

XXXX XXXX,

STUDENT

v.

PRINCE GEORGE’S COUNTY

PUBLIC SCHOOLS

*** BEFORE MARC NACHMAN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-PGEO-OT-16-34681**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On November 15, 2016, XXXX XXXX’s (Student) parent (Parent), on the Student’s behalf, filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) seeking compensatory education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415(f)(1)(A) (2010)¹ and 42 U.S.C.A. § 11433.²

On January 11, 2016, I conducted a telephone pre-hearing conference (Conference). The following individuals participated: Andrew W. Nussbaum, Nussbaum Law, LLC, on behalf of Prince George’s County Public Schools (PGCPS); and Marlon Charles, Esquire, on behalf of the Student. By agreement of the parties, the hearing was scheduled for February 15 and 16, 2017, starting each day at 9:30 a.m., at a location identified in the Notice of Hearing prepared and sent by the OAH.

¹ “United States Code Annotated.”

² This section concerns facilitating the identification, enrollment, attendance, and success in school of homeless children and youth. At the commencement of the hearing, the Student’s attorney withdrew this aspect of the Complaint.

I held the hearing on February 15, 2017, at 9201 Basil Court, Room 102, Upper Marlboro, Prince George's County, Maryland. Mr. Charles represented the Student. Mr. Nussbaum represented PGCPS. The hearing was concluded in one day, so it was not necessary to extend the hearing for a second day.

In accordance with the applicable regulations, the decision in this case would normally be due forty-five days after December 2, 2016, the date of the resolution meeting. 34 C.F.R.³ §§ 300.510(b) and (c), 300.515(a) and (c)(2016). Because the hearing commenced more than forty-five days from the date of the resolution meeting, the parties agreed to extend the time requirements and, at their request, I am issuing a decision within thirty days from the close of the hearing. 34 C.F.R. 300.515 (2016); Md. Code Ann., Educ. § 8-413(h) (Supp. 2016).

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2016); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); 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; MSDE procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

The issues are whether PGCPS failed to:

1. Properly evaluate the Student during the 2014-2015 and 2015-2016 school years;

³ "Code of Federal Regulations."

2. Develop an appropriate educational placement for the Student starting in April 2016 (2015-2016 school year);⁴ and
3. Provide/offer a compensatory education plan for failure to provide an appropriate educational placement.

SUMMARY OF THE EVIDENCE

Exhibits⁵

Unless otherwise noted, I admitted the following exhibits on behalf of the Student:

1. IEP
2. "XXXX" (XXXX) Program Information
3. NOT ADMITTED INTO EVIDENCE
4. Résumé: XXXX XXXX
5. Résumé: XXXX XXXX
6. Résumé: XXXX XXXX

⁴ This issue was addressed in the Conference and included in the Student's Pre-Hearing Conference Statement and addressed by me in the Pre-Hearing Conference report. At the start of this hearing, however, the Student's attorney abandoned those grounds as follows:

MR. CHARLES: And just preliminarily before we start with the questioning of this witness, Your Honor, and I'll sign whatever is needed. We'll withdraw the issue related to her residency and the comp ed related to the days that she missed.

JUDGE: Give me one second.

All right.

Mr. Nussbaum, I take it there's no objection on that, not that you actually have a right to it. But with that being said, what I suggest is -- and I'll certainly accept your oral proffer on that -- if you could prepare a letter and then I'll include that in the file.

MR. NUSSBAUM: That's a good idea.

JUDGE: A letter will be fine.

MR. CHARLES: Yes.

(Tr. Page 72:6 to 72:23). Although Mr. Charles did not follow up by sending a letter, he did not produce any evidence on this claim or make any argument in its support anytime during the hearing. Nevertheless, as it was not formally withdrawn, I am maintaining it as an issue in this matter.

Additionally, other than claiming there was a delay in the IEP process due to PGCP's violation of Child Find, Mr. Charles did not present any evidence to challenge the IEP, either procedurally or substantively.

⁵ The parties had no objections to the admission of the opposing party's exhibits, save for an objection by PGCP to the letters and emails contained in Student Ex. # 3. The Student did not subsequently move Student Ex. # 3 into evidence, so it was not admitted.

