

*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: A.S.

Date of Birth: [redacted]

Dates of Hearing: October 5, November 17, & November 22, 2010

### **OPEN HEARING**

ODR Case # 01047-0910AS

Parties to the Hearing:

Parent[s]

Ms. Melanie Munden  
Director of Special Education  
& Student Services  
Upper Moreland Township  
School District  
2900 Terwood Road  
Willow Grove, PA 19090

Representative:

Pro Se

Karl Romberger, Esquire  
Sweet, Stevens, Katz & Williams  
331 East Butler Avenue  
New Britain, PA 18901

Date Record Closed:

December 13, 2010

Date of Decision:

December 28, 2010

Hearing Officer:

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student) is a [teenaged] student diagnosed with attention deficit hyperactivity disorder (“ADHD”) who resides in the Upper Moreland Township School District (“District”). The parties dispute the student’s need for special education under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>1</sup>. There is no dispute between the parties, however, as to the student’s eligibility as a protected handicapped student under Section 504 the Rehabilitation Act of 1973 (“Section 504”).<sup>2</sup>

The parents filed a complaint alleging multiple violations of IDEIA and Section 504 and asserting claims for various remedies as the result of those alleged violations. It appeared that the parties had settled the dispute, but the settlement fell through, and the hearing convened in three sessions over October and November 2010.

For the reasons set forth below, while I find that the District failed in its obligations to identify timely the student as a protected handicapped student, I find that there is no remedy owed to the student by the District.

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<sup>1</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162.

<sup>2</sup> It is this hearing officer’s preference to cite to the implementing regulation of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11.

## **ISSUES**

Does the student qualify as a “child with a disability” under IDEIA? If so, did the District fail in its obligations toward the student under IDEIA?

Did the District fail to meet its obligations to the student as a “protected handicapped student” under Section 504?<sup>3</sup>

If the answer to any of these questions is in the affirmative, is the student owed a remedy?

## **FINDINGS OF FACT**

1. The student entered the District in 8<sup>th</sup> grade. Prior to that time, the student had attended private school. (Parents’ Exhibit [“P”]-1 at pages 1, 7; School District Exhibit [“S”]-1, S-2; Notes of Testimony [“NT”] at 138-139, 161-162).
2. Approximately seven weeks into the school year, beginning in mid-October, the student began to exhibit a series of behaviors that resulted in disciplinary action. (P-3 at page 5).
3. From October 15 through November 19 the student was involved in eight behavioral incidents, including refusal to carry out directions, threatening other students, disrupting classes, using

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<sup>3</sup> Section 504 provides protections to “qualified handicapped persons” (34 C.F.R. §104.3(l)(2)). Pennsylvania has explicitly adopted the protections of Section 504 through the provisions of 22 PA Code §§15.1-15.11, where such an individual is referred to as a “protected handicapped student”. The term “protected handicapped student” from Chapter 15 will be used for the remainder of this decision.

- profanity, and being present in unauthorized areas during the school day. The incidents resulted in detention, in-school suspensions, and one out-of-school suspension. (P-3 at page 5).
4. The student's parent contacted administration at the District school where the student attended, indicating that he was concerned about the student's behaviors and that the student had been diagnosed with attention deficit disorder. (NT at 139-140).
  5. On November 29, the assistant principal responded to the parent with an email indicating that the number of disciplinary incidents was out of the ordinary and that the student needed "some form of intervention". The administrator went on to write that "(t)he best way to start the ball rolling would be to give [Student] a 504 plan." The administrator requested that information regarding the student's diagnosis be provided to the District. This information was not provided by parents. (P-2 at page 1; NT at 139-140).
  6. On November 30, the student was involved in an incident where [Student] brought a toy gun to school. This incident resulted in two days of in-school suspension and three days of out-of-school suspension. The student was also required by the District to undergo a risk assessment through a provider of mental health services. (P-3 at page 33; NT at 962-963).
  7. Thereafter, a District school psychologist spoke with the student's father and suggested that data be gathered on an ADHD screening

