

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.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: E.S.

Date of Birth: [redacted]

Dates of Hearing:
October 22, 2009
March 25, 2010
March 26, 2010
June 7, 2010

CLOSED HEARING

ODR No. 00074-0910-AS

Parties to the Hearing:

Parent[s]

Ms. Kelly Brennan
Director of Special Education
Pottsville Area School District
1501 Laurel Boulevard
Pottsville, PA 17901

Representative:

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Date Record Closed:

June 30, 2010

Date of Decision:

July 15, 2010

Hearing Officer:

Cathy A. Skidmore, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is currently a teen-aged student residing within the Pottsville Area School District (hereafter District). Student's parents filed a due process complaint July 27, 2009, claiming that the District denied Student a free, appropriate public education under the Individuals with Disabilities Education Act (IDEA)² and Section 504 of the Rehabilitation Act of 1973.³ The case was assigned to Hearing Officer Deborah G. DeLauro who conducted an initial hearing session on October 22, 2009 limited to the issue of whether the Student and parents could present evidence on claims which preceded the filing of the due process complaint by more than two years. (Notes of Testimony (N.T.) 9-10, 102) Hearing Officer DeLauro issued a ruling on December 5, 2009 which determined that the parents knew or should have known of the actions forming the basis of their complaint by December 22, 2004, and that neither of the exceptions to the two-year statute of limitations was established. (Hearing Officer Exhibit (HO) 1) Accordingly, Hearing Officer DeLauro limited the scope of the hearing to the time period between July 27, 2007 and July 27, 2009, which encompassed the 2007-08 and 2008-09 school years. (N.T. 114-15; HO 1)

The case was reassigned to this hearing officer on December 18, 2009. An initial hearing session on January 19, 2010 was continued, and two hearing sessions were held on March 25 and 26, 2010. Due the unavailability of one witness for medical reasons, the final hearing session was not held until June 7, 2010. The record closed on June 30, 2010.

The parents presented evidence on their claims challenging the provision of a free, appropriate public education (FAPE) to Student for the 2007-08 and 2008-09 school years. The District defended those claims, asserting that it did not deny FAPE to Student throughout that time period. For the following reasons, I find in favor of the parents on the eligibility issue as well as for a portion of the time period during which they request compensatory education.

ISSUES

1. Whether the Student is eligible under the IDEA and/or Section 504; and
2. If so, whether the Student is entitled to compensatory education for the 2007-08 and 2008-09 school years.

¹ The name and gender of the Student are not used in this decision in order to preserve the Student's privacy.

² 20 U.S.C. §§ 1400 *et seq.*

³ 29 U.S.C. § 794.

FINDINGS OF FACT

1. Student is a resident of the District and has attended school there since kindergarten. Student has been diagnosed with ADHD. (N.T. 14, 28; School District Exhibits (S) 7, 15)
2. Beginning in kindergarten and throughout Student's enrollment in the District, Student frequently refused to complete homework. Student at times was oppositional and would not listen to adults, exhibited difficulties with handwriting, and completed work carelessly. (N.T. 29-35, 52, 71-73, 86; S 1, S 2, S 4, S 5)
3. Student's parents⁴ and the District discussed conducting some testing of Student during Student's fourth grade year (2003-04), but this was not done at that time. (N.T. 34-37)
4. Student's parents had Student privately evaluated in late 2004/early 2005 when Student was in fifth grade and had entered the middle school. The psychologist who conducted the evaluation obtained information including the parent and teacher versions of the Conners' Rating Scales (Conners), which assesses behavior problems; input from Student's fifth grade teacher; and the parent and teacher versions of the Behavior Assessment System for Children (BASC). She also administered Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), the Wechsler Individual Achievement Test – Second Edition (WIAT-II), and three subtests from the Woodcock Johnson Tests of Achievement – Third Edition (WJ III) (reading fluency, writing fluency, and math fluency). (N.T. 38-39, 41-42, 166; S 6, S 7)
5. Student obtained a full scale IQ score in the average range with a relative weakness on the Working Memory Index. On the WIAT-II, Student demonstrated significant ability-achievement discrepancies in the areas of reading comprehension, mathematics computations, and mathematics reasoning. The private psychologist determined that Student met the criteria for identification as a student with a Specific Learning Disability in reading comprehension, mathematics computation, and mathematics reasoning using the Verbal Comprehension Index as the ability score. The psychologist also concluded that Student was eligible for identification under the Other Health Impairment (OHI) category due to ADHD. (S 7)
6. The parents provided the District with the independent psychological report, and the District initiated its own evaluation in April 2005. Student had by that time

