This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

G.S., 6148/05-06 AS
Name

[redacted]
Date of Birth
02/24/06, 02/27/06, 03/04/06
Dates of Hearing
Closed
Type of Hearing

Parties to the Hearing:

Parent[s]
Parents' Names

03/11/06
Date Transcript Received

03/ 26/06
Date of Decision

Council Rock
School District

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Signature of Hearing Officer

I. BACKGROUND

[Student] is a [teenaged] resident of Council Rock School District who attends Council Rock High School South as a 10th grade special education student. Prior to enrolling in the School District in the summer of 2004, [Student] attended private schools, leaving the [redacted] School after 8th grade, when [Student] reached the end of its curriculum.

The School District provided [Student] with a learning support IEP for 9th grade based upon [Student's] Mother's representation that [Student] has a learning disability and was attending a school for learning disabled students. [Student], however, had never been identified as an IDEA eligible school-age "child with a disability." Shortly after [Student] enrolled in the School District, it sought [Student's] Parents' permission for an evaluation to determine [Student's] eligibility for special education services, which [Student's] Parents ultimately provided.

Upon completion of the evaluation in the spring of 2005, the School District concluded that [Student] is not IDEA eligible and recommended termination of special education. [Student's] Parents sought mediation, which was unsuccessful. Parents then requested a due process hearing, which they later withdrew in order to obtain an independent educational evaluation (IEE). After Parents withdrew their request for a hearing, the School District requested a due process hearing for a determination that their evaluation was appropriate and accurate and to seek an order that [Student] is not an IDEA eligible student, since [Student] does not meet the criteria for a specific learning disability, or, in the alternative, because [Student] does not need special education.

II. FINDINGS OF FACT

1. [Student] is a [teenaged] child, born [redacted]. [Student] is a resident of the School District and a 10th grade student at [a] High School. (Stipulation, N.T. pp. 46, 47, 102).

2. [Student] was deemed eligible for special education services and provided with an IEP for the 2004/2005 school year. After completion of a School District evaluation and ER at the end of the 2004/2005 school year, [Student's] IDEA eligibility became and remains an issue in dispute between the School District and Parents. (N.T. p. 60, 646, 647, 649; S-5, S-7).

3. [Student's] Parents believe that [Student] has a learning disability, and, therefore, is eligible for IDEA services in accordance with Federal and State Standards. 34 C.F.R. §300.7(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (N.T. pp. 62– 64, 811, 853).

4. [Student's] Mother first became concerned that [Student] had a learning disability when [Student] was unable to recognize and distinguish the letters "P" and "R" at age 3½ years, despite [Student's] devotion to the [redacted] television characters. (N.T. p. 813)

5. [Student] attended a private pre-school, but [Student's] Mother was advised by teachers there that [Student] would be unable to keep up in that school's kindergarten program. (N.T. p. 813).

6. [Student] was enrolled in a different private school for kindergarten and first grade. While in kindergarten, [Student] was evaluated for and received itinerant early intervention services in [Student's] general education kindergarten setting. (N.T. p.813, 814, 916; S-5)

7. From second grade through eighth grade, [Student's] Parents enrolled [Student], at their own expense, at the [redacted] School, which is described as a school for students with language- based learning differences with an enrollment of approximately 95 students in grades 1–8. The [redacted] School does not evaluate students to determine the existence of learning disabilities. (N.T. pp. 483, 484, 514, 515, 814)

8. Progress reports for the 3 marking periods of [Student's] 8th grade year reveal that [Student] made excellent progress, earning an A or A- in all subject areas in the last marking period, improving from grades of B and B+ in math, social studies and English in the first marking period. (N.T. p. 508; S-3)

9. Since the [redacted] School curriculum ends after 8th grade, [Student] needed to transition to another school setting for 9th grade. Although the [redacted] School recommended that [Student] continue in a small, private school, [Student's] Parents could not afford the tuition. (N.T. pp. 508, 759, 821, 822, 829)

10. In preparation for the transition to a public school and in order to determine the type of program which would best meet [Student's] needs, [Student] was evaluated by [a local] County Intermediate Unit (IU) school psychologist Mr. B in the fall of 2003 at age [redacted]. (N.T. pp. 821– 823; S-2, S-5, P-1)

11. [Student's] standard and scaled scores on the standardized tests administered in the course of the IU/Mr. B evaluation were:

WISC-IV		Subtest Scaled Scores (Average = 10)
Verbal Comprehension	130	Similarities-15; Vocabulary-15; Comprehension-15
Perceptual Reasoning	79	Block Design-5; Picture Concepts-9; Matrix Reasoning-6
Working Memory	88	Digit Span-6; Letter/Number Sequencing-10
Processing Speed	91	Coding-7; Symbol Search-10
Full Scale	99	

Kaufman Test of Educational Achievement–Standard Scores by Age/Grade (Avg.=100)
Reading Decoding– 92–93/93–94; Reading Comprehension– 108/109 Spelling– 83/84; Mathematics Applications– 96/96;

Wide Range Achievement Test– Standard Scores (Avg.= 100)
Reading– 91; Arithmetic Computation– 94;

Developmental Test of Visual-Motor Integration Standard Score– 73 (Avg.= 83– 117)

