

*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: K.K.

Date of Birth: [redacted]

Dates of Hearing:

August 20, 2010

September 9, 2010

May 3, 2011

May 6, 2011

CLOSED HEARING

ODR File No. 01129-0910KE

Parties to the Hearing:

Representative:

Parent[s]

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Date Record Closed:

May 26, 2011

Date of Decision:

June 7, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student<sup>1</sup> is a high-school aged student in the Middletown Area School District (hereafter District) who is eligible for special education and related services. Student's Parents filed a due process complaint under both the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and Section 504 of the Rehabilitation Act of 1973 (Section 504),<sup>3</sup> as well as Chapters 14 and 15 of the Pennsylvania Code,<sup>4</sup> challenging the educational program provided to Student by the District from the beginning of the 2005-06 school year through the present. As remedies, they sought compensatory education, reimbursement for expenses incurred for private tutoring, and an independent educational evaluation (IEE).

The hearing initially convened over two sessions to address the District's motion to limit the scope of the Parents' claims and the issue of the IEE. On October 23, 2010, this hearing officer determined that the Parents would be permitted to present evidence of their claims from May 18, 2008 forward, and also ordered an IEE at public expense.<sup>5</sup> The parties obtained an IEE of Student, and the hearing thereafter continued over two additional sessions. For the reasons which follow, I find in favor of the Parents.

## **ISSUES**

Whether the District provided a free, appropriate public education (FAPE) to Student; and,

If it did not, is Student entitled to compensatory education and, if so, in what amount; and, are the Parents entitled to reimbursement for private tutoring?

## **FINDINGS OF FACT**

1. Student is a high-school aged student who resides with the Parents in the District. (Notes of Testimony (N.T.) 27-28; School District Exhibit (S) 7)
2. Student began attending school in the District in first grade and struggled with reading. Student received services through the Title I Reading Program that school year as well as in second grade. (N.T. 31-40, 142-43; Parent Exhibit (P) 1)

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

<sup>2</sup> 20 U.S.C. §§ 1401 *et seq.*

<sup>3</sup> 29 U.S.C. § 794.

<sup>4</sup> 22 Pa. Code §§ 14.101-14.163 and 22 Pa Code §§ 15.1-15.11.

<sup>5</sup> Hearing Officer Exhibit (HO) 5. Specifically, this hearing officer concluded that the Parents failed to establish the applicability of either of the two exceptions to the statute of limitations in the IDEA, but that they were entitled to an IEE of Student at public expense. *Id.*

3. Student continued to receive Title I Reading services in fourth and fifth grade, the 2005-06 and 2006-07 school years. (N.T. 29-30, 43-48, 70-72; P 4, P 5, P 6, P 11)
4. During the first marking period of the fifth grade school year, the Parents<sup>6</sup> asked that Student be evaluated, noting Student's continued struggles with reading. After a screening revealed weaknesses in auditory discrimination and phonemic manipulation, the District suggested that the Parents have Student's hearing tested, which they did. The Parents also arranged for a central auditory processing disorder (CAPD) assessment and advised the District. (N.T. 49-50, 53-57, 148-49, 156-57, 181-82, 336-37, 346; P 8; S 1, S 5)
5. The audiologist who conducted the CAPD evaluation determined that Student did have an auditory processing deficit, authoring a report which included recommendations for Student's educational program. Those recommendations for the school environment included preferential seating; repetition of information when Student did not understand it; a trial with an auditory trainer (FM system); contextual and visual cues; preteaching of new information including vocabulary; study guides or other written material to assist with retention and understanding; a multisensory learning environment; reading assistance; and untimed tests. This report, dated December 19, 2006, was provided to the District sometime after that date. (N.T. 58, 63, 213, 337-38; S 1)
6. On December 4, 2006, the Parents wrote to the District and asked that Student be evaluated by the school psychologist. The District issued a permission to evaluate form, which the Parents signed and returned. The District conducted the evaluation and issued an initial evaluation report (ER) on February 22, 2007. (N.T. 58-59, 152-53; S 2, S 5, S 7)
7. The ER indicated the reason for the referral was parental concern that Student had a learning disability. It included information from the Parents, a summary of the CAPD evaluation, a classroom observation, and cognitive and achievement testing. The ER noted that Student demonstrated weaknesses in spelling, reading, and written expression on the Wechsler Individual Achievement Test – Second Edition (WIAT-II), which were not consistent with Student's overall cognitive ability, but that the lower scores were in the average range. (S 6, S 7)
8. The parents met with District representatives to review the ER, which concluded that Student was not eligible for special education. The ER did recommend that Student participate in a supplemental reading program to improve sight word development and fluency; that essential vocabulary words be previewed; and that "recommended teaching strategies for CAPD" be provided. (N.T. 60-63, 67-69; S 7)

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<sup>6</sup> References throughout this opinion to "Parents" will include both parents where it appears that one parent was acting on behalf of both, with the understanding that the mother was more actively involved in Student's education, except where otherwise noted.

