

**XXXX XXXX,**

**STUDENT**

**v.**

**ANNE ARUNDEL COUNTY**

**PUBLIC SCHOOLS**

**\* BEFORE JENNIFER L. GRESOCK,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: MSDE-AARU-OT-16-35924**

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**DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
ORDER

**STATEMENT OF THE CASE**

On November 29, 2016, Marlon Charles, Esquire, on behalf of XXXX XXXX and her child, XXXX XXXX (Student), filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Anne Arundel County Public Schools (AACPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).<sup>1</sup>

I held a telephone prehearing conference on January 19, 2017. Mr. Charles represented the Parent. Manisha S. Kavadi, Esquire, represented the AACPS. By agreement of the parties, the hearing was scheduled for February 6 and February 7, 2017.

I held the hearing on February 6 and 7, 2017, at the AACPS Board of Education in Annapolis, Maryland. Mr. Charles represented the Parent. Ms. Kavadi represented the AACPS.

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<sup>1</sup> U.S.C.A. is an abbreviation for United States Code Annotated.

The November 29, 2016 Complaint marks the start of the thirty-day resolution period. 34 C.F.R. § 300.510(b) (2016). On January 19, 2017, I held a telephone prehearing conference, which both Mr. Charles and Ms. Kavadi attended by telephone. At that prehearing conference, the parties informed me that a resolution meeting was held on December 12, 2016, but it did not resolve the matter. The thirty-day resolution period ended on December 29, 2016, which I advised, and the parties agreed, is the triggering event of the forty-five day timeframe for a decision. 34 C.F.R. § 300.510(b)(2). This is because none of the events described in 34 C.F.R. Section 300.510(c), which adjust the thirty-day resolution period, occurred – the parties did not waive the resolution meeting, did not provide me with any written document reflecting that no agreement was possible, and there was no mediation.

The hearing dates requested by the parties fell within 45 days after the triggering events described in the federal regulations. My decision is also therefore due on or before the forty-fifth day. In this case, the forty-fifth day is Sunday, February 12, 2017. My decision is therefore due by the last preceding business day, Friday, February 10, 2017. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a).<sup>2</sup>

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; Maryland State Department of Education 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.

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<sup>2</sup> C.F.R. is an abbreviation for Code of Federal Regulations.

## ISSUES

The issues are:

- (1) Whether the AACPS failed to timely identify, locate, and evaluate the Student's eligibility for special education and related services under the IDEA;
- (2) Whether the Parent is entitled to an independent educational evaluation at public expense;
- (3) What, if any, remedy is appropriate.

## SUMMARY OF THE EVIDENCE

### Exhibits

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

- Parent Ex. 1 - Emails from XXXX XXXX, Child & Family Therapist, XXXX, to AACPS staff, dated May 12, 2015 and May 19, 2015; Reply email from XXXX XXXX, Assistant Principal, dated May 13, 2015
- Parent Ex. 2 - Two Facsimile Cover Sheets from Ms. XXXX to AACPS staff, dated February 24, 2015 and May 1, 2015; Authorization to Secure and/or Release Information, dated March 29, 2016
- Parent Ex. 3 - NOT ADMITTED
- Parent Ex. 4 - NOT ADMITTED
- Parent Ex. 5 - Treatment Plan Problems and Objectives, XXXX Behavioral Health, dated August 15, 2016
- Parent Ex. 6 - NOT ADMITTED
- Parent Ex. 7 - NOT ADMITTED
- Parent Ex. 8 - Treatment Plan, MSA – XXXX Center, dated October 21, 2016
- Parent Ex. 9 - NOT ADMITTED
- Parent Ex. 10 - NOT ADMITTED
- Parent Ex. 11 - NOT ADMITTED
- Parent Ex. 12 - AACPS Student Transcript, dated January 30, 2017

Parent Ex. 13 - 1<sup>st</sup> Offense Letter, dated August 24, 2016, regarding disciplinary incident on June 3, 2016; Discipline Referral Form, dated January 7, 2016; Discipline Referral Form, dated May 29, 2015; Letter to the Parent from XXXX XXXX, Assistant Principal, [School 1], and XXXX XXXX, Principal, [School 1], dated May 28, 2015; Discipline Referral Form, dated May 29, 2015 (duplicate); Letter to the Parent from Mr. XXXX and Ms. XXXX, dated May 27, 2015; Discipline Referral Form, dated February 27, 2015; Discipline Referral Form, dated February 2, 2015; [School 1] Incident Reports, dated January 22, 2015, February 3, 2015, February 9, 2015, and February 11, 2015; CSMS Audit Report reflecting service dates from December 2, 2013 to January 27, 2017; Incident List reflecting incidents from February 2, 2015 through May 28, 2015; Contact Log reflecting contact with Parent from February 20, 2015 through May 28, 2015

Parent Ex. 14 - NOT ADMITTED

Parent Ex. 15 - NOT ADMITTED

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

AACPS<sup>3</sup> Ex. 1 - Section 504 – Eligibility meeting record, dated September 12, 2016; Written Notice/Consent, dated September 12, 2016; Section 504 – Meeting Notice and Invitation, dated September 1, 2016

AACPS Ex. 2 - Section 504 – Plan, dated September 12, 2016

AACPS Ex. 3 - NOT ADMITTED

AACPS Ex. 4 - IEP Team Meeting Report, Prior Written Notice, dated November 14, 2016

AACPS Ex. 5 - Referral, dated November 14, 2016; Summary of Student Performance in the School Setting, dated November 14, 2016

AACPS Ex. 6 - Student Evaluation Plan, dated November 14, 2016, including Parent Consent for Evaluation

AACPS Ex. 7 - Letter from the Parent to [School 2] Special Education staff, dated November 29, 2016, with cover sheet dated December 1, 2016

AACPS Ex. 8 - XXXX HealthCare documents, dated October 18, 2016; Initial Service Agreement for State of Maryland In-Home Services Program, dated October 19, 2016; XXXX Health Hospital Discharge Instructions, dated October 18, 2016; State of Maryland – In-Home Family Services Program Family Service Intended Action Letter, dated October 19, 2016; Treatment Plan, MSA – XXXX Center, dated October, 21, 2016

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<sup>3</sup> AACPS exhibits were premarked by counsel as “AA.”

- AACPS Ex. 9 - 1<sup>st</sup> Offense Letter, dated August 24, 2016, regarding disciplinary incident on June 3, 2016; Letter from XXXX XXXX, Assistant Principal, [School 2], dated September 8, 2016
- AACPS Ex. 10 - Student Schedule for the Student, dated January 27, 2017
- AACPS Ex. 11 - Decision Making Room Log, dated from November 30, 2016, through January 26, 2017
- AACPS Ex. 12 - Daily Attendance Summary, dated August 22, 2016 through January 27, 2017
- AACPS Ex. 13 - Incident List, dated December 17, 2015, through June 3, 2016; Record of December 17, 2015 incident, printed January 27, 2017; [School 2] Return from Suspension, dated December 21, 2015; Record of January 1, 2016<sup>4</sup> incident, printed January 27, 2017; Discipline Referral Form, dated January 7, 2016; Record of June 3, 2016 incident, printed January 27, 2017
- AACPS Ex. 14 - Attendance Details, dated August 24, 2015 through December 12, 2016
- AACPS Ex. 15 - Incident List, dated February 2, 2015 through May 28, 2015; Parent Contact Log, dated February 20, 2015 through May 28, 2015; Discipline Referral Form, dated May 28, 2015; Letter to the Parent from Mr. XXXX and Ms. XXXX, dated May 28, 2015; Discipline Referral Form, dated May 27, 2015; Letter to the Parent from Mr. XXXX and Ms. XXXX, dated May 27, 2015; Discipline Referral Form, dated February 27, 2015; Discipline Referral Form, dated February 2, 2015; Incident Reports, dated January 22, 2015, February 3, 2015, February 9, 2015, and February 11, 2015
- AACPS Ex. 16 - Attendance Details, dated August 25, 2014 through June 18, 2015
- AACPS Ex. 17 - NOT ADMITTED
- AACPS Ex. 18 - 8<sup>th</sup> Grade Team Minutes, dated February 5, 2015
- AACPS Ex. 19 - CSMS Audit Report, dated December 2, 2013 through January 27, 2017
- AACPS Ex. 20 - NOT ADMITTED
- AACPS Ex. 21 - NOT ADMITTED

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<sup>4</sup> January 1, 2016 appears to be a typographical error, as January 1 was New Year's Day, a federal holiday. Elsewhere, the document is dated February 1, 2016, which is the likely date of the incident.