- instrument from the parents and from the student's teachers. On December 12 the District requested and received permission to screen the student for ADHD. (S-1, S-2; NT at 163-164).
8. Rating scales were provided to five of the student's teachers (reading, Spanish, science, math, and social studies), as well as to the student's parents. The student also completed a self-report scale. (S-3).
  9. The reading teacher reported no atypical results. (S-3 at page 1).
  10. The student was rated by the Spanish teacher as mildly atypical for hyperactivity, ADHD index (indicating the degree to which a child may be at risk for ADHD), restless/impulsive, emotional lability, and DSM-IV diagnostic criteria for ADHD/hyperactive-impulsive type. (S-3 at pages 1-2).
  11. The student was rated by the science teacher as markedly atypical for oppositional behaviors. This teacher also rated the student as mildly atypical for restless/impulsive, generally problematic behavior, and DSM-IV diagnostic criteria for ADHD/hyperactive-impulsive type. (S-3 at page 2).
  12. The student was rated by the math teacher as markedly atypical for oppositional behaviors and restless/impulsive. This teacher also rated the student as moderately atypical for generally problematic behavior, and mildly atypical for hyperactivity, social problems, ADHD index, and emotional lability. (S-3 at page 2).

13. The student was rated by the social studies teacher as mildly atypical for hyperactivity and DSM-IV diagnostic criteria for ADHD/hyperactive-impulsive type. (S-3 at page 2).
14. The student was rated by the parents as moderately atypical for hyperactivity, restless/impulsive, emotional lability, and generally problematic behavior. The parents rated the student as mildly atypical for DSM-IV diagnostic criteria for ADHD/inattentive type, oppositional, and cognitive problems/inattention. (S-3 at pages 2-3).
15. The student's self-report rated [Student] as markedly atypical for family problems. The student rated [Student] as moderately atypical for anger control, ADHD index, and DSM-IV diagnostic criteria for ADHD/hyperactive-impulsive type. The student rated [Student] as mildly atypical for emotional problems, conduct problems, DSM-IV diagnostic criteria for ADHD/inattentive type, and DSM-IV diagnostic criteria for ADHD/combined inattentive & hyperactive-impulsive types. (S-3 at page 3).
16. To the school psychologist, the results did not warrant a diagnosis of ADHD but recommended additional monitoring and family consultation with a mental health provider or pediatrician. ((S-3 at pages 2-3).

17. After November 29, when the administrator recommended that some type of intervention seemed to be warranted, the student was involved in twenty additional behavioral incidents including throwing objects, possession of the toy gun, derogatory remarks to students, poking/touching students, disrespect toward staff, derogatory remarks to staff, threats toward other students, disruption of class, refusal to carry out directives, misconduct during a drill, refusal to participate in class, misconduct at detention, and unauthorized use of username/password. (P-3 at pages 3-5).
18. The incidents resulted in verbal warnings, detentions, in-school suspension, and out-of-school suspension. (P-3 at pages 3-5).
19. The school psychologist also served in a counseling role for the student and so was advised of all of the behavioral incidents in the 8<sup>th</sup> grade. In 8<sup>th</sup> grade there were twenty-eight behavioral incidents resulting in documented school discipline in 8<sup>th</sup> grade. (P-3 at pages 3-5; NT at 1050-1051).
20. For 9<sup>th</sup> grade, the 2008-2009 school year, the student transitioned to high school. There are transition processes in place at the District for students who present concerns, as judged by the middle school counselors, that high school staff need to be

apprised of. The student's middle school discipline history did not trigger any such process. (NT at 405-409, 899-901).