Test of Written Language Standard Score– 9 (Avg. = 8–12)

(S-2, P-1)

12. Although the [IU] evaluation revealed primarily average scores in both intellectual capacity and achievement, the evaluation report identified several areas of relative weakness considered by the evaluator to be potential problem areas which might interfere with [Student's] educational progress going forward, such as tasks requiring processing speed, working memory and perceptual reasoning skills (S-2, P-1)

13. The [IIU] report also made a number of recommendations to the "Instructional Support Team" for educational supports to overcome such potential problems, including: extra time to read passages, extended time for tests, study questions, breaking reading material into small chunks, graphic organizers, use of a word processor and spell checker, pre-printed materials to reduce the need to copy from the board and take notes, organization strategies, help with copying homework assignments. (S-2, P-1)

14. On June 9, 2004, [Student's] Mother enrolled [Student] at the School District as a 9th grade student. Based upon the location of [Student's] residence, [Student] was assigned to [a] High School. (N.T. pp. 93, 95, 829, 830; S-1)

15. During the summer of 2004, [Student's] Mother contacted the School District to discuss [Student's] educational needs, relating that [Student] was a student with a learning disability who had always received special education services. (N.T. pp. 77, 95, 132, 830)

16. At a meeting on June 23, 2004, the School District's Supervisor of Special Education discussed with [Student's] Mother the accommodations she believed [Student] needed in order to succeed in high school. [Student's] Mother also provided the School District with the [IU] evaluation report in response to its request for prior educational records, but gave the District no other records. (N.T. pp. 77, 78, 92, 830, S-2, P-1)

17. Before the 2004/2005 school year began, two IEP meetings were held and a special education program was developed for [Student] for 9th grade with the input of [Student], [Student's] Parents and a teacher from the [redacted] School, who met with the School District members of [Student's] IEP team. (N.T. pp. 99– 107, 495, 832– 843; S-4)

18. The final IEP dated August 5, 2004, which is still being implemented during the 2005/2006 school year, includes an extensive list of accommodations for [Student] under the heading "Specially Designed Instruction." The items of specially designed instruction were drawn from a list provided by [Student's] Mother and reflect many of the recommendations made in the 2003 IU report. Delivery and implementation of most of the listed accommodations are self-directed by [Student] in consultation with [Student's] teachers. (N.T. pp. 109, 111– 113, 495– 503, 785– 789, 833– 843; S-2, P-1)

19. The August 5, 2004 IEP was also implemented in 9th grade by assigning [Student] to inclusion classes for English and science, to a resource room math class, and to a study skills class, which is designed to help special education students manage their time, organize their assignments and projects, receive extra help in completing them correctly and on time and take extended time tests, when necessary. [Student] was also assigned to a regular education social studies class. Resource room classes and study skills are available only to students eligible for special education. Regular education students are randomly assigned to inclusion classes, but only special education students are guaranteed assignment to inclusion classes. (N.T. pp. 112, 183, 207, 228– 232, 315– 323; S-4, S-5, S-6, S-9)

20. Soon after the child study team met on June 30, 2004, the School District requested permission to evaluate [Student] for special education eligibility. The initial request was followed by several subsequent requests. (N.T. pp. 98– 100, 115– 119, 641, 642; S-4)

21. After signing and subsequently verbally withdrawing permission to evaluate [Student] several times, Parents ultimately signed the permission to evaluate on November, 2004. Standardized testing for the evaluation, compiling additional information and preparing a final Evaluation Report (ER) was conducted in April 2005 by a supervised school psychologist intern with an M.A. degree who is enrolled in a Ph.D. program, and is

currently employed by the School District as a school psychologist. (N.T. pp. 116, 117, 522– 525, 577, 582, 642– 645, 663; S-5)

22. The School District's ER yielded the following standardized test scores for [Student]:

WISC-IV		Subtest Scaled Scores (Average = 10)
Verbal Comprehension	108	Similarities-12; Vocabulary-12; Comprehension-11
Perceptual Reasoning	88	Block Design-6; Picture Concepts-10; Matrix Reasoning-8
Working Memory	97	Digit Span-10; Letter/Number Sequencing-9
Processing Speed	88	Coding-6; Symbol Search-10
Full Scale	95	

WIAT-II–Standard Scores		Subtest Standard Scores Average=100)
Reading	113	Word Reading-99; Reading Comprehension-131; Pseudoword Decoding-105
Mathematics	100	Numerical Operations-102; Math Reasoning-101
Written Language	92	Spelling-96; Written Expression-92

(N.T. pp. 550– 555; S-5)

23. [Student's] 9th grade teachers also provided comments which were included in the final ER dated May 4, 2005. All stated that [Student] was an excellent student and that [Student] was achieving at an outstanding level, except [Student's] Pre-Algebra teacher, who rated [Student's] performance as average. [Student's] regular education social studies teacher noted that [Student] was not sufficiently challenged in the 9th grade academic class. [Student's] inclusion English teacher noted that [Student] did not make use of any IEP accommodations and that [Student's] written expression had improved significantly over the course of the school year. (N.T. pp. 556, 559; S-5, S-6)