9. Those “strategies” were set forth in the ER as a page of program modifications and specially designed instruction: preferential seating away from noise/distractions; previewing of curriculum material; use of graphic organizers; re-wording and/or re-stating directions when necessary; extra time for processing and word retrieval; checking for comprehension of vocabulary and instruction; encouragement and prompting for verbal explanations, inferential thinking, and making predictions; comprehension strategies (identifying important information and encouraging Student to ask questions); notice of changes in topic; use of study guides for all classes where tests are given; and supplementation of verbal information through visual support. (S 7)
10. The parents approved the Notice of Recommended Educational Placement (NOREP) for regular education. (N.T. 137-38, 150; S 8)
11. Student entered sixth grade in the middle school for the 2007-08 school year, and achieved final grades of C or better in all classes with a C+ in Reading. Comments on Student’s report card that year included “Disrupts educational process,” “Poor listening/choice making skills, ” and “Off task & unfocused” (Math); “Needs to put more effort into studying” (Social Studies); and “Inconsistent effort” (Enrichment/Remediation). Student scored in the below basic and basic ranges on the 4Sight reading and math assessments that school year. On the Pennsylvania System of School Assessment (PSSA), Student scored in the below basic range in reading and mathematics. (N.T. 72-76; P 14, P 16; S 12)
12. For the next school year, 2008-09, Student was in seventh grade. Student’s mid-quarter report for the first marking period reflected failing grades in four classes: Music, Physical Education, Social Studies, and Language Arts/Reading. In Science, the teacher comments were that Student did not follow directions, had poor listening and choice making skills, and displayed poor organizational skills. Student’s parents contacted the teachers and they discussed how Student could bring up Student’s grades. (N.T. 77-79; P 17)
13. A Section 504/Chapter 15 Service Agreement was developed in October 2008 to address Student’s CAPD which was impacting Student’s ability to follow multi-step directions as well as comprehension of materials (i.e., processing information presented auditorially). The Agreement was drafted by the Title I Reading teacher, one of the Parents, and a case manager. The Service Agreement provided for accommodations including preferential classroom seating; an FM system; repetition of information; use of contextual and visual cues for understanding; study guides; weekly checks of Student’s homework folders; and extended time for tests, quizzes, and other assessments, as well as a quiet place for Student to complete those. The Parents approved the Service Agreement. (N.T. 79-88, 145, 160-61, 291-92; S 9)
14. Also beginning in October 2008, Student participated in after-school tutoring in either reading or math or both. Student also was provided with a supplemental reading program several days a week for the entire school year, and focused on reading fluency and comprehension. (N.T. 76-77, 117-18, 185, 411-12, 428-30, 463, 466-67; P 15)

15. Student had difficulty in seventh grade with completing and turning in assignments, and keeping attention to task. Student continued to struggle with reading, and was also having difficulty in math and as a result was changed to a different math class. (N.T. 82-87, 93-98, 410-11, 414, 461-62, 467-70, 471-74; P 17; S 13)
16. Student's parents met with the teachers and the assistant principal in January 2009 and discussed Student's difficulties and additional accommodations and strategies to help Student, although the Service Agreement was not revised at that time. Student was moved to a smaller resource class (study hall) where Student was to be provided with assistance with organization every day. One additional accommodation, use of an FM system, was to be considered after two weeks of the meeting if Student continued to experience difficulty. The FM system was tried toward the end of the 2008-09 school year. (N.T. 88-93, 100-01, 159-60, 170, 406-10, 422-25, 427-28, 438-39, 444-45, 462-66, 476; P 22, P 26)
17. The District observed Student in all four major classes in early February 2009 to determine on-task and off-task behavior. The percentage of time that Student was on-task during these observations ranged from 49% (Social Studies) to 68% (Language Arts). Off-task behaviors included chewing on and playing with a pencil, putting Student's head down on the desk, looking around the room or out into the hallway, and talking with peers. (S 13)
18. In late May and early June 2009, Student's teachers met together as well as with the Parents to discuss and revise the Service Agreement. The team decided that Student would be placed in co-taught classes whenever possible. (N.T. 98-100, 416-17, 426, 434-35, 446-47; P 26; S 10)
19. At the end of that seventh grade school year, Student failed Family and Consumer Sciences, had D grades in Language Arts/Reading, Science, and Social Studies, and had a B grade or better in all other classes. On the PSSA, Student scored in the basic range in mathematics and in the below basic range in reading. (N.T. 460-62; P 17; S 14)
20. In May 2009, Student began private tutoring for reading at the expense of the Parents. Student attended there for two hours each week through June 2010. (N.T. 106-11, 172; P 23, P 24)
21. Student's Service Agreement was revised in September 2009, and provided for accommodations including preferential classroom seating; an FM system; repetition of information; highlighted directions; use of contextual and visual cues for understanding; study guides; instruction in organizing and prioritizing information and materials; use of an agenda book to be checked daily by teachers and parents; a set of textbooks for the home; and extended time for tests, quizzes, and other assessments, as well as a quiet place for Student to complete those, in addition to use of the Kurzweil program (an assistive technology speech-to-text program) for completing assessments. The Parents approved the Service Agreement. (N.T. 104, 139-40, 436, 444; S 10, S 11)

