

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: Student

Date of Birth: xx/xx/xx

Dates of Hearing: July 17, 2009

CLOSED HEARING

ODR#10111/08-09 KE

Parties to the Hearing:

I

Council Rock School District
The Chancellor Center
30 North Chancellor Street
Newtown, PA 18940

Representative:

Pro Se

School District Attorney
Grace M. Deon, Esquire
Eastburn and Gray, P.C.
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P.O. Box 1389
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Date Record Closed:

August 20, 2009

Date of Decision:

September 4, 2009

Hearing Officer: Deborah G. DeLauro

I. BACKGROUND

Student (hereinafter “Student”) is a post-teen resident of the Council Rock School District (hereinafter “District”) who graduated from [redacted] High School (hereinafter “High School”) in June 2008. Student attended [redacted] University for the first semester of the 2008-2009 school year and then transferred to [redacted] University in December, 2008.

In January, 2006, when Student was in tenth grade, Student’s father (hereinafter “Parent”) requested that his child be considered for 504 services¹. At the time, Student was taking mostly accelerated academic classes, and was earning average grades. Upon consideration of Parent’s request, the 504 Coordinator and school guidance counselor determined that it would be best to evaluate Student for special education services under the Individuals with Disabilities Education Improvement Act (hereinafter “IDEIA”). To that end, the Child Study Team (hereinafter “CST”) made a referral for a comprehensive psycho-educational assessment and in June, 2006, the school psychologist issued an Initial Evaluation Report (hereinafter “ER”) finding Student not eligible for special education services.²

In January and February, 2007, when Student was in 11th grade, Parent obtained an independent neuropsychological evaluation (hereinafter “IEE”) which recommended, *inter alia*, that Parents pursue the possibility of having Student classified as a student with a specific learning disability in the area of reading comprehension. The District reviewed the IEE and again determined that Student did not qualify for specially designed instruction under IDEIA or

¹ Section 504 Service Plan under the Rehabilitation Act of 1973 (hereinafter “Section 504”)

for accommodations under Section 504. Student's grades continued to improve slightly in 11th and 12th grades and Student took the Standard Achievement Tests (hereinafter "SATs") without accommodations.

The Parent brought this action in disagreement with the District's 2006 determination of non-eligibility. Accordingly, a due process hearing was held in July 2009 to determine the following issues.

II. ISSUES

1. Whether the District failed to identify Student as a student with a disability under IDEIA?³
 - 1) Whether the District's evaluation dated June 13, 2006 was appropriate?
 - 2) Whether the District appropriately considered the independent neuropsychological evaluation conducted by Dr. H?
2. If not, then whether the District failed to provide Student with a Free Appropriate Public Education (hereinafter "FAPE")?

For the reasons stated below, this hearing officer finds that the District's initial evaluation was inappropriate; but the re-evaluation report corrected the major flaws in the ER and was appropriate; that Student did not qualify for specially designed instruction under the IDEIA or Section 504 accommodations; that the District did properly consider the independent educational evaluation; and that the District did not deny Student a FAPE.

III. FINDINGS OF FACT

1. Student is a post-teen aged resident of the Council Rock School District.
2. Student was an above average student getting average grades in high school. Student was in regular education. [SD-2; N.T. pp. 41-42; 54; 165-166; 167-168]

² The initial ER did not evaluate Student's eligibility for Section 504 accommodations.

³ In light of Parent's initial request for consideration for a 504 service plan, this hearing officer will also address the 504 eligibility issue.

3. Student graduated from High School in June 2008 and attended University for the Fall semester where Student earned 2 As, 3 Bs and a C+. [SD-7; N.T. pp. 30; 55; 81]
4. (hereinafter “Mr. D”), was Student’s guidance counselor from 9th through 12th grades. [N.T. pp. 66] No concerns were raised by Parents in 9th grade. [N.T. pp. 66-67]
5. On or about January 4, 2006, an email from Parent was forwarded to Mr. D requesting that Student be “considered” for 504 Services and describing Student as having “impaired sensory, manual or speaking skills.” [SD-1; N.T. pp. 67-68] Mr. D followed up with Student’s teachers⁴ and a meeting with Mr. D, Parent and Mr. L⁵ (hereinafter “Mr. L”) was scheduled to discuss Student’s needs. At the meeting, it was decided to conduct a comprehensive psycho-educational evaluation and a referral was made to the CST on January 20, 2006. [SD-2; N.T. pp. 70-71; 85-87]
6. Student was evaluated on May 22, 2006 when Student was in tenth grade and the initial ER dated June 13, 2006 found Student to be non-exceptional and not in need of specially designed instruction under the IDEIA. [SD-3; N.T. pp. 73; 102; 112-116; 163]
7. The Evaluation Report [SD-3] yielded the following standardized test scores for Student:

<u>WISC-IV</u> ⁶	<u>Subtest Scaled Scores (Average = 10)</u>
Verbal Comprehension	98 Similarities-07; Vocabulary-10; Comprehension-12
Perceptual Reasoning	110 Block Design-12; Picture Concepts-12; Matrix Reason-11
Working Memory	113 Digit Span-09; Letter/Number Sequencing-16
Processing Speed	106 Coding-08; Symbol Search-14
Full Scale IQ	108

WIAT II⁷ Standard score 100=Average.

<u>Subtest</u>	<u>Standard Score</u>	<u>Percentile Rank</u>	<u>Grade Equiv.</u>
Word Reading:	112	79	>12.9
Comprehension	116	86	>12.9
Pseudo word Decoding	100	50	8.2
Numerical Operations:	118	88	>12.9
Math Reasoning:	120	91	>12.9
Composite Scores:			
Reading:	109	73	-----
Mathematics:	122	93	-----

⁴ Teachers did not have any concerns that Student may have a suspected learning disability. [SD-1; N.T. p. 69]

⁵ Mr. L was the Supervisor of Pupil Services and the designated 504 Coordinator.

⁶ Wechsler Intelligence Scale for Children, Fourth Edition.

⁷ Wechsler Individual Achievement Test, Second Edition.

8. Ms. C came to her conclusion by using the discrepancy model but noted that the discrepancies between Student's verbal comprehension and Student's stronger Working Memory skills were indicative of a learning profile and not a learning disability. [SD-3; N.T. pp. 110-116] Ms. C stated that there were no indicators that Student had either a learning disability or was a child in need of special education. Ms. C concluded that Student did not exhibit qualifications for a specific learning disability under either prong. [SD-3; SD-1; N.T. pp. 116-117; 118-119]
9. Furthermore, according to Ms. C, Student's above average score on the Reading Comprehension section of the WIAT-II suggested that Student was able to read materials that were on a post high school level of difficulty. [N.T. pp. 114-115] Ms. C testified that the testing conducted in the area of Reading on the WIAT-II assessed all areas of reading, [N.T. 142-143] and it was professionally appropriate to normatively compare the WIAT-II with the WISC-IV.[N.T. pp. 144-145]
10. In addition, the testing results did not lead Ms. C to believe that Student should be referred for an evaluation in either speech and language or occupational therapy. [N.T. pp. 142-143]
11. Ms. C measured Student's emotional stability using the Behavior Assessment System for Children, Second Edition (hereinafter "BASC-2"). She gave Student's teachers and Parents the rating scales to complete. Student's teacher completed the rating scales but Parents never returned them. [N.T. pp. 106-108] Although Student's teachers indicated some "at-risk" concerns in the areas of social skills, leadership skills and study skills, Ms. C concluded that the information provided nothing significant from an emotional standpoint.⁸ [SD-3; N.T. pp. 115-118]
12. Ms. C had a letter referencing Parents' concerns but no other input. [SD-3; N.T. pp. 109] Ms. C testified that Parents did not respond to her invitation to discuss the ER and did not send in any kind of rebuttal. [N.T. pp. 105, 149]
13. In January and February, 2007, Parent hired Dr. H⁹ to conduct an independent psycho-educational evaluation. [N.T. pp. 30-32] (hereinafter "Dr. H") evaluated Student for three hours each on two separate occasions and also observed Student at school. [N.T. pp. 34] Dr. H did not contact Ms. C but did review the District's ER and did not dispute Ms. C's findings. [SD-5; N.T. pp. 38-40]

⁸ Please note that this conclusion was not included in the June 13, 2006 ER; Ms. C simply stated that Student was not eligible for special education services under IDEA without explaining why she dismissed the Teacher Rating Scales without comment.

⁹ Dr. H is a developmental neuro-psychologist, who is Board certified in PA. She has a BA from [redacted] College; a Masters Degree and Ph.D. in clinical psychology from the University of [redacted]. She did her internship at [redacted]Hospital in [redacted] and two years of post-op training at [redacted] Hospital.