I admitted the following exhibits on behalf of PGCPS:

1. Student SIT⁶ Referral Form - 2/16/15
2. XXXX⁷ Tier Information - 3/18/15
3. XXXX Tier Information - 5/28/15
4. Student SIT Referral Form- 9/16/15
5. XXXX Tier Information - 9/16/15
6. XXXX Tier Information - 11/18/15
7. DRA⁸ Levels for BGL, OGL, AGL⁹ Designations
8. Letter from Parent - 12/7/15
9. IEP¹⁰ Meeting - 2/10/16
10. IEP Meeting - 4/6/16
11. IEP Meeting - 4/28/16
12. IEP Meeting - 5/24/16
13. IEP Meeting - 8/30/16
14. IEP Meeting -11/1/16
15. Education Assessment - 3/14/16
16. Psychological Assessment Report - 3/23/16
17. IEP - 4/28/16
18. IEP - Amended 12/7/16
19. Progress Reports on IEP Goals
20. Performance Matters
21. Email from XXXX XXXX. re: S.P.I.R.E.¹¹ Assessment -10/19/16
22. S.P.I.R.E. Intervention Data
23. Report Cards
24. Data Collection - Math
25. Attendance History
26. XXXX
27. Resolution Agreement - 11/7/16
28. Résumé - XXXX XXXX
29. Résumé - XXXX XXXX
30. Résumé - XXXX XXXX
31. Résumé - XXXX XXXX
32. Résumé - XXXX XXXX
33. Résumé - XXXX XXXX
34. Résumé - XXXX XXXX
35. Résumé - XXXX XXXX

⁶ “School Implementation Team.”

⁷ “XXXX”

⁸ “Developmental Reading Assessment.”

⁹ Below grade level (BGL), on grade level (OGL) and above grade level (AGL).

¹⁰ “Individualized Education Program.”

¹¹ “Specialized Program Individualizing Reading Excellence.”

Testimony

The Student presented the following witnesses:

- The Parent;
- Dr. XXXX XXXX, who was admitted as an expert in school psychology; and
- XXXX XXXX.

PGCPS presented the following witnesses:¹²

- Dr. XXXX XXXX, who was admitted as an expert in general education and XXXX specifically; and
- XXXX XXXX, who was admitted as an expert in XXXX.

Stipulations

The parties stipulated that if PGCPS presented the three witnesses listed in footnote 12, they would testify as follows:

1. XXXX XXXX is a general education teacher whose résumé is found at PGCPS Ex. # 32. Ms. XXXX was accepted as an expert in general education.
 - a. Ms. XXXX is the Student's teacher for third grade reading and social studies at [School 2], PGCPS.
 - b. Ms. XXXX would testify that the Student receives Special Education services in the classroom and in pull out sessions, and specifically for the S.P.I.R.E reading program.
 - c. Ms. XXXX would further testify that the Student is "flourishing," likes, is interested in her subjects, and participates.
 - d. The Student is making progress, is more comfortable than before as she "fits in" with her fellow third grade students, and her reading scores have improved.
 - e. Ms. XXXX's opinion would be that she does not believe that the Student needs any services in addition to what she is being provided by her special education teachers in order to keep up with her classmates. (Tr. Pages 221:16 to 223:21).
2. XXXX XXXX is a certified special education teacher whose résumé is found at PGCPS Ex. # 33. Ms. XXXX was accepted as an expert in special education.
 - a. Ms. XXXX provides Special Education math services to the student approximately four times per week, between 30 and 40 minutes each time, and mostly in the classroom, but occasionally as a pull out.

¹² The parties entered into stipulations regarding the testimony of three other witnesses, the Student's classroom teachers: XXXX XXXX, XXXX XXXX and XXXX XXXX, whose live testimony PGCPS intended to present. Instead, their stipulated testimony appears in the following section.

- b. The Student is making progress towards her math goals and objectives under her current IEP (PGCPS Ex. # 18) and her progress reports are found at PCGPS Ex. # 19 and 24.
 - c. Ms. XXXX would testify that the Student has been doing well in math, performs as an average student, and does not need services in addition to what she is being provided in order to make progress on her IEP goals and objectives. (Tr. Pages 223:24 to 225:13).
3. XXXX XXXX is a certified special education teacher whose résumé is found at PGCPS Ex. # 34. Mr. XXXX was accepted as an expert in special education.
 - a. Mr. XXXX works with the Student in the area of reading and is her IEP case manager.
 - b. He works with the Student using S.P.I.R.E. Mr. XXXX documented the Student's progress in a recent email to her mother (PGCPS Ex. # 19).
 - c. The Student has made progress in her IEP goals relating to reading, reading comprehension and fluency.
 - d. In Mr. XXXX's opinion, the Student does not need services in addition to what she is being provided in order to make progress on her IEP goals and objectives. (Tr. Pages 225:17 to 226:19).

FINDINGS OF FACT

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

1. The Student is presently nine years of age, having been born in XXXX 2007.
2. At all times relevant to this matter, the Student attended PGCPS schools.
3. Prior to the 2014-2015 school year, the Student attended [School 1].
4. The Student is currently in the third grade at [School 2].
5. The Parent advised PGCPS that she had concerns about the Student's academic progress at her previous school. On February 16, 2015, the Student was referred to XXXX because she was performing below grade level, in math, reading and writing. She had already been receiving reading intervention and small group instruction, "Numberworld" and ELO¹³ after school tutoring. (PGCPS Ex. # 1).

¹³ "Expanded Learning Opportunities." (Tr. Page 121:20 to 121:21).