22. During the 2009-10 school year (eighth grade), Student was in co-taught Math and Reading/Language Arts classes. (N.T. 504-06, 511; S 20)
23. Student used the FM system at the beginning of the 2009-10 school year, but by the end of the second marking period, Student did not wish to use it any longer due to peer reactions. (N.T. 101-03, 169-70, 185-86, 397, 400-01; P 26)
24. Student's Parents requested that Student be removed from the supplemental reading program in September 2009 because Student was experiencing difficulty with the teacher in that program during that school year. (N.T. 116-18, 395, 399-400, 412; S 16)
25. Also in the fall of 2009, Student's Parents requested that Student be re-evaluated to determine whether Student had a learning disability. (N.T. 119, 207-08; S 17)
26. The District completed and issued a new ER in December 2009. This ER included information from the Parents as well as two classroom observations. (N.T. 119-20, 205-07, 263-66; S 18)
27. The reason for the referral was "to determine if [Student] has a specific learning disability." (S 18 at 1) Teacher input into the ER reflected that Student was off-task and easily distracted in Science class; was off-task and did not use work time efficiently in Language Arts/Reading class; and was unorganized and argumentative and unable to complete assignments without prompting in Pre-Algebra class, although that behavior had improved during the month prior to the December 2009 ER. (S 18)
28. With respect to academic functioning, the ER noted weaknesses in reading comprehension, decoding, and reading fluency, as well as spelling. The District school psychologist administered the Woodcock-Johnson Third Edition Test of Cognitive Abilities (WJ III COG), as well as the Woodcock-Johnson Third Edition Tests of Achievement (WJ III ACH). She also administered the Oral Reading Fluency subtest of the Wechsler Individual Achievement Test – Third Edition (WIAT-III). The ER did indicate Student's scores on the PSSA from third through seventh grade as well as report card grades for sixth and seventh grade. The evaluation also included speech/language assessment using the Listening Comprehension Test Adolescent and the Adolescent Word Test – 2. (N.T. 209-16, 235-37, 339-41, 346-56; S 18)
29. Behavioral information obtained consisted of the Conners Third Edition (Conners 3) behavioral rating scales from the parents and Student's teachers. Student's Parents provided scores in the very elevated range in the areas of Learning Problems, Executive Functioning, and ADHD Inattentive Type, while Student's teachers provided scores in the very elevated range in the areas of Executive Functioning, Defiance/Aggression, and Oppositional Defiant Disorder, and in the elevated range for Inattention, Learning Problems, and ADHD Inattentive Type. (N.T. 224-28, 282-83; S 18)
30. The ER concluded that Student did not exhibit a severe discrepancy between ability and achievement based upon the WJ III COG and the WJ III ACH. It did, however, conclude that Student was eligible for special education on the basis of an Other Health

Impairment (OHI) based upon the CAPD. Student's Parents agreed that Student needed special education and checked the box that they agreed, but they did not necessarily agree with the entire content of the ER. (N.T. 124-25, 214-21, 240-41, 260-63; S 18)