24. In 9th grade, [Student's] final grades in [Student's] major, full credit academic subjects were "A" in English and social studies, "A-" in science and "B" in Pre-Algebra. (S-5, S-9)

25. Based upon the ER, the School District concluded that [Student] is not IDEA eligible and issued a NOREP on August 1, 2005, recommending that [Student] be placed entirely in regular education classes. Since [Student's] Parents disagreed, special education services were continued in the current school year. In 10th grade, [Student] is taking the following regular education academic classes and special education classes: Inclusion English and biology, a regular education honors social studies class, Algebra II in the resource room and study skills. In the first and second marking periods of the current school year, respectively, [Student] received the following grades: Biology– A-, B+; Algebra– B, B+; social studies– B+, A-; English– A, A-. (N.T. pp. 179, 236, 246, 314, 377, 428, 557, 667; S-9)

26. All of [Student's] current teachers consider [Student] an excellent student who could succeed very well in regular education classes, since [Student] does not need and does not use the SDI included in [Student's] IEP for [Student's] academic classes. In English, [Student's] writing is solidly average, at about the middle of the group, without modifications. [Student] does not request help in organizing and completing assignments and projects in [Student's] study skills class, as intended, but uses it as a study hall to complete homework assignments and work on long-term projects. (N.T. pp. 192– 200, 222, 248– 251, 256, 339– 344, 381, 385, 386, 389– 391, 432– 435, 440– 448, 609, 610, 617, 775)

27. [Student's] Parents have hired a tutor for [Student], a School District English teacher, who assists [Student] with English and social studies writing assignments. Neither [Student] nor [Student's] Parents believe that [Student] would be able to maintain [Student's] academic success in without special education services, and are especially apprehensive that [Student] will be unable to succeed in regular education math and chemistry in 11th grade, which they anticipate being harder for [Student] than [Student's] current courses due to [Student's] relative weakness in math-based classes. (N.T. pp. 158, 775 – 783, 861– 863, 870, 871, 900, 903)

III. ISSUES

1. Did the School District appropriately evaluate [Student] to determine whether [Student] is eligible for special education services?

2. Is the School District correct in its determination that [Student] is not a "child with a disability" who, by reason thereof, needs specially designed instruction, and, therefore, is not an IDEA eligible student?

3. Is the School District permitted to discontinue special education services to [Student]?

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Introduction

As noted repeatedly on the record of the due process hearing in this matter, the only substantive dispute in this case centered on the School District's evaluation of [Student], from which it concluded that [Student] is not eligible for IDEA special education services. The appropriateness and accuracy of the School District's evaluation and the resulting eligibility determination were raised in a School District due process hearing request, and the School

District had the burden of proving that its evaluation was appropriate and that it correctly determined that [Student] is not IDEA eligible. There are both federal and Pennsylvania substantive legal standards governing evaluations and the determination of IDEA eligibility which set forth the criteria the School District is required to meet to in order to conduct an appropriate evaluation and determine whether [Student] is eligible for special education. *See*, 20 U.S.C. §1414(b), (c); 34 C.F.R. §§300.12, 500(b)(2), 532– 536; 22 Pa. Code §14.123. Federal and state special education rules also define the various conditions which support the determination that a student is a "child with a disability" and add an essential additional eligibility criterion, *i.e.*, that "by reason of" such identified condition, the student needs specially designed instruction. 20 U.S.C. §§1414(3)(A)(i), (ii), 30(A); 34 C.F.R. §300.7(a), (c); 22 Pa. Code §§14.101, 102(a)(2)(ii).

Before discussing and applying the foregoing legal standards to this case, however, preliminary issues concerning scheduling, evidence and representation by counsel must be discussed, since the Parents were obviously concerned that their ability to oppose the School District's conclusion that [Student] is not IDEA eligible was compromised by matters which occurred outside of the due process hearing itself, but affected the way the hearing was conducted and the evidence which was admitted, or more to the point, not admitted.

B. Hearing Officer Scheduling and Evidentiary Rulings

Decisions concerning scheduling and the admission of evidence at a due process hearing are matters vested almost entirely to the discretion of the administrative due hearing officer. *See*, *e.g.*, Dispute Resolution Manual §§702 A, 703, 808, 809, 907–910; *In Re: The Educational Assignment of E.E.*, Special Education Opinion No. 1645 (Sept. 14, 2005); *In Re: The*

Educational Assignment of B.B., Special Education Opinion No.1578 (Feb. 18, 2005). Such discretion, however, is constrained to some extent by certain overriding statutory and regulatory principles, *e.g.,* the due process hearing must be impartial; hearings must be scheduled at a time and place reasonably convenient for the Parents; due process matters should be promptly resolved, ideally within 45 days after the recently mandated conciliation period ends; parties are required to disclose to each other the evidence they are planning to rely on at the hearing at least five (5) business days before the hearing. 20 U.S.C.§§1415(f)(1)(A), (3); 34 C.F.R.§§300.507, 508, 509(a)(3), (b), 511; 22 Pa. Code §§14.162(d), (k), (q); Dispute Resolution Manual §§ 501, 501(K), 807A, 808A. Since all of these issues were implicated in this case, a brief discussion of the pre-hearing proceedings is necessary as background information.