AACPS Ex. 22 - Resume, XXXX XXXX

AACPS Ex. 23 - Resume, XXXX XXXX

AACPS Ex. 24 - Resume, XXXX XXXX, LCSW-C

AACPS Ex. 25 - NOT ADMITTED

AACPS Ex. 26 - Resume, XXXX XXXX

AACPS Ex. 27 - Student's High School Report Card, 2015 – 2016 School Year, Marking Period  
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AACPS Ex. 28 - Student's Middle School Report Card, 2014 – 2015 School Year, Marking  
Period 4

### Testimony

The Parent testified and presented the testimony of XXXX XXXX, Ph.D., accepted as an expert in school psychology.

The AACPS presented the following witnesses:

- XXXX XXXX, Department Chair for Special Education, [School 2], admitted as an expert in special education;
- XXXX XXXX, Licensed Clinical Social Worker (LCSW), [School 1], admitted as an expert in licensed clinical social work;
- XXXX XXXX, Assistant Principal at [School 3], former Assistant Principal at [School 2], admitted as an expert in high school administration and general education;
- XXXX XXXX, School Psychologist, [School 2], admitted as an expert in school psychology.

## FINDINGS OF FACT

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

1. The Student is a fifteen-year old girl who attends Anne Arundel County Public Schools.
2. The Student attended [School 1] for eighth grade during the 2014-2015 school year.
3. The Student failed four of her eight classes in eighth grade, including Social Studies, Science, Healthy Living, and Fitness for Life. She also received three Ds (in English/Language Arts, Mathematics, and Spanish 1), and one B (in True Colors).
4. During the 2014-2015 school year, the Student had four documented disciplinary incidents, occurring on the following dates: February 2, 2015 (inappropriate use of language, resulting in a telephone call to the Parent); February 27, 2015 (insubordination, resulting in assignment to the Decision Making Room); May 27, 2015 (disruption to class/school, resulting in an in-school suspension); and May 28, 2015 (insubordination due to her refusal to attend in-school suspension, resulting in a one-day out-of-school suspension).
5. During the 2014-2015 school year, the Student was marked “absent, unexcused” for 15.50 days, and “absent, excused” for 5.50 days. The total number of school attendance days was 181.
6. The Student missed five English classes in the first quarter, and earned a 48%. She missed three English classes in the second quarter, and earned a 44%. She missed eight English classes in the third quarter, and earned a 71%. She missed seven English classes in the fourth quarter, and earned an 81%.

7. The Student missed five Social Studies classes in the first quarter, and earned a 25%. She missed four Social Studies classes in the second quarter, and earned a 65%. She missed six Social Studies classes in the third quarter, and earned 54%. She missed eight Social Studies classes in the fourth quarter, and earned a 50%,

8. The Student missed three Science classes in the first quarter, and earned a 64%. She missed two Science classes in the second quarter, and earned a 68%. She missed nine Science classes in the third quarter, and earned a 46%. She missed seven Science classes in the fourth quarter, and earned a 57%.

9. The Student missed three Mathematics classes in the first quarter, and earned a 68%. She missed two Mathematics classes in the second quarter, and earned a 71%. She missed six Mathematics classes in the third quarter, and earned a 51%. She missed six Mathematics classes in the fourth quarter, and earned a 69%.

10. The Student missed three Spanish I classes in the first quarter, and earned a 77%. She missed three Spanish I classes in the second quarter, and earned a 61%. She missed seven Spanish I classes in the third quarter, and earned a 62%. She missed twelve Spanish I classes in the fourth quarter, and earned a 68%.

11. The Student missed two True Colors classes in each of the first two quarters, and earned a 96% and a 75%, respectively, and three True Colors classes in the third and fourth quarters, and earned an 86% and a 78%, respectively.

12. The Student missed one Healthy Living class in the first quarter, and earned an 88%. She missed two Healthy Living classes in the second quarter, and earned a 36%. She missed three Healthy Living classes in the third quarter, and earned a 32%. She missed six Healthy Living classes in the fourth quarter, and earned a 41%.



13. The Student missed one Fitness for Life class in the first quarter, and earned a 58%. She missed one Fitness for Life class in the second quarter, and earned a 37%. She missed two Fitness for Life classes in the third quarter, and earned a 66%. She missed four Fitness for Life classes in the fourth quarter, and earned a 59%.

14. Because the Student was failing more than two courses during her eighth grade year, sometime during that school year she was assigned to an academic support group. This group met once a week to provide support for completing assignments and incentives for attendance. The Student was also invited to join, and did attend, Lunch Bunch, a social and academic peer support group.

15. During her eighth-grade year, the Student developed a relationship with XXXX XXXX, licensed clinical social worker at [School 1], who provided her with counseling and academic support as needed. The Student frequently sought out Ms. XXXX for assistance with social conflict, and she could use space in her office area for academic work.

16. The Student began attending counseling sessions with XXXX XXXX, Child & Family Therapist, XXXX, in March 2014.

17. On February 24, 2015, Ms. XXXX sent to [School 1] an authorization form to secure and/or release information from [School 1], along with a cover sheet requesting that school administration call her.

18. On May 1, 2015, Ms. XXXX again sent to [School 1] an authorization form to secure and/or release of information from [School 1], along with a cover sheet requesting that school administration call her.

19. On May 12, 2015, Ms. XXXX contacted a staff member at [School 1] by email to request that school administration call her to discuss “incidents” that had occurred at school, as well as the Student’s “progress/behavior.”

20. On May 13, 2015, XXXX XXXX, Assistant Principal at [School 1], replied to Ms. XXXX, indicating that she would call her on May 14, 2015.

21. On May 19, 2015, Ms. XXXX followed up by email with Ms. XXXX, indicating that she had not yet received her phone call.

22. The Student attended summer school in summer 2015, following her eighth grade year. She earned a “D” in Spanish I, a high-school level Spanish course.

23. The Student attended [School 2] during the 2015-2016 school year for ninth grade.

24. Because the Student had attended summer school in the summer of 2015, she was assigned to an advisory program under the guidance of a behavior interventionist for her ninth grade year. The approximately fifteen students in the advisory program meet as a group with the behavior interventionist twice a week for 30 minutes, focusing on social and emotional issues.

25. The Student is also assigned a XXXX Support Advocate; her advocate is Ms. XXXX. Ms. XXXX does not provide direct instruction but visits the Student’s classrooms to observe the interaction and engagement of the Student. She also speaks regularly with the Parent.

26. During the 2015-2016 school year, the Student had three documented disciplinary incidents, occurring on the following dates: December 17, 2015 (disrespect towards others, resulting in a one-day out-of-school suspension, conference with the Student, and a telephone call to the Parent); January 7, 2016 (disruption to class/school and insubordination, resulting in a conference with the Student and detention in the office); and June 3, 2016 (fighting: verbal, resulting in an eight-day out-of-school suspension and detention in the office).

27. During the 2015-2016 school year, the Student received a failing grade in twelve classes, a “D” in one class, a “C” in two classes, a “B” in one class, and “Satisfactory” in two classes. She earned 2.50 credits.

28. In her first semester English class, the Student was absent one time during the first quarter and earned a grade of 71%. She was absent four times during the second quarter, and earned a grade of 23%. In her second semester English class, the Student was absent three times during the third quarter and earned a 31%. She was absent 16 times during the fourth quarter, and earned a grade of 29%.

29. In her first semester History of the U.S. class, the Student was absent three times during the first quarter and earned a grade of 65%. She was absent five times during the second quarter, and earned a grade of 77%. In her second semester History of the U.S. class, the Student was absent six times during the third quarter and earned a 50%. She was absent 11 times during the fourth quarter, and earned a grade of 50%.