31. The District also determined that Student did not demonstrate grade-level reading skills and needed specially designed instruction in that area. (N.T. 309-10, 320)
32. An Individualized Education Program (IEP) was developed for Student at a meeting held on December 2009. (N.T. 125-29, 140-41, 440; S 19, S 20)
33. The December 2009 IEP noted, among other things, concerns with time on task in the classroom and with losing or misplacing school work and failing to turn in assignments. Needs identified were further development of reading skills (decoding, fluency, and comprehension), demonstration of appropriate attention/time on task, and use of available accommodations and supports. (S 20)
34. The December 2009 IEP included a transition plan focused on Student's desire to attend a vocational-technical program, which was Student's own idea. There was one goal addressing reading comprehension, and the program modifications/specially designed instruction provided for co-taught classes in Math and Language Arts/Reading; preferential seating; use of an FM system; repetition of information and directions; highlighted directions; use of contextual and visual cues for understanding; study guides for all tests; a quiet environment and extended time for all assessments; tests read as requested by Student; a set of textbooks at home; and chunking of test items. Student would have been provided itinerant learning support. (N.T. 389; S 20)
35. The Parents did not approve the NOREP accompanying the December 2009 IEP. The District took no further action with respect to the proposed IEP at that time. (N.T. 129-30, 382, 447-48)
36. Student continued to demonstrate difficulty with completing and turning in assignments throughout the 2009-10 school year (eighth grade). Student's teachers and the assistant principal met several times to discuss concerns about Student's inconsistent homework completion, attention in class, and grades. They also considered making changes to the accommodations to Student's Service Agreement on a trial basis. (N.T. 114-16, 417-21, 438-39, 495, 499, 501-03, 508-09, 517-20, 524-25, 527-28; P 26 p. 4)
37. The Kurzweil program was never used for Student to take any tests. (N.T. 140, 436-37, 496, 522)
38. During the 2009-10 school year, Student attained grades of C or better in all classes except Pre-Algebra and Science, for which Student had a D. (N.T. 135, 486; P 25)
39. In the spring of 2010, the Parents contacted the District to inquire about Student's Service Agreement since Student would be attending a vocational-technical school for ninth grade (2010-11). They also asked the vo-tech school about Student's Service Agreement, but it was not aware that that plan existed. (N.T. 131-33, 375-76)

40. The District convened a meeting in May 2010 with Student and the Parents to discuss Student's transition to the vo-tech. (N.T. 439-40)
41. Also in May 2010, the vo-tech conducted a reading assessment of all students who would be entering its program in the fall. Based upon Student's scores on that assessment and others conducted by the District, the reading specialist/literacy coach at the vo-tech recommended Student for reading decoding. (N.T. 532-33, 539-43, 546-47)
42. A meeting convened at the vo-tech at the start of the 2010-11 school year to review the Service Agreement. Student attended that meeting. The participants decided to implement the same accommodations as in Student's prior Service Agreement except that the FM system was removed at Student's request. (N.T. 375-77, 394-95)
43. Student began attending the vo-tech school for the 2010-11 school year in a four-year program. Student had academic classes in the morning, and shop classes for approximately 2½ hours in the afternoon. On days that Student had reading instruction, Student split that 2½ hours, spending 30-40 minutes in reading instruction and the remainder of the time in shop class. Student did not begin to receive the recommended reading instruction until December, however, and that program did not address Student's reading fluency need. (N.T. 133-35, 375, 390, 541, 543-45, 549, 558)
44. For the first half of the 2010-11 school year, Student did well in some subjects, including the shop classes, but continued to fail to turn in homework assignments which affected Student's grades in other classes. Student's shop class instructor worked with Student as necessary to be sure Student understands the materials and takes appropriate notes. By contrast, Student had failing grades in Algebra, English, and Science, and had a D in Reading. (N.T. 377-81, 391-92, 549-52, 554-56; P 30, P 31)
45. In November 2010, the Parents contacted the District to convene a new IEP meeting. The team made changes to the previous December 2009 IEP by adding goals addressing reading fluency, written expression, class participation, and attention and focus; one new item of specially designed instruction was a research-based, systematic, sequential reading program. The parents approved this IEP pending the results of the IEE. Around this time, Student began to receive the instruction in reading. (N.T. 382-84, 388-89; P 31, P 32, P 34)
46. In December 2010, the Parents met with representatives of the vo-tech to develop an IEP.<sup>7</sup> This IEP noted that Student failed to complete homework and turn in assignments in all classes, and that this resulted in poor grades; Student also did not use the agenda planner effectively without prompting. Needs identified were development of reading skills (decoding, fluency, and comprehension), demonstration of appropriate attention and time on task, use of available accommodations/supports, self-advocacy, organization, and homework completion. Goals addressed reading comprehension, reading fluency, written expression, assignment and homework completion, and attention/focus. Program modifications/specially designed instruction were very similar to those previously

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<sup>7</sup> The District, however, remained the local education agency (LEA). See N.T. 27-28; P 34 at 1.



provided by the District: preferential seating; repetition of information and directions; highlighted directions; use of contextual and visual cues for understanding; study guides for all tests; a quiet environment and extended time for all assessments; tests read as requested by Student; a set of textbooks at home; chunking of test items; use of an FM system; planner signed daily by teachers; and a 5-10 minute period at the end of each day for organizational support. One new item of specially designed instruction was assistance with shop theory. The Parents approved the IEP and NOREP in January 2011 pending the IEE. (N.T. 384-86; P 30, P 33)

