

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
DUE PROCESS HEARING

Name of Child: Student
ODR #10019/08-09 LS

Date of Birth: xx/xx/xx

Dates of Hearing:
June 25, 2009
August 26, 2009
September 2, 2009
September 9, 2009
September 30, 2009
October 15, 2009
October 27, 2009

CLOSED HEARING

Parties to the Hearing:

Bristol Township School District
6401 Mill Creek Road
Levittown, Pennsylvania 19057

Last Transcript Received:

Record Closed

Date of Decision:

Representative:

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November 1, 2009

November 30, 2009

December 15, 2009

Hearing Officer:

Deborah G. DeLauro, M.Ed, J.D.

Background

Student enrolled in the Bristol Township District as a kindergarten student in the 2004-2005 school year. Student accrued numerous absences, late arrivals, early dismissals and nurse visits due to Student's difficulty separating from Student's parents. Student's separation difficulties manifested in a variety of somatic complaints including stomach issues, chest issues and issues related to Student's diagnosed asthma. Parents sought medical reasons for Student's complaints but also asked for help from the District.

Student started having academic difficulties due in part to Student's excessive absences. In December 2004, Student was identified as an eligible student based upon the classification of Speech/ Language Impairment, and an IEP was developed to address Student's articulation problems. Some tutoring in math was added in first grade, but Student's academic problems and excessive absences continued to escalate.

In December 2006, the District conducted a 504 meeting to discuss health issues but because of the team's understanding that a medical diagnosis was required, did not develop a 504 Service Plan until June 2007. The 504 Plan did not address Student's attendance issues or the instruction missed due to Student's absences.

The District initiated Truancy proceedings against the Parents at the end of the 2006-2007 school year. The following year, Student's absences continued to increase and Student's teachers started reporting that Student was not making adequate progress. When all other medical issues were ruled out, it was suggested that Student might be suffering from separation anxiety and Student was referred to an independent psychologist and psychiatrist.

In June 2008 the 504 Plan was discontinued because the Parents did not provide updated medical information. The Parents protested in July 2008 and requested a psycho-educational evaluation. In spite of Student's diagnoses of ADHD, School Phobia, Generalized Anxiety Disorder and a R/O for Aspergers, the October 2008 Re-Evaluation Report, discontinued speech and Language services and determined that although Student had met the disability criteria under the category of Other Health Impairment, Student was not in need of specially designed instruction.

In January 2009, the District agreed to fund an independent educational evaluation, included an independent speech/language evaluation, and in the Spring 2009, the IEE found Student to be eligible for special education services as a student with an Emotional Disturbance and in need of specially designed instruction.

In May 2009, Student's Parents filed a due process complaint to seek compensatory education due to the District's alleged failure to meet its Child Find obligations under IDEA and Section 504 by failing to appropriately and timely evaluate Student and provide Student with a Free Appropriate Public Education.

The due process hearing was held over seven sessions between June 25 and October 27, 2009. For the reasons explained below, the Parents have met their burden by a preponderance of the evidence.

Issues

1. Whether the District failed to meet its' child find obligations under IDEA and Section 504 by failing to timely and appropriately evaluate Student?
2. Whether the District failed to provide Student with a free appropriate public education under IDEA and/or §504 of the Rehabilitation Act ?
3. Whether Student is entitled to compensatory education; and if so, how much?
4. Whether Parents are owed reimbursement for the costs expended to obtain counseling services for Student?

Findings of Fact

1. Student (hereinafter "Student") is a pre-teen aged student who resides in the Bristol Township School District (hereinafter "District") where Student has been enrolled since kindergarten. [P-1; P-42; N.T. p. 47]
2. Student attended [redacted] Elementary School (hereinafter "Elementary School One") from kindergarten (2004-2005) through fourth grade (2008-2009). Student is currently in the fifth grade attending [redacted] Elementary School (hereinafter "Elementary School Two") [P-42]
3. Since kindergarten, Student had difficulty separating from Student's parents to attend school which resulted in numerous absences, later arrivals, early dismissals, and nurse visits in each of the school years. [SD-1; N.T. pp. 1452, 1459, 1463] Student's teachers were all aware of Student's absences and somatic complaints. [N.T. pp. 1454, 1460-1461, 1477-1478, 1481, 1509-1510, 1531]
4. Student frequently complained of stomach aches, head aches, gastrointestinal issues and diagnosed asthma. [SD-32 pp. 223-227; N.T. pp.1457, 1464-1465, 1482, 1517-1518, 1534]

5. Over the years, Parents tried to find medical reasons for Student's somatic complaints.¹ In Student's kindergarten year, parents took the Student to the [redacted] Hospital (hereinafter "Hospital") where Student was diagnosed and treated for asthma. [N.T. pp. 1456-1457, 1516.]
6. In kindergarten, student was absent 25 days, Student had 9 late arrivals and 7 early dismissals. [SD-1; P-1 p. 2; N.T. pp. 63-65.]
7. In December 2004, Student was found eligible under the classification of Speech/Language Impairment and received therapy on an Itinerant level to address articulation problems. [SD-66; 67; P-2; N.T.]
8. In first grade, Student was absent 23 times, was late 24 times, and was dismissed early 18 times. [P-2, pp. 17-18; N.T. p. 67]. Student visited the Nurse's office 25 times in first grade; 64% of the visits were gastrointestinal related, 8% involved chest issues, and 28% fell under the category of "other." [N.T. pp. 896-897]
9. In December 2005, Mrs. B reported that Student was performing at the basic level in math and at the Kindergarten level in reading. In math Student had difficulties with basic facts and overall math concepts. [P-3, p. 59; N.T. pp. 74, 630-633].
10. Student received tutoring in first grade for reading and math because Student scored below benchmarks on benchmark assessments. [N.T. pp. 1876, 1937]. Mrs. M (hereinafter "Mrs. M"), the Instructional Support Teacher, agreed that Student had difficulty in math. [N.T. p. 1937].
11. On Student's report card, Student had 2's (sometimes demonstrates this skill) in reading math and writing. [P-2, pp. 17-18; N.T. pp. 68, 625-626]. While Ms. B testified that 2's were "average" scores, this contradicted the comments she provided for the mid-year IEP. [N.T. p. 639].
12. Ms. B stated that she reviewed the term "child find" prior to providing testimony because she forgot what the term meant, [N.T. pp. 612-613] and that she no longer informs parents that they can request an evaluation for special education because when she did this in the past, it "backfired" on her. [N.T. pp. 619-620] She stated further that she has never participated in an evaluation for special education, under Section 504 or the IDEA. [N.T. pp. 620-621]
13. In second grade, Student was absent 38 times, was late 30 times, and was dismissed early 13 times. [P-1 p. 23; N.T., pp. 812, 817, 839]. Student visited the Nurse's office 36 times; 78% of the visits were gastrointestinal related, 8% were chest related, and 14% were other. The Mrs. C, Student's second grade teacher

¹ Over the years, Student was tested for cystic fibrosis, celiac disease, irritable bowel syndrome and Crohn's Disease, all of which were found to be negative. [P-36]