30. In her first semester Matter and Energy class, the Student was absent one time during the first quarter and earned a grade of 54%. She was absent two times during the second quarter, and earned a grade of 80%. In her second semester Matter and Energy class, the Student was absent nine times during the third quarter and earned a 60%. She was absent 11 times during the fourth quarter, and earned a grade of 50%.

31. In her first semester Algebra I class, the Student was absent two times during the first quarter and earned a grade of 56%. She was absent eight times during the second quarter, and earned a grade of 54%. In her second semester Algebra I class, the Student was absent seven times during the third quarter and earned a 28%. She was absent 14 times during the fourth quarter, and earned a grade of 53%.

32. In her first semester American Sign Language I class, the Student was absent one time during the first quarter and earned a grade of 62%. She was absent five times during the second quarter, and earned a grade of 21%. In her second semester American Sign Language I class, the Student was absent ten times during the third quarter and earned a 28%. She was absent eighteen times during the fourth quarter, and earned a grade of 24%.

33. In her first semester Art class (Foundations of Studio Art), the Student was absent four times during the first quarter and earned a grade of 53%. She was absent three times during the second quarter, and earned a grade of 11%. In her second semester Art class (Photo and Digital Processing), the Student was absent nine times during the third quarter and earned a 0%. She was absent twenty times during the fourth quarter, and earned a grade of 0%.

34. In her first semester Child Development class, the Student was absent two times during the first quarter and earned a grade of 90%. She was absent one time during the second quarter, and earned a grade of 85%. In her second semester Child Development class, the Student was absent ten times during the third quarter and earned a 31%. She was absent sixteen times during the fourth quarter, and earned a grade of 8%.

35. In her first semester Physical Education class (Fitness for Life), the Student was absent one time during the first quarter and earned a grade of 71%. She was absent four times during the second quarter, and earned a grade of 69%. In her second semester Physical Education class (Dance), the Student was absent nine times during the third quarter and earned a 38%. She was absent 14 times during the fourth quarter, and earned a grade of 24%.

36. As of April 15, 2015, the Student had passed the Maryland State Assessments in the areas of reading (score: proficient), math (score: basic), and science (score: proficient).

37. The Student currently attends [School 2] for the 2016-2017 school year, where she is repeating the ninth grade.

38. When the Student returned to school in the fall of 2016, she was distraught to learn that she had to repeat ninth grade and was hospitalized for one day with suicidal ideation.

39. During the 2016-2017 school year, the Student has received failing grades in every class except one, where she received a “Satisfactory” rating.

40. To date, the Student has earned 3.75 credits, out of 13.25 credits attempted at [School 2]. Her grade point average is 0.56, and her weighted class rank is 591 out of 620.

41. On September 12, 2016, AACPS convened a meeting to determine her eligibility for a 504 Plan.<sup>5</sup> The Parent attended this meeting, along with XXXX XXXX, General Education Teacher; XXXX XXXX, biology teacher; and XXXX XXXX, school psychologist.

42. The Student was found eligible for a 504 Plan based on a mental impairment, diagnosed as anxiety/depression.

43. During the process of developing the 504 Plan in late August and September 2016, the Parent provided to AACPS medical documentation including a Behavioral Health Plan from Anne Arundel XXXX (reflecting a diagnosis of mood disorder, attention deficit/hyperactivity disorder, and unspecified trauma and stressor-related disorder).

44. The Student was hospitalized at XXXX Health Care from October 8, 2016 through October 18, 2016. She was diagnosed with intermittent explosive disorder and unspecified depressive disorder.

45. Within a few days of the Student’s release from XXXX Health Care in mid-October 2016, the Parent provided documentation related to her admission there to AACPS.

46. After the Student was released from XXXX Health Care, she received outpatient mental health care through MSA – XXXX Center (MSA). MSA diagnosed the Student with

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<sup>5</sup> A 504 Plan is intended to protect a child with a disability from discrimination under the Rehabilitation Act of 1973. Under Section 504, a child with a disability may receive accommodations and modifications that are not available to nondisabled children. To be eligible for protections under Section 504, an individual must have a physical or mental impairment that substantially limits at least one major life activity. 34 C.F.R § 104.4.

Disruptive Mood Dysregulation Disorder, Panic Disorder, and Attention Deficit/Hyperactivity Disorder.

47. The Student currently attends an MSA session once per week.

48. The Parent provided documentation regarding the MSA program to AACPS in October 2016, sometime after October 21, 2016.

49. At the October 2016 meeting, the Parent informed AACPS staff that the Student was behaving aggressively at home, including hiding weapons, causing damage to the home, and injuring her siblings. The Parent expressed that she was fearful about these behaviors.

50. On November 14, 2016, AACPS convened an Individualized Education Program (IEP) meeting. The IEP team considered the existence of an emotional disability. This consideration was based on its review of existing assessment data, curriculum assessments, pre-referral interventions, and present level of performance, school attendance and referral information.

51. At the November 14, 2016 IEP meeting, the Parent provided written consent for evaluation in the following areas: psychological, functional behavioral, and academic.

52. On November 29, 2016, before any evaluation of the Student had taken place, the Parent rescinded her consent for evaluation. At that time, she also requested an independent evaluation.

53. In late November/early December 2016, the Student was assigned to classes co-taught by a special educator and a content expert. These classes included English, U.S. Government, Geometry and Biology. The Student was also assigned to a class on [Class], in which subjects such as test anxiety and dealing with difficult situations are addressed.

54. As of January 27, 2017, the Student has been marked “absent unexcused” for 41 of 97 school days.

55. To be marked absent for a half day (0.5), a student must miss more than two classes during the school day.

56. The Student attends school most days, but skips individual classes frequently.

57. The Student does not utilize the services outlined in her 504 Plan, such as counseling sessions with school psychologist XXXX XXXX.

## **DISCUSSION**

### *Legal Framework*

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487 (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. At issue in the case at hand are the IDEA provisions pertaining to Child Find and to independent educational evaluations.

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.

Independent educational evaluations, or IEEs, are permitted by § 1415(b)(1), which states that procedures implementing the IDEA must include “[a]n opportunity for the parents of a child with a disability . . . to obtain an independent educational evaluation of the child.” A parent has

the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 C.F.R. § 300.502.

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parent has the burden of proving that AACPS failed to comply with Child Find requirements and that she is entitled to an IEE 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).

### *Arguments of the Parties*

This case involves a high school student who is currently repeating the ninth grade at [School 2], after she failed nearly all of her classes the previous school year. She has not been identified as a student in need of special education or related services, and she does not have an IEP<sup>6</sup> at this time. The Parent argued that she has requested that the Student be evaluated for special education and related services at least twice in the two years prior to filing her Complaint, but that AACPS has failed to evaluate the Student. In addition, the Parent argued that AACPS failed to meet its obligation under Child Find because it did not itself initiate an evaluation, despite the Student's failing grades during the 2014-2015, 2015-2016, and 2016-2017 school years and its knowledge that she was receiving mental health treatment. Because of AACPS's failure to timely evaluate the Student, either based on its own referral or the Parent's, the Parent contended that she no longer trusts AACPS to properly evaluate the Student. For that reason, she requests that I find AACPS failed to comply with relevant Child Find provisions and order AACPS to fund an IEE.

AACPS contended that it has fully complied with the IDEA with regard to Child Find. Noting that it was not provided with documentation of the Student's mental health diagnoses

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<sup>6</sup> An IEP is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with Section 1432 of this title." U.S.C.A. § 1401(14).



until October 2016, AACPS acknowledged that the Student's grades were generally poor in eighth grade, ninth grade, and her second ninth grade year, but maintained that poor grades alone – even failing grades – are not enough to trigger an obligation by the public agency to evaluate a student for special education or related services. AACPS asserted that this is particularly true when a student's poor performance is attributable to chronic absenteeism, which it contends is the case here. In addition, AACPS maintained that it implemented numerous interventions to support the Student academically, as well as socially and emotionally.