6. The Student entered the XXXX Tier system on March 18, 2015 in Tier 1 (PGCPS Ex. # 2).
- 2). Per the March 18, 2015 meeting:
- a. The Student's DRA assessment level recorded in October 2014 was 12, with 94% comprehension, 5/13 dictation score for words, 22/38 dictation score for sounds, and no self-correction.
 - b. The Student's DRA assessment level recorded in January 2015 was 16,¹⁴ with 95% comprehension, 10/18 dictation score for words, 43/55 dictation score for sounds, and 1/5 self-correction. The SRI¹⁵ level was 50, indicating "at risk."
 - c. The school's concerns were the Student's ability to retain information, inconsistency, and according to the Parent, focus.
 - d. The Student took longer to complete her activities and a student was assigned to assist her. The Student's teacher modified her assignments and highlighted the problems she had to complete. The teacher noted that the Student's spelling was "getting better" and worked on "Foundations"¹⁶ with the Student. The Student would get frustrated when she got the information incorrect.
 - e. As of the March 2015 XXXX meeting, the plan was to have the Student continue with Foundations, continue with LLI,¹⁷ flashcards and other strategies (i.e., cutting out pictures containing target sounds) to practice letters and sounds, and use the "Waterford" program.
 - f. The next progress monitoring review date was set for May 28, 2015.

¹⁴ The IEP Team minutes from February 10, 2016, indicate her DRA score was 14, which was also below grade level (PGCPS Ex. # 7).

¹⁵ "Scholastics Reading Inventory."

¹⁶ "Foundations" works on basic phonics skills. (Tr., Page 130:19 to 130:22).

¹⁷ "Leveled Literacy Intervention." (Tr. Page 121:14 to 121:15).

7. On May 28, 2015, the XXXX team met to review the Student's progress (PGCPS Ex. # 3), as follows:
- a. The Student's DRA assessment level was 20 with 7 errors; level 28 was difficult and level 24 produced 12 or more errors.
 - b. The Student was working on context clues and vocabulary building, and she was observed thinking about her answers before making choices.
 - c. The Student's writing was inconsistent, her thoughts were jumbled and she did not turn in her classwork.
 - d. PGCPS was concerned about the Student's reading readiness and comprehension (Reading Goal # 1), as measured by the DRA and SRI. The plan to meet these goals in the 2015-2016 school year was:
 - i. Retelling stories;
 - ii. Identifying sequences of events, main ideas and details or facts in literary and information texts; and
 - iii. Responding to readings through mapping, topic webbing and the like.
 - e. Due to inadequate progress, PGCPS was implementing different intervention. The Student was also being retained in the second grade.
 - f. Over the summer, the Parent was going to help with her basic skills over the summer using flash cards, addition, subtraction, simple word problems and strengthening reading skills.

- b. The Student's reading teacher found that she was doing well with additional fact test with accuracy, less well on comprehension, which was difficult for her, but her fluency was good.
 - c. The Student's math teacher found her "good" in place value activity relating to expanded form, and that she was keeping up with the class in math.
 - d. The next progress monitoring review date was set for November 18, 2015.
9. On November 18, 2015, the XXXX team met to review the Student's progress (PGCPS Ex. # 5), as follows:
 - a. The Student was making adequate progress in reaching her goals and continued intervention was indicated.
 - b. The goals were unchanged.
 - c. The next progress monitoring review date was set for January 20, 2016.
10. The Student's DRA level was 24 in October 2015 and 28 in January 2016 (PGCPS Ex. # 9).
11. On December 7, 2015, the Parent sent a letter telling PGCPS that the Student had been diagnosed with ADHD by a licensed psychologist and requesting that the Student be tested by the special education department to rule out learning disabilities (PGCPS Ex. # 8).
12. As a result of the Parent's letter of December 7, 2015, the school developed a 504 Plan to accommodate the Student as a result of her diagnosis of ADHD. The Student continued being monitored under the XXXX program.¹⁸
13. On February 10, 2016, an IEP team meeting was convened to address the Parent's request for assessments. The team proposed conducting cognitive and education assessments to

¹⁸ The Student's "504 Plan" is not the subject of this hearing.

determine the Student's present level of academic performance to see if she would be identified as a student needing special education services. The next meeting was scheduled for April 6, 2016 (PGCPS Ex. # 9).

