

*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 "Student"  
ODR #10207/08-09 LS

Date of Birth: xx/xx/xx

Dates of Hearing:  
September 14, 2009  
November 24, 2009

CLOSED HEARING

Parties to the Hearing:

Wissahickon School District  
601 Knight Road  
Ambler, Pennsylvania 19002

Last Transcript Received:

Record Closed

Date of Decision:

Hearing Officer:

Representative:

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November 30, 2009

December 29, 2009

January 13, 2010

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

## **Background**

Student “Student” is an elementary-school aged first grade student who resides in the Wissahickon School District. Student has a history of aggressive behavior and has been diagnosed with a Sensory Integration/Processing Disorder and ADHD. The Parents enrolled their child in the District’s kindergarten at the start of the 2008-2009 school year.

Contending that the District failed to meet its Child Find obligations in violation of IDEA<sup>1</sup> and Section 504<sup>2</sup> by failing to timely evaluate and identify Student as eligible for special education and related services, Parents filed a due process complaint seeking compensatory education for the 2008-2009 school year, and the 2009 extended school year.

The due process hearing was held on September 14, 2009<sup>3</sup> and November 24, 2009. For the reasons explained below, the Parents have only partially met their burden by a preponderance of the evidence.

Therefore, based upon the record compiled during the two hearing sessions and the arguments of counsel, Parents will be awarded limited compensatory education for a portion of the period in dispute from April 3, 2009 through June 19, 2009.

## **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?

## **Findings of Fact**

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<sup>1</sup> Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. and Chapter 14 of the PA Code.

<sup>2</sup> Section 504 of the Rehabilitation Act and Chapter 15 of the PA Code.

<sup>3</sup> Hearing Officer Daniel Myers conducted the first hearing on September 14, 2009. The second hearing session was conducted by this Hearing Officer.

1. Student (hereinafter “Student”) is an elementary-school aged first grade student who resides in the Wissahickon School District (hereinafter “District”) where Student has been enrolled since kindergarten. [P-1; NT. pp. 23-25]<sup>4</sup>
2. When Student was five years old, (hereinafter “Parents”) enrolled Student in the [redacted] Elementary School (hereinafter “School”) for the 2008-2009 school year.
3. In July 2008, Parent met with Ms. F, the Principal, in order to discuss their experiences with Student’s behavior. [NT p. 30-31] Specifically, Parents explained that Student had difficulty making friends and had a history of aggressive behavior in pre-school. [NT pp. 30-31] They also explained how Student would get frustrated when Student was not able to do something that other children could do.
4. Parents provided the Principal with a Pre-Admission Screening Report dated October 6, 2007 written by Dr. S, Ph.D, NCSP at [agency redacted], which identified Student’s overall functioning within the superior range of intelligence with a verbal IQ of 143, a Performance IQ of 103 and a Full Scale IQ of 125 on the Wechsler Pre-School and Primary Scale of Intelligence-Third Edition (hereinafter “WPPSI”). [SD-1; NT p. 28, 31]
5. Parents also provided the Principal with a private Occupational Therapy (“OT”) Evaluation by Ms. H, Occupational and Family Therapist, dated March 10, 2008 which indicated, *inter alia*, that Student could be intrusive and bossy with peers, and that Student’s behavior was calmer in classes with fewer students. She also indicated that Student had weaknesses in sensory integration/sensory processing and motor planning. [SD-2; NT p. 28.]
5. Finally, Parents provided the Principal with a second private OT evaluation conducted by [agency redacted] Inc. dated, May 10, 2008 which diagnosed Student with a sensory processing disorder.<sup>5</sup> [SD-3, pp. 16-25; NT pp. 28-30, 34]
6. District issued a Permission to Evaluate (hereinafter “PTE”) on July 25, 2008, which the Parents signed and returned on September 16, 2008. [P-26; SD-5]

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<sup>4</sup> References to “SD” and “P” are to the School District, and Parent exhibits, respectively. References to “N.T.” are to the transcripts of the September 14 and November 24, 2009 hearing sessions conducted in this matter.