AACPS took the position that once the Parent provided reports from mental health providers in October 2016, it considered those reports along with factors related to the Student's academic performance. These considerations resulted in AACPS's initiation of the IEP eligibility process in November 2016, when it convened an IEP meeting with the Parent's participation and obtained the Parent's consent for evaluating the Student. Before the time permitted by law for evaluation had passed, and before any evaluation was conducted, the Parent withdrew her consent. For that reason, AACPS contended it was unable to move forward with a determination regarding the Student's eligibility for special education and related services. Finally, AACPS argued that in the absence of a completed evaluation by AACPS, the Parent is not entitled to an IEE at public expense.

#### *Motion for Judgment*

At the close of the Parent's case, AACPS made an oral Motion for Judgment, pursuant to COMAR 28.02.01.12(E)(1). AACPS argued that 34 C.F.R. Section 300.502(b)(1) requires that a parent seeking an IEE must show that she disagrees with the evaluation obtained by the public agency. In this case, that precondition has not been met, argued AACPS, as the public agency did not have an opportunity to obtain an evaluation before the Parent withdrew her consent.

AACPS also argued that the Parent had not met her burden with regard to any of the proposed

resolutions in her Complaint. The Parent responded that she did believe the remedy of an IEE would be appropriate if I find a violation of the Child Find provisions.

After hearing brief oral argument regarding the Motion for Judgment, I declined to render judgment until the close of all evidence, which is within my discretion. COMAR 28.02.01.12(E)(2)(b). AACPS then presented its case, effectively withdrawing its Motion for Judgment pursuant to COMAR 28.02.01.12(E)(3).

### *Evidence Presented*

The Parent testified on her own behalf and also presented the testimony of Dr. XXXX XXXX, accepted as an expert in school psychology. The Parent testified that in 2014, she suffered the loss of her unborn son and that the Student has had a difficult time emotionally since the loss. The Student's problematic behaviors emerged near the end of the 2014-2015 school year, when the Student was in eighth grade. To help the Student cope, the Parent arranged for her to receive individual therapy with therapist XXXX XXXX through the XXXX, a church-based agency. The Student began therapy in March 2014. The Parent stated that in May 2015, Ms. XXXX reached out to the administration at [School 1] by email in an effort to discuss the Student's behavioral incidents, as well as her progress at school. According to the Parent, the staff at [School 1] was not responsive to Ms. XXXX. The Parent also stated that at this time – May 2015 – she requested that the Student be evaluated for special education and related services but that AACPS did not respond to her request. The Parent acknowledged on cross examination that she herself did not provide any reports from the XXXX to AACPS.

The Parent testified that she requested that the Student be evaluated a second time in early June 2016, which was near the end of the Student's first ninth-grade year. She stated that she directed this request to XXXX XXXX, a teacher at [School 2], but Ms. XXXX responded that because the school year was ending, the Student could not be evaluated until the fall of

2016. Around this time, the Parent had to contact the Anne Arundel County Crisis System, a mobile mental health crisis care provider, because the Student refused to go to school. Then on June 3, 2016, the Student was suspended for eight days due to a verbal fight with another girl.

The Parent stated that the Student did not have behavioral problems over the summer of 2016 but continued to receive mental health treatment. Beginning in August 2015, she received this treatment through XXXX Behavioral Health, rather than XXXX. The Parent acknowledged that she had no contact with AACPS over the summer. When she returned to school in August 2016, the Student learned that she had not been promoted to tenth grade and would have to repeat ninth grade. The Student was so distraught at her retention in ninth grade that she was hospitalized for a day due to suicidal thoughts. This hospitalization followed her elopement from school, a disruption the police were called to assist in resolving. Ms. XXXX, Assistant Principal at [School 2], accompanied the Student to the hospital.

A few weeks later, the Student was again hospitalized, this time for a period of ten days, at XXXX Health Care, where she received inpatient mental health care. She was hospitalized for aggression. Upon her release from the hospital, the Student began receiving outpatient mental health care through MSA (in place of XXXX Behavioral Health). Her twelve-week treatment plan began with sessions four days a week, with a gradual decrease in the number of sessions. At the time of the hearing, the Student has therapy, including both group therapy and individual therapy, once per week through MSA. The Parent testified that MSA's diagnosis of the Student is Disruptive Mood Dysregulation Disorder, Panic Disorder, and Other Specified Attention Deficit/Hyperactivity Disorder. The MSA treatment plan included transitioning the Student back into school.

The Parent acknowledged that it was not until the fall of 2016 that she provided reports from the Student's mental health care providers to AACPS staff. She explained that she

provided some reports in late August 2016, when the Student returned to school. She continued to provide reports in September and October 2016, including reports from XXXX Behavioral Health and XXXX Health Care. Some of these reports were provided to AACPS during the process of establishing a 504 Plan. This 504 Plan, noted the Parent, did not work – if anything, the Student’s behavior grew even worse. The Parent testified that while she did not provide these reports from mental health care providers until late August 2016, she had provided medication administration authorization to AACPS during the prior school year, so [School 2] was aware that the Student takes medications.

With regard to the Student’s absenteeism, the Parent testified that the Student goes to school nearly every day but frequently skips classes because she is distressed by the large number of students in her classes. Crowds cause the Student to suffer panic attacks. The Parent also maintained that while the Student does miss classes, her absenteeism is not the reason for her poor academic performance. She noted that the Student was absent less frequently in eighth grade than in ninth grade, but that her eighth-grade grades were still poor. She also acknowledged that the Student had passed the Maryland State Assessments, showing proficiency in both Science and English, which she attributed to the Student being smart.

When asked about the relatively small number of behavioral incidents at school particularly during the eighth grade, the Parent testified that the disciplinary records do not fully reflect the number of times the school called her to discuss problematic behaviors. The Parent stated that at times, she was receiving calls four to five times per month.

The Parent also offered the testimony of Dr. XXXX. Dr. XXXX has extensive experience with psychological testing and diagnosis, and he was formerly the clinical director for a program for emotionally disturbed youth in the District of Columbia. He testified that he first met the Student in October 2016, when she was repeating ninth grade for the second time. He

stated that it was of particular concern to him that she was failing nearly all her classes, with a grade point average of 0.56. He further testified that she also performed very poorly during her eighth grade year, failing multiple classes. It was Dr. XXXX's expert opinion that the Student's poor grades in eighth grade put AACPS on notice that it had reason to suspect she was a student with a disability. He stated this even more emphatically with regard to ninth grade. In addition, he testified that the Student's emotional and social difficulties, including a mood disorder, depression, and anxiety, should have triggered an evaluation of the Student.

With regard to AACPS's knowledge of the Student's mental health concerns, Dr. XXXX testified that chronic attendance issues are frequently attributable to depression, and that the communications from Ms. XXXX, sent to [School 1] in May 2015, explicitly stated that the Student was receiving mental health treatment. Nonetheless, Dr. XXXX was adamant that notice of the Student's mental health care treatment is not even the key factor, as the Student's failing grades alone were enough that AACPS should have suspected that the Student has a disability and may need special education or related services. At the very least, maintained Dr. XXXX, AACPS should have implemented a formal response to intervention.

On cross examination, Dr. XXXX acknowledged that he has never evaluated the Student and has met her only twice, once for a 45-minute interview and once briefly at her school. He further acknowledged that he provided no mental health care to her, had not observed her in any of her classes, and had never spoken with any AACPS staff members about the Student. He conceded that he was not aware of what measures [School 2] may have implemented to address the Student's needs.

Dr. XXXX also took the position that the non-responsiveness of [School 1] staff to Ms. XXXX's communications in May 2015 was improper, and that if staff had responded appropriately, it would have had enough pieces of the puzzle to recognize the Student may have

a disability and be in need of special education and related services. He testified that he had two long conversations with Ms. XXXX, where she shared that she had reached out to [School 1] several times but received no meaningful response.