21. In 9<sup>th</sup> grade, the student was involved in thirty-one behavioral incidents including possession of electronics, refusal to carry out directives, disrespect toward staff, inappropriate comments, disruption of class, throwing objects, failure to report to detention, fighting, hallway misconduct, vandalism, and refusal to participate in class. (P-3 at pages 1-3).
22. The incidents resulted in verbal warnings, detentions, in-school suspension, and out-of-school suspension. (P-3 at pages 1-3; S-5).
23. In August prior to the start of 10<sup>th</sup> grade, the parents presented the report of a dually licensed psychologist and certified school psychologist who had worked with the family in the past and who had performed testing and a comprehensive evaluation of the student over that summer. (P-1 at pages 7-17; NT at 1053).
24. The evaluation report found that the student met the diagnostic criteria for ADHD/combined type and conduct disorder. The report recommended that the student be provided with a 504 plan to help student with organizational skills and a number of school-based accommodations. (P-1 at pages 16-17).
25. Even though much of the information in the report had not been shared with the District, results of similar ADHD



assessments in 2007 showed consistency with the results obtained by the District in its screening of January 2008. (P-1; S-3).

26. The District obtained permission to speak with the private evaluator and a District school psychologist did so. (S-9; NT at 389-390, 1160).
27. The district accepted the private evaluation and its conclusions/recommendations and, in September gathered data from the student's 10<sup>th</sup> grade teachers. (S-10; NT at 1053-1054).
28. On October 8, parents agreed to a 504 plan (also referred to as a Chapter 15 service agreement).<sup>4</sup> (S-12).
29. The Section 504 plan identified the student as a student with ADHD/combined type. The accommodations included regular communication between home and school, an assignment book, preferential seating, verbal and non-verbal cues, extended time on tests as needed, and the opportunity to meet with a school counselor or school psychologist as needed. (S-12).
30. The school psychologist shared the Section 504 plan with the student's teachers. The school psychologist was supposed to share the plan with the student but never did. (S-11; NT at 1071).

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<sup>4</sup> Because of its roots in both federal statute (Section 504) and Pennsylvania regulations (22 PA Code §15), the document used for services and accommodations for a protected handicapped student is many times referred to interchangeably as a Section 504 plan or a Chapter 15 service agreement.

31. In December, the parents requested a comprehensive psycho-educational evaluation. The District school psychologist responded by letter that he was unclear about such an evaluation given the comprehensive private evaluation issued [just that] August. Still, the District enclosed a re-evaluation request form with the letter. (P-1 at page 18, P-12; S-14, S-15; NT at 1075-1078).
32. Upon receiving parents' formal request for a re-evaluation in early January the District requested permission to re-evaluate the student, which was granted by the parents on January 22. At a meeting on January 29, however, the parents revoked the permission to evaluate. (P-12; S-16, S-17; NT at 1078-1081).
33. Simultaneously, in late January, the parties were meeting to revise the Section 504 plan. The District shared this revised Section 504 plan in early February, but parents never received the plan. This was not known, and shared again, until March. Ultimately, parents did not return the Section 504 plan because, in mid-March, the student withdrew from the District. (P-12; S-20, S-22, S-24, S-25; NT at 52-53, 1082-1083, 1091).
34. Over the course of the 2009-2010 school year, the student was involved in eight behavioral incidents where [Student] was the offender, including failure to report to detention,

- insubordination/disrespectful behavior, theft, harassment, disruption of class, throwing objects, and fighting. (P-3 at page 1).
35. The incidents resulted in detentions and out-of-school suspensions. (P-3 at page 1-3).
36. Throughout the students' time at the District, the student's academic achievement was generally commensurate with [Student's] cognitive ability. (P-1 at pages 13-14; S-26: NT at 236-237, 926, 1084, 1110-1111, 1144-1145).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### IDEIA

For a student to qualify as a child with a disability under the IDEIA, the student must meet two criteria. First, as the result of an evaluation, the student must have been identified as having a disability that confers the protections of IDEIA.<sup>5</sup> The student's diagnosis, accepted by the District, of ADHD qualifies student under this aspect of the IDEIA.<sup>6</sup> (FF 23, 24, 27). Second, though, the student must require special education as a result of the disability.<sup>7</sup> Special education is, as defined under the IDEIA, "specially designed instruction...." which

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<sup>5</sup> 34 C.F.R. §300.8(a)(1).

<sup>6</sup> 34 C.F.R. §300.8(c)(9).

