

██████████,
STUDENT

v.

PRINCE GEORGE'S COUNTY
PUBLIC SCHOOLS

* BEFORE JENNIFER M. CARTER JONES,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-PGEO-OT-18-27393
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DECISION

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STATEMENT OF THE CASE

On August 24, 2018, ██████████ (Parent) filed a Due Process Complaint (Complaint) on the behalf of her daughter, ██████████ (Student), with the Office of Administrative Hearings (OAH),¹ alleging the Prince George's County Public Schools (PGCPS) had violated the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).² 20 U.S.C.A. § 1415(f)(1)(A) (2017).³

On September 12, 2018, the Parties participated in mediation but were unable to reach a resolution of the matter. Also on September 19, 2018, I conducted a telephone prehearing

¹ "Filed" means "the earlier of when the document is postmarked or received at the [OAH] and, when required, served on the other parties to a proceeding or an administrative law judge." COMAR 28.02.01.02. The Complaint was dated August 23, 2018, but postmarked August 24, 2018. The OAH received the Complaint on August 29, 2018.

² All references to Title 20 of the United States Code Annotated (U.S.C.A) are to the 2017 volume.

³ U.S.C.A. is an abbreviation for United States Code Annotated.

conference with the Parties. PGCPs was represented by Gail Viens, Esquire. The Student and Parent were not represented. I issued a Prehearing Conference Report and Scheduling Order on September 12, 2018.

I held a hearing on October 2, 2018, at the Largo Government Center in Largo, Maryland. The Parent represented the Student. Gail Viens, Esquire, represented PGCPs. The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a) (2017);⁴ Md. Code Ann., Educ. § 8-413(e)(1) (2018);⁵ 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. 2018); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

Did PGCPs deny the Student a Free and Appropriate Public Education (FAPE) by:

1. Refusing to or failing to evaluate the Student for a learning disability since August 24, 2016;⁶
2. Placing the Student on suspension or house suspensions; and
3. Failing to alert the Parent of the Student's absences from school and to involve truancy officials related to those absences?

⁴ All references to Title 34 of the Code of Federal Regulations are to the 2017 volume.

⁵ All references to the Education Article of the Maryland Annotated Code are to the 2018 volume.

⁶ This date is derived from the IDEA and State statutes of limitation, 20 U.S.C.A. § 1415(f)(3)(C)(2017) and Md. Code Ann., Educ. § 8-413(d)(3) (2018), which provide the complaining party must file any due process complaint "within two years of the date the party knew or should have known about the action that forms the basis for the due process complaint." *Id.* The statute of limitations does not limit the Parent from seeking compensation for as many years as a deprivation is found to exist. *See G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F. 3d 601 (3rd Cir. 2015). *See also T.B., Jr. ex rel T.B., Sr. v. Prince George's Cnty. Bd. of Educ.*, 2016 WL 7235661 (D. Md. December 13, 2016).

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence on behalf of the Parent:

- Parent 1 Complaint letter from the Parent to [REDACTED] High School ([REDACTED]), dated August 20, 2018
- Parent 2 Email from the Parent to Mr. [REDACTED] at [REDACTED] Middle School ([REDACTED] MS),⁷ dated April 9, 2016; Hand-written letter from the Parent to [REDACTED] [REDACTED] School Counselor, dated March 23, 2017 (one smaller and one larger version); Letter from the Parent to [REDACTED] at [REDACTED],⁸ dated April 23, 2018
- Parent 3 Emails between the Parent and the Office of the Ombudsman, PGCPSS, for dates including January 30, 2018 through February 2, 2018
- Parent 4 Letter from [REDACTED] PGCPSS Pupil Personnel Worker, to the Parent, dated February 13, 2018
- Parent 5 The Student's Report Card for the 2017 - 2018 academic year
- Parent 6 Copy of school attendance data for the 2017 - 2018 academic year

I admitted the following exhibits on behalf of PGCPSS:

- PGCPSS 1 - 3 Not offered
- PGCPSS 4 Handwritten letter from the Parent to [REDACTED] dated March 23, 2018 (see Parent 2); Notice of Individualized Education Program (IEP) Team Meeting, dated May 4, 2017; IEP Team Meeting Sign-In Sheet, dated May 15, 2018; Copy of receipt of Maryland Procedural Safeguards Notices, dated May 15, 2018
- PGCPSS 5 Letter from the Parent to [REDACTED], dated April 23, 2018 (see Parent 2); Notice of IEP Team Meeting, dated May 11, 2018; Notice and Consent for Assessment, dated June 7, 2018; IEP Team Meeting Sign-In Sheet, dated June 7, 2018; Copy of receipt of Maryland Procedural Safeguards Notices, dated June 7, 2018; Notice of IEP Team Meeting, dated August 31, 2018; IEP Team Meeting Sign-In Sheet, dated September 6, 2018; Copy of receipt of Maryland Procedural Safeguards Notices, dated September 6, 2018; Consent for Release of

⁷ The nature of Mr. [REDACTED]'s professional role at [REDACTED] MS is unclear.

⁸ The nature of Ms. [REDACTED]'s professional role at [REDACTED] is also unclear.