AACPS offered four witnesses in support of its case, all of whom were staff members at [School 1] or [School 2] during the Student's time at those schools. XXXX XXXX, Department Chair for Special Education at [School 2], testified that she became involved with the Student in October 2016, when Ms. XXXX and Ms. XXXX approached her with concerns about the Student. On November 2, 2016, Ms. XXXX observed the Student in class. She then coordinated an IEP Team Meeting, which she described as an Initial Screening, on November 14, 2016. The purpose of this meeting was to determine whether AACPS should proceed with testing; the recommendation reached at the meeting was that the Student should be evaluated in three areas: psychological, academic, and behavioral/functional. This recommendation was based at least in part on the medical reports provided by the Parent at the meeting. According to Ms. XXXX, it was also based on attendance records and reports from teachers. Ms. XXXX noted that on November 14, 2016, the Parent provided her written consent for the testing. That consent triggered the 60-day period during which the evaluations needed to be completed. However, on November 29, 2016, just as the evaluations were being scheduled, the Parent rescinded her consent.

Ms. XXXX testified that AACPS was prepared to move forward with the evaluations and had both the staff and resources available to complete the evaluations. But for the Parent's rescission of consent, the evaluations would have been completed as required by the IDEA, according to Ms. XXXX. While the evaluations were being scheduled, Ms. XXXX testified that AACPS staff provided additional support to the Student in several ways. First, she was enrolled in classes that were co-taught by a special education teacher and a content expert. While the

Student did not have an IEP at that time, Ms. XXXX testified that the special education teacher would have provided any academic support the Student sought in the classroom. The Student's co-taught classes included English, U.S. Government, Geometry, and Biology. In addition, Ms. XXXX testified that the Student was enrolled in a [Class] class, which, while not specific to special education students, provided extra support to students in need. The [Class] class is a tailored and fluid environment where the instructor addresses such topics as test anxiety and resolving difficult situations. Ms. XXXX noted that despite the small class size of the [Class] class (fewer than ten students), the Student often skipped class.

Ms. XXXX also testified that the Student has access to the Decision Making Room, where students are sometimes referred to manage behavioral problems. In the Student's case, her visits to the Decision Making Room are typically based on her own initiative. Ms. XXXX stated that the Student will come into the room and simply sit at times; other times, she comes into the room to do work.

AACPS also offered testimony from XXXX XXXX, LCSW, who worked with the Student at [School 1]. Ms. XXXX was very familiar with the Student, having first met her when she was in seventh grade. When the Student was in eighth grade, her teaching team (which Ms. XXXX referred to as an interdisciplinary team) referred her to the school's support services team because she was failing more than two classes. Ms. XXXX explained that the support services team met once per week and provided incentives for good attendance as well as support with completing schoolwork. In addition, the Student joined a Lunch Bunch group intended to address self-esteem issues, self-awareness, and developing peer relationships.

Ms. XXXX testified that she had a good relationship with the Student. She stated the Student would come to her office for counseling sessions, which typically lasted about 20 minutes, when she had conflicts with peers or teachers. In addition, Ms. XXXX said that she

provided direct academic intervention in the form of a quiet space in her office to complete schoolwork, either with or without Ms. XXXX's assistance.

Ms. XXXX, whom I accepted as an expert in licensed clinical social work, testified that she is familiar with the criteria set out in the IDEA regarding emotional disturbance. (This criteria appears in 34 C.F.R. 300.8(c)(4)(i)). Looking back at the Student's behavior at that time, Ms. XXXX maintained that the Student did not exhibit characteristics associated with emotional disturbance. For example, she did not exhibit an inability to learn; when she attended class, she was able to pass. She also had good interpersonal relationships, including teachers she liked and at least one close friend. While Ms. XXXX described the Student as one of the quieter children in the Lunch Bunch group, she noted that the Student was not an outsider. Ms. XXXX also testified that the Student did not exhibit inappropriate behaviors or feelings; for example, she was not needy or over reactive. With regard to depression or unhappiness, Ms. XXXX stated that the Student expressed no such emotions, instead typically expressing defiance. In particular, Ms. XXXX testified that the Student's most frequent emotional presentation was "pissed off;" the Student did not like to be told what to do, and her defiance was an effort to remain in control of her environment. In addition, Ms. XXXX testified that she was not aware of the Student experiencing any physical symptoms of emotional disturbance. She did not, for example, make frequent visits to the school nurse.

Ms. XXXX also addressed Dr. XXXX's description of the Student as anxious and depressed, stating that at the time she interacted with the Student, the Student did not exhibit or express any anxiety or depression. More often, the Student blamed someone else for her unwillingness to participate in class. For example, she would complain about teachers and students she did not like. It was Ms. XXXX's expert opinion that the behaviors exhibited by the Student were most accurately characterized as oppositionally defiant, and thus a conduct



disorder, rather than emotional disturbance. She also noted that a diagnosis of emotional disturbance, as defined by the IDEA regulation, requires the characteristics to present for a “long period of time” and to a “marked degree.” The Student, in her opinion, did not exhibit sustained behavioral problems during her eighth grade year or, based on her review of the Student’s records, in her first ninth-grade year.

Ms. XXXX acknowledged that the Student had several disciplinary incidents, but took the position that these incidents were not of a frequency or intensity that would justify a referral based on emotional disturbance. With regard to frequency, she stated that there were two periods of time where the Student was disciplined for behavioral problems, February 2015 and May 2015. In both periods, two incidents occurred, for a total of four incidents. With regard to intensity, Ms. XXXX explained that yelling and cursing at adults (which occurred on February 24, 2015) is indicative of oppositional defiance, not a disability. She also described it as fairly typical behavior for a middle school student.

Ms. XXXX also acknowledged that the Student had frequent absences from class, and, noting that the Student appeared to perform better when her attendance was better, took the position that her failing grades were due to poor attendance. Ms. XXXX saw no evidence that the Student had an inability to learn that would support a suspicion that she had a disability. With regard to the Student’s alleged difficulty with crowded classrooms, Ms. XXXX testified that she saw no evidence of such a difficulty. In fact, Ms. XXXX stated that the eighth-grade classes the Student passed were large classes, typically between 25 and 30 students.

It was also Ms. XXXX’s expert opinion that while [School 1] staff may have known that the Student was receiving mental health care, and that she was grieving the loss of her brother, neither of these factors would have prompted a referral for consideration of special education and related services. Ms. XXXX testified that it is quite common for adolescents in this age group to

have emotional and social needs that require additional support and guidance, and so therapy would not be reason for the school to suspect a disability.

XXXX XXXX, who was Assistant Principal at [School 2] during the 2015-2016 school year, also testified for AACPS. She first met the Student in December 2015, when the Student had an outburst at her advocate, Ms. XXXX. Ms. XXXX explained that the Student was assigned to an advisory program when she entered ninth grade in the fall of 2015. This program involved twice-weekly meetings with a behavior interventionist. Meetings lasted thirty minutes, with about fifteen students in the group. The meetings addressed mostly social and emotional issues. In addition, the Student's summer school attendance meant that she was assigned an advocate, who did not perform a teaching function, but would observe the Student in class and talk with the Student, the Parent, and teachers.

Ms. XXXX was aware of the Student's disciplinary history at school, and she testified that she did not consider the behaviors the Student exhibited to be particularly alarming. She noted that they were relatively minor incidents, and were not frequent. She testified that students in this age group are frequently insubordinate and disrespectful to peers, teachers, and administrators, and that verbal fighting, especially among teenage girls, is commonplace at school. She also testified that ninth grade is a particularly difficult year for many students because they are transitioning to high school. Ms. XXXX stated that she spoke to school staff about the Student but did not get any feedback indicating that she was depressed, unhappy, or exhibiting other concerning behavior, such as frequently visiting the school nurse; she noted that school staff would typically bring such matters to her attention.

Ms. XXXX observed in her testimony that the Student did often miss class, and she testified that these absences seemed to increase around February 2016, which she identified as the time when the Student started skipping individual classes more frequently. These absences

did, in Ms. XXXX's opinion, significantly affect the Student's academic performance. She also noted that despite failing many of her classes during the 2015-2016 school year, she did earn some credits. Ms. XXXX reviewed the Student's grades during the hearing, noting that during the first semester of the 2015-2016 school year, the Student passed classes even though those classes were quite large. Finally, Ms. XXXX testified that during the 2015-2016 school year, neither the Parent nor any mental health care provider provided [School 2] staff with any reports or diagnoses. She stated that having now read the reports, the Student's behavior is not reflective of the behaviors she observed in her interaction with the Student during 2015-2016.