⁴ While Student's mother was a more active participant throughout the relevant time periods and during the hearing, I will generally refer to them collectively throughout this decision except where reference is necessarily made to one or the other parent.

begun taking medication for the ADHD which was reportedly helpful to Student's studying and remembering homework. (N.T. 43, 46-47, 49-51; Parent Exhibit (P) 1; S 9, S 10, S 13)

7. The District's Initial Evaluation Report (ER) was completed and issued in September 2005. Parental and teacher input was obtained. The ER also included information from the private psychological evaluation (WISC-IV, WIAT-II, and WJ-III), and accepted the ADHD diagnosis. The District conducted its own speech and language assessments which revealed Student's need to develop overall articulation skills. The ER concluded that Student did not have a specific learning disability but was eligible for speech and language support services. (N.T. 412-15; S 13, S 14, S 15, S 17)
8. A meeting of Student's Individualized Education Program (IEP) team convened in October 2005 and the members developed an IEP to address Student's articulation needs through speech/language therapy. Student's parents approved the Notice of Recommended Educational Placement (NOREP). (S 16, 20, 21, 22)
9. Student's medication was discontinued by the start of Student's seventh grade school year (2006-07). (N.T. 73)
10. A new IEP was developed in October 2006 which continued speech/language therapy services for Student. The parents were not able to attend the IEP team meeting but participated via telephone. (N.T. 136-38; S 24)
11. Student began eighth grade at the start of the 2007-08 school year and continued to receive speech/language therapy services. A new IEP was developed in October 2007 which continued to address speech/language needs. Student's parents participated in the meeting via telephone. (N.T. 137-38, 142-43; S 28)
12. Student continued to experience difficulty with completing homework throughout the 2007-08 school year, often failing to turn in required work which adversely affected Student's grades. Student received an Unsatisfactory grade in physical education, and final grades of A (Art, English, Health, and Music), B (Family/Consumer Science, Literature, Science, and Social Studies), and C (Algebra, Spanish, and Technology) in all other subjects. On the Pennsylvania System of School Assessment (PSSA) tests, Student scored in the Proficient range in Reading, Writing, and Science, and in the Basic range in Mathematics. Student was absent 22 days out of that school year. (N.T. 138-41, 145-49, 197-98; S 37, S 44 pp. 5-6)
13. Student's father, who is in the military, served in Afghanistan from June 2008 to June 2009, which had an effect on Student. (N.T. 195-96, 348-49; S 49)
14. Student was reevaluated by the District in at the start of the 2008-09 school year, ninth grade, which was also Student's first year in the District high school. The Reevaluation Report (RR) stated that Student had met the speech/language goals in the most recent IEP and no longer needed speech/language support. The RR

concluded that Student was no longer eligible for special education. The parents approved the NOREP on October 6, 2008. (N.T. 150-54; S 30, S 31, S 32, S 33)