In a conference call with counsel for both parties on January 6, 2006, a first hearing date in this case was set for February 1, 2006, with a second date to be determined for presentation of the Parents' case after completion of their independent educational evaluation. A few days before the first hearing date, Parents' counsel asked for a continuance due to a new work schedule for [Student's] Mother. (*See*, Exh. HO-2, pp. 1, 2) In an exchange of e-mail messages between January 31 and February 8, 2006 concerning new hearing dates, which included acceding to Parents' request that only Monday, Friday and evening dates be considered, Parents' counsel also noted that the IEE was not yet completed but that the final testing session would be held on February 10. (*Id.*). A preliminary report from the independent evaluator, dated January 27, 2006, had already been sent to School District counsel. Ultimately, since Parents' counsel did not provide any suggested dates or confirm any dates when Parents' witnesses would be available, as repeatedly requested, the hearing was set for Friday, February 24 and Monday,

February 27. (*See*, Exh. HO-2, pp.1–8; HO-3). No further communications were received from Parents' counsel from February 8 until February 22, 2006. (HO-2).

On February 21, 2006, School District counsel submitted a motion in limine to preclude the 29 page final report of Parents' evaluator, which was dated February 18, and received by counsel on February 21, only two full business days before the first hearing session, which had been scheduled prior to the final IE testing session. The District also moved to preclude the testimony of an additional witness, [Student's] tutor, whom Parents' counsel disclosed at that time. (Exh. HO-1A). In response to the District's motion, Parents moved to continue the hearing in order to provide additional time for the District to consider and prepare to respond to the final IEE report. (Exh. HO-1B) On February 22 a written ruling was transmitted to both attorneys via fax and e-mail denying the Parents' motion and granting the School District's motion. (Exh. HO-1C). The testimony of Parents' expert witness, however, was specifically not precluded with respect to all test results and other matters contained in her January 27 preliminary report. (*Id*. at 2; *See, e.g.*, N.T. pp. 6, 13, 15, 68, 901).

Prior to convening the due process hearing, Parents' counsel requested a conference because the Parents had expressed their unwillingness to proceed with that attorney's representation at the hearing. After further discussion of the School District's motion in limine and explanation of the burden of proof at the hearing, Parents' counsel requested and was granted leave to withdraw from representing Parents. (N.T. pp. 7– 14, 30, 31). Although the Parents did not want to proceed without counsel at the hearing, they likewise were unwilling to have their original counsel represent them, and requested a continuance to permit them to obtain new counsel. (N.T. pp. 8) When that motion was denied, Parents participated in the first hearing

session without counsel, making an opening statement and cross-examining the witnesses called by the School District at the first hearing session. (N.T. pp.62–72; 121– 148, 204– 225, 256–264).

Over the weekend, Parents obtained new counsel to represent them at the February 27 hearing session, and at the final session held on Saturday, March 4, at which the Parents presented their case.[1] (N.T. p. 290)

At each hearing session, the Parents, personally and through counsel, objected to the preclusion of their expert/independent evaluator's final report, equating that ruling with the preclusion of the witness entirely, since she refused to appear and testify if she could not testify to her entire report. Since Parents' counsel objected, specifically, to the "wooden" application of the procedural rules, that issue, along with scheduling the hearing and proceeding with the first session in the absence of counsel for the Parents require some additional discussion.

In the first instance, the Appeals Panel has ruled that late disclosure of evidence should result in preclusion:

> Pursuant to the above-cited federal and state regulations, a party has a right to "Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing" (34 CFR §300.507(a)(3) and 22 Pa. Code §14.162(k)). It is undisputed that both parties failed to comply with these regulations. It is also undisputed that the regulations are implicitly clear in their mandate that a party has the right to prohibit the introduction of evidence not disclosed in accordance with the rule. The choice of the word "prohibit" is strong. The hearing officer followed the law when he ruled as he did, given the Parent's objection to allowing the introduction of evidence which the District needed to prove its case. ... We also note that

[1] A Saturday session was scheduled to balance the Parents' request at the second hearing session not to conduct additional hearing sessions during business hours in order to avoid further loss of work time for Father and the School District's reluctance to schedule evening sessions due to issues of the unavailability of its witnesses and the likely need for more than one additional hearing session, which would have significantly increased the District's costs.

> the hearing officer has broad discretion in the admission of evidence at the hearing, and we find no error of law in the hearing officer's decision to bind the District to its responsibilities under the five day rule.

In Re: The Educational Assignment of B.B., Special Education Opinion No.1578 (Feb. 18, 2005). (*See, also, In Re: The Educational Assignment of W.P.*, Special Education Opinion No.1593 (Apr. 5, 2005), in which the Appeals Panel reversed the Hearing Officer's decision to admit untimely disclosed evidence). In this case, precluding the Parents' final IEE report based upon untimely disclosure did not prevent them from presenting evidence on which they bore the burden of proof, since they had no burden of proof, and certainly did not prevent Parents from attacking every aspect of the School District's evaluation, from selection of tests and administration thereof to interpretation of the results. That Parents did not present that type of expert evidence in opposition to the School District's case was solely the result of their expert witness/independent evaluator's refusal to accept the decision to apply the five day rule to her IEE. It should also be noted that Parents presented no reason or explanation for their expert's failure to prepare her report early enough for timely disclosure to the School District. (N.T. pp. 595–597; HO-1C at 2).