Last, AACPS presented the testimony of XXXX XXXX, school psychologist, who met the Student in September 2016 while developing her 504 Plan. Ms. XXXX testified that while meeting with the Parent regarding the development of the 504 Plan, the Parent provided information that prompted Ms. XXXX and Ms. XXXX to follow up with a referral for screening the Student for an IEP. This information included that the Student was hiding knives at home, injuring her siblings, and causing the Parent to be fearful for the Student's safety, as well as the rest of the family's safety. The Parent also shared information about the Student's mental health care history, including her hospitalization in August 2016.

Ms. XXXX testified that her role with regard to the Student included counseling pursuant to her 504 Plan, as well as possibly conducting the psychological assessment as part of the Student's eligibility for special education and related services. She described the evaluation that would have taken place, had the Parent not withdrawn her consent. The psychological evaluation would have included intellectual and cognitive assessments, a comprehensive background review, and assessment of the Student's social and emotional behavioral functioning. In addition, a functional behavioral assessment would be conducted, including observation of the Student and gathering information about her. Following these assessments, a

meeting to share information would be held. That meeting was scheduled for January 10, 2017, and all evaluations would have therefore been completed by that date, had the Parent not rescinded her consent for evaluation.

In her testimony, Ms. XXXX cautioned that the information the Parent provided about the Student's difficult behavior at home was not itself the reason for the referral for an IEP evaluation; rather, that information, coupled with the evaluations and assessments and Ms. XXXX' discussion with the Student's mental health care provider at the time, XXXX XXXX, prompted the referral. She emphasized that no single factor was the impetus for the referral, and that the referral was based on the Student's present behaviors and performance, not on any prior concerns. She also noted that she was concerned that the 504 Plan was not effectively addressing the Student's issues, as the Student continued to be absent and was not utilizing the counseling sessions with Ms. XXXX.

### *Analysis*

In essence, the Parent's position is three-fold with regard to Child Find: first, that the Student's failing grades in eighth grade and her first ninth year should have prompted AACPS to initiate a referral for evaluating the Student for eligibility with regard to special education and related services; second, that AACPS was clearly on notice with regard to the Student's mental health status, and that, even if failing grades alone were not enough for a referral, certainly failing grades plus knowledge of the mental health care she was receiving should have been; and third, that the Parent requested evaluation for special education and related services at least twice, and yet an evaluation was not timely completed. I will address the third issue first.

The Parent testified that she requested an evaluation in early June 2016, shortly before the Student was suspended on June 3, 2016.<sup>7</sup> She stated that she directed this request to Ms.

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<sup>7</sup> The Parent also stated that she requested an evaluation in May 2015. Counsel for AACPS objected to the

XXXX, a teacher at [School 2], and that Ms. XXXX responded that because it was so close to the end of the school year, any evaluation would have to wait until fall, when school resumed for the 2016-2017 academic year.

If in fact Ms. XXXX had told the Parent that an evaluation would not occur until fall 2016, AACPS would have violated its obligation to “promptly request parental consent to assess a student to determine if the student needs special education and related services.” COMAR 13A.05.01.04A(3). Obtaining parental consent triggers the 60-day timeframe for the completion of an initial evaluation. 34 C.F.R. § 300.301(c)(1)(i). However, I find that there was no evidence to corroborate the Parent’s account of a request for evaluation.

This is not to say the Parent was not a credible witness. During her testimony, her demeanor was open and honest, and she responded to questions during both direct examination and cross examination directly and in some detail. It is clear that she is a determined advocate for the Student, both in terms of the Student’s emotional and mental health, as well as her academic performance. It is also clear that the Student is, at times, a difficult and challenging child. But it is not clear from the record what the Parent discussed with Ms. XXXX, if anything, in June 2016, and if in fact the Parent requested an evaluation. The Parent provided no written documentation of any request, such as a letter or email. While the IDEA does not require that the request for evaluation be made in writing, the Parent did not offer any evidence besides her own account that she made such a request.

What the Parent described with regard to the June 2016 conversation was that she and Ms. XXXX discussed a 504 Plan for the Student. Such a conversation could have played out in many different ways – it may have been a brainstorming session about possible ways to address

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presentation of evidence regarding this request as it was prior to the two-year period that preceded the Complaint and thus outside of the permissible scope of my decision, pursuant to Section 1415(b)(6)(B). Counsel for the Parent agreed that it was outside of the permissible two-year period, and I therefore do not consider any evidence pertaining to a request for evaluation in May 2015.

the Student's needs, a suggestion by Ms. XXXX that the Parent consider a 504 Plan, or the Parent asking about what a 504 Plan might involve. The Parent may very well believe that she conveyed such a request during the conversation. The Parent did not provide a detailed account of the conversation with Ms. XXXX, and there were no corroborating records, reports, or testimony. I am mindful that it is the Parent who bears the burden of proof, and I am not persuaded that she in fact requested that the Student be evaluated in June 2016.

I note that an additional factor in my weighing of the evidence with regard to any request in June 2016 is AACPS's overall expeditious responsiveness to the Student's needs. Staff at both [School 1] and [School 2] testified extensively about the proactive steps they took with regard to the Student's academic and emotional needs, including the Student's referral to a support services team and the Student's relationship with Ms. XXXX in eighth grade, the support advocate assigned to the Student in her first ninth-grade year, and establishing a 504 Plan in September 2016. These actions undermine the reliability of any contention that AACPS failed to respond appropriately to a request for evaluation in June 2016; such a claim is simply not consistent with AACPS's other actions with regard to the Student. What seems most likely, based on the evidence before me, is that Ms. XXXX and the Parent had a conversation about the Student's academic and/or emotional challenges in June 2016 and discussed some possible options to explore for the 2016-2017 school year. This is not adequate to trigger AACPS's Child Find obligations under the IDEA.

The Parent also maintained that she requested an evaluation in October 2016 in a conversation with Ms. XXXX. Again, she did not provide the details of this conversation, and there was no corroborating evidence that she specifically made such a request. However, AACPS did in fact move forward with obtaining the Parent's consent at that time, scheduling an initial IEP meeting in November 2016. (AA Ex. 4.) For that reason, the Parent's allegation that

she requested an evaluation in October 2016 but that AACPS failed to respond is not supported by the sequence of events that followed.

I now turn to the issue of whether AACPS was on notice regarding the Student's mental health care treatment, such that it would have reason to suspect that the Student is a child with a disability. AACPS argued, and the Parent acknowledged, that she did not provide any reports from health care providers to AACPS until September or October 2016. However, the Parent argued that because the Student's therapist, Ms. XXXX, faxed a copy of an authorization form to allow communication between AACPS and herself to AACPS on three occasions (with the first being February 25, 2015), and emailed a contact at [School 1] on two occasions in May 2015 requesting a discussion by telephone, AACPS was on notice of the Student's mental health concerns. (Parent Exs. 1 and 2.)

Dr. XXXX was adamant that it was the responsibility of AACPS to respond to these communications from Ms. XXXX, and that in failing to do so, AACPS failed in its obligation to comply with Child Find. Had school staff responded appropriately, according to Mr. XXXX, it would have had a full picture of the Student, and that full picture would have provided a clear basis for suspecting that the Student had a disability. AACPS did not dispute that it did not respond to these communications from Ms. XXXX, despite her request for a response, other than an emailed response from the Assistant Principal promising a telephone call to Ms. XXXX. Whether the promised telephone call took place is not clear from the record before me; Dr. XXXX testified that he had two lengthy conversations with Ms. XXXX in which she expressed that AACPS had never responded adequately to her responses, but neither Ms. XXXX herself nor anyone else with first-hand knowledge of the email exchange testified.