15. On the same date that they approved the NOREP, Student's mother wrote a letter to the District's Director of Special Education requesting that Student be evaluated for learning disabilities. The District's school psychologist telephoned the parents and spoke with Student's mother about the request, and they discussed the possibility of developing a Section 504 service plan. Although Student's mother did not change her mind about having Student evaluated, the District believed that the parents no longer wished to pursue a special education evaluation. The District school psychologist contacted the high school guidance counselor to conduct a Section 504 evaluation. (N.T. 154-57, 202-05, 225-26, 241-43, 312, 340-43, 380-81, 382-86, 397-99; S 34)
16. The District sent the parents a Permission to Evaluate form on or about October 10, 2008, but the parents never received it and it was not returned. (N.T. 157, 205-06, 242-44; S 35)
17. The District's high school guidance counselor arranged for Student to receive peer tutoring in the fall of 2008 for science class. Student also had math tutoring at the beginning of the school year. Completion of homework continued to be a problem for Student and negatively affected Student's grades. (N.T. 169-73, 188-91, 398, 504-05, 532)
18. In October 2008, at the request of the guidance counselor, two of Student's teachers completed the Conners scales. Results were scored by the school psychologist and indicated T-scores in the clinically significant range on Inattention, Hyperactivity, and Peer Relations by one teacher, and in the clinically significant range in Inattention and Learning Problems/Executive Functioning by the other teacher. The record does not establish what was done with these results although the parents did receive a copy of the scores. (N.T. 159, 290-91, 294-95, 343, 391-95, 433-34, 485; S 50)
19. In late 2008, the high school guidance counselor had a discussion with the school psychologist about Student and the possibility of developing some type of service agreement. The guidance counselor spoke with Student's mother over the telephone and, based upon that conversation, created a document called "Service Agreement" which set forth accommodations for Student from December 15, 2008 through the end of the 2008-09 school year. The accommodations listed were:
 - seating preference
 - extra time to complete test [sic], if needed, at the discretion of the teacher
 - study guide provided 2 days before test
 - tutoring upon request

This document was signed by the guidance counselor and Student's mother, and distributed to Student's parents through the mail and to Student's teachers in their school mailboxes. There was no follow-up to ensure that the specified accommodations were being followed for Student. (N.T. 166-69, 532-40, 547, 551; S 36)

20. The District's guidance counselor has never had training related to IDEA, Section 504, or Pennsylvania's Chapter 15. (N.T. 530-31)
21. The "Service Agreement" document developed for Student is not a Section 504 plan, but is a document sometimes used in the District for students who are not eligible for IEPs or Section 504 plans. These agreements are monitored by guidance counselors. (N.T. 277-83, 390-92)
22. Homework remained a problem for Student throughout the 2008-09 school year, and Student's grades showed a significant decline from those obtained during prior years. Specifically, Student's grades were:

	Qtr1	Qtr2	Qtr3	Qtr4	Final
English 1	C	F	B	C	C
Computer Writing	C	B			B
Amer. History 2	B	B	B	C	B
Algebra I	D	D	F	F	F
Consumer Science	F	F	F	F1 ⁵	F
German I	B	C	D	F2	D
Microsoft Office			B	D	C
Foundations of Art			D	D	D
Creative Lit.			A	A	A
Desktop Publishing	D	D			D

Student was absent 15.5 days and tardy on 2 days.

(N.T. 171-76, 188-89, 503-05; S 44 pp. 6-7)

23. In April 2009, Students parents contacted the District about an evaluation of Student. The District sent a Permission to Evaluate form to the parents which was signed and returned. The parents also indicated on the form their concerns over Student's performance in math and science. (N.T. 176-82, 246-50; S 38, S 39, S 40)

⁵ F1 and F2 are lower grades than F. (N.T. 174, 252)

24. The District conducted the evaluation and issued an ER on June 1, 2009.⁶ Parental input provided for the ER indicated their concerns over Student's focus, study habits, writing a research paper, math, and science. The ER also described a classroom observation done in an Algebra class when Student was noted to be on-task for only 40% of the time, did not have homework completed, and did not complete the classwork assignment. The Algebra teacher reported that this behavior was typical for Student. (N.T. 181-82, 441-42, 444-45, 451-52, 469-70, 484-85; P 2; S 41, S 49)
25. Curriculum based assessments completed in May 2009 revealed independent and instructional levels for reading and math, and the ER also reported Student's grades from the four most recent marking periods as well as PSSA scores from 5th through 8th grades. (N.T. 449-51, 459-61; S 41)
26. The District considered Student's low and failing grades but determined, rather summarily, that Student's ADHD did not contribute to Student's poor academic performance in ninth grade. (N.T. 475-77)
27. The District also administered several assessments. On the WISC-IV, Student obtained a Full Scale IQ score of 100 (in the average range) with relative weakness displayed on the Working Memory Index (27th percentile). On the WJ-III, Student achieved scores in the average range or above in all areas except Math Fluency (limited to average range), Applied Problems (limited to average range), and on the Broad Math cluster (limited to average range). (N.T. 449, 452-56, 463-64; S 41)
28. For behavioral information, the District obtained checklists from the Achenbach System of Empirically-Based Assessment (ASEBA) completed by Student's mother and by Student's English teacher. Student's parents' form reflected clinically significant scores on the Thought Problems and Attention Problems scales, while the checklist completed by Student's English teacher revealed all normal range scores. A checklist sent to the Algebra teacher was not returned, and Student was given but did not complete the self-report. (N.T. 435-37, 446-47, 464-66, 487-88, 508-09; S 41)
29. The District did not try to determine why Student was not completing or turning in homework, even though Student displayed this problem in all classes and "across all settings." (N.T. 472) Student's Algebra I teacher believed Student would choose not to do homework, and the school psychologist believed Student was being "stubborn." (N.T. 472-73, 503-08; P 2; S 41)
30. The District school psychologist determines whether a student is eligible for special education. In Student's case, the psychologist who conducted the