14. The IEE included the following recommendations:

- 1) Participation in honors and accelerated courses can be expected to present a challenge to Student. Student will feel more comfortable with the levels of expectation in mainstream educational program.
- 2) Parents may wish to pursue the possibility of having student classified as a student with a specific learning disability in the area of reading, specifically, reading comprehension.
- 3) Suggestion that Student not take a foreign language next year, but spend the time in a learning support reading program instead. Interventions should focus on teaching Student reading comprehension strategies and study strategies.
- 4) Study skills instruction in note taking and study skills.
- 5) Private tutoring and reading comprehension strategies.
- 6) Suggestion that student become proficient at using a laptop for note taking in the classroom.
- 7) Monitor Student's emotional status, as Student may be experiencing emotional symptoms that Student is unwilling to discuss. The symptoms of depression, in particular, should be considered.

[SD-5; N.T. pp. 35-36]

15. Although Dr. H's results regarding Student's cognitive ability were similar to the District's ER results (e.g. IQ 111 on the Differential Ability Scales (hereinafter "DAS") compared to IQ 108 on the WISC-IV, both reflect scores in the "High Average" range) her findings in Reading Comprehension differed significantly from the District's ER. Dr. H found Student's reading comprehension to be poor, in the borderline range on the Grey Oral Reading Test (hereinafter "GORT-IV"), which involved longer passages and did not allow Student to refer to passages to answer questions, and at the lower end of the low average range on the Nelson-Denny, which involved briefer passages that Student could refer to when Student answered the questions.[SD-5; N.T. pp. 34, 47]

16. Dr. B (hereinafter "Dr. B") the school psychologist who reviewed the IEE and issued the RR letter dated April 10, 2007 [SD-6] characterized the low Reading Comprehension scores on the GORT-IV and the NELSON-DENNY as "outliers" and stated that they were reading screeners and not intended for determining whether a student had a learning disability.¹⁰ [N.T. pp. 170-173] Dr. B further asserted that in order to determine a learning disability, you need to test for cognitive ability as well as achievement, so that is why the District's use of the WISC-IV and the WIAT-II are appropriate to use together. [N.T. pp. 175-177] Therefore, Dr. B disagreed with Dr. H's conclusions, which he stated did not match reality¹¹, in other words, that Student did not need specially designed instruction in

¹⁰ Dr. H disagreed that the GORT-IV and the NELSON-DENNY were reading screening tests.[N.T. pp. 34-36]

¹¹ Student consistently earned proficient and advanced scores on the PSSA and was admitted to a competitive university where Student achieved high average and average grades. [SD-7; SD-2; N.T. pp. 167, 178-180]

order to access the curriculum. [N.T. pp. 178-179]

17. Dr. B never met Student, yet he pointed out that Student's G.P.A showed modest improvement between 9th and 12th grades without special services. [N.T. 167] Dr. B argued further that Student was an above average student, getting some below average grades in large part because Student's Parents insisted that Student take Honors and Accelerated classes in disregard of teacher recommendations. [N.T. pp. 181-185]
18. Mr. L, the Supervisor for Pupil Services, was also the 504 Coordinator for the District. He acknowledged that Student was never evaluated for 504 accommodations, but the information gathered to determine eligibility under IDEIA could also be used to determine eligibility under 504. [N.T. pp. 201-210]
19. Mr. L also testified to the numerous steps the District takes in order to meet its Child Find obligation. Specifically, Student reported that the District issues public notification of its Child Find obligation through a variety of publications including, but not limited to, the school calendar, the web site and the newspapers. Student also testified that Parents were given the Procedural Safeguards when they received the Permission to Evaluate (hereinafter "PTE"). [N.T. pp. 202-203, 203-205, 201-211; SD-4]