47. The IEE was conducted by a private psychologist in January 2011 and a report subsequently issued. The tests administered included the WISC-IV, and selected subtests of the Wide Range Assessment of Memory and Learning, Second Edition, the Comprehensive Assessment of Spoken Language, the Kaufman Test of Educational Achievement, Second Edition, the Delis Kaplan Executive Function System, the WJ-III, and the WIAT-III. The independent psychologist also used the Behavior Assessment System for Children – Second Edition (BASC-2), the Behavior Rating Inventory of Executive Functioning (BRIEF), and the Conners-3. In addition, a Reading Skills Analysis was performed by a reading specialist. (N.T. 386-87, 392; P 29)
48. On the WISC-IV, Student attained a full scale IQ in the average range, and the General Ability Index score was also in the average range. (P 29)
49. The IEE assessment of Student's attention and executive functioning reflected concerns with attention, behavioral inhibition and impulsivity, and hyperactivity. (P 29)
50. The Reading Skills Analysis included the WJ-III Diagnostic Reading Battery, the Test of Word Reading Efficiency, and the Gray Oral Reading Tests (GORT-4). Weaknesses were noted in word identification, reading comprehension, reading fluency, and spelling, (P 29)
51. With respect to language, Student demonstrated weaknesses in receptive and expressive language. (P 29)
52. The independent psychologist also observed Student in two classes, although Student had previously met the examiner who was not able to determine if Student's behavior during the observations was impacted by having met the independent psychologist. (P 29)
53. The independent psychologist concluded that Student met the criteria for "Learning Disorder, NOS [Not Otherwise Specified] due to weaknesses in fluency in reading and mathematics and in spelling, as well as deficits in executive functioning" (P 29 at 29), and also concluded that Student had Attention-Deficit Hyperactivity Disorder (ADHD). (P 29)
54. Recommendations in the IEE included treatment for symptoms of ADHD; continuation of previous accommodations/modifications/specially designed instruction: preferential classroom seating; repetition of information; highlighted directions; use of contextual and visual cues for understanding; study guides; instruction in organizing and prioritizing

information and materials; use of a daily assignment book to be checked by teachers and parents, a set of textbooks for the home; and extended time for tests, quizzes, and other assessments, as well as a quiet place for Student to complete those; chunking of test items; and use of an FM system. In addition, she recommended chunking of assignments/tasks; a plan for redirecting Student when attention and focus appear to be drifting; a clock or timer as a visual reminder of how long concentration is necessary; recording of lectures; an organized workspace; scheduled breaks for homework and longer assignments; use of a squeeze ball or similar item; and opportunities for physical activity throughout the day. (P 29 at 30-31)

55. Further recommendations were made to address Student's weaknesses in reading fluency and reading comprehension through a research-based, explicit, systematic reading program, as well as reading instruction at the 6<sup>th</sup>-7<sup>th</sup> grade level. The reading specialist also suggested that Student's independent reading materials should be at the 4<sup>th</sup> grade level. (P 29)
56. The IEE also provided recommended strategies and interventions for explicit instruction in executive functioning skills, as well as to help Student with written assignments. (P 29)
57. By the end of the third marking period, Student was failing both Algebra and Science. (P 31)
58. The following exhibits were admitted into the record by the close of the evidence: P 1-26 and 28-34; S 1-14 and 16-21; HO 1-5. (N.T. 25-26, 373, 560) HO 6 dated May 7, 2011 is a memorialization of the on-the-record discussion on May 6, 2011 of the decision due date, and is hereby admitted into the record.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Legal Principles

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);<sup>8</sup> *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. See *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The

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<sup>8</sup> The burden of production, "i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

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). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole was essentially consistent. In some instances, witnesses' recollections differed, which did not necessarily render the testimony incredible. The credibility of particular witnesses is discussed further in this decision as necessary.

### IDEA Principles

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 *Board of Education 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).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child's progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

The IDEA and state and federal regulations obligate 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 commonly referred to as child find. Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995).

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 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(a). Further,

*Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

### Section 504 Principles

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. 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).

Section 104.35 of the applicable regulations implementing Section 504 requires that an evaluation “shall” be conducted “before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 C.F.R. § 104.35. An initial evaluation under Section 504 must assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id.*

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).

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).