- and the School Nurse, Ms. M, (hereinafter “Ms. EM”) recalled that Student was having difficulty getting to school due to medical issues. [N.T. pp. 812, 906].
14. Mrs. C, spoke to the principal about Student’s excessive absences. [N.T. p. 862]. She was not familiar with the term “child find,” and had not heard of “red flags.” [N.T. pp. 802, 804]. She did not recall if she had ever participated in an evaluation for special education under Section 504 or the IDEA. [N.T. pp. 807-808] Although Mrs. C testified that she referred Student to the Instructional Support Teacher, this statement contradicted the educational record. [N.T. p. 825].
 15. In second grade, Student performed below the targeted level in 3 out of 6 reading theme tests and 6 out of 9 initial math assessments. [P-1, p. 24; N.T. pp. 79-80, 820]. Student was also below benchmark on the DIBELS reading assessment in the winter and spring. [SD-69; N.T. p. 1945].
 16. On Student’s second grade report card, Student had 2s in numerous areas on Student’s report card. [N.T. pp. 76-78]. Mrs. C equated 2s with having difficulty. [N.T. pp. 68-70, 78, 837-838]. Student did not receive tutoring in second grade, as Student did in first because there was either a shortage of funding or teachers. [N.T. p. 1882].
 17. At an IEP meeting conducted in December of Mrs. C reported that [Student’s] absences interfere with Student’s overall performance.” [P-5, p. 70; N.T. pp. 75, 824, 849-850]. She testified that Student had specific difficulties in the area of math. [N.T. pp. 858-859, 866].
 18. On December 19, 2006, the District conducted a “504 meeting to discuss health issues” which were keeping Student from coming to school. [N.T. pp. 58-59, 908, 950-951, 954, 999, 1078]. However, the District failed to conduct a pre-placement evaluation and informed the parents that a medical diagnosis was required to obtain a 504 Plan. [P-6; N.T. pp. 59-61, 87-88, 827, 950, 1000]. At the time of the meeting, 504 Plans were “new in the building.” [N.T. pp. 998-999]. The Principal, (hereinafter “Mrs. JC”), stated that it was her understanding that a specific medical diagnosis was required to establish a need for a 504 Plan. [N.T. p. 999].
 19. It was not until June 8, 2007, that the District developed a 504 Plan for Student based upon diagnoses of Failure to Thrive and Lactose Intolerance. [P-10; N.T. pp. 1000-1001, 1005, 1543].
 20. The 504 Plan consisted of a medical history drafted by Mrs. EM, and some accommodations. [P-10, pp. 88-89; N.T. p. 909]. The District collected other relevant information from the parents, the teacher, and the student, but did not evaluate or analyze the information. [N.T. pp. 95-100, 1001-1004].

21. There was nothing in the 504 plan to address the instruction missed by Student when Student was absent due to Student's handicapping condition. [N.T. pp. 310, 1010]. Ms. JC testified that the 504 Plan was "scant." [N.T. p. 1135] Mr. d agreed that the 504 Plan did not address Student's attendance issues.
22. Mrs. C testified that the 504 Plan offered nothing in addition to what she was already doing, yet it was her opinion that Student's absences were affecting Student's performance and Student was not making adequate progress. [N.T. pp. 828, 868-869].
23. At the end of Student's second grade school year, the parents received a citation for truancy and the Superintendent asked the Social Worker, (hereinafter "Ms. R") to contact the parents and speak with Student. [N.T. pp. 1668-1669, 1713]. Ms. R knew that Student had an attendance issue but was not clear about Student's issues. [N.T. pp. 1676, 1677, 1719-1720].
24. In third grade, Student was absent 53 times. [P-1, p. 34; N.T. pp. 328, 1014]. Student visited the Nurse' office 35 times; 51% of the visits were gastrointestinal related, 29% were chest, and 20% were other. [N.T. pp. 896, 899]. Student's third grade teacher, Mrs. (hereinafter "Mrs. MC"), was aware of Student's frequent absences at the beginning of the school year and attributed them to a medical condition. [N.T. pp. 295-296]. During third grade, when all other medical issues had been ruled out, the specialists told the family that they may want to look at anxiety as the possible cause of Student's complaints. [N.T. pp. 1485, 1535-1537]. This was reported to Student's third grade teacher, Mrs. MC. [N.T. p. 1485].
25. Mrs. MC was not familiar with the term "child find" or "red flags." [N.T. pp. 267-269]. She never referred a child for a special education evaluation; she referred students only to the Instructional Support Team (hereinafter "IST"). [N.T. pp. 286-287]. She was not aware that psychological services are a related service under the IDEA. [N.T. pp. 274-275]. She was also unclear about what child-related information could be shared among staff members. [N.T. pp. 278-279].
26. Mrs. MC had only looked at Student's 504 Plan once, and did not implement it in full. [N.T. pp. 298, 300-309, 1009, 1011]. By mid-year, Mrs. MC reported that Student's absences were resulting in inconsistent performance. [P-12, p. 111; N.T. pp. 328-329]. By March of 2008, Mrs. MC had concerns related to Student's absences because Student was missing large amounts of work. [P-15; N.T. p. 331]. Student's report card grades in third grade were based upon tests and quizzes, including retests. [N.T. pp. 324-325, 327]. Mrs. MC would continuously retest students until they passed the test. N.T. p. 356. On the third grade PSSAs, Student achieved a proficient score in math and reading. [SD-42; N.T. p. 197].

27. During Student's third grade year, at the end of February 2008, Mrs. MC spoke to (hereinafter "Ms. E"), the District Guidance Counselor, about a conversation she had had with [the mother] wherein separation anxiety was discussed as a possible issue. [N.T. pp. 1592-1593, 1597]
28. In March of 2008, Ms. E realized that Student may be suffering from more than stomach issues, and that Student may also have anxiety issues. [N.T. pp. 1595, 1612-1613, 1636-1637, 1638]. She agreed that the nurse visits, late arrivals, early dismissals and absences were all signs of anxiety. [N.T. p. 1637]. Ms. E testified that she thought Student's attendance and the other concerns were red flags, but she was just not aware of the information until the end of Student's third grade year. [N.T. p. 1624]. .
29. After first referring the family to [redacted] Anxiety Clinic, [N.T. pp. 1595, 1598] Ms. E and Ms. R then recommended (hereinafter "Dr. R") to the family and Student began seeing her for anxiety. [P-17; N.T. pp. 116-117, 1598-1599, 1637, 1714-1715, 1981-1982]. Dr. R informed Ms. E and Ms. R. that Student was suffering from separation anxiety. [N.T. pp. 1601-1602, 1619]
30. Dr. R was contacted by Ms. R, District Social Worker, in May of 2008 to provide assistance to Student because Student was missing numerous days from school, and there was possible anxiety. [N.T. pp. 417, 418] Dr. R. Student's therapist, is a doctorate level Psychologist. [P-43; N.T. pp. 414-415] She works cooperatively with several school districts in the area, and has previously worked with the Bristol Township School District. [N.T., pp. 415-416].
31. Based upon input from several individuals and Student, Dr. R provided a diagnosis of Separation Anxiety, and informed Ms. R that Student's anxiety was impacting Student's attendance and how Student behaves in the classroom. [N.T. pp. 420-421, 445, 447-448].
32. Dr. R also spoke with Mr. d in May 2008 about providing accommodations for Student's anxiety. [N.T. pp. 426-427, 453]. Mr. d requested a letter from Dr. R supporting the anxiety diagnosis, which she provided on September 5, 2008. [P-23, pp. 172-174; N.T. p. 453].
33. Although Mrs. MC acknowledged that the anxiety was different than the handicapping condition referenced in the 504 Plan, and she testified that there were times when she thought that the issues were not medical, but something else. [N.T. p. 400], she did not go to the IST teacher because she thought that it would be a violation of confidentiality. [N.T. p. 337]. By year end, Mrs. MC reported that Student's absences were greatly interfering with Student's learning. [P-18, p. 140; N.T. pp. 400-402].
34. In June of 2008, the District determined that Student was no longer eligible for a 504 Plan because the parents did not provide the District with updated medical