IV. 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.¹² 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. This hearing officer found the the independent evaluator, Dr. H to be credible but her testimony revealed significant short comings in her evaluation (e.g. failure to fully consider the significant difference between the scores she obtained on the GORT and NELSON DENNY and Student’s performance on the WIAT II a year earlier, and her failure to take into consideration the fact that Student did not need specially designed instruction to make meaningful progress). On the other hand, the school psychologist, Ms. C was less forthcoming and credible when she testified as to the whereabouts of the January 13, 2006 letter or the Permission to Evaluate (hereinafter “PTE”) from the Parent requesting an evaluation for 504 services even though she did reference the letter but not its content it in the ER. Additionally, she was quick to point out that the District had sixty “school” days to conduct the evaluation and produce an ER, but never acknowledged that the ER was beyond sixty school and calendar days, and therefore, was untimely¹³. Mr. D, the school guidance counselor gave credible testimony about his part in facilitating the Parent’s request. However, his statement¹⁴ regarding Dr. H’s alleged comment to him when he was accompanying her during her observation of Student at school, lessened his credibility slightly. Dr. B provided knowledgeable and credible testimony regarding his part in reviewing the IEE and the reasons why he concluded that Student was non-exceptional. However, Dr. B’s credibility was mildly tainted when he stated that he did not see the need for conducting any additional assessments

¹² 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).

¹³ The CST made the referral within two weeks after January 20, 2007; the ER wasn’t completed until June 13, 2007, clearly beyond the 60 school day timeframe.

after reviewing Ms. C's findings in the ER. Finally, I found that Mr. L, Supervisor of Pupil Services, provided credible testimony up to the point when he was explaining that he was the 504 Coordinator in January 2006, but did not make that clear to the Parent.

The Parent was clearly very concerned about his child and thought that a finding of eligibility under IDEA as a student with a learning disability¹⁵ or as a student with a disability requiring a 504 Service Plan would have helped his child to perform better in school. However, Parent's inconsistent follow through¹⁶ and his consistent misuse of terms and procedures, did not work to his child's benefit in the end. This hearing officer appreciates the passion this Parent has for his child, but feels obligated to point out that a more cooperative, less accusatory approach might have been more effective.

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Special Education

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004).

B. Child Find

IDEA's so-called "Child Find" provision requires that states ensure that:

"...All children with disabilities residing in the State, including children with disabilities

¹⁴ Mr. D reported that Dr. H believed that the Parents had concerns because in comparison to Student's sister, Student was not as academically successful. [SD-1; N.T. pp. 75-76] Dr. H flatly denied Mr. D's allegation. [N.T. p. 38]

¹⁵ Parent incorrectly referred to a "hidden" learning disability which describes many learning disabilities but which is not an eligibility category under IDEA.

attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving special education and related services.” 20 U.S.C. § 1412(a)(3).

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. (emphasis added) 34 C.F.R. §300.7

D. Burden of Proof

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). The Parent requested this

¹⁶ The record reveals that Parent missed many opportunities to participate in meetings in a cooperative way and utilize the educational process delineated in IDEIA and Section 504. [SD-4]

hearing to challenge the District's determination that Student is not eligible for special education services under the IDEA or accommodations under Section 504 and is therefore assigned both the burden of persuasion and the burden of production (presenting its evidence first) in the hearing. Application of the burden of persuasion 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. This is not the case here.

Typically, the burden of proof in an administrative hearing alleging a FAPE denial is upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); *L.E. v. Ramsey Bd. Of Educ.*, 435 F.3d 384 (3d Cir. 2006); *In Re a Student in the Ambridge Area School District, Special Education Opinion No. 1763* (2006) Here, the substantive dispute in this case centered not only on the District's evaluation from which it concluded that Student was not eligible for IDEA special education services but also on the District's consideration of the IEE and eligibility under Section 504. In the instant matter, the appropriateness and accuracy of the School District's evaluation and the resulting eligibility determination were **not** raised in the context of the Parents' request for the District to fund an IEE, but instead focused on the District's consideration of the IEE and the question of eligibility under IDEA and Section 504. Therefore, although the District typically has the burden of proving that its evaluation is appropriate and that it correctly determined that Student is not IDEA eligible, in this instance, the Parent has the burden of proving that the District failed to provide FAPE by denying Student eligibility under the IDEA, by not properly considering the IEE and by inappropriately determining Student's eligibility under Section 504.

E. Independent Educational Evaluation

Parents have a conditional right to an IEE at public expense if the parent disagrees with the District's evaluation. 34 CFR 300.502(b). Parents also have the right to have the IEE considered by the District in any decision made with respect to providing FAPE for that student.

34 CFR 300.502(c)(1) Consideration, however, is contingent on the IEE meeting District's criteria. This section of the statute imposes an affirmative obligation on the District to consider the results of an IEE in any decision regarding the provision of FAPE to the student, if that evaluation meets District criteria. The requirement, however, does not mean that the District is compelled to consider the IEE in its decision regarding the provision of FAPE, if it does not meet District criteria. If the District believes that the IEE does not meet agency criteria, it would be appropriate for the District to explain to the parent why. 71 Fed. Reg. 46,690 (2006).

