions through RTI and a 504 plan in place for the Student that could not be properly implemented due to the Student's poor attendance record and that there was no reason for PGCPS to believe that the Student had a disability that was impacting his ability to learn. PGCPS asserts that the Student's ability to learn was limited because he was not available to learn. PGCPS claims there was no indication that would have

prompted the school to suspect a specific learning disability or the need for special educational services.

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 (M.D. Pa. 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. However, in this case, there is a 504 plan with detailed and coordinated interventions for the Student which include a behavior sticker chart, allowing more time for tests, and allowing the Student to take breaks.

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 School Dist., 696 F.3d 233, 249 (3d Cir. L.A.R. 34.1(a)(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, Board of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 314 (6 Cir. R. 354(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 School Dist.*, 826 F.Supp.2d 635, 660 (S.D.N.Y. 2011). *See also, A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F.Supp.2d 221,225 (D. Conn. 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 legal standard is particularly relevant because the Student’s progress was being monitored and tracked, and he appeared to be making progress in math and science. A 504 Plan was put in place on April 18,

2018, and until the Parent filed the Due Process Complaint on October 11, 2018, there was no impetus for such an evaluation.

It is not just the diagnosis of a learning disability that triggers an IDEA response, but the need for special educational services. *Woodstock*, 572 F.Supp.2d at 225. In the present case, even if there was recognition of the need, there was intervention being provided through close monitoring and interventional services under RTI. In *Woodstock*, the school used Child Study Teams (“CSTs”) to determine whether the student “could be accommodated as a regular education student and the teams developed action plans to address the difficulties he was having.” *Woodstock*, 572 F.Supp.2d at 227. CSTs were similar to the SIT, and the action plans seem similar to the RTI’s monitoring and interventions “for assisting and identifying struggling students. . . . The use of alternative programs, such as CSTs, is not inconsistent with the IDEA. For it is sensible policy for LEAs to explore options in the regular education environment before designating a child as a special education student.” *Id.*

The Parent did not prove that the Student should have been identified as a student in need of special education services. The evidence showed that he was being monitored in the second tier of RTI, which maintained increased scrutiny and monitoring, and that he was given educational interventions that he could benefit from if he was available to learn. While it is true that the Student is in the Third grade and reading at a Kindergarten level – different students’ progress at different rates, and a student progressing at a slower rate is not automatically suspected of having a learning disability. *D.K., supra*. If there is a positive response to the interventions, special education may not be indicated. The Student was not declining in all subjects – in fact, he was only declining in the courses for which he often arrived late in the morning or during which he was absent. There was a great deal of testimony offered by PGCPs regarding the Student’s attendance record from kindergarten through Second grade. Out of 180 days of school, the Student was

absent twenty-three days and tardy fifty-three days in kindergarten, he was absent twenty-three days and tardy seventy-eight days in First grade and he was absent 34.5 days and tardy 85 days in Second grade. This attendance record for a young child is abysmal and any reasonable person can correlate the Student's attendance record and his declining grades in reading, which is the Student's first class of the day. There is also a direct correlation to the Student's confidence level and negative behaviors he exhibits in class and his attendance. Dr. [REDACTED] and Ms. [REDACTED] both testified that the more a child is available to access the curriculum, the more they learn. There was testimony from various teachers that the Student was 30 to 45 minutes late on average, and based on the testimony of his Second grade reading teacher, the Student would miss half of the reading class when he was late for school. There was also testimony from Ms. [REDACTED] that she was unable to truly assess his abilities and implement the Student's interventions because of his attendance record. Ms. [REDACTED] believed that the Student would make progress if he was present.

However, even if the Student – who was making progress in some subjects - was deemed to be “struggling,” not every “struggling” student requires a special education evaluation. *Scarsdale, supra*. There is no strict liability requiring the school to identify the child at the “earliest possible moment.” *Woodstock, supra*. The Parent did not meet the burden to prove that PGCPs violated its obligation under Child Find to conduct an initial evaluation of the Student on its own initiative.

PGCPs did not fail to conduct an initial evaluation of the Student after requests for assistance were made by the Parent

The second issue is whether the PGCPs failed to evaluate the Student when the Parent made numerous requests for assistance. I found the Parent in this matter to be honest and forthcoming in her testimony regarding all that she has done to help the Student. I empathize with and understand that she is disheartened that the Student is in the Third grade and struggling to read which negatively affects his confidence. The Parent is involved and it is obvious from

the evidence presented that she has communicated with teachers and administrators in the PGCPs about her concerns with the Student's educational progress in reading since First grade. The evidence shows that she has asked for resources, strategies, meetings with staff and a 504 plan to tackle the Student's deficit. However, the Parent testified that she never made a request for a special education evaluation to anyone in the PGCPs. There are numerous requests for assistance but no request for an evaluation. Assistant Principal [REDACTED] testified that if the Parent had made such a request, the Special Education Coordinator would have been contacted and the evaluation process would have begun but no such request was ever made. PGCPs provided testimony from staff that corroborated the Parent's testimony that she did not request an initial evaluation of the Student.

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). A student with a suspected disability who may need special education shall be referred, *in writing*, to a public agency. An initial referral may be initiated by the student's parent; or a representative of a public agency. COMAR 13A.05.01.04 (emphasis added). There is absolutely no evidence to support the Parent's claim that a request was made for an initial referral for evaluation for special education services. There is no case law presented by the Parent to support her contention that her requests for assistance should be construed as a request for an initial evaluation under the IDEA. Therefore, the Parent has failed to meet her burden with regards to this issue.

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 during the 2016-2017 and

2017-2018 school years. 20 U.S.C.A. § 1412(a)(3) (2017); *Jana K. ex rel. Tim K. v. Annville-Cleona School Dist.*, 39 F.Supp.3d 584 (M.D. Pa. 2014) ; *D.K. v. Abington School Dist.*, 696 F.3d 233 (3d Cir. L.A.R. 34.1(a)(2012); *Schaffer v. Weast*, 546 U.S. 49 (2005);

2. The PGCPS did not fail to conduct an initial evaluation of the Student after requests for assistance were made by the Parent. 34 C.F.R. § 300.301(b)(2018) and COMAR 13A.05.01.04; and

3. The Parent is not entitled to any remedy.

ORDER

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

December 26, 2018
Date Decision Issued⁸

Signature Appears on Original

Tameika Lunn-Exinor
Administrative Law Judge

TLE/cmg
#177342

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) (2018). 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.

⁸ The forty-five-day time period for the issuance of this decision began to run on November 9, 2018, the date OAH received notice that the resolution session was conducted without a resolution. In accordance with the applicable regulations, the decision in this case is due on Monday, December 24, 2018. On Thursday, December 20, 2018, the OAH received a notice for immediate release from the Governor's Office that all State offices would be closed on Monday, December 24, 2018 in observance of Christmas Eve. Therefore this decision was issued on the next business day for the State of Maryland, which was Wednesday, December 26, 2018.

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]