Finally, the scheduling issue which arose several days before the initial hearing session and continued throughout the first day, specifically the refusal to grant additional continuances in this matter even when Parents were proceeding without counsel for a time, was part and parcel of the untimely disclosure issue. Parents purportedly lost confidence in their counsel because of the late disclosures and wanted to delay the hearing for that reason. Parents, however, had already been accommodated far beyond "reasonably" with respect to scheduling due to personal issues, and granting their request for yet another delay of the hearing requested by the School District

would have been an unfair burden on the School District, as well as an unreasonable extension of the appropriate timelines. Parties to a due process hearing undisputably have the right to be represented by counsel, and continuances to obtain counsel are often granted, but doing so remains a matter of hearing officer discretion. 20 U.S.C. §1415(h)(1); 34 C.F.R. §300.509(a)(1); Dispute Resolution Manual §§501(4), 603(2).

In this case, the hearing was requested by the School District and had been continued beyond the timelines at Parents' request and over the School District's objection. Parents then created the situation which left them without counsel at the first hearing session just before the due process hearing was to be convened by blaming their former counsel for the untimeliness of the disclosure of the IEE, for the failure to timely disclose the student's tutor as a witness, and, perhaps, for the attorney's failure to obtain a favorable ruling on the Parents' motion for a continuance or to obtain a continuance by agreement. Parents strongly expressed their lack of confidence in that attorney and their unwillingness to continue with his representation at the hearing. Whether or not their accusations against the former attorney were accurate was certainly not a proper matter of inquiry at a due process hearing, and in the face of Parents' strongly expressed lack of confidence, the attorney felt there was no choice but to withdraw from the case. At that point, it became impossible to accommodate the desires of all parties, since there were only two choices: grant another continuance and thereby require the School District to bear the additional expenses resulting from an aborted hearing after all necessary parties were assembled or proceed with the hearing despite the Parents' lack of an attorney and their desire to be represented. In light of all prior and current circumstances, the decision was made to require the Parents to bear the responsibility for the difficulties created by their representatives, whether

by their expert witness, their former attorney or by a combination of their actions. Although Parents did not have the evidence and schedule they preferred, they were not treated unfairly by being required to follow the disclosure rules which apply to everyone involved in a due process hearing and by holding them responsible for the actions of those acting on their behalf. Rather, they were simply not afforded preferential treatment.

Moreover, to the extent that Parents' procedural rights were violated by requiring them to proceed without counsel, it was a matter of harmless error. Although the Parents expressed their feelings of inadequacy in representing their son's interest without the advice of counsel, they were granted considerable leeway in their statements and questions and acquitted themselves quite well. In addition, no technical testimony was taken at the first hearing session. The witnesses were a school administrator, who testified primarily about her participation in meetings with Parents, and two of [Student] teachers. Both Parents and [Student] could, and did, testify to the same matters, as did additional School District teacher witnesses who were cross-examined by Parents' new counsel.

C. Appropriateness/Accuracy of the School District's Evaluation and Eligibility Determination

The issue of [Student's] IDEA eligibility with respect to the whether [Student] is a "child with a disability" centers on whether [Student] meets the objective criteria for the disability category "specific learning disability" as that term is defined in the IDEA statute and regulations, as well as the additional requirement that "by reason thereof," [Student] "needs special education and related services." 20 U.S.C. §1401(3), (30); 34 C.F.R. §300.7(a)(1), (c)(10), 22 Pa. Code §§14.101, 102(a)(2)(ii). *In Re: The Educational Assignment of Vincent D.*, Special Education Opinion No. 1413 (Sep. 23, 2003); *In Re: The Educational Assignment of Michael M.*, Special

Education Opinion No. 1019 (June, 2000). There was no suggestion in the record that [Student] or [Student's] Parents believe that [Student] falls within the definition of any other disability category, or that the School District has any reason to suspect any other disability based upon [Student's] adjustment and functioning in school.

A "specific learning disability" is defined as,

> ...a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia.

20 U.S.C. §1401(30); 34 C.F.R. §300.7(c)(10), 22 Pa. Code §§14.102(a)(2)(ii). Additional criteria relating to evaluations and determining whether a specific learning disability exists found in federal and state regulations specify that a "team of qualified professionals" and the parents must determine "whether a child suspected of having a specific learning disability is a child with a disability" and further specify that the team must include a regular classroom teacher who teaches the child and a school psychologist. 34 C.F.R. §300.540; 22 Pa. Code §14.124(a). The regulations further provide that

> (a) A team may determine that a child has a specific learning disability if–
>
> (1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child's age and ability levels and
>
> (2) The team finds that the child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas: (i) oral expression. (ii) Listening comprehension. (iii) Written expression. (iv) Basic reading skill. (v) Reading Comprehension. (vi) Mathematics calculation. (vii) Mathematics reasoning.