Counsel for the Parent repeatedly asked AACPS's witnesses (over the objection of AACPS) how they would have responded to the communications from Ms. XXXX. Ms. XXXX

acknowledged that it would be appropriate for school staff to respond to Ms. XXXX's May 2015 emails, which requested discussion about the Student. Ms. XXXX stated that she likely would have consulted with the school psychologist regarding the next appropriate step if she received emails like the ones sent by Ms. XXXX in May 2015. However, Ms. XXXX also stated that neither the emails nor the authorization forms sent by Ms. XXXX would have prompted her to refer the Student for evaluation for eligibility for special education and related services. She testified that it is common for students in this age group to receive counseling services, and that a student's participation in therapy does not indicate that the student has been diagnosed with any mental health condition.

I found Ms. XXXX's testimony on this point highly persuasive. I agree that merely providing AACPS with authorization forms that allow AACPS and the Student's therapist to confer does not put AACPS on notice regarding a suspected disability. There is nothing substantive in an authorization form that would provide AACPS with any meaningful information about the Student. With regard to the emails from Ms. XXXX, I similarly conclude that they are not adequate to establish that AACPS would have reason to suspect that the Student was a child with a disability and in need of special education, as contemplated by 34 C.F.R. Section 300.111(c)(1). The emails merely state that Ms. XXXX knows of "a few incidents" that have occurred at school "in the last few months," and that she was hoping to discuss the email recipient's "understanding of these incidents as well as [the Student's] progress/behavior in school." (Parent Ex. 1.) If anything, the email appears to be an effort by Ms. XXXX to obtain – not provide – information regarding the Student's needs. The emails refer to no diagnosis, no conditions, and no specific concerns regarding the Student's needs. In fact, Ms. XXXX offers no independent opinion or information at all about the Student, except that she provides the Student with weekly therapy. There is simply nothing in the emails to support a contention that AACPS should have derived from them any



suspicion that the Student had a disability.

The Parent also mentioned several times in her testimony that AACPS was aware that the Student takes medication, as she has provided the school with permission forms for the administration of medication. However, no evidence was offered regarding what medications were specified in these permission forms or when they were provided to AACPS. Accordingly, I find that the Parent did not establish that AACPS was on notice of the Student's mental health concerns such that it would have reason to suspect the Student had a disability and was in need of special education.

The Parent also argued that the Student's disciplinary record should have provided a basis for AACPS to suspect that the Student has a disability. In eighth grade, the Student had four disciplinary incidents. (AA Ex. 15.) The first was on February 2, 2015, when she used inappropriate language, resulting in a telephone call to the Parent. She had another incident later that month, on February 27, 2015, when she "blew up in class" and "yelled and cursed at several adults." The outburst was significant enough that staff considered calling the police, because they feared for her safety as well as the safety of others. She was assigned to spend two days in the Decision Making Room. She had no further incidents until May 27, 2015, when she was disrespectful to a teacher who asked why she was late to class. She was given in-school suspension the following day, but that caused another incident when she refused to return to the Decision Making Room when she learned that the teacher she had spoken to disrespectfully would not be disciplined for his interaction with her.

In ninth grade, the Student had three disciplinary incidents. (AA Ex. 13<sup>8</sup>.) On December 17, 2015, she was disrespectful and used profanity towards Ms. XXXX, her advocate. As a result, she was suspended for one day. She had a second incident on January 7, 2016, when she

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<sup>8</sup> Though this exhibit lists four incidents, Ms. XXXX explained in her testimony that the two incidents from January 2016 were in fact a single incident, which occurred on January 7, 2016.

refused to participate in Algebra I, instead throwing things back and forth with a classmate, talking, and laughing, and refusing to settle down when asked to do so. The most serious incident occurred on June 3, 2016, when the Student got into a verbal fight with another student. The incident caused significant disruption, because the Student would not cooperate with efforts to remove her to the office, and once in the office, the Student left to seek out the other student again. She was given an eight-day suspension, which she served from June 7, 2016 to June 16, 2016.

In addition to these incidents, the Parent testified that she was frequently called about more minor incidents that are not reflected in the Student's disciplinary records. The Parent maintained that these incidents are reflective of a possible disability and provided a basis for AACPS to suspect that the Student may have a disability. I disagree.

In her testimony regarding the incidents in the eighth grade, Ms. XXXX offered her opinion that the incidents are fairly typical behaviors at the middle school level. She also noted that their nature – yelling, cursing, acting disrespectful – is commonplace at that age. She opined that these behaviors are best described as oppositional defiance, rather than symptoms of emotional disturbance. She noted that students who are found to be emotionally disturbed typically have a lengthy record of incidents, reflecting the occurrence of such behaviors over a long period of time. She also noted that the behaviors were generally more defiant than violent or out of control, and that emotional disturbance would be characterized as the latter.

On cross examination, Ms. XXXX did acknowledge that the February 27, 2015 incident was perhaps more extreme than the other incidents, as staff noted they considered calling the police to manage the Student's behavior. Nonetheless, she maintained that as a whole, the Student's eighth grade disciplinary record provided no basis for suspecting that the Student may have had a disability.

Ms. XXXX, who was present for the Student's eighth-grade year but not her ninth, nonetheless offered her opinion of the latter based on her expertise. Again, she noted that there were only a few incidents, and that did not represent the kind of sustained dysfunction associated with emotional disturbance. I found Ms. XXXX's testimony and expert opinion particularly compelling on this point, especially in light of her extensive background in psychiatric care, as well as because of her first-hand familiarity with both the Student in a school environment and the typical behaviors of the students who attend [School 1].

I also found Ms. XXXX's testimony distinguishing the Student's behavior during the 2014-2015 school year from the characteristics of emotional disturbance, as defined in the IDEA regulations at 34 C.F.R. Section 300.8(b)(4) highly persuasive. Ms. XXXX explained that the Student did not demonstrate an inability to learn, an inability to build or maintain interpersonal relationships, inappropriate types of behavior or feelings under normal circumstances, a pervasive mood of unhappiness or depression, or the development of any physical symptoms. Any of these could be basis to suspect that a Student might be emotionally disturbed, but Ms. XXXX maintained that the Student exhibited none of these "over a long period of time" and "to a marked degree," as required by 34 C.F.R. Section 300.8(b)(4). Instead, Ms. XXXX opined that the Student's behaviors were consistent with a conduct disorder, in that she had control of her actions and chose to respond defiantly.<sup>9</sup> Based on Ms. XXXX's compelling testimony, I am persuaded that the Student's behavior in the 2014-2015 and 2016-2017 school years was not such that

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<sup>9</sup> See *Springer v. Fairfax Cnty. Sch.Bd.*, 134 F.3d 659 (4<sup>th</sup> Cir. 1998) for a discussion of the difference between a conduct disorder and emotional disturbance as defined by the IDEA. The student in that case engaged in criminal behavior, including burglary, tampering with an automobile, and substance abuse, obviously significantly more serious behaviors than the Student's truancy. It is important to note that Ms. XXXX was not advocating a diagnosis of a conduct disorder in the Student's case but rather stating the Student's behaviors appeared to reflect a choice, rather than a disability, which would make them more similar to a conduct disorder than to emotional disturbance. The *Springer* Court held in part that the parents in that case "had failed to establish the critical causal connection" between the student's condition and his educational difficulties. *Id.* at 666. For that reason, the Court noted that the student's "delinquent behaviors," including his truancy, appeared to be the primary cause of his academic difficulties. The Student's failing grades in this case were similarly understood by AACPS to be a consequence of her truancy, a reasonable conclusion.

AACPS should have suspected that the Student had a disability.

Finally, I turn to the issue of the Student's failing grades and whether her grades alone obligated AACPS to evaluate her for a suspected disability. The record makes clear that the Student's grades for the 2015-2016 school year were indisputably dismal. (AA Ex. 27.) AACPS doggedly argued that the Student did pass a few classes, in which she received a D, a C, or, in one class, a B. But in the second semester of the 2015-2016 school year, the Student failed every single class but one (her Student Seminar with Ms. XXXX). Her highest grade was a 55% in Matter and Energy (Science). Her other grades were 30% (English); 50% (History of the U.S.); 32% (Algebra I); 26% (American Sign Language); 20% (Child Development, which was the course she had earned a B in first semester); and 31% in Dance. The Student's grades in eighth grade were not quite as poor – she failed four of her eight classes – but that is still half of her coursework. (AA Ex. 28.)