Here the District, in considering the IEE, made much of the fact that Dr. H suggested that the Parents pursue the possibility of classifying Student as a student with a specific learning disability without taking into consideration the fact that the two Reading Assessments she used showed Student's performance to be entirely different from Student's performance on the WIAT II, in class and on the PSSAs.¹⁷ Most importantly, the District psychologist, Dr. B carefully explained why Student disagreed with the independent evaluator's recommendation: she failed to consider whether Student needed specially designed instruction in order to make meaningful progress Student's academic performance. [SD-2; SD-3; SD-5; SD-6; N.T. pp. 47, 50-53, 171, 177]

F. Evaluations

In conducting the evaluation, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information including information provided by the parent, that may assist in determining not only whether the child is a child with a disability, but also whether the student is able to be involved in and progress in the

general education curriculum. 34 CFR §300.304(b). The evaluation must also be sufficiently comprehensive to identify all of the child's special education and related services needs. 34 CFR §300.304(b)(c)(6). Furthermore, the student must be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 CFR 300.304(c)(4). Assessment tools and strategies to provide relevant information that directly assists persons in determining the educational needs of the student must be provided. 34 CFR 300.304(c)(7). No single measure or assessment may be used as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child. 34 CFR 300.304(c)(2). Only technically sound instruments that assess the relative contribution of cognitive and behavioral factors in addition to physical or developmental factors may be used. 34 CFR 300.304(b)(3). Assessments and other evaluation materials must be used for purposes for which they are valid and reliable; must be administered by trained and knowledgeable personnel; and must be administered in accordance with any instructions provided by the producer. 34 CFR 300.304(c)(1)(iii)-(v). Assessments and other evaluation materials must include those tailored to address specific areas of educational need and not merely those that are designed to produce a single general intelligence quotient. 34 CFR 300.304(c)(2).

In the instant matter, the District's evaluation provided little to no interpretation of Student's scores or how they related to the conclusion that Student was neither a child with a disability nor a child with a disability who did not need specially designed instruction. For example, there is no explanation of the significance, if any, of Student's standard score in Pseudo

¹⁷ On Student's PSSAs, Student achieved overall scores of 1629 in Reading and 1642 in Mathematics both

word Decoding on the WIAT-II being noticeably lower than Student's scores in Comprehension and Word Reading. Nor is there any explanation of the significance of Student's teachers finding Student to be "at risk" in the areas of attention, adaptability, social skills, leadership skills and study skills. A further review of the ER reveals that Ms. C never explained how these areas of concern affected, or not, Student's ability to be involved in and progress in the general education curriculum. Ms. C found that Student did not have a specific learning disability, but did not explain or correlate the information about Student's emotional stability with her determination that Student was not eligible for special education services and specially designed instruction under IDEIA. Even more significantly, Ms. C failed to evaluate Student for Section 504 accommodations. [SD-3; N.T. pp. 201-210]

Nevertheless, there are both federal and Pennsylvania substantive legal standards governing evaluations and the determination of IDEA eligibility which set forth the criteria the School District is required to meet in order to conduct an appropriate evaluation and determine whether Student is eligible for special education. *See*, 20 U.S.C. §1414(b), (c); 34 C.F.R. §§300.12, 500(b)(2), 532– 536; 22 Pa. Code §14.123. Federal and state special education rules also define the various conditions which support the determination that a student is a "child with a disability" and add an essential additional eligibility criterion, *i.e.*, that "by reason of" such identified condition, the student needs specially designed instruction. 20 U.S.C. §1414(3)(A)(i), (ii), 30(A); 34 C.F.R. §300.7(a), (c); 22 Pa. Code §§14.101, 102(a)(2)(ii).