14. On April 6, 2016, the IEP team met again to review the results of the Student's assessments. Based on those assessments, the IEP team found her to be a student with Other Health Impairment (OHI), and thus qualified for special education services. The IEP team agreed to meet again on April 28, 2016 to discuss and approve a draft IEP (PGPCS Ex. # 10).
15. On April 28, 2016, the IEP team met to discuss the IEP. The draft IEP was rejected in favor of obtaining additional evaluations to determine the Student's current performance in reading and math (PGCPS Ex. # 11).
16. On May 24, 2016, the IEP team again met to review the evaluations and decide on an IEP (PGCPS Ex. # 12). At that meeting:
 - a. The IEP team changed the Student's disability from OHI to Specific Learning Disability (SLD).
 - b. The Student was provided fifteen hours of compensatory services because the school did not meet the timeline for the initial evaluation. The compensatory education was scheduled for one hour in the afternoon for five days at the end of May 2016 and 10 days before mid-June 2016.
 - c. The Student was determined to be eligible for Extended School Year (ESY) services due to school break regression of the skills and concepts she learned during the school year.
17. On August 30, 2016, the IEP team met again to review and revise the Student's IEP (PGCPS Ex. # 13). Some minor modifications were made, such as those regarding the

repetition of instructions and use of a graphic organizer, but an assistive technology (AT) would not be implemented until an AT assessment was completed.

18. An additional IEP team meeting was held on November 1, 2016 (PGCPS Ex. # 14). At that meeting, the Student's progress was reviewed and additional changes were proposed.

19. On November 7, 2016, the Parent and PGCPS school personnel attended a resolution conference to address outstanding concerns of the Parent and the school (PGCPS Ex.

27). The terms of that agreement were as follows:

- a. The Parent will receive data that she previously requested, specifically the interpretive report of the S.P.I.R.E. pretest, DRA, MAP-R¹⁹ and MI (Math) assessments.
- b. PGCPS will conduct an OT²⁰ assessment.
- c. PGCPS will conduct a speech/language assessment.
- d. PGCPS will fund an IEE²¹ for academic testing.
- e. PGCPS will provide 25 hours of compensatory services to be provided by a certified S.P.I.R.E. trained provider, approved by PGCPS, with verification of certification provided by the Parent.
- f. PGCPS will conduct an AT assessment.
- g. The Student's then pending due process complaint and hearing request would be withdrawn.

20. The present Complaint was filed on November 15, 2016. The Complaint alleged denial of FAPE for failure to timely identify, locate and evaluate the Student pursuant to 34 CFR §§300.111, 300.504(a) and (b), 300.301(b) and 300.306. A resolution conference was held on December 2, 2016, without an agreement being reached.

¹⁹ "Measure of Academic Progress- Reading."

²⁰ "Occupational Therapy."

²¹ "Individual Educational Evaluation."

21. The present Complaint requests that PGCPS fund a compensatory education plan for the Student. The Student has not yet availed herself of the 25 hours of compensatory education negotiated for her as a result of the meeting of November 7, 2016 (PGCPS Ex. # 27).

DISCUSSION

Applicable Law

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487 (2010), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 and Supp. 2016), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a free, appropriate public education. 20 U.S.C.A. § 1412. Courts have defined the word “appropriate” to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. *See In Re Conklin*, 946 F.2d 306 (4th Cir. 1991). At issue in the case at hand are the IDEA provisions pertaining to “Child Find” and the claim that PGCPS did not timely identify the Student for special education services.

Child Find requires that “[a]ll children with disabilities residing in the State . . .and who are in need of special education and related services are identified, located, and evaluated” § 1412(a)(3); 34 C.F.R. § 300.111(a)(1)(i). Under 34 C.F.R. Section 300.301, a public agency “must conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability” See also § 1414(a)(1)(A). A request for an initial evaluation may be initiated by either the parent of a child or by the public agency. 34 C.F.R. § 300.301(b). Once the public agency receives parental consent for evaluation, the public agency must conduct the evaluation within 60 days.

The Student seeks “compensatory education.” Although the IDEA does not explicitly

authorize the award of compensatory education, the IDEA "...authorizes the court to 'grant such relief as the court determines appropriate.'" *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Todd A.*, 79 F.3d 654, 656 (7th Cir. 1996)(quoting 20 U.S.C. Section 1415(3)(2)(now at 20 U.S.C. Section 1415(i)(2)(c)(iii)). *See also, Board of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 316 (6th Cir. 2007)("An award of compensatory education is an equitable remedy that a court can grant as it finds appropriate.").

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Student has the burden of proving that PGCPS failed to comply with Child Find requirements and that she is entitled to compensatory education at public expense. The burden of proof on these issues is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009).

Contentions of the Parties

The Student contends that PGCPS did not timely identify her as needing special education services. Although the Student was monitored in the XXXX protocol, the school should have recognized that the Student was falling behind and not making academic progress, which should have put the school on notice that more intensive intervention was appropriate, i.e., the earlier scheduling of an IEP team to address the Student's lack of progress and the eventual provision of special education services. The Student cites her retention in the second grade and slow progression of DRA test scores as evidence that the school failed to perform its obligation under Child Find.

PGCPS counters that the Student was properly monitored in the XXXX program, and with the XXXX interventions in place, she progressed from tier to tier with increased interventions, making progress, albeit not sufficient progress pass from the second grade to the third grade. PGCPS asserts that the reason for the Student's retention in the second grade was

because it was academically necessary for the Student to demonstrate skills taught in the second grade that were necessary for success in the third grade; these were prerequisite skills that were no longer taught in third grade. PGCPS maintains that its actions were timely, appropriate, and the Student is not entitled to the relief she is seeking.