### Child Find and Provision of a Free, Appropriate Public Education

The first issue is whether Student should have been identified as eligible under the IDEA and/or Section 504 by May 18, 2008, the date from which Parents’ claims have been considered in this case. The record reflects that the District evaluated Student for special education after a parental request in December 2006, and issued an ER in February 2007 which concluded that Student was not eligible for special education.<sup>9</sup> (Finding of Fact (FF) 4, 6, 7, 8) While there was some evidence of Student’s continued struggles with reading both before and during the 2007-08 school year (FF 2, 3, 4), there is little evidence in the record to suggest, much less support a conclusion that, as of May 18, 2008, Student had a disability recognized in the IDEA, or that Student was in need of specially designed instruction. As the burden was on the Parents to establish that Student was eligible for special education and should have been so identified under the IDEA by the end of the 2007-08 school year, this claim must fail.

A related issue is whether Student should have been identified under Section 504 at some point prior to the development of the first Service Agreement. As noted, the District’s 2007 ER found Student ineligible for special education under the IDEA (FF 8), but it is further noteworthy that it did make recommendations on teaching strategies for Student to address the CAPD. (FF 8, 9) However, even considering that the 2007 ER made recommendations to support Student in school, there was little evidence presented as to Student’s performance during the 2007-08 school year from which one might conclude that the District failed in its child find obligations under Section 504 as of May 2008. At the end of the 2007-08 school year, Student had achieved grades of C or better in all classes, but several teachers had noted problematic behaviors (first marking period) and lack of effort and motivation (all marking periods), and Student’s benchmark assessments were below expectations. (FF 11; P 14) Passing grades, in and of themselves, do not indicate that an educational program is appropriate, but by the same token, problematic behaviors do not automatically equate to a finding that the District should have identified Student with a disability requiring appropriate educational intervention, i.e., that Student should have been provided with a Service Agreement by the end of the 2007-08 school year. Again, the lack of preponderant evidence establishing a child find claim under Section 504 compels the conclusion that the Parents have not met their burden.

At the beginning of the next school year, 2008-09, however, it appears that things changed dramatically for the worse. Student’s behavior and failing grades were of significant

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<sup>9</sup> This hearing officer previously determined that the parents could not challenge the adequacy of that February 2007 ER. (HO 5)

concern by the middle of the first marking period. (FF 12) The District responded by developing a Service Agreement in October 2008, and Student began a supplemental reading program and tutoring. (FF 13, 14) This hearing officer concludes that the District's response was prompt in light of these new concerns.

There is, however, a glaring flaw in how the Service Agreement was developed. As explained above, the applicable regulations require that an evaluation be conducted "before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 C.F.R. § 104.35. No such evaluation occurred in the fall of 2008. It might be argued that the October 2008 Service Agreement was based upon the 2007 ER, which did include recommendations to address Student's CAPD. Nevertheless, that evaluation was nearly two years old at the time the initial Service Agreement was developed, and Student's academic and behavioral performance had noticeably changed since the time of that ER. Thus, Student was not assessed in all areas of current educational need using a variety of sources which could have been considered by a team of professionals. *Id.*

Without a current evaluation of Student's needs, it would have been difficult to assess whether the October 2008 Service Agreement was appropriate at the time it was first implemented. The accommodations listed in that Agreement followed many of the recommendations in the 2007 ER, which had incorporated many of those made in the 2006 CAPD evaluation. (FF 5, 9, 13) However, a number of those recommendations were not included. Despite Student's longstanding struggles with reading, failing grades in many subjects, and a recognition in the October 2008 Service Agreement that Student had difficulty with comprehending material, it did not provide for preview of curriculum materials or vocabulary, comprehension strategies, or supplementing of information presented auditorially. Nor did the October 2008 Service Agreement address the difficulties with organization and attention which Student's teachers had consistently noted. (FF 12, 15)

It is, therefore, not surprising that meetings convened in January 2009 to consider further changes to Student's educational program because the existing program was not addressing all needs. Student continued to exhibit difficulties in classes. (FF 15) Additionally, Student's considerable off-task behavior was well documented (FF 17), yet no steps were taken to address these significant findings. There was no explanation for the failure to try the FM system until the end of the 2008-09 school year. The continuous attempts over that school year to make changes to Student's accommodations clearly were not adequate to support Student, who continued to demonstrate difficulty with reading, turning in assignments, and maintaining attention. (FF 15, 19) This hearing officer concludes that, at least by the beginning of the third marking period during the 2009-10 school year, the District should have taken steps to conduct a new evaluation to determine what Student's needs were and to appropriately address them. The failure to do so amounted to a denial of FAPE.