Information, dated September 6, 2018; emails between [REDACTED], M.Ed., [REDACTED] Special Education Department, [REDACTED] School Psychologist, and the Parent, for dates including July 23, 2018 and August 24, 2018

PGCPS 6 Not offered

PGCPS 7 Resumes for [REDACTED], [REDACTED] School Psychologist, and [REDACTED] PGCPS Instructional Specialist for Special Education Compliance⁹

Testimony

The Parent and the Student testified.

PGCPS presented the following witnesses:

- [REDACTED] PGCPS Special Education Compliance Instructional Specialist, accepted as an expert in special education
- [REDACTED], [REDACTED] School Psychologist, accepted as an expert in school psychology

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Student was born in [REDACTED] 2002. She is currently in the tenth grade at [REDACTED]
2. The Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and is on medication.
3. Under certain circumstances, students diagnosed with ADHD may be eligible for special education services if it rises to the level of "other health impairment" under the IDEA.
4. The Student attended [REDACTED] MS for middle school.
5. On or about April 9, 2016, the Parent sent an email to Dr. [REDACTED] at [REDACTED] MS. In her email, the Parent told Dr. [REDACTED] the Student was having difficulty comprehending her school work and she requested that the Student be provided with "additional testing." (Parent 1).

⁹ PGCPS included a Resume for [REDACTED] but did not offer it into evidence because Ms. [REDACTED] did not testify at the hearing.

6. PGCPS did not evaluate the Student after the Parent's April 9, 2016 email.
7. The Student initially attended high school at [REDACTED] High School ([REDACTED]), beginning in August 2016.
8. On August 19, 2016, the Parent sent an email to Dr. [REDACTED] at [REDACTED] and requested that the Student be evaluated in all of her subjects. The Parent further informed Dr. [REDACTED] the Student's grades were extremely low and she had been struggling with comprehending her work.
9. PGCPSS did not evaluate the Student after the Parent's August 19, 2016 email to Dr. [REDACTED]
10. On March 23, 2017, the Parent wrote a letter addressed to "Ms. [REDACTED] whom it may concern:" In the March 23 letter, the Parent requested that the Student be evaluated for a "learning disability/special education/ IEP" for each of her subjects. (Parent 2).
11. Ms. [REDACTED] signed the Parent's March 23 letter, acknowledging receipt.
12. On May 4, 2017, PGCPSS sent the Parent a Notice of IEP Team Meeting inviting the Parent to an IEP team meeting on May 15, 2017. The May 4, 2017 Notice of IEP Team Meeting noted the purpose of the meeting was to "review written referral and/or existing data and information, and, if appropriate, determine eligibility for special education services." (PGCPSS 4).
13. On May 15, 2017, PGCPSS convened an IEP team meeting. The Parent and the Student attended this meeting along with a school special educator; the [REDACTED] Assistant Principal; [REDACTED], [REDACTED] School Psychologist at the time; and, [REDACTED] [REDACTED] School Counselor.

14. At the conclusion of the May 15, 2017 IEP team meeting, PGCPs gave the Parent a copy of the Parental Rights and Safeguards Notice, provided the Parent with a verbal and written explanation of the Parents' Rights and Responsibilities in the Individualized Education Program Process, and provided the Parent with a written explanation about access to habilitative services.

15. Prior Written Notice is a written description of what matters were considered and discussed at an IEP team meeting, a description of any action proposed or refused by the school system, an explanation of why the agency proposed or refused any action during the IEP team meeting, and a description of the information and data the IEP team based their decision to propose or refuse any action. The IEP team is required to provide a parent with Prior Written Notice after every IEP team meeting.

16. PGCPs did not give the Parent a copy of any Prior Written Notice after the May 15, 2017 IEP team meeting.

17. PGCPs did not evaluate the Student after the May 15, 2017 IEP team meeting.

18. The Student attended [REDACTED] for the 2017 - 2018 school year.

19. On January 26, 2018, the Student was involved in a physical altercation at [REDACTED]. As a result of this altercation, the Student was disciplinarily removed (*i.e.* suspended) from school for eleven days.

20. On February 13, 2018, Pupil Personnel Worker [REDACTED] conducted an extended suspension conference to determine whether the Student should remain on suspension beyond the eleven days. Ms. [REDACTED] determined the Student should not be placed on extended suspension and the student should return to school the following day, February 14, 2018.

21. PGCPS did not evaluate the student for a learning disability during the 2017-2018 school year.

22. Between September 6, 2017 and June 20, 2018, the Student was absent from at least one period of her school day 59.5 days out of 180 scheduled school days.¹⁰

23. By the third quarter of the 2017-2018 school year, the Student was failing most of her classes.

24. On April 23, 2018, the Parent wrote a letter to [REDACTED] at [REDACTED] again requesting that the Student be evaluated for special education services eligibility.

25. On May 11, 2018, PGCPs sent the Parent a Notice of IEP Team Meeting inviting the Parent to an IEP team meeting on May 21, 2018.¹¹

26. On June 7, 2018, PGCPs convened an IEP team meeting. The Parent attended this meeting along with a school special educator, the Student's English teacher, a case manager, the [REDACTED] Assistant Principal, [REDACTED] School Counselor Ms. [REDACTED] and Ms. [REDACTED] the [REDACTED] School Psychologist.