34 C.F.R. §300.541(a).[2]

The School District contends that the standardized intelligence and achievement tests administered to [Student] in the course of its own 2005 evaluation, as well as the same or similar tests administered in 2003 by Mr. B, a school psychologist employed by [a local] Intermediate Unit, are consistent and support the conclusion that [Student] does not exhibit the characteristics of a student with a specific learning disability in any category. Both the School District evaluation and the [IU] evaluation place [Student's] intellectual ability in the average range, as measured by the WISC IV (Wechsler Intelligence Scale for Children, Fourth Edition). In addition, both evaluations place [Student's] achievement primarily in the average range, although one measure used in the [IU] evaluation, the Developmental Test of Visual-Motor Integration fell below average. That score is consistent with the relatively low scores [Student] received in the Perceptual Reasoning component of the WISC-IV in both evaluations, particularly the block design and matrix reasoning sub-tests. (*See*, F.F. 11 and 22, above).

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[2] The most recent amendments to the IDEA statute provide that

> [W]hen determining whether a child has a specific learning disability as defined in §602 a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation or mathematical reasoning.
>
> In determining whether a child has a specific learning disability a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures described in paragraphs (2) and (3).

20 U.S.C. §1414(b)(6)(A), (B). Consequently, as of July 1, 2005, determining whether a "severe" discrepancy between achievement and intellectual ability exists is no longer mandatory and response to intervention may be considered in evaluating a child for a specific learning disability.

Analysis and reproduction of abstract figures/symbols is obviously a weak area for [Student].

The primary differences between the [IU] evaluation and the School District evaluation lie in the difference in the WISC verbal comprehension scores and the significance placed on the areas of weakness which came to light in both evaluations. When Mr. B administered the WISC-IV, [Student] scored 130, placing [Student] in the very superior range of verbal abilities, while the School District evaluator obtained a score in the average range, albeit still 20 points higher than [Student's] perceptual reasoning and working memory scores. (*Id.)* Although all of the [IU] academic achievement scores were in the average range, consistent with [Student's] full scale IQ, Mr. B nevertheless considered [Student's] achievement test scores to be below what would be expected of a student with very superior verbal abilities. He then looked closely at [Student's] areas of weakness, identified several areas where [Student] might experience difficulties in school and recommended "instructional support accommodations and allowances" to maximize [Student's] success in school. (P-1 @ 6–9). Significantly, Mr. B did not conclude that the differences he noted in [Student's] performance amounted to a learning disability in any area and did not suggest that [Student] was in need of special education services. Indeed, since a specific learning disability under IDEA requires that a child not achieve commensurate with [Student's] age or ability in oral expression, listening comprehension, basic reading skill, mathematics calculation or reasoning, and [Student's] achievement scores place [Student] in the average or above average range in all of those areas, Mr. B could hardly have drawn that conclusion. Moreover, Mr. B's belief that [Student's] superior verbal abilities predict very high academic achievement are borne out by [Student's] grades in the courses [Student] has taken since 8th grade, which have all been As and Bs, with the "B" grades primarily in math and

science, areas of relative weakness for [Student]. In that sense, certainly, [Student] is achieving in an actual academic setting commensurate with [Student's] abilities, even within the parameters set by the [IU] evaluation. Finally, by describing his suggestions as strategies and accommodations for "instructional support" rather than speaking in terms of specially designed instruction or special education services, Mr. B appears to contemplate that [Student] would receive support within a regular education program.

The School District evaluator and another School District School psychologist viewed [Student's] standardized test scores as showing no discrepancy between ability and achievement since [Student's] scores fell within the average range on all measures of ability and achievement. Although the School District witnesses noted that discrepancies [Student's] verbal and performance scores might merit additional investigation under some circumstances, they noted that [Student's] clear lack of need for specially designed instruction makes such investigation unnecessary in this case. (*See*, N.T. pp. 566– 569, 573, 678–726, 729, 742).

As noted, [Student's] grades from 8th grade through the present demonstrate that [Student] is highly successful in school in all subject areas. In the partial report from the Parents' independent evaluator, Dr. G notes that the School District evaluation did not take into account [Student's] response to intervention. In addition, [Student's] Parents and [Student] testified that [Student] works very hard to achieve [Student's] outstanding grades, and works with a tutor. Consistent with [Student's] teachers, however, [Student] also testified that [Student] has not really made use of the items of specially designed instruction in [Student's] IEP during this school year. There are some accommodations that [Student] has never used in either 9th or 10th grade. [Student] certainly believes that the study skills class [Student] has taken in both school