Factual Analysis

The gist of the Student's Complaint is how long the Student was being monitored in the XXXX program and whether PGCPS should have identified the Student as a student in need of special education services earlier than it did. The use and operation of XXXX was discussed by all of the witnesses.

All of the witnesses agreed that XXXX is a schoolwide screening where all students are placed in one of three tiers, with data determining which students receive more comprehensive strategies to promote the students' academic, social and emotional success. Mr. XXXX, PGCPS' expert in XXXX administration, described the program through his testimony as well as through written material (PGCPS Ex. # 26). All students in a school have access to the standard curriculum.²²

In the first tier, or the base of the XXXX pyramid covering the 75-85% of the students in a school, students are assessed several times a year, with the teachers matching the instruction to the needs of the individual student. In the second, or middle, tier, representing approximately 10-15% of the students in a school, students having difficulty learning the basic curricula are given special help, including small group teaching. These students receive more monitoring than those students in Tier 1. In the third tier, students needing more help than students in the lower tiers get individual help with additional testing if the interventions are not successful. On the most basic level, XXXX is a means to identify students in a school that require more intervention

²² There was debate among the witnesses whether students who qualified for special education services were included in the XXXX pyramid, receiving XXXX assessment and interventions.

than others and provide them instruction that meets their needs (Tr. Page 200:7 to 200:9). Mr.

XXXX testified that XXXX was a “discrepancy” model of educational services, looking more to the success of instructional methods:

A. [XXXX] became prevalent after the update to the to Individuals With Disabilities Education Act in 2004.

So, in the Individuals with Disability Education Act prior to 2004, there was language that regulated that states use what's called a discrepancy model. They take a set difference between a child's IQ and that child's achievement, and use that to determine whether or not this child has a specific learning disability.

But in the 2004 update, the language changed to permit schools -- states to use that model, but also permitted them to use a model where they looked at how children responded to interventions put in place as the determining factor.

Q. What were the reasons for that change?

A. The main reason was that it kind of took out some of the overidentification, some of the misidentification, some of the disproportionality (sic) in identification. It took away some subjectivity and it was also what we called a wait to fail model.

Q. I want to ask you about a couple words that you've used.

A. Okay.

Q. Overidentification, misidentification, disproportionate. What does that mean exactly?

A. So, by proportionate, over -- I would -- overidentification would mean a school may have more special education students than another school.

Misidentified might mean a student might be identified as having a learning disability when, in fact, if they had gotten some prior support, that diagnosis wouldn't be there.

And then the disproportionality deals with the overidentification of maybe students with -- students of a certain ethnic background or students with limited English proficiency, or something like that.

(Tr. Pages 197:24 to 199:12). PGCPS has used XXXX as a method to prevent overidentification

of students for special education services since 2009 (Tr. Page 200:14 to 200:19).

The Student presented the testimony of Dr. XXXX XXXX, an expert in school psychology. Dr. XXXX explained XXXX as a framework to address academic and behavioral concerns. Dr. XXXX did not disagree that the Student was initially properly monitored in XXXX, but he testified that students should only be in a particular tier for six to eight weeks. He opined that if the Student were not successful in that period of time in that tier, she should be moved up to the next tier, and if completing the third tier, special education services must be considered by the school team monitoring. Dr. XXXX did not, however, present any authority for his contention that the tiers were time-limited or followed that particular order.

Mr. XXXX explained that although the cycles are between six and nine weeks, if progress is being made, the Student may remain in the tier beyond that cycle:

Q. ...Is there a time limit as far as how long a student would be receiving XXXX?

A. That varies in the consensus of how a school has its XXXX plan. But typically it's anywhere from six to nine weeks.

Q. I'm sorry. What is six to nine weeks?

A. The intervention -- the interval of how long a student is in a tier.

Q. In a tier. Okay.

A. Yes.

Q. And then, if the student is making progress during that six to nine weeks, what happens?

A. If the student meets a target, they may do what's called a fade out. The intervention may discontinue. If they're making constant -- if they're making gains, then it may be determined that the intervention is working and the student is -- the

student's moving along with that support, and it may continue.

Q. If a student is making progress but is still below grade level, is that an indication that XXXX is not working?

A. No, it's not.

Q. Why isn't it?

A. Because the student's making progress. The student's responding to the intervention.

Q. Even if the intervention isn't bringing them up to grade level?

A. Even if the intervention's not bringing them up to grade level. Correct.

Q. If they're -- if they're making progress, albeit not reaching grade level, would a referral to special education be usually done at that point?

A. No, it wouldn't.

Q. Why not?

A. Because the student is making progress and a situation where I envision that the child would be referred would be when the child is not making any progress or the child is even regressing, there's no correlation to the support that the student is -- no correlation to the support a student's being given.