27. At the June 7, 2018 IEP team meeting, after reviewing the Student's grades, attendance record and the Parent's request for evaluation, the IEP team determined the Student should receive psychological and educational testing to determine if she was eligible for special education and related services.

28. Also on June 7, 2018, the Parent gave consent to PGCPs to evaluate the Student's cognitive, social/emotional/behavioral, and academic performance.

29. At the conclusion of the June 7 IEP team meeting, PGCPs gave the Parent a copy of the Parental Rights and Safeguards Notice and provided the Parent with a verbal and written

¹⁰ The Student's absences varied among all her class periods/subjects.

¹¹ It is unclear if the IEP team met on May 21, 2018.

explanation of the Parents' Rights and Responsibilities in the Individualized Education Program Process.

30. Between June 7 and July 12, 2018, Ms. [REDACTED] called the Parent at two different phone numbers to schedule educational and psychological assessment for the Student. She was unable to reach the Parent, but she left a voicemail at one of the numbers for the Parent.

31. By an email dated July 12, 2018, Ms. [REDACTED] advised the Parent she was available to conduct the psychological assessment of the Student on July 30, July 31, and August 1, 2018. Ms. [REDACTED] also advised the Parent that [REDACTED] [REDACTED] Special Educator, was available to conduct the educational assessment of the Student the week of July 23 – July 26, 2018.

32. In her July 12, 2018 email, Ms. [REDACTED] asked the Parent to advise Ms. [REDACTED] of her availability on the dates she offered to conduct the educational and psychological assessments.

33. The Parent did not respond to Ms. [REDACTED]'s attempts to schedule assessments for the Student before July 16, 2018, when Ms. [REDACTED] went out of the country for two weeks.

34. [REDACTED] began working as a Special Education Compliance Instructional Specialist with PGCPS on August 20, 2018.

35. On August 31, 2018, PGCPS invited the Parent to attend an IEP team meeting on September 6, 2018, to "review existing information to determine" if the Student should be evaluated to determine if she had a learning disability and was eligible for special education services. (PGCPS 5).

36. On September 6, 2018, the IEP team met and determined that PGCPS would conduct cognitive, social/emotional/behavioral, and academic performance assessments of the

Student. The IEP team also determined the Parent would receive the results of those assessments by October 23, 2018, and the IEP team would reconvene on October 30, 2018, to review the results of the assessments. At that time, the IEP team will also decide whether the Student is eligible for special education services under the IDEA and to address whether the Student is eligible for any compensatory services.

37. The Parent attended the September 6, 2018 IEP team meeting.

38. At the conclusion of the September 6, 2018 IEP team meeting, PGCPS gave the Parent a copy of the Parental Rights and Safeguards Notice, provided the Parent with a verbal and written explanation of the Parents' Rights and Responsibilities in the Individualized Education Program Process, and provided the Parent with a written explanation about access to habilitative services.

39. As of October 2, 2018, the date of the hearing, Ms. [REDACTED] had completed the educational testing of the Student. Ms. [REDACTED] had begun conducting psychological testing of the Student.

40. Determining whether the Student is eligible for special education services requires an evaluation of the assessments she has been given, a discussion about the Student's attendance and behavior and a multifaceted/multidisciplinary consideration of the Student's complete psychological, educational, medical and behavioral profile.

DISCUSSION

The Legal Framework

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C. §§ 1400-1482; 34 C.F.R. Part 300; Md. Code Ann., Educ. §§ 8-401 through 8-417 and COMAR 13A.05.01. The IDEA requires "that all children with

disabilities have available to them a FAPE 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* Md. Code Ann., 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 20 U.S.C.A. section 1401(3) and the applicable 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.

See also Md. Code Ann., 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 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.

In this instance, until recently, 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. In April 2016, when the Student was middle school at ■■■ MS, the Parent first requested that PGCPs evaluate the Student for a disability under the IDEA.

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. 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 34 C.F.R. § 300.301 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. *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

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.

The IEP is the tool for providing necessary services to the disabled child. 20 U.S.C.A. § 1414(d). Congress instructed each public school system to review such a child's IEP

periodically . . . to determine whether the annual goals for the child are being "achieved" and to revise the IEP as appropriate to address –

- (I) any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;
- (II) the results of any reevaluation . . . ;
- (III) information about the child provided to, or by, the parents . . . ;
- (IV) the child's anticipated needs; or
- (V) other matters.

20 U.S.C.A. § 1414(d)(4)(A)(i) & (ii).

The substantive requirements of the IDEA mandate, as stated above, that state and local education agencies make a FAPE available to children with disabilities. 20 U.S.C.A. § 1412(a)(1). As the Supreme Court detailed in *Hendrick Hudson District Board Of Education v. Rowley*,¹² because special education and related services must meet the state's educational standards, the scope of the benefit required by the IDEA is an IEP reasonably calculated to permit the student to meet the state's educational standards; generally, to pass from grade-to-

¹² 458 U.S. 176 (1982).

grade on grade level. *Rowley*, 458 U.S. at 204; 20 U.S.C.A. § 1401(9). The Supreme Court further refined the meaning of a FAPE in a recent case, holding that for an educational agency to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988 (2017).