<sup>7</sup> 34 C.F.R. §300.8(a)(1).

“means adapting...the content, methodology, or delivery of instruction....”<sup>8</sup>

Here, the record is clear that the student does not require specially designed instruction as the result of Student’s ADHD. While the student’s behavior presents significant challenges in the school environment (FF 3, 6, 17, 21, 34), the student does not require specially designed instruction as the result of Student’s ADHD. (FF 36). Because of this, the student does not qualify as a child with a disability under the IDEIA.

Accordingly, because the student does not qualify as a child with a disability under the IDEIA, the District has not violated any provision of that statute.

#### Section 504

Under Section 504 of the Rehabilitation Act of 1973, a “protected handicapped student”<sup>9</sup> (a) is entitled to a FAPE<sup>10</sup> and (b) must not suffer discrimination as the result of the student’s disability.<sup>11</sup> Each of these claims will be considered separately.

*FAPE under Section 504.* Under Section 504, a protected handicapped student is entitled to a FAPE “regardless of the nature or

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<sup>8</sup> 34 C.F.R. §300.39(a)(1),(3).

<sup>9</sup> 34 C.F.R. §104.3(l)(2); *see* 22 PA Code §15.2.

<sup>10</sup> 34 C.F.R. §104.33.

<sup>11</sup> 34 C.F.R. §104.4.

severity of the person's handicap".<sup>12</sup> Pennsylvania has adopted the protections of Section 504.<sup>13</sup> In the Pennsylvania regulations, the evaluation of a student and provision of services under Section 504 initiated by a school district requires a detailed written notice to the parents.<sup>14</sup> Here, the District initiated the process for evaluating the student for Section 504 eligibility. (FF 1, 2, 4, 5) but did not comply with the notice provisions (FF 7).

This procedural flaw was, ultimately, not prejudicial to the student. More substantively, however, the District's January 2008 screening for ADHD failed to identify Student appropriately as a student with ADHD. Here, the results of the screening were arguably inconclusive (FF 10, 11, 12, 13, 14, 15). But there was near unanimity in terms of atypical (albeit mild) results for restlessness/impulsivity and DSM-IV diagnostic criteria for ADHD/hyperactive-impulsive type. (FF 10, 11, 12, 13, 14, 15). And, further, there was enough consistency across multiple raters in terms of moderately atypical levels of generally problematic behaviors and clinically significant levels of oppositional behavior to warrant a very close examination of the student's behaviors in the school environment. (FF 11, 12, 14).

Still, the results of the screening were far from definitive. When taken in conjunction with the student's behavior unfolding over the

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<sup>12</sup> 34 C.F.R. §104.33(a).

<sup>13</sup> 22 PA Code §15.1; *see generally* 22 PA Code §§15.1-15.11.

<sup>14</sup> 22 PA Code §15.5.

school year—28 behavioral incidents—the results of the screening take on an entirely different cast. (FF 3, 6, 17, 18, 19). The school psychologist, who also served as a middle school counselor for the student, testified that she reviewed the student’s discipline records in 8<sup>th</sup> grade each time the student was disciplined. (FF 19).

Given the results of her screening and the information surfacing multiple times each month over the course of the 2007-2008 school year, the District should have undertaken further assessments, or other procedures, to ascertain the student’s needs given Student’s ADHD.<sup>15</sup> It is the considered opinion of this hearing officer that, even accepting that the January 2008 ADHD screening results were inconclusive, by February 9, 2008, the student had been involved in another five behavior incidents, including two incidents of disrespect and derogatory comments to staff, two incidents of throwing objects, and one incident of poking/touching another student. (FF 17, 18). And the screening and these multiple incidents all followed on the heels of the toy gun incident, which required referral to a mental health agency for the student’s return to school. (FF 6).