- information. [P-18, SD-31, SD-32; N.T. pp. 914, 915, 952, 1019]. At the time, Student was still having medical issues, and the team was also aware of issues related to anxiety; that Student was seeing a therapist; that Student was visiting the nurse frequently; that Student had a significant number of absences; the teacher was concerned about Student's progress and stated that Student's absences were greatly interfering with Student's learning. [N.T. pp. 915, 974, 1013-1015]. There were no assessments conducted or analysis of the information obtained from Student's teacher, Parents or staff prior to termination of the 504 Service Plan. [P-18; N.T. pp. 972, 1015-1016]. Ms. JC testified that 504 Plans address physical issues and when anxiety became an issue, the District needed to look under the IDEA. [N.T. pp. 1017, 1023-1024, 1093]. Ms. R testified that Student needed something more intensive than a 504 Plan. [N.T. p. 1689], yet no Permission to Evaluate Form (hereinafter "PTE") was issued at or after the meeting. [N.T. p. 1020].
35. On July 14, 2008, the parents wrote to Ms. JC and the District, objected to the removal of Student's 504 Plan, and requested, among other things, a "psychological and educational evaluation for Student." [P-21; N.T. pp. 121-122, 1983-1984].
36. On September 9, 2008, a meeting was conducted to determine the scope of the Reevaluation requested by the parents. [P-23]. The PTE was issued and signed by the parents at the meeting. [P-23; N.T. pp. 1147-1151].
37. By letter dated September 5, 2008, Dr. R provided several working diagnoses to Mr. d, including ADHD, School Phobia, Asthma, and Lactose Intolerance. [P-23, p. 173]. She stated in the letter that she was hoping that Student would qualify for an IEP based upon Student's anxiety. [P-23, p. 173; N.T. p. 126]. In her letter, Dr. R also included a report from Student's Psychiatrist, (hereinafter "Dr. K"), who provided additional diagnoses of School Phobia, Generalized Anxiety Disorder, and R/O Aspergers. [P-23, p. 174]. Her notes state "severe anxiety refusing to go to school." P23, p. 174. The parents also signed a release so that information could be obtained from [redacted] Center, where Dr. K and Dr. R were employed. [P-23, p. 170].
38. On October 28, 2008, Ms. D (hereinafter "Ms. D"), Certified School Psychologist, completed the Reevaluation Report (hereinafter "RR") which she stated was based not only on a variety of cognitive, processing and achievement tests, including curriculum based measures and behavior rating scales but also on her review of Student's educational record, classroom observation, Parent interviews and information from teacher conferences. [P-28]
39. Ms. D's testing indicated that Student's cognitive ability is within the average range (Full Scale I.Q. 95). [P-28, p. 190; N.T. p. 1241]. However, although there were significant discrepancies on the indices of the cognitive testing which "could be a concern," they were not addressed in the report [P-28, p. 190; N.T. pp. 1161-

- 1163, 1245-1246] and neither was Student's below average processing speed (80). [N.T. pp. 1241, 1244]
40. Contrary to her prior statements, Ms. D did not review Student's entire education record as she stated she knew nothing about Student's 504 Plan or the statements made by Student's third grade teacher. [N.T. pp. 1190-1194, 1238, 1296-1297].
 41. Similarly, in spite of the significant number of absences in 3rd and 4th grades, there was no discussion of Student's absences during earlier years. [P-28, p. 188; N.T. pp. 1152-1154, 1156, 1227, 1288-1299]; there was no information reported regarding late arrivals or early dismissals. [N.T. pp. 1227-122]; no information from the School Nurse, the Guidance Counselor, or the Social Worker included in the report, [N.T. pp. 916, 1157-1158, 1205, 1237, 1709]; and there was no analysis of how weaknesses in verbal memory for auditory information for example, impacted Student, if at all. [P-28, p. 191; N.T. pp. 1164-1165, 1247-1248].
 42. The social emotional assessments conducted by Ms. D for the RR indicated that Student's adaptive capabilities were not sufficient for Student to manage the stress that Student was feeling, and that it was likely that Student would have recurrent episodes of heightened anxiety, tension and irritability, yet Ms. D only acknowledged that Student needed to develop coping strategies and did not even consider the possibility of Student's eligibility under the category of "Emotional Disturbance." [P-28, p. 196; N.T. 1179-1180, 1199-1200]
 43. On the Conner's Behavior Rating Scales, Student's teachers, Mrs. MC and Mrs. JC, rated Student as Very Elevated on the Generalized Anxiety Disorder and Separation Anxiety Scales acknowledging Student as having many more concerns than are typically reported for a child Student's age. [P-28, p. 184, 194; N.T. pp. 1186-1187]
 44. Furthermore, the protocols revealed that one teacher rated Student in the very elevated range on the Obsessive Compulsive Disorder, Autistic Disorder, and Aspergers Disorder. [P-28, p. 194, P47, p. 8; N.T. pp. 1187, 1311]. However, both teachers rated Student in the Very Elevated range for Aspergers. [P-47, p. 8; N.T. pp. 1317-1318], as well as Emotional Distress, Unsettling Thoughts, Separation Fears, and Physical Symptoms scales. [P-28, p. 194; N.T. p. 1187]
 45. The parents rated Student in the Very Elevated range on almost every scale. [P-28, p. 194], however, Ms. D thought there was a significant difference between how the parents saw Student and how the school saw Student. [N.T. p. 1277] Ms. D further testified that the behaviors reported on the Conners were those demonstrated in the past two months, yet she had Ms. MC, the third grade teacher, completed the scales knowing only Student's behavior from third grade. [N.T. pp. 1277-1278]