In addition to the IDEA's requirement that a disabled child receive appropriate educational benefit, the child must be placed in the least restrictive environment (LRE) to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i) and 300.117. Yet, placement in the general education environment may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. 34 C.F.R. § 300.114(a)(2)(ii).

Throughout the process of identifying a student as a child with a disability and establishing the appropriate individualized educational content for the student, parents are entitled to certain mandatory procedural protections related to the identification of the student as a child with a disability, the establishment of the individualized educational content reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances, and notice of the parents' right to appeal any determination of the IEP team with which they disagree. 20 U.S.C.A. § 1415. Additionally, every time the Student's IEP team meets, the local education agency is required to provide the parents with "prior written notice" which essentially means the local education agency must provide in writing, what was discussed during the IEP team meeting and any conclusions made and proposed actions with regard to the

student's educational program. *Id.* When the local education agency fails to abide by the procedural protections afforded students and parents under the IDEA, at a hearing, the parent must prove that any procedural violation resulted in a denial of FAPE to the child. Particularly, the parent must prove that the procedural violation **(I)** impeded the child's right to a free appropriate public education; **(II)** significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or **(III)** caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(i) and (ii).

Furthermore, a child who engages in behavior that violates a student code of conduct may be eligible for protection under the IDEA even if that student has not been determined to be eligible for special education and related services if the local education agency "had knowledge . . . that the child was a child with a disability before the behavior that precipitated the disciplinary action." 34 C.F.R. § 300.534(a). According to the IDEA:

A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred -

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child . . . ; or

(3) The teacher of the child, or other personnel of the [local education agency], expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

34 C.F.R. § 300.534 (b).

In such a circumstance, a student who is not receiving special education and related services but who *should* be receiving them would be entitled to certain protections when she is suspended from school for more than ten days, including special education and related services during suspension. 34 C.F.R. § 300.530 (d)(4). A failure to provide those special education

services could result in a denial of FAPE for the time the student did not receive services for any time beyond the tenth day of suspension. Particularly, the local education agency would be required to make a determination of whether the student's behavior was a manifestation of her disability (manifestation determination) and, if so, address the student's behavior and either return the student to school or provide special education services for any period of time the student remains suspended beyond ten days. 34 C.F.R. §530 (e), (f).

Finally, if a school district fails to offer a student a FAPE, it must fund private placement if the placement is appropriate. *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 369. (1985). To be appropriate, the private placement and program must be reasonably calculated to provide the student an educational benefit. *Carter v. Florence Cty. Sch. Dist. Four*, 950 F.2d 156, 163 (4th Cir. 1991), *aff'd*, *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

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 that PGCPS denied the Student a FAPE when it failed to evaluate the Student as consistently requested by the Parent beginning in April 2016; inappropriately suspended the Student; and failed to address the Student's absences. Furthermore, regarding any alleged procedural violations, the Parent has the burden of proving that those violations resulted in the denial of FAPE to the Student.

The Parties' Positions

The Student/Parent

The Parent asserts that since the Student was in middle school, the Parent believed the Student may have a disability that impacts her ability to derive meaningful educational benefit from her general education academic course load. Particularly, the Parent asserts that she has

repeatedly requested that PGCPS evaluate the Student for a disability since Middle School, but PGCPS either ignored her requests or declined to evaluate the Student. In support of her position, the Parent submitted an April 9, 2016 email she wrote to Mr. [REDACTED] an official at [REDACTED] MS; an August 19, 2016 email she sent to "Dr. [REDACTED]" at the Student's first high school, [REDACTED] a March 23, 2017 handwritten letter she delivered to [REDACTED], [REDACTED] School Counselor; and an April 23, 2018 letter she sent to [REDACTED] at [REDACTED]. In each of these letters, the Parent explained that the Student was not doing well in school and requested that the Student be assessed. The Parent testified that she never received any response to her request that the Student be evaluated.

The Parent explained that the Student has begun to skip school and develop emotional issues as a result of her inability to grasp the academic material at school. To that end, the Parent submitted the Student's attendance records, which demonstrated that between September 6, 2017 and June 20, 2018, the Student was absent from at least one period of her school day 59.5 days out of 180 scheduled school days.

The Parent also asserted that the Student was inappropriately suspended for eleven days after the Student was involved in a physical altercation at [REDACTED] and the Student was required to serve what she called "in-house suspensions".¹³ To support her assertions, the Parent submitted a copy of PGCPS' Notification Request of Extended Suspension and Pupil Personnel Worker [REDACTED]'s decision denying an extended suspension and authorizing the Student's return to school.¹⁴

¹³ From what I glean from the Parent's testimony, these "in-house suspensions" are similar to detention.

¹⁴ The Parent represented that she attempted to obtain copies of the "in-house suspensions" but the school administrator would not give them to her. It is unclear if any document exists related to any alleged "in-house suspension."