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

The issue of Student's IDEA eligibility with respect to whether Student is a "child with a

"Advanced".

disability” centers on whether Student meets the objective criteria for one or more of the disability categories as defined in the IDEA statute and regulations, as well as the additional requirement that “by reason thereof,” Student “needs special education and related services.” 20 U.S.C. §1401(3), (30); 34 C.F.R. §300.7(a)(1), (c)(10), 22 Pa. Code §§14.101, 102(a)(2)(ii). *In Re: The Educational Assignment of Vincent D., Special Education Opinion No. 1413 (Sep. 23, 2003); In Re: The Educational Assignment of Michael M., Special Education Opinion No. 1019 (June, 2000)*. Here, although the initial evaluation on its’ face does not make this clear, we learn through testimony that the District determined that Student was not eligible for special education services under the IDEIA as a child with a specific learning disability because even though there was a discrepancy between Student’s Verbal Comprehension score and Student’s Perceptual Reasoning Quotient on the WISC IV, it was more indicative of a learning style rather than a learning disability and “by reason thereof” Student did not need specially designed instruction to make academic progress. [SD-3; N.T. pp. 111-112; 116; 167-170; 178]

A “specific learning disability” is defined as,

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

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

teaches the child and a school psychologist. 34 C.F.R. §300.540; 22 Pa. Code §14.124(a). The regulations further provide that

(a) A team may determine that a child has a specific learning disability if–

(1) The child does not achieve commensurate with Student’s or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child’s age and ability levels and

(2) The team finds that the child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas: (i) oral expression. (ii) Listening comprehension. (iii) Written expression. (iv) Basic reading skill. (v) Reading Comprehension. (vi) Mathematics calculation. (vii) Mathematics reasoning.

34 C.F.R. §300.541(a).

However, the most recent amendments to the IDEA statute provide that

[W]hen determining whether a child has a specific learning disability as defined in §602 a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation or mathematical reasoning.

In determining whether a child has a specific learning disability a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures described in paragraphs (2) and (3).

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

More specifically, when determining whether a child has a specific learning disability, the

District:

- (1) must not require the use of the severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning

disability as defined in section 300.8(c)(10);

- (2) must permit the use of the process based on the child's response to scientific, research based intervention;
- (3) may permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability.

Here, the ER is devoid of consideration of these criteria, and it wasn't until the District was presented with the IEE and consequently, issued a re-evaluation report (hereinafter "RR") "considering" the independent evaluation, was it made clear how and why the District concluded that Student, in fact, did not meet the eligibility criteria for special education services under IDEIA. [SD-6; N.T. pp. 78-80; 161; 163, 181; 186] Nevertheless, a review of the record, both documentary and testimonial, does establish that Student did not meet the criteria for a specific learning disability, and assuming *arguendo* that Student had, Student did not demonstrate a need for special education services and programming where Student performed in the above average to average range, as measured by standardized assessments, report card grades and class work.

Simply put, the ER failed to properly evaluate Student to determine whether Student qualified as a child with a specific learning disability. That being said, these errors were harmless in so far as they did not result in a denial of FAPE for the Student. 34 CFR 300.514.

Therefore, for all of the above reasons, this hearing officer find that District did not err in its determination that Student did not qualify for special education services under IDEIA.

H. Eligibility Under Section 504

Section 504 states: An otherwise qualified individual with a disability in the United States, . . . shall solely by reason of her or Student's 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.S. § 794. The substantive requirements of the Rehabilitation Act in the education context are equivalent to the requirements set forth in the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. See *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citing *W.B. v. Matula*, 67 F.3d 484, 492-93 (3d Cir. 1995)). The regulations implementing the Rehabilitation Act provide that districts "shall provide a free appropriate public education to each qualified handicapped person who is in the district's jurisdiction." 34 C.F.R. § 104.33(a); see also *W.B.*, 67 F.3d at 493.

Under Section 504, an individual is disabled if Student has, or has a record of having, or is regarded as having, a physical or mental impairment that significantly interferes with one of life's major activities. 34 CFR 104.3(j) Major life activities are "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, *learning* and working." 34 CFR 104.3(j)(2)(ii)

However, it is important to note that students who are eligible for services under IDEIA will always meet the definition of eligibility for Section 504, but the converse is not true. The non-categorical criteria for determining eligibility under Section 504 are generally broader, or more inclusive, than the categories of eligibility under the IDEA. As a result, there are students eligible for educational program adaptations and services under Section 504 who are ineligible under the IDEIA. Unfortunately, in the instant matter, even though Mr. L outlined the procedure for determining Section 504 eligibility, the District failed to follow that procedure and evaluate the Student for Section 504 accommodations and modifications. [SD-3; N.T. pp. 202, 206-210]