Q. Okay.

(Tr. Pages 204:5 to 205:21). Mr. XXXX reviewed the data and confirmed that the Student was making progress in XXXX:

Q. Based on what you heard of Ms. XXXX and what you've seen in the documents, in your opinion was the XXXX process done properly and appropriately at [School 2] with respect to [the Student]?

A. Yes, it was.

Q. Is there anything that you've seen in the documentation or heard from Ms. XXXX to suggest that [the Student] should have been referred earlier to special education for an evaluation than she was?

A. No.

Q. Do you agree with -- excuse me. Do you agree with Ms. XXXX's opinion that [the Student] was continuing to make progress while she was in the XXXX process?

A. Yes, I do. I see constant movement. The only score I'm really familiar with is the DRA.

The first DRA level that I see continual there. Yes.

Q. And, again, the fact that she's making progress, even though it's below grade level, that wouldn't be a flag to you that she should be referred?

A. No.

(Tr. Pages 206:8 to 207:4). Based on his review of the Student's progress and achievement being monitored by XXXX, there was no need to refer the Student for a special education evaluation until her mother requested the evaluation in December 2015. (Tr. Page 207:5 to 207:19).

Dr. XXXX tracked the Student through the XXXX process, claiming that she made inadequate progress in the lower tiers, thus requiring different and progressively more intensive interventions.²³ He justified this contention on the basis that the Student continued to read below grade level (tracking the DRA scores in the XXXX progress notes), resulting in her having to repeat the second grade. He contended that the lack of progress, coupled with PGCPS's failure to identify and evaluate the Student for special education eligibility, caused her to fall behind. It wasn't until the mother's letter of December 7, 2015, that PGCPS scheduled evaluations and started the special education process. He further contended that when it was determined that the Student was being retained in the second grade at the end of the school year (May 2015), the evaluations should have commenced; and, if a student is failing, despite XXXX assistance, special education is indicated.

Dr. XXXX pointed out the interventions provided in the Student's IEP,²⁴ and concluded that if they were started earlier, the Student would not have been retained in the second grade at the end of the previous school year. He conceded however, that retention in a grade is not in itself a reason to evaluate a student for special education services.

²³ The Parent also testified to the lack of progress, based on the Student's falling grades, her ADHD diagnosis and some unspecified "incident on the bus" that she referred to but failed to explain. (Tr. Page 79:1 to 79:8).

²⁴ Dr. XXXX analyzed Parent Ex. # 1, which is a draft IEP from April 2016. The draft does not contain the final refinements of the Student's initial IEP of April 28, 2016 (PGCPS Ex. # 17).

Dr. XXXX XXXX countered this evidence. Dr. XXXX is the Assistant Principal at [School 2] and was accepted as an expert in General Education and specifically XXXX. Dr. XXXX explained how the SIT team placed the Student in the first tier of XXXX and how she was monitored through the second tier. She also described how the Student was making small but incremental progress in reading, tracking her DRA scores, the standard by which the student was being monitored – from her initial level of 12 in reading, through her progression to 16, then 20 and 24. Dr. XXXX explained how these reading scores were below grade level, but were still rising, indicating that the Student was attaining some benefit from her education. She also described the comprehension testing.

Dr. XXXX also explained in detail that the Student was retained in the second grade due to her failure to attain basic skills. Dr. XXXX explained that in first and second grade, students learn to read; and in third grade, students read to learn information. Because the Student was still unable to understand the concepts of phonics (the basis of reading skills), although she was making steady progress on the DRA, she still had too many errors and had not mastered the necessary reading skills to succeed in the third grade. Dr. XXXX testified:

Q. So she was still below grade level?

A. She was still below grade level.

Q. But she -- she made progress?

A. But she moved, she made progress. She did move.

Q. All right.

A. And one thing I do want to point out as well is in second grade, they teach phonics and phonological awareness to second graders.

And what that is, it deals with letter identification, the sounds of the letters; beginning and ending sounds, middle sounds. So it deals a lot with listening and also learning how to decode words. And also encode words because if they're decoding, they're reading. And they are looking on how to see -- if they had the word see -- cat, C-A-T, and they're decoding that. But when they're listening to a

sentence being read to them, they have to take that and write that out, what they hear.

And, so, that happens in second grade.

Beyond second grade there's no phonics skills being taught. There's no phonological awareness being taught.

Because in kindergarten, first and second grade they're learning to read. Whereas in third grade and up, they're reading to learn information.

(Tr. Pages 127:2 to 128:2). Dr. XXXX emphasized that the Student continued to make progress:

Q. And Ms. XXXX, if a student is in XXXX and after so many months of being in XXXX is still below grade level, does that indicate to you that XXXX interventions aren't working?