The Parent acknowledged that she signed a consent form, allowing PGCPS to evaluate the Student and that an IEP Team Meeting is scheduled for the end of October to review the results and other data to determine if the Student has a disability requiring special education and related services under the IDEA. Regardless of any current evaluation and the scheduled late-October IEP team meeting, the Parent testified that due to PGCPS's past failures to evaluate the Student despite consistent requests from the Parent that Student be evaluated, she has lost confidence that the school will adequately evaluate the Student.¹⁵

Ultimately, the Parent testified that she is a single mother and is doing the best she can to help her daughter, who has begun to display emotional problems as a result of her inability to grasp the academic material in her classes.

The Student also testified, stating that the academic work became harder for her to comprehend in middle school. She further explained that at [REDACTED] she would ask the teachers questions and instead of answering her questions, they would reply in a sarcastic manner. The Student lamented that other students often pick on her and that she feels dumb because she does not understand any of her work. To that end, the Student explained she no longer sees the purpose of going to school at all.

Ultimately, as a result of PGCPS' failure to evaluate the Student from April 9, 2016 through August 2018, the Parent asserts the Student was denied an IEP and thus, denied a FAPE. In addition to compensatory services, the Parent testified that she is seeking \$30,000,000.00,¹⁶

¹⁵ The Parent did not request an independent educational evaluation in her complaint.

¹⁶ The Parent also requested \$30,000.00 as a remedy in her Due Process Complaint for "mental anguish". As I explained to the Parent at a prehearing conference I conducted with the Parent and Ms. Viens on September 12, 2018, such damages are unavailable as a remedy at an administrative due process hearing. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 371 (1985) (distinguishing the availability of "damages" as a remedy under the IDEA from reimbursement for private school tuition by the local education agency).

private placement, computers and electronic supplies, transportation to school, tutoring, counseling, and uniforms.

PGCPS

PGCPS asserts that the Parent's request for relief under the IDEA for PGCPS's alleged failure to provide the Student with a FAPE is premature. Although PGCPS concedes that the Parent has requested that the Student be evaluated for an educational disability since middle school, it argues that as of June 7, 2018, PGCPS agreed to conduct cognitive and academic evaluation of the Student to assess whether she has an educational disability. Until those evaluations are complete, and PGCPS has a full picture of the Student, PGCPS argues that there can be no determination that the Student is eligible for special education services or that she was denied FAPE at any point prior to the evaluation results. According to PGCPS, it cannot identify any child as a student with a disability without reviewing all of the Student-related data; including anecdotal data, grades, disciplinary history, attendance, and the results of cognitive and academic evaluations. PGCPS agreed to complete the Student's evaluations and provide the results to the Parent no later than October 23, 2018, and to convene an IEP team meeting on October 30, 2018, to discuss and determine whether the Student has an educational disability and what steps are required to address the Student's academic performance.

In support of its position, PGCPS presented the testimony of [REDACTED] PGCPS Instructional Specialist for Compliance. Ms. [REDACTED] testified that when she first began working for PGCPS on August 20, 2018, she became aware that the Parent had requested that the Student be evaluated. Reviewing the Student's history, Ms. [REDACTED] learned that the Parent had requested evaluations at least back to March 2017, when she submitted a request for assessments to Ms. [REDACTED] who was the [REDACTED] School Counselor at the time. Ms. [REDACTED] testified that PGCPS

convened an IEP team meeting on May 15, 2017. Ms. [REDACTED] also testified that her review of PGCPS records revealed that no prior written notice (minutes) of that May 15, 2017 IEP team meeting was produced or provided to the Parent. In light of the proximity of the May 15, 2017 IEP team meeting to the Parent's March 23, 2017 request to Ms. [REDACTED] that PGCPS assesses the Student, Ms. [REDACTED] assumed the IEP team convened on May 15, 2017 to address whether the Student should be evaluated for a disability. PGCPS, however, never conducted any assessments.

In light of the Parent's historical consistent requests that the Student be evaluated and based upon the drop in the Student's grades and attendance, Ms. [REDACTED] testified that she believes PGCPS should have evaluated the Student after the May 15, 2017 IEP team meeting, and, potentially as early as August 2016. To address the failure of the school system to evaluate the Student and recognizing that the Parent and the Student may have lost trust in PGCPS due to that failure, Ms. [REDACTED] explained she felt it was important that PGCPS immediately assess the student. Furthermore, if the assessments revealed the Student had an educational disability and was eligible for special education and related services, Ms. [REDACTED] believed the Student would be entitled to compensatory services.

Ms. [REDACTED] further explained that compensatory services are designed to make up for the time a local education agency fails to identify a child with a disability and/or provide that child with special education and related services. Compensatory services are intended to make a student whole – to fill in the gaps in a student's education that exist because the local education agency failed to appropriately individualize the student's educational program during a period of time in the past. Ms. [REDACTED] testified that she absolutely believes that if the Student's assessments reveal she has a disability that impacts her access to the educational curriculum, the

Student would be entitled to compensatory services for the time during which the Parent requested that the Student be assessed, but PGCPs failed to do so.