⁶ The testing was conducted by a school psychologist intern who also drafted the ER. The District's certified school psychologist oversaw this process and also reviewed the ER. (N.T. 345, 349, 399-400, 439-41)

evaluation concluded that Student did not have a disability and was not eligible for special education. She considered whether Student had ADHD and would qualify under the Other Health Impaired (OHI) category but concluded that Student did not. The District accordingly issued a NOREP recommending regular education for Student. (N.T. 183, 285-87, 471-73, 475; S 41, S 42)

31. Student's parents did not approve the NOREP and requested a due process hearing on June 28, 2009. (N.T. 183-85; S 42)
32. Student enrolled in a cyber charter school for the 2009-10 school year. Student has a service agreement but not an IEP in that placement. (N.T. 213-14, 518; S 48)

DISCUSSION AND CONCLUSIONS OF LAW

Burden of Persuasion

The U.S. Supreme Court has made clear that in an administrative hearing, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden in this case rests with the parents who requested the hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.⁷

Eligibility under the IDEA

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Bd. of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

The IDEA obligates school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. This obligation is

⁷ Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D.Pa. 2009).

commonly referred to as child find. The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications including specific learning disability and OHI, and who, “by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39. Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In this case, the parents first contend that the District failed in its responsibility to identify Student as qualifying for special education by reason of a specific learning disability in mathematics, or alternatively, as Other Health Impaired (OHI) due to Student’s ADHD.

With respect to a mathematics learning disability, the parents rely principally on the private evaluation obtained in 2005. I am unable to accord a great deal of weight to the content of this evaluation for several reasons. First, this evaluation report was completed in early 2005 and, at this point and in relation to the time periods at issue, was based upon relatively stale data and information. (Finding of Fact (FF) 4, 5) Secondly, the private psychologist who conducted this evaluation did not testify and was not subject to cross-examination, which would have been particularly helpful to resolving the differing approaches taken by her and the District evaluator in conducting their respective ability-achievement discrepancy analyses. Next, the District evaluation which was completed later in 2005 and concluded that Student did not have a learning disability expressly considered and rejected this information from the private evaluation and, significantly, the propriety of that District evaluation is not within the scope of this hearing.

After review of the evidence in this case, it is very evident that Student exhibits a relative weakness in mathematics. (N.T. 398; FF 12, 24, 27) A weakness or lack of achievement in a particular subject area does not necessarily indicate a learning disability, however. Here, the District school psychologist who evaluated Student in 2009 considered this weakness including Student’s poor grades in this area, and then made further inquiry into Student’s ability to complete the curriculum based assessments in math, determining that Student had the necessary skills to complete problems left undone. (N.T. 444-45, 460-62; P 2; S 41) Information from Student’s Algebra teacher did not contradict this conclusion but rather supported it. (FF 24, 25, 29) Consideration of Student’s performance on the WISC-IV and WJ-III lent further support for the conclusion reached on eligibility on this basis. (N.T. 367, 443) Viewing the record as a whole, the evidence simply does not establish that Student has a specific learning disability in math.