46. These scales are linked to the IDEA classifications of Emotional Disturbance, Autism, Speech/Language Impairment, among others; yet on the RR, Ms. D did not consider Student's eligibility under Emotional Disturbance or Autism and discontinued Student's eligibility for speech and language services. [P-47, p. 21; N.T. pp. 1318-1319]. Ms. D made this determination even though Ms. MC's results reflected that Student's problems seriously affected Student's schoolwork and grades; and also that socially, Student's problems seriously affected Student's friendships or relationships. [P-47, pp. 17, 1319-1320]
47. A speech/language evaluation, completed by (hereinafter "Ms. H"), included one assessment and the completion of a Pragmatics Profile from the CELF-IV. Although Student's social language score of 107 was well below the criterion score for Student's age 132. [P-28, p. 201; N.T. pp. 1321, 1832-1833], Ms. H dismissed the score because she "[knew] that there were concerns that would have impacted Student's social skills other than speech/language." [N.T. p. 1502-1504, 1834-1835]
48. Furthermore, Ms. H testified that at the end of third grade even though Student still had not fully generalized the production of the "r" sound, by the start of fourth grade, Student had. [P-28, p. 201; N.T. pp. 1498, 1773-1774] She relied in part on a comment made by the parent, but then provided no data to support the generalization. [N.T. p. 1829] Based on this information, the RR indicated that Student was no longer eligible for speech/language services.
49. The RR concluded that Student had a disability, under the category of Other Health Impairment (hereinafter "OHI"), but did not require specially designed instruction (hereinafter "SDI"). [P-28, p. 202; N.T. p. 136, 223]. In support, Ms. D testified that Student met the definition of OHI because Student was diagnosed with ADHD and Asthma. [N.T. pp. 1200, 1254-1255, 1275-1276, 1307-1308] but Student was not in need of specially designed instruction because it was not impacting Student's academic performance. [N.T. p. 1200].
50. Ms. D found Student ineligible for special education services in spite of her testimony that she agreed that Student was missing math skills due to Student's absences, needed to develop coping skills, had organizational skill issues, had sensory issues, and that Student's third grade teacher reported significant emotional needs on the Conners and finally, that Student's absences were impacting Student's performance in school. [N.T. pp. 1201-1204]
51. Ms. C agreed that Student had significant emotional issues according to the ER, as well as coping skills issues, processing speed issues, and working memory issues. [N.T. pp. 1033, 1035]. In addition, she agreed that specially designed instruction could be provided for coping skills, organization skills, and math skill. [N.T. pp. 1033-1034]. She agreed that counseling services could also have been provided. [N.T. pp. 1034-1035].

52. The Reevaluation Report did not consider or analyze Emotional Disturbance as a disability category. [P-28]. Ms. D stated that this was because Student was proficient in academics in third grade and because Center did not provide a major Psychiatric diagnosis. [N.T. pp. 1189, 1296, 1332]. However, contrary to Ms. D's explanation, the record reveals that she spoke to Dr. R only after the RR was completed and being reviewed. [N.T. p. 1168].
53. Similarly, the RR did not consider or analyze Autism as a disability category because according to Ms. D, a diagnosis from a medical professional was required before Autism could be considered as a disability category. [P-28; N.T. pp. 1254, 1260]
54. A Notice of Recommended Educational Placement (hereinafter "NOREP") was issued on November 18, 2008, discontinuing Speech/Language services and finding Student ineligible for special education services. [P-28, p. 207]. The parents responded by requesting a due process hearing. [P-28, p. 209; N.T. p. 1580]
55. By letter dated November 25, 2008, the parents requested an independent educational evaluation including, *inter alia*, a speech and language assessment at public expense. [N.T. p. 136] The District agreed and issued a Permission to Re-evaluate for the independent educational evaluation. [P-31, pp. 219-220; N.T. pp. 136-137]
56. In December 2008, (hereinafter "Ms. JC"), Student's fourth grade teacher, reported that Student continued to struggle in math (e.g. geometry) [P-30, 45; N.T. pp. 703-704] In January 2009, she reported that Student math and reading scores were not proficient.
57. By the end of second marking period, Ms. JC reported that Student was Below Basic in Student's fourth grade academics and she was seeing little progress. In addition, retention was being considered. [SD-70; N.T. p. 706]
58. Although Student had not met with proficiency in all areas of Student's report card, there were several that suddenly went to proficiency during the fourth marking period. Ms. JC testified that between March and June of 2009, Student was provided with additional instruction to master skills and if Student was able to pass a retest, Student would obtain proficiency. [N.T. pp. 716-719, 1037]
59. In fourth grade, Student was absent 26 days, was late 30 times, and was dismissed early 27 times. Student visited the Nurse's office 58 times; 19% of those visits were gastrointestinal, 29% were chest, and 66% were other. [N.T. pp. 896, 899] On the PSSAs in fourth grade, Student achieved a basic score in math and a below basic score in reading. [SD-71; N.T. p. 195]

60. In the Spring of 2009, (hereinafter “Dr. S”), a Doctor of Psychology in Clinical Psychology and a Certified School Psychologist, issued an independent evaluation report. [P-35; N.T. 1374]. Dr. S’s evaluation was based on his review of Student’s educational records, interviews with the Parents, Dr. R and Student’s teacher. [P-29; N.T. pp. 1377-1378, 1380, 1383-1386, 1393-1394] .
61. Dr. S found that Student had significant difficulties with math, particularly with regrouping and he questioned how the District could define Student as “proficient” in math when Student got a 63 standard score on the WIAT-II. [P-35; N.T. pp. 1395, 1402, 1430]. Dr. S found a significant difference between Student’s Verbal and Nonverbal abilities, and noted low scores in processing speed. [N.T. p. 1396] He explained that the differences between Student’s index scores (Perceptual Reasoning, Verbal Comprehension and lower processing speed) may cause frustration and confusion for Student and which may also lead teachers to think Student’s skills are higher than they actually are. [N.T. pp. 1397-1399]
62. Dr. S concluded that Student’s anxiety was tied closely to Student’s absences, and Student’s absences tended to play a role in Student’s inability to keep up in the curriculum. [N.T. p. 1428]
63. Dr. S diagnosed Student with Separation Anxiety, Asperger’s Disorder, Tic Disorder, poor academic functioning and poor social functioning. [P-35 p. 238; N.T. p. 1388]. He concluded that Student met the criteria for eligibility under the classification of Emotional Disturbance, and he made recommendations for educational programming, which included a need for specially designed instruction in math and supports to help Student manage Student’s anxiety. [P-35 p. 238-239; N.T. pp. 1430-1431, 1435, 1442-1445] Dr. S did not believe that Other Health Impairment was an appropriate classification. [N.T. p. 1432]. Dr. S opined that Student’s anxiety began impacting Student’s school performance at the point that it affected Student’s attendance. [N.T. pp. 1446-1447]
64. Dr. S recommended; 1) a behavioral support plan similar to that used for students with school phobia; 2) counseling; 3) a dedicated person to support Student in Student’s entry to school on a daily basis; 4) staff facilitated peer interactions; 5) direct, explicit instruction in organizational skills; 6) second set of books; 7) additional supports to introduce and reinforce concepts Student missed during absences; and 8) specially designed instruction in math. [P-35, p. 239; N.T. pp. 142-146, 1442]
65. During the independent testing conducted by Dr. S, he noted articulation issues. [N.T. pp. 1411-1412]
66. Ms. S, M.A., SLP, (hereinafter “Ms. S”) conducted a comprehensive independent Speech and Language Evaluation. [P-36]. She met with Student over four sessions to conduct her testing, which included administration of the Clinical