A. No.

Q. Why not?

A. When you see that a child -- you have to look at where the child starts. So if a child is starting say at a one, and they're below grade level, yes. But if you see that they are moving -- and that's the key, if they're responding to what you're putting in place. And as an educator, when you have consistent strategies put in place for a child or consistent education put in place for a child, you're going to see movement.

When there are gaps because of various reasons, then there may be -- there are going to be gaps in their learning.

So with [the Student], she was making progress. She was still below grade level. She was making progress. Because she went from a 12 to a 16 to a 20. So she had made progress.

And, so, it was not enough to comfortably move her into third grade because, again, in second grade you're learning to read information. And then third grade, you're reading to learn information.

And there was still some foundational skills that she still needs to have before she could successfully manipulate third grade.

(Tr. Pages 137:1 to 138:4). Nevertheless, the Student's progress was not sufficient to move her to the third grade because she still needed to master the skills that she was progressing in, but which were prerequisites for the third grade: Dr. XXXX explained:

Q. So if [the Student] went on to third grade, would she have -- would she have received in third grade the foundational kind of skills that she needed to have before she moves on?

A. No. With third grade curriculum, it does not focus on phonics and phonological awareness. Excuse me.

Q. And was that one of the reasons why she was recommended for retaining?

A. Yes.

(Tr. Page 136:14 to 136:23). She further explained:

Q. Why does the school retain any child?

A. A school retains a child because they are not performing at the level which they need to be successful at that next grade, or they're lacking skills needed for that next grade.

(Tr. Page 185:7 to 185:11).

Dr. XXXX also explained the difference between students who need more intensive skill building through XXXX versus eligibility for special education. The Student was progressing in Math in her XXXX assessments, and was responding well to the strategies crafted for her in the XXXX program. Even if a child is working below his or her grade level, the student may still be progressing. This progress was confirmed by the Student's increased performance on the SRI Lexile (PGCPS Ex. # 20), going from 50 (indicating at risk) through 200 (below basic, but no longer at risk) in the second half of second grade.

The question was posed to Dr. XXXX regarding whether the Student should have been evaluated earlier, after the Parent informed the school of her ADHD diagnosis by letter on December 7, 2015 (PGCPS Ex. # 8). Dr. XXXX testified that if the Student was not making the progress – even though incremental – they would have looked for other explanations for her lack of progress. The Parent's letter tipped the scales towards seeking assessments to test for special education needs. Until that time, the Student was progressing and the interventions being put in

place were causing the Student to make sufficient progress.²⁵

Dr. XXXX's opinion was supported by the testimony of XXXX XXXX, who was accepted as an expert in XXXX. He explained the reason school systems use XXXX as an educational tool. Short of the need to identify students for special education services, students under XXXX are given the best instructional practices to meet the needs of all students, not just those in need of special education services. The length of time in a tier is set not by a predetermined time limit, but what the XXXX team decides is the appropriate level of intervention (i.e., tier 1, 2, 3 and what programs to get the student to progress, i.e., Foundations, Numberworks, etc.). Mr. XXXX also testified that even if a student performs below his or her grade level, as long as the student is making progress, then XXXX remains appropriate intervention. Mr. XXXX testified that the Student was making progress through the XXXX program, as evidenced by the test scores (and particularly the DRA and the SRI).

Legal Analysis

A. Child Find and XXXX

At the root of the Student's case is the allegation that PGCPS failed to timely suspect a learning disability and evaluate her and provide special education services. The Student contends that she was in XXXX too long and due to her lack of progress, her retention in the second grade constituted a violation of her rights. PGCPS contends that the Student was making progress, and even though she was in XXXX and retained in the second grade, they did not violate its Child Find responsibilities. It 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:

²⁵ The concept of measurement of progress while a student is in XXXX is different than progress measured before and during a student's enrollment in Special Education.

(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) (2010). An LEA's failure to timely evaluate a child who it should suspect of having a disability constitutes a procedural violation of the IDEA.

Although the court in *Jana K. ex rel. Tim K. v. Annville-Cleona School Dist.*, 39 F.Supp.3d 584, 603 (2014) found that the LEA missed the student's "glaring needs," including suicidal ideations expressed to the school counselor, "clearly declining" emotional well-being and academic performance, it recognized that "[a] school district is not obligated to conduct a formal evaluation of every struggling student and it may be prudent to offer other interventions before rushing to a special education identification." In that case, the school only had a "patchwork" of "uncoordinated and intermittent" interventions that relied on the student to take the initiative to access them. *Jana K.*, 39 F. Supp. 3d at 604.

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

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

diagnose and even experts disagree about whether [some] should be considered a disability at all.” *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F.Supp.2d 221, 226 (D.Conn.2008).