With respect to the District’s failure to conclude that Student is eligible under the IDEA as a student with OHI, the parents assert that the District’s 2009 ER did not contain sufficient information on Student’s behavior and its impact in the school setting. I agree that there are a number of concerns with the District’s 2009 ER, beginning with the fact that the determination was not made by a group of qualified professionals including the parents as required by Section 300.306(a) of the federal regulations but, instead, was left

to the sole determination of the school psychologist who authored the report. (FF 30) This ER also makes no reference to, and the District apparently did not consider, the October 2008 Conners results which were clearly relevant and important to an understanding of how Student's behavior and ADHD was impacting Student's success at school. (FF 18, 22; N.T. 485) The single ASEBA checklist returned by one of Student's teachers (FF 28) is not an appropriate substitute for this clearly critical information.

Nevertheless, the District did consider Student's ADHD diagnosis in determining whether Student was eligible for special education. Specifically, the school psychologist who authored the ER conducted a classroom observation and noted Student's off-task behavior and failure to complete work. As will be more fully discussed below, Student's ADHD diagnosis does not appear to be in serious dispute, and the symptoms of that disorder appear to have had an impact Student's education at least by the first marking period of the 2008-09 school year. (FF 22, 24) Significantly, however, there is no evidence from which to conclude that, by reason of Student's ADHD, Student required specially designed instruction. The existence of a diagnosis is not, in and of itself, sufficient to meet the two-pronged test for IDEA eligibility. For these reasons, I cannot conclude that the parents met their burden of establishing Student's eligibility under the IDEA based upon OHI.

Section 504 Eligibility

The obligation to provide a "free appropriate public education" is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm.w. 2005). Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). "Major life activities" include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is "disabled" as defined by the Act; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood at 253. "In addition, the plaintiff must demonstrate that defendants know or should be reasonably expected to know of his disability." *Id.* In the context of education, Section 504 and its implementing regulations "require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction." *Id.* (citation and quotation marks omitted); *see also* 34 C.F.R. § 104.33(a). That obligation includes the duty of child find under Section 504. 34 C.F.R. § 104.32; *Ridgewood*, 172 F.3d at 253. Under Section 504, "an appropriate education is the provision of regular or

special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). “There are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002).

Similar to Section 504, Pennsylvania’s Chapter 15 regulations require a substantial limitation with respect to education, defining a “protected handicapped student” as:

A student who meets the following conditions:

- (i) Is of an age at which public education is offered in that school district.
- (ii) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program.
- (iii) Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under § 15.10 (relating to discrimination claims).

22 Pa. Code § 15.2.

As with the child find obligation under the IDEA, the District had a reasonable period of time within which to fulfill that duty under Section 504. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). Section 104.35 of the applicable regulations require that an initial evaluation under Section 504 assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. 34 C.F.R. § 104.35.

Although Student’s grades during the 2007-08 school year started to show a decline, Student was demonstrating the same problem with turning in homework as in prior years which continued to adversely affect Student’s performance at school. (FF 12) Still, Student was achieving C or better grades in all subjects and scoring in the proficient range in reading, writing, and science, and in the basic range in math. (FF 12) Overall, Student’s eighth grade school year (2007-08) did not present signs of newly manifested and significant difficulty for Student which warranted assessment by the District. In other words, even by the end of the 2007-08 school year, the District had no reason to explore whether Student’s individual needs were being met in regular education.

The beginning of the 2008-09 school year, however, started off with markedly different behavior and performance. (FF 18, 22) Student's mother testified credibly that when she discussed a Section 504 plan with the District in October 2008, she did not agree to rescind her request for testing altogether. Even assuming that the District reasonably understood that the parents had decided not to pursue a special education evaluation under the IDEA after discussing a Section 504 evaluation in the fall, the District's actions after that discussion failed to meet its obligations under that statute. By October 6, 2008, not only did the District have a request from the parent to evaluate Student, it had information which provided reason to suspect that Student's disability was affecting Student's learning. As noted above, in considering a Section 504 plan for a student with a disability, a school district is required to conduct an initial evaluation which assesses all areas of educational need. That evaluation is to be drawn from a variety of sources and considered by a team which includes the parents. Nothing resembling this process occurred here. Instead, inexplicably, a District employee who was unfamiliar with Section 504 in general drafted a purported "service agreement" based solely upon a telephone discussion with Student's parents. (FF 19, 20, 21) While the accommodations set forth in that agreement might have been helpful to Student, the contents of the agreement were not based upon a consideration of all of Student's individual educational needs. Moreover, to the extent that this agreement was even implemented (FF 12), Student's school performance showed no improvement and the effectiveness of the accommodations listed is questionable at best.