- Evaluation of Language Fundamentals (“CELF-4”), the Test of Problem Solving (“TOPS-3”), the Comprehensive Assessment of Spoken Language (“CASL”), and the Test of Auditory Processing Skills (“TAPS-3”), as well as an assessment of fluency, voice, and articulation. [P-36; N.T. pp. 580-581]
67. As Dr. S., Dr. R and the Parents noted, Ms. S also found that Student had “R,” “L”, and vowel distortions in Student’s articulation, and that Student required Speech/Language Therapy for articulation. [N.T. pp. 521-525, 1988].
68. Furthermore, Ms. S also found that Student had significant difficulty with auditory processing skills and memory, as well as pragmatic language skills and required Speech/Language Therapy to address these areas. [N.T. pp. 536-538] Specifically, on the CASL, Student achieved lower scores on two subtests dealing with generating language and use of appropriate word knowledge. [P-36, p. 260; N.T. p. 527] On the TAPS-3, a test of auditory processing, Student earned a scaled score of 1 on subtests measuring auditory memory skills, and achieved a 69 standard score on overall auditory memory skills. [P-36, p. 263-264; N.T. pp. 529-530, 532-533] On the CELF-4, Student achieved an overall Language Memory index standard score of 78. [P-36, p. 265; N.T. p. 535]
69. In July of 2009 Student was found eligible for special education services IDEA but Parents assert that the IEP wasn’t appropriate until October 1, 2009 when revisions were made. [SD-3]
70. Dr. R has been counseling Student weekly since May 2008, and at the time of her testimony, had seen Student thirty-seven times. [N.T. p. 418] The parents had to pay \$20.00 per session that was not covered by insurance. [N.T. p. 418]

Discussion and Conclusions of Law

Burden of Proof

The Parents requested this hearing and therefore they bore the burden of proof. The burden of proof is in two parts: the burden of production (simply, which party presents its case first) and the burden of persuasion (which side has to convince the decision-maker(s) by a preponderance of the evidence that its position should be upheld).

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed

upon the party seeking relief. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). In this case, Student bears the burden of persuasion because Student contends that the School District denied Student a FAPE by failing to meet its Child Find obligations under IDEA and Section 504, by failing to timely and appropriately evaluate Student and provide Student with an appropriate program. However, the application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio.

In this matter however, the evidence was not in equipoise, as the Parents provided preponderant evidence.

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision should be based solely upon the substantial evidence presented at the hearing.² Quite often, testimony or documentary evidence conflicts; which is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special

education experience. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003)*. This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

In the instant case, credibility played an even larger more critical role than usual in shaping the perceptions of the parties as well as this Hearing Officer. Here, for example, the District claims that each of Student’s teachers were familiar with either the term “child find” or the District’s duty to identify, locate and/or evaluate student’s that may be in need of special education services. The Parents, on the other hand, provide specific testimony from each of Student’s teachers revealing their acknowledged lack of clear understanding what the terms “child find” or “red flags” meant in practice. A careful review of notes taken contemporaneously during the hearing and the testimonial record revealed contradictory statements made by each of Student’s teachers as well as by the Principal and the Supervisor of Special Education which indicated not only that, at the time Student was in first, second, third and fourth grades, they did not have a clear understanding of what constituted a “red flag” and what the District’s child find duties were, but that they also had misconceptions about the basic tenets of evaluations and eligibility criteria under §504 and IDEA. F.F. 11, 12, 14, 25, 40 Therefore, this Hearing Officer found the testimony of the District’s teachers, and administrative staff to be contradicted and contrary to the testimonial and documentary evidence and consequently less credible,

² Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Whether the District failed to meet its' child find obligations under IDEA and Section 504 by failing to timely and appropriately evaluate Student?

Child Find

Both the federal IDEA and Pennsylvania special education regulations require school districts to identify children who may be eligible for special education services³ and evaluate them to determine eligibility. 34 C.F.R. §300.111; *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007); *Annika T. v. Unionville Chadds-Ford School District*, 2009 WL 778350 (E.D.Pa. 2009); *A.P. v. Woodstock Bd. of Education*, 572 F.Supp.2d 221 (D.Conn. 2008); *Charlotte-Mecklenburg Bd. of Educ. v. B.H.*, 2008 WL 4394191 (W.D.N.C. 2008); 22 Pa. Code §§14.121, 122.

In accordance with §14.122 of the Pennsylvania special education regulations, a school district must screen all students in certain areas as the first step in identifying children potentially eligible for special education services, and may try early classroom interventions to determine whether concerns can be resolved before proposing an IDEA evaluation to explore suspected areas of need in detail.

The version of §14.122 in effect at the time the claims in this case arose provided as follows with respect to the initial identification of potentially eligible students⁴:

³ “Special education’ is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that Student or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26

⁴ A ‘child with a disability’ means a child evaluated in accordance with §§300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. §300.7

Screening.

(a) Each school district shall establish a system of screening to accomplish the following:

(1) Identify and provide initial screening for students prior to referral for a special education evaluation.

(2) Provide peer support for teachers and other staff members to assist them in working effectively with students in the general education curriculum.

(3) Conduct hearing and vision screening in accordance with section 1402 of the Public School Code of 1949 (24 P. S. § 14-1402) for the purpose of identifying students with hearing or vision difficulty so that they can be referred for assistance or recommended for evaluation for special education.

(4) Identify students who may need special education services and programs.

(b) Each school district shall implement a comprehensive screening process. School districts may implement instructional support according to Department guidelines or an alternative screening process. School districts which elect not to use instructional support for screening shall develop and implement a comprehensive screening process that meets the requirements specified in subsections (a) and (c).

(c) The screening process shall include:

(1) For students with academic concerns, an assessment of the student's functioning in the curriculum including curriculum-based or performance-based assessment.

(2) For students with behavioral concerns, a systematic observation of the student's behavior in the classroom or area in which the student is displaying difficulty.

(3) An intervention based on the results of the assessments under paragraph (1) or (2).

(4) An assessment of the student's response to the intervention.

(5) A determination as to whether the student's assessed difficulties are due to a lack of instruction or limited English proficiency.

(6) A determination as to whether the student's needs exceed the functional ability of the regular education program to maintain the student at an appropriate instructional level.

(7) Activities designed to gain the participation of parents.

(d) If screening activities have produced little or no improvement within 60 school days after initiation, the student shall be referred for evaluation under § 14.123 (relating to evaluation).

(e) Screening activities do not serve as a bar to the right of a parent to request an evaluation, at any time, including prior to or during the conduct of screening activities.

Children who are suspected of having a qualifying disability must be identified and evaluated within a reasonable time after the District was put on notice that the student's behavior indicates a disability. *Ridgewood Bd. Of Education v. N.E.*, 172 F.3d 238 (3d Cir. 1999); *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995).

Similarly, Section 504 contains its own child find requirement that is similar to the child find requirement of the IDEA. 34 C.F.R. § 104.32. A District must conduct a pre-placement evaluation to determine whether a student requires special education or related services before taking any action to provide those services under Section 504. 34 C.F.R. § 104.35.

[A] child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district's behavior did not rise to the level of slothfulness or bad faith. Rather, it is the responsibility of the child's teachers, therapists, and administrators -- and of the multi-disciplinary team that annually evaluates the student's progress -- to ascertain the child's educational needs, respond to deficiencies, and place Student or her accordingly.

M.C. on Behalf of J.C. v. Central Regional School Dist, 81 F.3d 389 (3rd Circuit 1996).