Before PGCPs could make the determinations that the Student was disabled, required an IEP, and was entitled to compensatory services, Ms. ██████ explained the student would have to be thoroughly assessed. To that end, Ms. ██████ testified that it is inappropriate for the IEP team to rely on only a few points of data, such as attendance, grades, or behavior, to determine whether the Student needs special education services. Rather, "in order to really determine if there is a suspected disability under IDEA, you must have multiple sources of data . . . to have everything that is presented not only at the school but at home as well." (T. ██████ at 75)

Accordingly, Ms. ██████ explained, the IEP team was required to compile multiple forms of data about the Student, including parent observations, teacher observations, grades, scores on State and local general assessments, the Student's present level of achievement and past levels of achievement, and the results of assessments in academic performance (reading, mathematics and written language), Intellectual/Cognitive Functioning, and Emotional/Social/ Behavior Development. Ms. ██████ further noted that the IEP team would also consider the Student's existing diagnosis of ADHD and any medications she takes on a regular basis. Only once PGCPs and the Parent obtained the results of all of those assessments could the IEP team make any determinations about educational programming for the Student.

As the required assessments would be completed by October 23, 2018, and an IEP team meeting was scheduled for October 30, 2018, to review the data obtained from the assessments and determine whether the Student had a disability and required an IEP, PGCPs reiterated its argument that the Parent's allegations that the Student was denied a FAPE and is entitled to relief for that denial is premature.

School Psychologist [REDACTED] echoed Ms. [REDACTED]'s testimony explaining that, as of the hearing date, PGCPs was close to completing comprehensive academic, psychological and behavioral assessments of the Student using a multitude of tools. Ms. [REDACTED] further testified that after the Parent gave her written consent for PGCPs to conduct assessments of the Student to schedule testing over the summer, Ms. [REDACTED] emailed the Parent on June 12, 2018, advising her of the specific dates she and Mrs. [REDACTED] a [REDACTED] Special Education Teacher, would be available to conduct the psychological and academic testing for the Student. Ms. [REDACTED] also called two phone numbers for the Parent and was able to leave a voicemail at one of those numbers, asking the Parent to contact her to schedule the Student's assessments.

Like Ms. [REDACTED] Ms. [REDACTED] explained that an IEP team cannot determine if a student has a specific learning disability or is eligible for special education services until that student is assessed to address all of the areas of potential or suspected disability. Accordingly, the IEP team cannot develop an IEP designed to provide a student with a FAPE or, as relevant in this case, determine if the student has been denied a FAPE as a result of the school system's failure to identify the student as a child with a disability. Ms. [REDACTED] reiterated that as of October 23, 2018, all of the Student's assessments should be completed and the results of those assessments provided to the Parent. On October 30, 2018, the IEP Team will meet to review the results of the assessments to determine if the Student is eligible for special education services. Ms. [REDACTED] further explained that as of the hearing date and until it has all of the results from the various assessments, the IEP team has no way to know if the Student is eligible for special education services or not. Ms. [REDACTED] explained that this is true even though the Student has been diagnosed with ADHD, as the assessments will allow the IEP team to learn whether that

diagnosis rises to the level to be classified as an "other health impairment," which is a disability under the IDEA warranting special education services.

Regarding the Student's January 2018 disciplinary removal, PGCPS acknowledges that the Parent had requested assessment of the Student, prior to the January 26, 2018 altercation at [REDACTED] and thus, pursuant to 34 C.F.R. § 300.534, the Student was eligible at that time to have a determination of whether the Student had a disability and, if so, whether her involvement in the January 26, 2018 fight was a manifestation of that disability. Accordingly, PGCPS concedes that, should the IEP team determine the Student is eligible for special education and related services, it must also address providing compensatory services for the eleventh day the Student remained disciplinarily removed.

Analysis

The Parent has not proven the Student is eligible for special education and related services

When a student is suspected of having a disability rendering her eligible for special education and related services, the nature and educational impact of that disability is not immediately known. Although the road to special education services *begins* with the suspected disability, that suspicion marks only the beginning of the journey to the provision of special education and related services and the road includes stops at various important and mandatory checkpoints. The first checkpoint is assessment. That is, the local education agency must evaluate the Student using measures aimed at comprehensively assessing the breadth of the Student's disability and the impact on that student's ability to access the academic curriculum. The next checkpoint involves notifying parents of the results of those assessments and convening an IEP team meeting to address the assessment results, discuss whether the assessments indicate the student has a disability that impacts her education, and if so, identify that disability and

develop an IEP reasonably calculated to enable a student to make progress appropriate in light of the student's disability. It is important to note that whether the local education agency failed to initiate the journey at an earlier time; and whether the student has a disability, is entitled to special education and related services, and has been denied FAPE for that time during which the PGCPs failed to identify the student as needing special education services, can only be determined once the Student has been *identified* as having a disability under the IDEA, making her eligible for special education services.

As stated above, the IEP is the tool for providing necessary services to the disabled child. 20 U.S.C.A. § 1414(d). In the instant matter, the IEP team, including the Parent, has not developed an IEP because the student has not been identified as eligible for special education services. The Parent conceded that as of the date of the hearing, the Student was being evaluated to determine if she has an educationally-impactful disability. As of the date of this decision, the Parent should have received the results of the assessments conducted by PGCPs and an IEP team meeting is scheduled for October 30, 2018, to review the assessment results and to determine if the student has a disability making her eligible for special education services. If so, the IEP team will develop an IEP for the Student, including goals and objectives for the Student's prospective educational progress and services and accommodations designed to allow her to achieve those goals and objectives. As Ms. [REDACTED] explained, if the Student is eligible for special education services and an IEP is developed for the Student, the IEP team will also discuss what compensatory services the Student is entitled to receive for the time PGCPs failed to evaluate the Student for an IDEA-eligible disability.