Nevertheless, to establish a violation of § 504, Student must demonstrate that (1) Student is disabled as defined by the Act;¹⁸ (2) Student is "otherwise qualified" to participate in school activities; (3) the school or the Board receives federal financial assistance; and (4) Student was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood Board of Education v. N.E. 172 F.3d 238, 253 (3d Cir. 1999); *J.F. v. School District of Philadelphia*, 2000 U.S. Dist. LEXIS 4434, No. 98-1793, (E.D.Pa. 2000); *Nathanson*

¹⁸ A "Handicapped person" under Section 504 of the Rehabilitation Act is defined as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 34 C.F.R. §104.3(j).

v. Medical College of Pennsylvania, 926 F.2d 1368, 1380 (3d Cir. 1991); 34 C.F.R. § 104.4(a). In addition, to be liable, the District must have known or have been reasonably expected to know of Student's disability. *Nathanson*, 926 F.2d at 1381. However, plaintiffs "need not establish that there has been an intent to discriminate in order to prevail under § 504." *Id. at 1384. See, Alexander v. Choate*, 469 U.S. 287, 297, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985); *Ridgewood*, 172 F.3d at 253; *Matula*.

A review of the testimony and documentary evidence in this matter clearly indicates that Student did not have a physical or mental impairment that significantly interfered with one of life's major activities (i.e. learning). Contrary to Parent's contention that Student had "impaired sensory, manual or speaking skills", none of Student's teachers agreed and there is no evidence to support Parent's claim. [SD-1; N.T. pp. 67-68]

The record further reveals that Student was not excluded from participation in, denied the benefits of, or subject to discrimination at school. Nevertheless, Parent has indirectly argued that the District did not provide his child with an appropriate education because the District should have provided Student with a § 504 Service Agreement, and therefore, denied Student access to the curriculum and a FAPE.

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 non-handicapped persons are met." 34 C.F.R. § 104.33(b)(1). There are no bright line rules to determine when a school district has provided an appropriate education as required by § 504. *Eric H. v. Methacton Sch. Dist.*, 265 F. Supp. 2d 513 (E.D.PA 2003).

What is known is that §504 requires a recipient of federal funds to make "reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped" person. 34 C.F.R. §104.12 (a). Although the Third Circuit has not specifically addressed what is a "reasonable accommodation" in relation to the Rehabilitation Act's requirement of an "appropriate" education, Courts have concluded that a reasonable accommodation analysis comports with the Third Circuit's explanation that an "appropriate" education must "provide 'significant learning' and confer 'meaningful benefit,'" *T.R. v. Kingwood*

Township Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988), but that it "need not maximize the potential of a disabled student." *Ridgewood*, 172 F.3d at 247; *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002).

Here, both the documentary and testimonial evidence reveals that there was no indication that Student needed accommodations or modifications to "level the playing field" and be able to access the curriculum. Therefore, for the reasons stated above, there was no denial of FAPE and the District did not err by failing to provide Student with a § 504 Service Agreement.

VI. COMPENSATORY EDUCATION

Compensatory education may be awarded for the period of time that a school district deprives an eligible student of FAPE. Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999) In this case, although there were procedural errors, none of those violations deprived Student of a FAPE and therefore, Student is not entitled to compensatory education. 34 CFR 300.513.

VII. SUMMARY

Based upon the evidence of record and the applicable law: the District's initial evaluation was untimely and inappropriate and therefore Parent is entitled to be reimbursed for the IEE which Student obtained and which resulted in the re-evaluation that appropriately determined the Student was not eligible under the IDEIA. Furthermore, the District properly considered the IEE; but did not appropriately apply the eligibility criteria under Section 504 which again in this case constitutes "harmless" error as based upon the both the record and the legal standards applicable to the issue of eligibility; the Student also does not meet the eligibility criteria for

accommodations under Section 504.¹⁹

VIII. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Council Rock School District's initial evaluation was not appropriate and therefore Parent is entitled to an IEE at District expense. The cost of the IEE must be substantiated by either a cancelled check or an invoice indicating that Parent paid the amount billed for the IEE only. No other costs may be added.

It is **FURTHER ORDERED** that the Council Rock School District correctly considered the IEE and determined that Student was not eligible for special education services under IDEIA or Section 504 accommodations. Therefore, the District did not deprive Student of a FAPE and no compensatory education is warranted.

Dated: September 4, 2009

Deborah G. DeLauro
Deborah G. DeLauro, Hearing Officer

¹⁹ This conclusion is supported by both the record and the legal standards applicable to the issue of eligibility.