At the beginning of the 2009-10 school year, Student's Service Agreement was again revised, adding accommodations to address organizational skills and homework/assignment completion and use of the Kurzweil program for tests. (FF 21, 23) The Kurzweil was never made available to Student during that school year. (FF 37) Student's continued need for

preview of curriculum materials was still not addressed. There was little evidence that Student actually received instruction in organizing and prioritizing information and materials as provided by the September 2009 Service Agreement, or when and how that was done; indeed, it clearly remained a need by the time of the December 2009 ER. (FF 27 29, 33) While co-taught classes may have provided some support for Student, Student had failing grades nearly every quarter and continued to demonstrate off-task behavior, distraction, and lack of organization, and inconsistently turned in assignments. (FF 27, 36, 38; P 25)

It is fortunate for Student that Student's Parents requested another special education evaluation in the fall of 2009. Although this hearing officer concluded that the ER was not sufficiently comprehensive to assess Student in all areas of need and failed to adequately set forth the District's analysis of whether Student had a specific learning disability (HO 5), it did conclude that Student was eligible for special education. (FF 30, 31) The IEP which was developed in December 2009, based on that ER, noted needs in developing reading skills (decoding, fluency, and comprehension) and attention and organizational skills. (FF 33) Despite these identified needs, the December 2009 IEP, which the Parents did not approve, contained only one goal, in reading comprehension, and that goal lacked both a baseline and identification of how Student's progress would be measured. (S 20 at 14) The program modifications and specially designed instruction were remarkably similar to those that had been provided in the previous Service Agreements (FF 13, 21, 34), which had clearly not been adequate to address Student's educational needs. Thus, even if this IEP had been approved and implemented, it is difficult to discern what additional educational benefit Student might have derived for the remainder of that school year, particularly since the IEP did not address all the needs identified in that very document.

Review of the IEE, when considered in the context of the record as a whole including the District's own evaluations, supports the conclusion that at least by December 2009, Student was and should have been identified as eligible for special education by reason of an OHI as well as a specific learning disability in reading. Student was not demonstrating adequate achievement in basic reading skills, reading fluency, or reading comprehension, and exhibited a severe discrepancy between intellectual ability and achievement in reading. (P 29 at 9-10, 19-24) *See* 22 Pa Code § 14.125. Even the District did not disagree in its December 2009 ER that Student required specially designed instruction in reading, satisfying the second prong of IDEA eligibility. (FF 31) *See* 34 C.F.R. §§ 300.8(a) and 300.39(a). Thus, this hearing officer concludes that the District violated its child find obligation to Student under the IDEA as of December 2009, which was not obviated by implementation of an appropriate Section 504 Plan over the course of the 2009-10 school year, as discussed above.

Student's transition to the vo-tech for the 2010-11 school year revealed that, despite Student's keen interest in attending that program, Student demonstrated no improvement in turning in assignments and homework and continued to fail classes. (FF 34, 44) It was not until after the November 2010 IEP meeting that Student began to receive reading instruction, despite the facts that these needs were specifically identified as far back as in the December 2009 ER and Student's struggles in reading were well known during the 2008-09 and 2009-10 school years. (FF 4, 7, 8, 11, 14, 15, 19, 20, 21, 22, 28, 31) The after-school tutoring and supplemental

reading program were no substitute for appropriate reading instruction that addressed Student's needs.

The IEPs developed in November and December 2010 are rather similar, and share a number of fatal flaws. None of the goals contain baselines, and thus, Student's progress toward those goals cannot be ascertained. (P 30, P 32) Moreover, these IEPs fail to address all of Student's identified needs (FF 28, 29, 31, 33; P 30, P 32), and for the reasons set forth above, are not appropriate. Nonetheless, this hearing officer does recognize that the parties continued to work together to agree to an interim program while the IEE was pending in order to attempt to provide Student with an appropriate education.

It must also be noted that a number of Student's current and former teachers testified that they believed Student demonstrated a lack of effort, and that, when motivated, Student did better in classes. (N.T. 467-68, 486, 488-89, 508-09) While Student's motivation and effort may very well have played a role in Student's academic and functional performance, one cannot assume that those factors are the sole reasons Student has experienced difficulties over the prior several school years. Indeed, such a supposition ignores many of the well-known symptoms of Student's CAPD and their impact on Student's access to education, as well as the newly diagnosed ADHD. Moreover, it is also apparent that Student continues to struggle even while attending the vo-tech program that Student chose, strongly suggesting that the difficulties cannot be attributed solely to motivation.

### Remedies

Whether or not Student would have been determined to be eligible for special education if an evaluation had commenced at the beginning of the third marking period of the 2008-09 school year, or sometime earlier than the time Student was identified in December 2009, it is apparent from the foregoing discussion that Student has been denied an appropriate educational program. This hearing officer, thus, concludes that Student was denied FAPE during the 2008-09, 2009-10 and 2010-11 school years. The next question is what relief is warranted. 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.* In addition to this "hour for hour" approach, some courts have endorsed a scheme that awards the "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." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).