Conceivably, at a hearing, a Parent might present sufficient evidence that a student is disabled, notwithstanding the fact that the Student has not yet been identified as having a

disability by the local education agency. For instance, a Parent could have a student independently assessed or offer the testimony of educational experts. In the instant matter, however, the Parent points to the Student's grades, her many absences, and her behavior/lack of confidence as the basis for the Parent's position that the Student has a disability impacting her ability to access the curriculum. Ms. [REDACTED] and Ms. [REDACTED] who were accepted as experts in special education and school psychology, respectively, explained the student's grades, behavior and absences do not provide enough information to determine if the Student has a disability. Rather, formal academic and psychological assessments, classroom observations, medical history, parental and teacher input are all necessary forms of information necessary to accurately determine if the Student is disabled. Furthermore, as Ms. [REDACTED] and Ms. [REDACTED] also explained, after fully assessing the Student and reviewing the results of those assessments, the IEP team may determine that the Student does not have a disability that impacts her education.

I conclude that the Parent's reliance on the Student's truancy, grades, and behavior are insufficient to meet her burden of proving the Student has a disability for which she is entitled to special education and related services. In so concluding, I find persuasive Ms. [REDACTED] and Ms. [REDACTED]'s testimony that determining eligibility under the IDEA requires assessment in multiple areas and using multiple assessment tools. Although the IEP team may determine on October 30, 2018 that the Student is eligible for special education and related services, I cannot make that determination based upon the evidence the Parent submitted at the October 2, 2018 hearing.

Procedural Errors

It is clear that PGCPS made two procedural errors regarding the Student. First, PGCPS failed to produce and provide the Parent with prior written notice of the May 15, 2017 IEP team meeting. I agree with Ms. [REDACTED] that in light of the proximity of the IEP team meeting to the

Parent's April 23, 2018 request to Ms. [REDACTED] at [REDACTED] that the Student be evaluated, the purpose of the IEP team meeting was to determine if such evaluations were necessary. Indeed, PGCPS' May 4, 2017 Notice of IEP Team Meeting invitation to the Parent noted the purpose of the meeting was to "review written referral and/or existing data, and information, and if appropriate, determine eligibility for special education services." (PGCPS 4). Accordingly, PGCPS had reason to suspect that the Student *might* have a disability that was impacting her education. PGCPS, however, did not evaluate the child. Conceivably, the IEP team determined at the May 15, 2017 IEP team meeting that the Student did not require assessments and was not disabled, but it failed to produce prior written notice regarding what was discussed and any determinations it made related to the Parent's request for assessments.

Prior written notice serves as an important vehicle of communication between schools and families. It informs parents of the actions the local education agency proposes or refuses and why, providing parents with sufficient information to effectively participate in their child's education and providing notice of parents' due process rights should they disagree with the proposed action or denial of services as determined by the IEP team. In this instance, the Parent was potentially denied an opportunity to challenge whatever decisions the May 15, 2017 IEP team made with regard to the Parent's April 23, 2017 request that the Student be evaluated for special education eligibility. Accordingly, should PGCPS determine at the October 30, 2018 IEP team meeting that the Student does have a disability that makes her eligible for special education and related services, it becomes clear that PGCPS' failure to assess the Student after the Parent's April 23, 2017 request resulted in the denial of a FAPE from that date, and potentially, dating back to April 9, 2016, when the Parent first requested the Student be assessed when she was a student at [REDACTED] MS.

PGCPS's second procedural error was that it failed to address whether the Student's involvement in the January 2018 altercation at [REDACTED] was a manifestation of a disability recognized under the IDEA. As I have stated, notwithstanding the fact that a student has not been identified as needing special education or related services, in certain circumstances, PGCPS must evaluate: 1) if the student has a disability recognized by the IDEA; and, if so, 2) was the Student's conduct a manifestation of her disability. The circumstances when PGCPS must make this inquiry/determination include when the Student's parent has requested that the Student be evaluated for special education and related services. 34 C.F.R. § 300.534 (b). In such a circumstance, a student who is not receiving special education and related services but who *should* be receiving them would be entitled to certain protections when she is suspended from school for more than ten days, including special education and related services during suspension. 34 C.F.R. § 300.530 (d)(4). If PGCPS had made the appropriate inquiry regarding the Student's behavior, it is possible that it may have determined the Student did have a disability, which would trigger protections of the IDEA related to removals from the educational setting for disciplinary purposes. Particularly, in this instance, PGCPS would be required to provide the Student appropriate special education or related services on the eleventh day the Student remained on suspension. A failure to provide special education services *could* result in a denial of FAPE for the time the student did not receive services for any time beyond the tenth day of suspension. 34 C.F.R. § 530 (e), (f).