years was very helpful to [Student] when [Student] began 9th grade, but identified no specific [Student] has received in that class in the current school year. [Student] credits [Student's] good grades in math to being instructed in the resource room and believes that [Student] would not be as successful in a regular education classroom. [Student] also believes that [Student's] grades in this school year reflect the fact that most of [Student's] classes are in areas of relative strength for [Student] and [Student's] math class is really a review of [Student's] 9th grade math class with little new material. All that may be entirely accurate, and it is certainly true that [Student] believes that [Student] deserves to achieve grades that are commensurate with [Student's] efforts. (N.T. p. 780). [Student's] efforts to succeed in school are certainly serious and sustained, and it is quite understandable that [Student] wants to reap a significant reward for [Student's] very hard work. [Student] and [Student's] Parents fear that if [Student] is required to take math and [Student's] next science class, probably chemistry, as a regular education student, [Student] likely will not continue to earn such high grades. (F.F. 27). Such fears might also be entirely reasonable and accurately predict a more difficult school year in 11th grade than [Student] has experienced in quite some time if [Student] is removed from special education services. None of these factors, however, demonstrate a true need for specially designed instruction. [Student's] relative weaknesses in some cognitive areas, which are also reflected in [Student's] standardized achievement test scores, are not "disabilities." Rather, [Student] has lesser ability in non-verbal areas– and commensurately lesser achievement in the same areas. As the School District argued, there is no child of average ability who would not draw extraordinary benefit from special education services, particularly in resource room math classes, where a very small instructional group permits much individualized attention and a pace that assures mastery

to an average student without pressure to keep up with a class which might include students with greater natural ability. Deriving significant benefit from special education services, however, is not the same as needing specially designed instruction. As obviously caring parents who are very much involved in [Student's] education, it is certainly understandable that [Student's] Parents have done their best to re-create the kind of small, supportive private school environment for [Student] in the public school to which [Student] had grown accustomed at the [redacted] School between 2nd and 8th grades. They cannot continue to do that, however, by insisting that [Student] has one or more specific learning disabilities, when neither standardized test scores nor [Student's] functioning in school support that conclusion. Similarly, Parents cannot maintain a special education placement for [Student] based upon future concerns when [Student] exhibits no current need for specially designed instruction.

Finally, it should be noted that special education services are explicitly aimed toward giving a student the means to overcome disabilities. Even if it is assumed that [Student] may have some learning disabilities, or had such disabilities in the past, and that [Student] received the equivalent of special education services at the [redacted] School, it is quite apparent that [Student's] response to intervention there, as well as through the School District special education services, has enabled [Student] to overcome [Student's] difficulties.

D. Procedures Relating to the School District Evaluation and Providing [Student] with an IEP

Resolving the substantive issues raised in the School District's request for a due process hearing renders moot all of the additional procedural matters raised by the Parents relating to the School District's purported IDEA procedural violations. The conclusion that [Student] is not an eligible student is based upon objective facts adduced at the hearing, i.e., those supported by

documentary and empirical evidence rather than subjective opinions alone, as well as the law relating to determining the existence of a learning disability. Nevertheless, Parents have raised issues aimed at the propriety of the School District's decision to proceed with an evaluation of [Student] which must be laid to rest. Through counsel, Parents suggested repeatedly during the hearing that the School District violated [Student's] procedural rights and safeguards under the IDEA statute and regulations by insisting upon conducting a multi-disciplinary evaluation, particularly since an evaluation had been conducted by [a local] Intermediate Unit in the fall of 2003, only two years before the School District's evaluation. Parents' counsel also identified other purported IDEA procedural violations, such as failing to convene [Student's] IEP team to review the results of the School District evaluation and failing to convene an IEP team meeting in August 2005 to review [Student's] IEP. Parents' Counsel's characterization of the evaluation and the School District's conduct, however, are entirely erroneous and contrary to the statutory and regulatory provisions which govern the issues in this case.

Initially, it must be noted that this case does not truly involve a student previously determined to be IDEA eligible whom the School District contends is no longer eligible. Although the School District deemed [Student] eligible when [Student] enrolled, [Student] was **never** identified as a "child with a disability" as that term is defined in the IDEA statute, and the federal and Pennsylvania regulations, either before or after [Student] enrolled in the School District. 34 C.F.R. §300.7(a); 22 Pa. Code §14.102(a)(2)(ii). The School District, therefore, was absolutely entitled to conduct a multi-disciplinary evaluation when [Student's] Parents requested special education services upon [Student's] enrollment in the School District, just as it would have for any child whose suspected disability was first brought to the attention of the

District. 20 U.S.C. §1414; 34 C.F.R. §§300.500(b)(2), 300.531.

Indeed, as the Commonwealth Court clarified in a September 2004 decision, because [Student] came into the School District from a private school, the School District would have had no obligation to provide [Student] with special education even if [Student] had enrolled in the District with an IEP from [Student's] private school. In *Schuylkill Haven Area School District v. Rhett P. And Katrina P.*, 857 A.2d 226, 230 (PA Commwlth 2004), the court reversed the Appeals Panel's award of compensatory education to two brothers whose IEPs from a private school were not implemented pending completion of a school district evaluation, holding that under 22 Pa. Code §14.131(a)(3), (4):

> [A] "new" school district is obligated to follow an IEP from a Pennsylvania school district, not a private school or a school district from another state. The regulations evidence an intent that a public school district make an independent evaluation of the student's needs relative to education when carrying out its public duty with public funds to provide a free appropriate public education.[3]

If school districts were not required to implement IEPs from private schools while they undertook their own evaluations, it follows that they were certainly not required to convene an IEP team and provide special education services to a student transferring from a private school who has never had either an IEP or a comprehensive multi-disciplinary evaluation which identified [Student] as IDEA eligible. In fact, the IDEA statute and the federal regulations required, and still require, that an evaluation be conducted before initiating special education services. 20 U.S.C. §1414(a)(1)(A); 34 C.F.R. §300.531. Both the federal statute and the