Where a School District persists too long in providing/revising Section 504 plans for a student and, at a certain point, knew or should have known that the student's Section 504 plans were not appropriate programming and that the student required an individualized education program, the School District has been found to have violated its IDEA child find requirements. *EH v Unionville-Chadds Ford School District, Special Education Opinion No. 1838 (2007)*

In this case, the testimonial and documentary evidence reveals that from the very beginning of Student's kindergarten year, Student had significant separation difficulties which manifested in excessive absences, and somatic complaints, and consequently resulted in academic problems. By first grade, the record clearly indicates that there were enough "red flags" to warrant an evaluation of Student. Yet the District did not conduct either a pre-placement evaluation to determine whether Student qualified as a child with a disability under §504 or as a child in need of specially designed instruction and special education services under the IDEA.

Parents assert that the reason the District failed to evaluate is twofold: one, because the District placed the blame and responsibility for determining the cause of Student's difficulties on the Parents, who were proactively seeking medical reasons; and two, because the District lacked the knowledge and appropriate training in identifying and screening students who present with difficulties which trigger an affirmative obligation to evaluate under child find. I agree. A review of the record provides overwhelming evidence that the administrators and teachers, while somewhat familiar with the term "child find," did not have a clear understanding of the "red flags" or eligibility criteria under either §504 or IDEA. F.F. 14, 18, 19, 20, 21, 22, 25, 26, 33, 34.

For example, the record reveals that Student's first grade teacher had to review the term "child find" prior to testifying because she forgot what it meant, and that she would not even tell parents that they can request an evaluation for special education because she did this before and it "backfired" on her. F.F. 12. Student's second grade teacher testified that she was not familiar with the term "child find," and had not heard of "red flags." She further stated that she did not recall if she had ever participated in an evaluation for special education under §504 or IDEA. F.F. 14. Similarly, Student's third grade teacher also stated that she was not familiar with the term "child find" or "red flags." Moreover, she too, testified that she never referred a child for a special education evaluation; she referred students only to the IST. F.F. 25.

In addition, even when a teacher or a district staff member discovered a problem which should have triggered an evaluation, they frequently did not know what to do next. For example, when the guidance counselor initially became aware that Student was suffering from more than stomach issues, she recommended that the Parents take Student to an Anxiety Clinic and then referred them to an outside therapist, instead of suggesting that the District conduct an evaluation. F.F. 28, 29. Similarly, when Student's third grade teacher suspected that some of Student's difficulties were not just medical, she did not make a referral to the Instructional Support Team because she thought that would be a violation of confidentiality. F.F. 33

The evidence further reveals that even when the District did convene a §504 meeting to discuss health issues, they did so without a pre-placement evaluation and under the impression in order to qualify for a §504 Service Plan, a Student was required to have a medical diagnosis. F.F. 18 In addition, by not conducting a pre-placement

evaluation before developing a 504 Service Plan, the District failed to adhere to the legal requirements and arguably the 504 Plan developed is by default rendered inappropriate.

46 IDLER 142 (May 1, 2006). A review of the testimonial and documentary evidence also shows that even when the District completed the §504 Service Plan, six months later, it was not appropriate in so far as it did not address the instruction that Student missed when Student was absent and it was as the Principal, Mrs. JC, described it “scant”. F.F. 21.

One of the many contradictions a careful review of the evidence uncovers pertains to the Student’s 504 Plan. Student’s third grade teacher testified that the 504 Plan offered nothing in addition to what she was already doing, yet it was also her opinion that Student’s absences were affecting Student’s performance and that Student was not making adequate progress. Equally contradictory is Ms. M, the IST teacher’s testimony that the District was providing additional support services: re-teaching math group, guided reading and the 504 Plan in 06/07; yet a year later when the District decided to remove the 504 Plan, Ms. M testified that the accommodations listed in the 504 Plan were best practices (not additional support services), things that they would do for any child in the classroom. [N.T. 1898]

The District asserts that since Student’s end of the year report cards often reflected average to above average grades and “proficiency” ratings, Student was achieving adequately in school and making progress. The problem with this argument is that many of Student’s teachers retested Student until Student passed, and gave Student “P’s” on Student’s report cards while reporting elsewhere that Student’s absences were

resulting in inconsistent performance and that Student was not making adequate progress. F.F. 17, 22, 26.

The Court in *Rowley, 458 U.S. at 203, n. 25* made it clear that grades cannot serve as the IDEA litmus test, and noted specifically that report card grades are necessarily an indicator that a child does not need special education services. Furthermore, Denying special education benefits because a student is able to pass from grade to grade despite documented impairments that adversely affect Student's educational performance is wrong. *Corchado ex. Rel. Corchado v. Board of Educ., 86 F. Supp. 2d 168, 176 (W.D.N.Y. 2000)*.

Nevertheless, the District is steadfast in its assertion that Student was not deficient in any area and that Student earned average to above average grades, thereby negating the need to evaluate Student for special education services. To the contrary, however, a review of the record indicates that the teachers were also reporting that Student was not making adequate progress, that Student's homework was affected by Student's absences, and that Student needed to be refocused or redirected. F.F. 13, 14, 15, 16, 17. Even Dr. S, the independent psychologist selected by the District to conduct the IEE, asked how a kid who gets a 63 on numerical operations on the WIAT-II ends up being proficient in most, if not all academic areas. [N.T. p. 1430]

Here, the record is replete with evidence supporting the Parent's assertion that the District should have known that Student required an evaluation for special education services under IDEA or accommodations under a 504 Plan as early as first grade. In fact, Dr. S made it clear that in Student's opinion, Student's anxiety began impacting Student's school performance at the point it affected Student's attendance and Parents

assert that Student's attendance started impacting at least Student's math performance in first grade. [N.T. pp. 1446-1447]

In the present case, Parents contend that even if a "red flag" was identified and evaluation commenced, it would be near impossible for the evaluation to be appropriate based on the their conclusion that the school psychologist made the eligibility decision unilaterally without input from the team and she did had serious misconceptions about eligibility criteria. For example, Parents point out that Ms. D thought that if a student had a medical diagnosis of ADHD or Asthma, they automatically met the definition of "Other Health Impairment". F.F.49 Parents note further that Ms. D also thought that in order to be found eligible as a student with an "Emotional Disturbance" it was required to have a major psychiatric diagnosis. F.F. 42

With regard to the comprehensiveness of the evaluation, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1414[a][1][A] provides that a local educational agency shall conduct a full and individual initial evaluation, in accordance with subsection [b] dealing with evaluation procedures, before the initial provision of special education and related services to a child with a disability. 20 U.S.C. §1414[b][2] instructs that in conducting the evaluation, the local educational agency shall use a variety of assessment tools and strategies to gather relevant information, including information provided by the parent, that may assist in determining whether the child is a child with a disability. 20 U.S.C. §1414[b][3][C] requires that the child be assessed in all areas of suspected disability.

In evaluating a child, a district may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Further, IDEA 2004 at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that

Assessments and other evaluation materials used to assess a child

Are selected and administered so as not to be discriminatory on a racial or cultural basis;

Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;

Are used for purposes for which the assessments or measures are valid and reliable;

Are administered by trained and knowledgeable personnel; and

Are administered in accordance with any instructions provided by the producer of such assessments;

The child is assessed in all areas of suspected disability;

Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Once a child has been evaluated it is the responsibility of the multidisciplinary team to decide whether the child is eligible for special education services. IDEA 2004 provides, at Section 614(b)(4) that

Upon completion of the administration of assessments and other evaluation measures, the determination of whether the child is a child with a disability as defined in section 602(3) and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5).