It must be noted that the District's experienced school psychologist agreed with the ADHD diagnosis. (N.T. 376) To the extent that some of the District's testimony through its intern school psychologist appeared to contradict the diagnosis, that testimony was based in part upon a misapprehension that the symptoms of ADHD must be displayed in "all settings" (N.T. 447-48, 472, 493-94), contrary to the DSM-IV⁸ which describes manifestation in two settings. In any event, the record as a whole establishes that the District did not seriously question Student's ADHD diagnosis.

The District contends that Student did not qualify for a Section 504 agreement even during the 2008-09 school year because Student's ADHD did not negatively impact Student's education. It asserts that Student's very poor grades were a product of several other factors such as the fact that Student's father was overseas on active duty, in addition to Student's refusal to complete homework. (FF 12, 13)

Yet, the existence of such other factors cannot definitively determine whether Student's disability prevented Student from access to an appropriate education. Only a proper evaluation would have permitted such a conclusion. Furthermore, this argument by the District ignores several pieces of compelling evidence, including (1) the perception of two of Student's teachers in October 2008 that Student was exhibiting clinically significant behavior with respect to Inattention, Hyperactivity, and Learning Problems/Executive Functioning; (2) the behavioral observation of Student's Algebra class where Student was on task only 40% of the time and did not complete any

⁸ American Psychiatric Association (2000). *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC: Author.

assignments; and (3) Student's several failing grades. (FF 18, 24, 26) There was also testimony by the District's experienced school psychologist that the reasons for Student's failure to complete homework should have been assessed, including whether this behavior was related to Student's disability. (N.T. 379-80) What is not understood is why the District did not proceed to do so, particularly after discussing such an evaluation with Student's parents. All of this evidence convincingly establishes that the District had both the reasons and obligation to conduct an evaluation of Student under Section 504 in the fall of 2008. Student's disability plainly substantially limited Student's access to education during the 2008-09 school year, and Student was, accordingly, entitled to an appropriate education which, though supports and accommodations, met Student's individual needs including Student's disability. The failure to do so constitutes a denial of FAPE to Student.

The next issue is what remedy is warranted to remedy the deprivation. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.*⁹ Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Giving the District reasonable time to complete a Section 504 evaluation and develop appropriate accommodations to address Student's disability, and further acknowledging the date on which the purported service agreement was drafted, this hearing officer finds that December 15, 2008 is the appropriate date on which to begin an award of compensatory education. This hearing officer also agrees with the parents that the effect of Student's disability on Student's education during that time period pervaded Student's entire day. With the exception of a few classes, Student's academic performance was extremely poor for the entire school year, and it would be next to impossible to calculate any hours during which Student's ability to derive meaningful educational benefit was not impeded by Student's unaccommodated disability throughout this time period. *See Keystone Cent. School Dist. v. E.E. ex rel. H.E.* 438 F.Supp.2d 519, 526 (M.D.Pa.,2006) (explaining that the law of special education does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education). Accordingly, the order will be for full days of compensatory education from December 15, 2008 through the end of the 2008-09 school year.

⁹ Compare *B.C. v. Penn Manor School District*, 906 A.2d 642 (Pa. Cmwlth. 2006), which rejected the *M.C.* standard for compensatory education, holding that "where there is a finding that a student is denied a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *Id.* at 650-51. *B.C.* was a case involving a gifted student, however, and is, thus, distinguishable. I therefore conclude that the *M.C.* standard is the appropriate method of determining the amount of compensation education owed to Student in this case.

The compensatory education award is subject to the following conditions and limitations. Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District to assure meaningful educational progress.

The compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for Student and parents. There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

CONCLUSION

For the foregoing reasons, Student is not eligible under the IDEA but is eligible under Section 504. Student is entitled to full days of compensatory education for the time period beginning December 15, 2008 and continuing through the end of the 2008-09 school year, subject to the conditions set forth above.

ORDER

Student is awarded compensatory education in the form of full days of compensatory education from December 15, 2008 to the end of the 2008-09 school year, in the nature and limitations set forth above.

Any claim not addressed in this decision and order is denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: July 15, 2010
ODR No. 00074-0910-AS