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[3] The continued viability of this decision is questionable in light of the IDEA 2004 amendments to the statute. *See*, 20 U.S.C. §1414(d)(2)(C)(II). Such provision, however, was not in effect in the summer of 2004, when [Student] enrolled in the School District. Moreover, since [Student] did not enter the School District with an IEP in place, would not have applied in any event.

federal and state regulations also permit school districts to initiate evaluation requests at any time they deem it necessary, as long as that is not more frequently than once per school year, and to seek a due process hearing when parents either oppose the evaluation or disagree with the results thereof. 20 U.S.C.§§1414(a)(1)(B), (D)(ii)(1); 34 C.F.R. §§300.505(b), 300.507(A)(1); 22 Pa. Code§14.162(c). Appeals Panel decisions have consistently upheld the absolute right of school districts to conduct their own evaluations and reevaluations when they deem it necessary, and have denied claims of eligibility and of compensatory education based upon alleged child find violations and failure to provide special education services when parents refused permission to evaluate. *See, e.g., In Re: The Educational Assignment of Laurie P.*, Special Education Opinion No. 710 (Apr. 12, 1996); *In Re: The Educational Assignment of Siobhan L.*, Special Education Opinion No. 1328 (Feb. 12, 2003).

The regulations further specify that upon completion of an evaluation, the determination of whether the student is a "child with a disability" must be made by a group of "qualified professionals" and the parents, who must also be provided with a copy of the evaluation report. 34 C.F.R. §300.534(a). There is no requirement that an IEP team be convened to make initial eligibility determinations as Parents' counsel asserted at the due process hearing in this matter. (N.T. p. 965). Rather, the regulatory provision cited by Parents' counsel applies to "reevaluations" of a "child with a disability" as those terms are defined in the IDEA statute and regulations. 20 U.S.C. §1401(3)(A); 34 C.F.R. §§300.7, 300.321(b), 300.536. Since [Student] had never been evaluated by the School District and had never been identified as IDEA eligible, those provisions did not apply to [Student]. As the School District witnesses testified, the evaluation results were examined by the child study team, which determined that [Student] is not

a "child with a disability" and, therefore, recommended no special education services. (*See, e.g.*, N.T. pp. 659, 667). The recommendation was discussed with the Parents, who were provided with a copy of the ER and the opportunity to disagree with the child study team conclusions, as they did. (*Id.*; F.F. 25). These actions were sufficient to fulfill the requirements for making eligibility determinations.

Nevertheless, since the School District had deemed [Student] eligible for special education services and provided [Student] with an IEP before conducting a multi-disciplinary evaluation and making an eligibility determination, it continued to treat [Student] as an eligible special education student in some respects. Specifically, the District: 1) notified the Parents and sought parental consent before terminating special education services; 34 C.F.R. §§300.503(A), 505(a)(1), (S-7); 2) requested a due process hearing when [Student's] Parents disagreed with the conclusion that [Student] is not a "child with a disability." 34 C.F.R. §300.507(a)(1); 3) continues to provide [Student] with special education services in accordance with the IDEA "stay put" rule until the disputed issues are resolved through the due process procedures. 20 U.S.C. §1415(j) 34 C.F.R. §300.514. The School District is fulfilling its "stay put" obligation by continuing to implement the IEP which [Student's] Parents approved in August 2004, including providing [Student] with math instruction in the resource room and the study skills class. Since "stay put" requires only that the student "must remain in his or her current educational placement," while a due process complaint is pending, (*Id.)*, the District is not required to convene an IEP team meeting for the purpose of reviewing and revising [Student's] IEP while the underlying issue of [Student's] eligibility for services remains in dispute.

V. SUMMARY

[Student] is a [teenaged] 10th grade student who is presently enrolled in the School District for the second school year. Based upon representations that [Student] was a student with learning disabilities who had received the equivalent of special education services in [Student's] prior private school setting, the School District deemed [Student] IDEA eligible and provided [Student] with special education services during the 2004/2005 school year, when [Student] entered 9th grade. The School District subsequently conducted a psycho-educational evaluation, completed by the end of the 2004/2005 school year, from which it concluded that [Student] is not a child with a disability. In light of the Parents' disagreement with that conclusion, the District has continued [Student's] special education services and sought a due process hearing, which was completed in three sessions between February 24 and March 4, 2006.

Base upon the evidence of record and the applicable law, the School District's evaluation was appropriate and its conclusion is supported by both the record and the legal standards applicable to the issue of eligibility. The School District, therefore, will be permitted to discontinue special education services to [Student].

VI. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the School District appropriately evaluated [Student] and correctly determined that [Student] is not a "child with a disability," i.e., a student who exhibits the characteristics of a learning or other disability and, "by reason thereof" needs special education. The School District correctly concluded, therefore, that [Student] is not an IDEA eligible student.

It is **FURTHER ORDERED** that the School District is permitted to discontinue special

education services to [Student].

Dated: 03/26/06 *Anne L. Carroll*

Anne L. Carroll, Esq., Hearing Officer