In this case, although the school psychologist used a variety of assessment tools and strategies to gather information, there were significant flaws in the assessment process which resulted in an inappropriate evaluation.

Specifically, in spite of the significant number of absences in 3rd and 4th grades, there was no discussion of Student's absences during earlier years; there was no information reported regarding late arrivals or early dismissals; no information from the School Nurse, the Guidance Counselor, or the Social Worker included in the report; and there was no analysis of how weaknesses in verbal memory for auditory information for example, impacted Student, if at all. F.F.41

Furthermore, the social emotional assessments conducted by Ms. D for the RR indicated that Student's adaptive capabilities were not sufficient for Student to manage the stress that Student was feeling, and that it was likely that Student would have recurrent episodes of heightened anxiety, tension and irritability, yet Ms. D only acknowledged that Student needed to develop coping strategies and did not even consider the possibility of Student's eligibility under the category of "Emotional Disturbance." F.F. 42

Next, with regard to cognitive and achievement testing, tests indicated that Student's cognitive ability is within the average range (Full Scale I.Q. 95). However, although there were significant discrepancies on the indices of the cognitive testing which "could be a concern," they were not addressed in the report and neither was Student's below average processing speed (80). F.F. 39

Similarly, there was also a significant discrepancy between Student's ability and achievement in numerical operations, and curriculum based assessments which revealed that Student was performing below the basic level in math, yet the Re-Evaluation Report did not address the possibility that Student's absences were impacting Student's academic performance. This was true even though on the Conners⁵ Student's third grade teacher reflected that Student's "problems serious affected Student's schoolwork and grades very often or very frequently." F.F. 46

Also, on the Conners, both Student's third and fourth grade teachers rated Student in the "Very Elevated" range on the Generalized Anxiety Disorder and Separation Anxiety Scales. F.F. 45 as well as the in the Very Elevated range for Aspergers and on Emotional Distress, Unsettling Thoughts, Separation Fears, and Physical Symptoms scales. F. F. 43,44, 45 Yet even though the Conners has scales relate directly to symptom level diagnostic criteria of the DSM IV-TR, and that link the results of the rating scales to possible areas of eligibility under the IDEA, F.F. 46, the RR considered only two classifications of disability, Specific Learning Disability and Other Health Impairment. Moreover, the evidence shows that Ms. D did not even consider Student's eligibility under Emotional Disturbance or Autism. F.F. 46

⁵ Conners Comprehensive Behavior rating Scales

Finally, with regard to consideration of continued eligibility under the category of Speech/Language Impairment, a speech/language evaluation, completed by Ms. H, the District Speech Therapist, included one assessment and the completion of a Pragmatics Profile from the CELF-IV. Although Student's social language score of 107 was well below the criterion score for Student's age, Ms. H dismissed the score because she "[knew] that there were concerns that would have impacted Student's social skills other than speech/language." F.F. 47

Furthermore, Ms. H testified that at the end of third grade even though Student still had not fully generalized the production of the "r" sound, by the start of fourth grade, Student had. She relied in part on a comment made by the parent, but then provided no data to support the generalization. Based on this information, the RR indicated that Student was no longer eligible for speech/language services. F.F. 48 The testimonial and documentary evidence in this matter, does not support the findings of Dr. S, Dr. R and the independent speech/language pathologist, Ms. S.

In light of the requirements above, this hearing officer finds that the evaluation produced by the District was substantively inappropriate. 34 C.F.R. §300.304(c)(6).

In conclusion, the evidence reveals that the District not only failed to conduct a comprehensive evaluation under IDEA but also failed to perform the required pre-placement evaluation under Section 504.

According, it is abundantly clear that the District failed to meet its Child find obligations under both §504 and the IDEA by failing to timely and appropriately evaluate Student.

Whether the District failed to provide Student with a free appropriate public education under §504 or IDEA?

FAPE

A determination that FAPE was denied must be based on substantive grounds, 34 C.F.R. §300.513. The evidence establishes that the District's procedures did result in a deprivation of educational benefit to Student as Parents contend.

With respect to the pre-evaluation screening process, there is a sometimes delicate balance between allowing sufficient time for reasonable attempts to address concerns through teaching methods and other classroom strategies and an unwarranted delay in referring a child for an evaluation. When interventions in the regular classroom do not lead to sufficient improvement within a reasonable time, a district is required to seek parental permission to evaluate. In the version of §14.122 that was in effect in 2006 and 2007, the appropriate time for assessing the effectiveness of screening activities was set at 60 days.

Here, however, the District never performed the required pre-placement evaluation and then delayed the development of a §504 Plan until the end of Student's second grade. The evidence further reveals that the 504 Service Plan failed to address Student's attendance issues and how Student would make up missed instruction due to Student's excessive absences. Therefore, the evidence supports the Parents' contention that Student's was denied a FAPE under §504 even during the time Student had a §504 Service Plan.

A party establishes a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. §794, where (1) Student is 'disabled' as defined by the Act; (2) Student is 'otherwise qualified' to participate in school activities; (3) the school or the board of

education receives federal financial assistance; and (4) Student was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Andrew M v. Delaware County, 490 F.3d 397 (3rd Cir. 2007); Ridgewood Board of Education v N.E., supra. When an education agency fails to provide a disabled child with a free and appropriate education, it violates Section 504 because it is denying a disabled child a guaranteed education merely because of the child's disability. It is the denial of an education that is guaranteed to all children that forms the basis of the claim. *Andrew M v. Delaware County, supra.*

As noted above, a recipient of federal funds that operates a public elementary or secondary education program or activity must establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of the Individuals with Disabilities Education Act is one means of meeting this requirement. 34 C.F.R. §104.35

Furthermore, The Rehabilitation Act, 29 U.S.C. §701 et seq., prohibits discrimination on the basis of disability within federally funded programs. This prohibition is specifically extended to public school systems in Section 504. See 29 U.S.C. §794(b)(2)(B). Section 504 provides that “no otherwise qualified individual with a disability ...shall solely by reason of Student’s or her disability, be excluded from the

participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. §794 (a) (2002)

In this case, I agree with the Parents that Student was excluded from participation in and denied the benefits of Student’s education because of Student’s disability. By not identifying the “red flags” which should have triggered a pre-placement evaluation which in turn would have resulted either in a §504 Service Plan or an IEP Student was denied a FAPE in violation of §504. Compensatory education is an appropriate remedy allowing for equitable relief. *Ridgewood Board of Education v. N.E., supra.*

A school district offers FAPE under IDEA by providing personalized instruction and support services pursuant to an IEP that need not provide the maximum possible benefit, but that must be reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or de minimis educational benefit. Whether an IEP is reasonably calculated to afford a child educational benefit can only be determined as of the time it is offered to the student and not at some later date. 20 U.S.C. §1412; *Board of Education v. Rowley, supra.; Ridgewood Board of Education v. M.E. ex. rel. M.E., supra.; Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlt. 1998); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); Daniel G. v. Delaware Valley School District, 813 A.2d 36 (Pa. Cmwlt. 2002)*

The IDEA requires a local educational agency to address every substantial educational need of the child with a disability, including behavior and social skills. If the

IEP is inadequate in any material way, it is inappropriate as a matter of law. *Rose v. Chester Co. Intermed. Unit*, 196 WL 238699, 24 IDELR 61, aff'd 114 F.3d 1173 (3d Cir. 1997). This is reflected in the requirements for both evaluations and individual education plans.