AACPS took the position that it reasonably concluded the Student's poor grades were due to chronic absenteeism, her failure to participate in class, and her failure to complete assignments. Ms. XXXX testified that in her opinion, the Student's grades did not reflect an inability to learn, because the lower her absentee level was, the better her academic performance was. She also noted that despite the Parent's concern about large class sizes contributing to the Student's absenteeism, the Student passed classes that had large numbers of students, such as Child Development, which she took in the first semester of the 2015-2016 school year; the Student earned a B that semester.

Ms. XXXX echoed Ms. XXXX's assertion that the Student was capable of doing her schoolwork when she chose to do so; she noted that the Student passed a high-school level Spanish class when she took that class in the summer of 2015. She also stated her opinion that generally, when the Student actually attended class, her performance improved significantly, and

that when her attendance declined, so did her grades.

I conclude that Dr. XXXX's position that failing grades alone should trigger AACPS's Child Find obligations is simply untenable, especially in light of the Student's chronic absenteeism, which provides the most obvious explanation for her poor grades. I recognize that the issue is not whether failing grades establish a disability, but rather whether they establish reason to suspect that a student has a disability. Nonetheless, I conclude that they do not inherently provide a basis for such a suspicion. Failing grades certainly should prompt some intervention from school staff. In this case, the Student's teachers noted on her report cards that her absenteeism was negatively impacting her grades. Her eighth grade teacher for Healthy Living marked on her report card that her absences affected achievement. Her Social Studies teacher noted that assignments were missing, and her Fitness for Life teacher noted that she needed to improve her participation. (AA Ex. 28.)

Similarly, every one of her ninth grade teachers from the 2015-2016 school year in the classes she failed marked that her absences were affecting her achievement. (AA Ex. 27.) More significantly, as a result of the Student's need to take summer school in the summer of 2015, various interventions were established to assist in her transition to high school, including assigning her an advocate and enrolling her in a program led by a behavior interventionist to address social and emotional issues.

What undermines Dr. XXXX's position that failing grades are inherently a red flag indicative of a possible disability is that when the Student attended class more regularly, her grades were better. It is clear from her 2015-2016 report card that in general, a higher number of missed classes correlated with lower grades. While this correlation would likely exist regardless of any disability, that the Student passed her classes when she actually attended class regularly indicates that AACPS reasonably concluded she has the ability to learn when she shows up for

and engages in class. Specifically, the Student earned a B in her Child Development class in the first semester of the 2015-2016 school year; and she missed only three classes that semester. She also earned a C in Fitness for Life, where she missed only five classes. On the other hand, she missed 10 classes of Algebra I (her highest number of missed classes for any single course), and failed the class. She also failed Foundations of Studio Art, where she missed seven classes. In English, she earned a 71% for the first half of the semester, when she missed only one class. But her grade dropped to 23% in the second half of the semester, when she missed four classes. Even earning an 81% on her English examination – her highest examination score, and again, a strong indicator of her ability to master the material – could not save her from failing English.

By the second semester of the 2015-2016 school year, the Student was skipping an enormous number of classes. She skipped English 19 times, and Matter and Energy 20 times. She was absent from Child Development 26 times, and American Sign Language 28 times. She skipped Algebra I 21 times, History of the U.S. 17 times, and Photo and Digital Processing 29 times. Her grade in Photo and Digital Processing was literally a zero; she did not earn a single percentage point, which suggests that she did not participate at all, even when present. With this level of absenteeism, it would make little sense for school staff to conclude that a disability is the suspected culprit; it reasonably concluded the Student failed her classes because she did not attend them.<sup>10</sup> This is further underscored by the Student's performance on the Maryland State Assessments, where she demonstrated proficiency in Science and English, and passed the Math at the basic level. (AA Ex. 5.)

The information available to AACPS before October 2016 suggested not that the Student's achievement was likely derailed by efforts undermined by a disability, but that the Student simply skipped class as she pleased, and that when she was frequently absent, she

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<sup>10</sup> I note that the Fourth Circuit has held that “when experts disagree, IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent.” *A.B. v. Lawson*, 354 F.3d 315 (4<sup>th</sup> Cir. 2004).

received poor grades because she missed assignments and could not participate in class activities. In addition, she was not present in class enough to master the material. In light of the clear correlation between the Student's grades and her attendance, as well as her ability to perform on the Maryland State Assessments, there simply is no basis for the Parent's assertion that AACPS should have suspected that the Student had a disability. Dr. XXXX testified that depression and anxiety can contribute to a student's absences, and yet AACPS school staff observed no indicators of depression or anxiety.

Consideration of the Student's mental health treatment, insofar as AACPS knew about that treatment, does not alter my analysis. Before August 2016, the only information AACPS had regarding the Student's mental health concerns was that the Student was receiving therapy and that she took medication. Even when this knowledge is coupled with the Student's poor grades, AACPS reasonably concluded that the latter were due to the Student's chronic absenteeism. This is also true when the disciplinary incidents are considered, because, like the therapy sessions, behavioral incidents of the nature, frequency, and intensity of those at issue in this case are simply typical of normal adolescent behavior. Ms. XXXX testified that even the Student's failing grades are not atypical; she stated that ninth grade is the most commonly failed grade because it is a difficult transitional year.

This is not to say that if the Student is evaluated now, she would not be found eligible for special education and related services based on a diagnosis of emotional disturbance. However, the issue before me is whether the evidence presented by the Parent supports a finding that AACPS failed to comply with Child Find provisions because it either did not respond when the Parent requested an evaluation or failed to act when it had reason to suspect that the Student had a disability; I find that the Parent has not met this burden.

The remedy sought by the Parent is an IEE pursuant to 34 Section C.F.R. 300.502.

AACPS argued that this remedy requires that any right to an IEE be predicated on the public agency having already completed its own evaluation, as the basis for an IEE is a parent's disagreement with the evaluation obtained by the public agency. In terms of the plain language of the regulation, AACPS is correct. However, I note that on occasion, courts have ruled that a parent is entitled to an IEE where no evaluation was obtained by the public agency, usually because the public agency either failed to conduct such an evaluation or because it took so long to take steps towards doing so that the court found an IEE to be a reasonable remedy.<sup>11</sup> As I have not found any violation of the Child Find requirements by AACPS, I find that the Parent is not entitled to any remedy.

However, I note that had I found a violation of the Child Find requirements, the remedy I would have ordered would have been that AACPS conduct an evaluation as long as the Parent provided her consent for it to do so. In fact, this remedy is available to the Parent at any time; she need only provide her consent to AACPS. While the Parent expressed distrust in AACPS's evaluation process, she offered no basis for such distrust. Furthermore, allowing AACPS to conduct its evaluation then provides a basis for her entitlement to an IEE, subject to other requirements of 34.C.F.R. Section 300.502(b)(2) through (4).

### **CONCLUSIONS OF LAW**

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

(1) AACPS did not fail to timely identify, locate, and evaluate the Student's eligibility for special education and related services under the IDEA. 20 U.S.C.A. § 1412(a)(3) (2010); 34 C.F.R. § 300.111(a)(1) and (c); *Schaffer v. Weast*, 546 U.S. 49 (2005); and

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<sup>11</sup> See, e.g., *Los Angeles Unified School District v. D.L.*, 548 F.Supp. 2d. 815 (C.D. Cal. 2008). But see *M.T.V. v DeKalb Cnty. Sch. Dist.*, 446 F.3d. 1153 (11<sup>th</sup> Cir. 2006), where the Court held that a school district must be allowed to conduct its own evaluation and may not be forced to rely solely on an IEE conducted at the parents' request.



(2) the Parent is not entitled to an independent educational evaluation at public expense. 20 U.S.C.A. § 1415(b)(1); 34 C.F.R. § 300.502; and

(3) the Parent is not entitled to any remedy.

**ORDER**

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

February 10, 2017  
Date Decision Issued

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Jennifer L. Gresock  
Administrative Law Judge

JLG/dlm

## **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.