In this case, there was little if any evidence which would permit a determination of what position Student would have been in had Student been provided with appropriate educational programming throughout the relevant time period. Thus, this hearing officer concludes that the *M.C.* standard is the appropriate method of determining the amount of compensatory education owed to Student in this case.

With respect to the 2008-09 school year, when it became apparent that intervention was necessary, the resulting Service Agreement developed in October 2008 was not based upon a current evaluation and, clearly, failed to meet Student's needs. Had the District conducted an appropriate evaluation under Section 504 within a reasonable time after the mid-first-quarter marking period, it is reasonable to conclude that an appropriate Section 504 Service Agreement would have been implemented no later than the end of the second marking period that year. Student continued to experience significant difficulties over the remainder of that school year, failing or barely passing most classes and exhibiting off-task behavior in four major classes as much as half of the time. Student's weaknesses in reading fluency, decoding, and comprehension unquestionably impacted Student in every subject. For these reasons, this hearing officer concludes that the denial of FAPE pervaded Student's school day, and, thus, Student is entitled to full days of compensatory education for the second half of the 2008-09 school year. *See Keystone Central School District v. E.E. ex rel. H.E.* 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (upholding award of full days of compensatory education, despite school district's argument that the student received some educational benefit, and explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education). Those full days translate to 5.5 hours of instruction for each school day.<sup>10</sup>

During the 2009-10 school year, having determined that the implemented Service Agreements and proposed December 2009 IEP continued to ineffectively address Student's documented needs, Student is entitled to full days of compensatory education for each school day for the same reasons as in the prior school year. Although Student's final grades improved slightly from the prior school year, the evidence is preponderant that the denial of FAPE to Student pervaded the school day and that there is no way to measure any portion of the school day or school year which was appropriate.

During the 2010-11 school year, while many of the same difficulties with attention, homework completion, and failing grades continued, two significant changes resulted: the addition of reading instruction, and the shop classes in which Student did quite well. (FF 43, 44) Using the same number of hours for each school day and deducting the 2½ hour period during which Student was provided with appropriate education in those classes,<sup>11</sup> Student is entitled to 3 hours per day of compensatory education from the first day of the 2010-11 school year and continuing through the date that an appropriate educational program is implemented for Student.

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<sup>10</sup> 22 Pa. Code §§ 11.1 and 11.3; *see also* P 32 at 24 and S 20 at 21 (calculating 420 minutes in a typical school day including lunch and other non-academic periods).

<sup>11</sup> Although there was some testimony that Student's reading instruction did not address Student's fluency needs (FF 43), this hearing officer cannot conclude based on this record that this program was wholly inappropriate for Student.

The hours of compensatory education are 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 that furthers the goals of Student's current or future IEPs. 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 through Student's IEP to assure meaningful educational progress. There are financial limits on the parents' discretion in selecting the compensatory education. 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.

The last issue is whether the Parents are entitled to reimbursement for the private tutoring provided between May 2009 and June 2010. Having concluded that the District denied Student FAPE by failing to appropriately program for Student's reading needs during that time period, and that Student is entitled to compensatory education by reason of that failure, this hearing officer concludes that it would be inequitable to also award reimbursement for the tutoring. Accordingly, this claim will be denied.

## **CONCLUSION**

For all of the foregoing reasons, this hearing officer concludes that the District did deny FAPE to Student for a portion of the 2008-09 school year, the entire 2009-10 school year, and the 2010-11 school year until an appropriate IEP is or was implemented. Consequently, Student is entitled to compensatory education. The Parents are not entitled to reimbursement for tutoring services.

## **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not provide FAPE to Student during the 2008-09 school year from the beginning of the third marking period to the end of the school year, and Student is accordingly entitled to, and the District is ordered to provide, 5.5 hours of compensatory education for each day that school was in session that school year beginning on the first day of the third marking period through the last day of the school year.

2. The District did not provide FAPE to Student during the 2009-10 school year, and Student is accordingly entitled to, and the District is ordered to provide, 5.5 hours of compensatory education for each day that school was in session that school year.
3. The District did not provide FAPE to Student during the 2010-11 school year, and Student is accordingly entitled to, and the District is ordered to provide, 3 hours of compensatory education for the time period beginning with the first day of the 2010-11 school year and continuing through the date that an appropriate educational program is implemented for Student.
4. The compensatory education hours are subject to the conditions and limitations set forth above.
5. The claim for reimbursement for tutoring services is denied.
6. The District is not ordered to take any further action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: June 7, 2011