The local educational agency must conduct a “full and individual initial evaluation” 20 U.S.C §1414(a)(1)(A). The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulations require that the evaluation procedures “assist in determining . . . [t]Student content of the child’s IEP. 34 C.F.R. §300.304(b)(1)

In the instant case, the evidence supports the Parent’s contention that the District did not conduct a timely or appropriate evaluation and therefore it wasn’t until the Spring of 2009 when the independent psychologist completed the IEE finding Student eligible for special education services under the classification of “Emotional Disturbance,” that the District agreed to develop an IEP. I agree.

A review of the IEE⁶ indicates that Dr. S determined that Student clearly suffers from Separation Anxiety and it is significantly interfering with Student’s life at home and Student’s ability to get and remain at-school. It is Student’s anxiety that lead to Student’s frequent absences and early dismissals and Student’s lost instruction time is what likely accounts for Student’s markedly weak math skills. . . .” [P-35, p. 238]

⁶ In addition, Student also presented with strong verbal skills in relation to Student’s nonverbal skills, poor math skills, weak memory, and weak visual perception skills. Dr. S also noted low scores in processing speed, explained that the differences between Student’s index scores (Perceptual Reasoning, Verbal Comprehension and lower processing speed) may cause frustration and confusion for Student and which may also lead teachers to think Student’s skills are higher than they actually are. F.F. 61

Specifically, Dr. S found that Student had significant difficulties with math, particularly with regrouping and consequently, Student recommended educational programming which included specially designed instruction in math. F.F. 63

Dr. S further diagnosed Student with Asperger's Disorder, Tic Disorder, poor academic functioning and poor social functioning. Student concluded that Student met the criteria for eligibility under the classification of Emotional Disturbance.⁷ F.F. 63

Dr. S recommended a behavioral support plan similar to that used for students with school phobia; counseling; a dedicated person to support Student in Student's entry to school on a daily basis; staff facilitated peer interactions; direct, explicit instruction in organizational skills; second set of books; additional supports to introduce and reinforce concepts Student missed during absences; and specially designed instruction in math. F.F. 64

Based on Dr. S's eligibility finding, the District developed an IEP and convened a IEP meetings on July 7, 2009 and October 1, 2009. Apart from the issue of reinstatement of speech and language therapy as a related service and specially designed instruction in math, the Parent and the District agree that the IEP offers a FAPE.

⁷ Emotional Disturbance—which means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

Here the Parents assert that the District's failure to conduct a timely and appropriate evaluation and identify Student in the first grade resulted in a denial of FAPE. I agree.

Therefore, I find that the District did deny Student a FAPE from the beginning of the 2005-2006 school year minus 60 days which the District would have been allowed had it conducted a timely evaluation., until the Parents filed this complaint on May 4, 2009.

Whether Student is entitled to compensatory education; and if so, how much?

Compensatory Education

When a school district fails to deliver a free and appropriate public education ("FAPE") to which a student is entitled, an award of compensatory education is justified. *M.C. v. Central Regional Sch. Dist., supra*. The right to compensatory education accrues when a school district "knows or should have known" that it is not providing an appropriate education. *Id; See, O.F. by N.S. v. Chester Upland Sch. Dist., 246 F. Supp. 2d 409 (E.D. Pa. 2002)*.

Parents assert that the District violated its child find obligations to Student, that they "knew or should have known" that Student was an eligible student long before they did, that they denied Student FAPE, and as such, compensatory education is owed. The compensatory education should include speech/language services that the District has failed to provide since November 18, 2008 when it was removed.

Parents further contend that because the District made specific misrepresentations forming the basis of the complaint, including statements that a medical diagnosis was required to obtain a 504 plan, that Student was "proficient" according to Student's report

cards, and that Student's issues were home issues and not school issues (RR), precludes the application of any limitations period. In addition, the record confirms that the Parents provided uncontradicted testimony that they did not receive procedural safeguards from the District and therefore, the District withheld information required to be provided under the Act. I agree. The statute of limitations does not apply to the facts in this matter.

Under IDEA, an eligible student who has not received more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *M.C. v. Central Regional School District, supra*. The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known.

In determining whether an award of compensatory education is warranted, the first step in the analysis is to assess the appropriateness of the program offered by the School District at the time it was offered or provided. In re: The Educational Assignment of Karyn S., Special Education Appeals Panel Opinion No. 1124 (June 4, 2001).

Compensatory education is an equitable remedy, designed to assure that an eligible student receives all of the special education services to which Student is entitled. *In re: The Educational Assignment of Nicholas T., Special Education Appeals Panel Opinion No. 1166 (August 17, 2001); In re: The Educational Assignment of Laura C., Special Education Appeals Panel Opinion No. 1183 (October 19, 2001)*. Rather, once it is determined that a School District has failed to provide FAPE, compensatory education, measured as stated above, must be awarded. *Id.*

Here for all of the reasons delineated above, Parents are entitled to compensatory

education from the start of the 2005-2006 school year minus the first 60 days equaling the time the District would have had to conduct an evaluation to the date the Parents filed their complaint, May 4, 2009, including the 2006 extended school year, the 2007 extended school year and the 2008 extended school year in the amount of two hours for each school day and two hours for 20 days for each extended school year.⁸

ORDER

It is hereby ORDERED that:

1. The Bristol Township District did fail in its Child Find obligation under IDEA and Section 504 to Student .
2. The Bristol Township School District failed to provide Student with a FAPE pursuant to the IDEA and §504 of the Rehabilitation Act from the start of the 2005-2006 school year minus 60 days through May 4, 2009.
3. The Bristol Township School District is required to provide compensatory education⁹ to Student for two hours for each school day including the 2005, 2006, 2007 and 2008 extended school years (i.e. 20 days for each ESY period) for violation of FAPE under IDEA and §504 of the Rehabilitation Act.
4. The Bristol Township School District is required to reimburse Parents for the costs expended (i.e. \$20.00 co-pay) to obtain counseling services from Dr. R from May 2008, the date of Student's first visit through May 4, 2009.

⁸ The form and utilization of services shall be decided by the Parent and may include only appropriate developmental, remedial or enriching instruction or therapy. The services may be used after school, on weekends, or during the summer. The services may be used hourly or in blocks of hours. The cost to the District of providing the awarded hours of compensatory education shall not exceed the rate the District would have paid for any like contracted services. The District has the right to challenge the cost of the services.

⁹ The form and utilization of services shall be decided by the Parent and may include only appropriate developmental, remedial or enriching instruction or therapy. The services may be used after school, on weekends, or during the summer. The services may be used hourly or in blocks of hours. The cost to the District of providing the awarded hours of compensatory education shall not exceed the rate the District would have paid for any like contracted services. The District has the right to challenge the cost of the services.

December 15, 2009
Date

Deborah G. DeLauro
Deborah G. DeLauro, Esquire
Hearing Officer