D.K. v. Abington School Dist., 696 F.3d 233, 249 (2012). The school district in *D.K.* provided interventions for the student short of special education evaluation and services. Schools are empowered to take proactive steps and try different interventions so that it need not “rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment.” *D.K.*, 696 F.3d at 252. See, *Board of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 314 (2007)(no violation if other interventions attempted before suspecting a learning disability prompting an IDEA evaluation). Child Find is “not an absolute liability statute.” *J.S. v. Scarsdale Union Free School Dist.*, 826 F.Supp.2d 635, 660 (2011). See also, *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F.Supp.2d 221,225 (2008)(“... IDEA is not an absolute liability statute and the Child Find provision does not ensure that every child with a disability will be found.”). This idea is particularly relevant because the Student’s progress was being monitored and tracked, and she appeared to be making some progress in her reading test scores. A 504 Plan was put in place, and until the mother alerted PGCPS about her concerns about the 504 Plan not “suit[ing] her needs” in her letter of December 7, 2015, 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 XXXX. In *Woodstock*, the school used a 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 XXXX’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 Student did not prove that she should have been identified as a student in need of special education services earlier than she was so identified. The evidence showed that she was being monitored in the second tier of XXXX which maintained increased scrutiny and monitoring, and that she was given educational interventions that she benefited from, making documented educational progress. While it is true that she was retained in the second grade, such retention does not automatically trigger the need for special educational services – 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. (Tr. Page 198:9 to 198:20). The Student was not declining – in fact, she was scoring incrementally higher on her DRA scores. Even if the Student – who was making progress - was deemed to be “struggling,” not every “struggling” student requires a special education evaluation. *Scarsdale, supra*. And even if so, there is no strict liability requiring the school to identify the child at the “earliest possible moment.” *Woodstock, supra*.

The Student did not meet the burden to prove that she was not timely or properly evaluated for special education services prior to January 2016, after her mother notified the school of the ADHD diagnosis.

B. Compensatory Education

Simply stated, “an award of compensatory education should be based on the amount of

services necessary to provide the same qualitative educational benefit the student would have received during the period of deprivation absent the school district's deficiencies." *Jana K.*, 39 F. Supp. 3d at 609. Having found no actionable delay in Child Find, an award of any kind is not indicated. Nevertheless, for the purposes of completeness, I will address the Student's proposed remedy.

Dr. XXXX testified that the Student did not receive proper services due to the delay in implementing the IEP, for a period of eight to ten months after the school should have identified the Student as one in need of special education services. He could not identify the specific deficits, as he was not familiar with how the student is currently functioning.²⁶

PGCPS offered the testimony of three teachers who are currently familiar with the Student's functioning. Although the parties entered into stipulations regarding those witnesses' testimony, I need not automatically accept that testimony. However, those teachers were proffered as experts, and their testimony would have been unrebutted, as Dr. XXXX was not able to testify about how the Student was currently functioning and how much progress she made, which would have been the basis for the compensatory education that he endorsed. The Student has made progress. The Parent testified that the Student is doing better in school now, focusing better and getting along with her classmates. She has improved academically since the school year began. She is still behind and having a little better time getting along with her fellow students.

Although Dr. XXXX does not subscribe to an "hour for hour" formula for compensatory services, he nevertheless testified that the Student should get one hour of instruction for each

²⁶ Dr. XXXX testified that he met the Student and her mother in November 2015, but did not test her and was not familiar with any evaluations performed on her. He also acknowledged that he has not observed the Student in school, although he was in her school and saw her briefly between classes. Accordingly, Dr. XXXX admits that he does not know how she presently functions in school. He also conceded to having made only a minimal review of the Student's records, having only seen the majority of the records that came to his attention as part of the documents exchanged by the parties five days prior to the hearing.

area (i.e., reading, language, math, etc.) for eight to ten months. He does not say, however, what that instruction should consist of or what deficits the instruction should be intended to rectify or how to do so. His opinion did not take into account the compensatory education provided to the Student in the May 24, 2016 IEP (PGCPS Ex. # 12) or the twenty-five hours of compensatory education provided to the Student in the agreement following the resolution meeting written on November 7, 2016 (PGCPS Ex. # 27).

CONCLUSIONS OF LAW

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

1. PGCPS did not fail to properly evaluate the Student or develop an appropriate educational placement during the 2014-2015 and 2015-2016 school years. 20 U.S.C.A. § 1412(a)(3) (2010); *Jana K. ex rel. Tim K. v. Annville-Cleona School Dist.*, 39 F.Supp.3d 584 (2014) ; *D.K. v. Abington School Dist.*, 696 F.3d 233 (2012); *Schaffer v. Weast*, 546 U.S. 49 (2005); and
2. PGCPS is not required to provide compensatory education to the Student as there was no failure to evaluate the Student or develop an appropriate educational placement during the 2014-2015 and 2015-2016 school years. *Board of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 316 (6th Cir. 2007); *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Todd A.*, 79 F.3d 654, 656 (7th Cir. 1996); 20 U.S.C. Section 1415(i)(2)(c)(iii).

ORDER

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

March 16, 2017
Date Decision Mailed

Marc Nachman
Administrative Law Judge

MN/sm

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 to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2016). 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.