As such, by February 9, 2008, the District would have been in a position where it knew or should have known that the student should have been further evaluated for ADHD (and potentially other diagnoses)

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<sup>15</sup> *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238 (3d Cir. 1999); *see P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009) for the application of IDEIA analyses for Section 504 claims.

as the result of the student's in-school behaviors. At that point, having undertaken an evaluation of some sort, it seems reasonable that the evaluation would have been comprehensive, perhaps even with an eye toward establishing or ruling out the student's qualification as a child with a disability under IDEIA. Thus, the District would have had 60 calendar days to complete such an evaluation (indeed, the type of comprehensive evaluation it ultimately accepted from the private evaluator in August 2009—FF 23, 25, 27),<sup>16</sup> and, given approximately a week to have received permission to perform the evaluation and another week to consider its results and began implementing some type of plan, it is the holding of this hearing officer that by April 23, 2008, the student should have had a Section 504 plan in place.

In sum, then, the student was without a Section 504 plan from April 23, 2008 through October 8, 2009, a period encompassing the end of 8<sup>th</sup> grade, the entire 9<sup>th</sup> grade, and the early part of 10<sup>th</sup> grade.

Accordingly, the student was denied a FAPE under Section 504 due to the District's substantive failure to diagnose the student's ADHD and have in place a Section 504 plan before October 8, 2009. The issue of remedy will be addressed below.

*Discrimination under Section 504.* Under Section 504, a protected handicapped student must not, because of his or her disability, "be

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<sup>16</sup> 22 PA Code §14.123(b).

excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination” in any program or activity offered by a school district.<sup>17</sup> Here, the District has not excluded the student from District programs or activities, denied the student the benefits of District programs or activities, or discriminated against the student in its treatment of the student. Indeed, even given the extensive disciplinary history of the student, the District’s treatment of the student was fair and did not result in any unwarranted or excessive exclusion from school or from District programs or activities. (FF 18, 22, 35).

Accordingly, the District did not discriminate against the student in violation of Section 504.

### Remedies

As outlined above, the District denied the student FAPE in violation of Section 504. Compensatory education is a standard remedy for the denial of FAPE.<sup>18</sup> Here, however, the record taken in its entirety does not support an award for compensatory education.

Even though the District denied FAPE to the student from April 23, 2008 through October 8, 2009, a review of the record shows that there were thirty-five behavioral incidents over this time period. Of those incidents, two resulted in verbal warnings, twenty-two resulted in

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<sup>17</sup> 34 C.F.R. §104.4(a).

<sup>18</sup> *Ridgewood*, 172 F.3d 238.



detentions<sup>19</sup>, nine resulted in in-school suspensions, and two resulted in an out-of-school suspension amounting to one day. (FF 18, 22, 34; P-3 at page 17). The student continued to attend school and performed as expected given [Student's] cognitive ability; indeed, behavioral incidents and the lack of a Section 504 plan notwithstanding, there is nothing in the record to indicate that the student did not make academic progress. (FF 36).

So even though there was a substantive denial of FAPE in that the student went for over forty-five school weeks without a Section 504 plan, that denial of FAPE did not rise to the level that the student is entitled to compensatory education.

Additionally, at the outset of the hearing, parents presented as a potential remedy claims for reimbursement for privately funded services. There was no evidence presented at the hearing in support of those claims, so no remedy can be awarded.

Accordingly, the student is not entitled to compensatory education, and the parents are not entitled to reimbursements.

## **CONCLUSION**

The student does not qualify as a child with a disability under IDEIA. The District, through significant substantive omissions, failed to have a Section 504 plan in place to address the student's ADHD. This

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<sup>19</sup> It should be noted that four of these detentions were assigned for the failure to attend detention. (P-3 at pages 1-4).

resulted in a denial of FAPE under the obligations of Section 504, but the deprivation did not rise to the level where compensatory education is owed as a remedy. Finally, the District did not discriminate against the student as a result of Student's disability.

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### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student does not qualify as a child with a disability under the IDEIA. The School District has, under the obligations of Section 504, denied the student a FAPE from April 23, 2008 through October 8, 2009. This denial of FAPE, however does not rise to the level that compensatory education is owed. The School District has not discriminated against the student as a result of Student's disability.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

December 28, 2010