PGCPS does not deny that it made the above-stated procedural errors. Therefore, should PGCPS determine on October 30, 2018, the student does have an IDEA-recognized disability and the Student is eligible for special education and related services, PGCPS acknowledges that as a result of its procedural errors, the Student was denied a FAPE for the relevant time periods

associated with those errors. Accordingly, it must determine what compensatory services the Student is entitled to receive as a result of that denial of FAPE.

As I have stated, before any determination can be made regarding whether the Student was denied a FAPE due to procedural errors, the Student must first be identified as requiring special education or related services under the IDEA as a result of an applicable disability. The Parent did not offer sufficient evidence at the hearing to allow me to find the Student has a disability making her eligible for special education or related services. Therefore, a critical determination *i.e.* disability, has not been established. According to PGCPs, the IEP team will make this determination on October 30, 2018. As of the date of this decision, however, because the Parent has not met her burden to establish the Student is disabled, I cannot make a determination that she was denied FAPE for any reason, whether substantive or procedural. Whatever the outcome of the October 30, 2018 IEP team meeting, the Parent retains her due process rights.

Regarding the Student's many absences, the Parent offered only her general allegations that PGCPs failed to properly address those absences, denying the Student a FAPE. I have already addressed that absences alone are not sufficient for a disability determination under the IDEA. On October 30, 2018, the IEP team, including the Parent, may have a better idea about whether the Student's absences resulted from a disability not addressed by PGCPs and whether PGCPs's action or inaction regarding those absences resulted in a denial of FAPE. At this time, because the Student has not been identified as having a disability, I cannot find that PGCPs failed to provide the Student FAPE related to her absences.

For the reasons stated above, I find that the Parent and the Student have not met their burden of proving the Student was eligible to receive special education and related services or

that she was denied a FAPE. *Schaffer v. Weast*, 546 U.S. 49 (2005). However, it is possible that the Student may be identified as a student with a disability under IDEA at the conclusion of the identification and evaluation process. Accordingly, PGCPSS may remedy the procedural violations found in this case and the violations' impact the Student's ability to receive FAPE if she is identified as a student eligible for special education services under IDEA. Therefore, I will order that if the Student is determined to be eligible to receive special education and related services under the IDEA, the IEP team must meet and discuss whether the Student requires compensatory services for the procedural violations concerning PGCPSS's failure to produce and provide the Parent with prior written notice after the May 17, 2017 IEP team meeting and its failure to make a manifestation determination related to the Student's January 2018 suspension.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that because the Student has been identified neither as disabled nor eligible for special education and related services, the Parent has not proven that the Prince George's County Public Schools denied the Student a Free and Appropriate Public Education by refusing to or failing to evaluate the Student under the IDEA since August 24, 2016. *Schaffer v. Weast*, 546 U.S. 49 (2005); 34 C.F.R. 300.301; 20 U.S.C.A. §1414(a)(1)(A), (d); COMAR 13A.05.01.05B(2)

I further conclude that the Parent has not proven that Prince George's County Public Schools denied the Student a Free and Appropriate Public Education by disciplinarily removing the student for more than ten days. *Schaffer v. Weast*, 546 U.S. 49 (2005); 34 C.F.R. 300.301; 20 U.S.C.A. §1414(a)(1)(A), (d) and (f)(3)(E)(1); COMAR 13A.05.01.05B(2);

I further conclude that the Parent has not proven that PGCPSS denied the Student a Free and Appropriate Public Education by failing to alert the Parent of the Student's absences

from school and involve truancy officials related to her absences. *Schaffer v. Weast*, 546 U.S. 49 (2005); 34 C.F.R. 300.301; 20 U.S.C.A. §1414(a)(1)(A), (d); COMAR 13A.05.01.05B(2)

I further conclude that the Prince George's County Public Schools made two procedural errors under the IDEA. First, it failed to produce and provide to the Parent prior written notice of the May 15, 2017 IEP team meeting; and, second, it failed to make a manifestation determination regarding the Student's January 2018 11-day disciplinary removal from school.¹⁷ 34 C.F.R. § 300.301; 20 U.S.C.A. § 1415; 34 C.F.R. § 300.534 (b), (d).

I further conclude that as the Prince George's County Public Schools has reason to suspect the Student may have a disability under the IDEA, it must convene an IEP team meeting to review any assessments, determine if the Student has a disability, and to determine if the Student is eligible for special education and related services. If the Student is identified as such, the IEP team must develop an IEP appropriate for the Student and address what compensatory services it will provide the Student as a result of the aforementioned procedural errors.

ORDER

I **ORDER** that PGCPs convene an IEP team meeting to determine if the Student is disabled and eligible for special education services under the IDEA and to determine whether the Student requires compensatory services as a result of the procedural violations enumerated above.

October 26, 2018
Date Decision Mailed

JCJ/emb
#176520

Signature Appears on Original

Jennifer M. Carter Jones
Administrative Law Judge

¹⁷ Despite these procedural violations, as the Parent has not established that the Student has a disability and is eligible for special education and related services under the IDEA, she has not proved the Student was denied a free appropriate public education. Accordingly, she is not entitled to administrative relief at this time.

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.

Copies Mailed to:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]