<sup>5</sup> The report stated that Student never worked as part as (sic) a team or was helpful with others. Student tried to play with Student’s peers, but it frequently ended with conflict. Student was unable to resolve conflicts without the help of Student’s teacher. Student could not handle frustration without emotional outbursts or aggressive behavior. Motor deficits, sensory processing differences, attentional control and behavior were identified as areas of concern, especially how they impacted Student’s behavior at home and school and interactions with peers.”[SD-3 pp. 16-25;NT pp. 28-30]

7. Parents had an independent Physical Therapy Evaluation conducted by Ms. S, MS, PT who recommended weekly physical therapy in the home to address Student's balance, proximal stability and coordination. [SD-4]
8. In August 2008, Parents met with Ms. O (hereinafter "Ms. O") the kindergarten teacher and also gave her copies of the three reports. [SD-1,2,3; NT pp. 34-35, 359-360]
9. Ms. O has been a kindergarten teacher for fifteen years and is currently in her fifth year with the District.<sup>6</sup> [NT pp. 272-273]
10. Ms. O testified that she had a good relationship with the Student and Student's Parents during the school year. [NT pp. 275-276] She communicated frequently with Parents about the Student, mostly through phone calls and email. [NT p. 276]
11. Student's mother testified that she believed that Ms. O was a great teacher, but that she was overwhelmed by Student and the classroom of twenty-three students. [NT pp. 48-49]
12. Ms. O described the kindergarten classroom as a cooperative learning atmosphere which included team building and activities using the floor and tables. [NT p. 282] The kindergarten classroom involved a lot of movement and active student engagement. [NT p. 282] The kindergarten class had 23 students who were spread out in a large classroom. [NT p. 284] The classroom had numerous tables for small group work. [NT p. 284] The Student's schedule included an organizational session at the beginning of the school day followed by approximate one hour periods for writer's workshop, reader's workshop, lunch and recess, math and specials. [NT pp. 285-286] Ms. O described the kindergarten routine in detail in her testimony. [NT 285-286] The kindergarten classroom routine included both structured and unstructured times for the students. [NT p. 287]
13. Ms. O testified that she utilized the "M.A.R.K." program (manners, academics, respect, kindness) which involved positive reinforcement and positive discipline in the classroom. [P-19; NT p. 62, 290] She stressed the importance of setting expectations for the Student each school day, which she did. [NT p. 290] She also utilized strategies which included modeling, positive reinforcement, recognition and discussion of bad choices, pairing the Student with other students with whom Student had a good relationship, effectively utilizing both structured and unstructured time and prompting. [NT pp. 291-301] The positive reinforcement which was effective with Student included the use of high fives, giving Student stickers and allowing Student to write stories on Student's Mac. [NT p. 299] The strategies utilized for the Student included allowing Student quiet time to finish Student's work and permitting flexibility of the Student's body positioning, particularly during carpet time. (NT p. 303).

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<sup>6</sup> Ms. O holds a Bachelor of Science in Elementary Education and a Masters Degree in Education with an emphasis on K through 8<sup>th</sup> grade. [NT pp. 73, 273]

14. Ms. O stated that the Student had numerous friends in the kindergarten classroom. [NT pp. 293-294]. Student had good days and bad days, but Student's behavior was clearly manageable. [NT pp. 294-296, 306-309] Ms. O communicated the Student's successes during Student's good days and also occurrences on Student's bad days to the Parents from the very beginning of the school year. (NT p. 300) Ms. O believed that she was managing Student's behavior in the classroom and communicated that to the Parents. [NT p. 306]
15. The District reviewed the private assessments and conducted a PT evaluation at Parents' request [SD-5] and on October 16, 2008 issued an Evaluation Report (hereinafter "ER") which determined that Student was not eligible for PT in the school setting. [SD-23]
16. Based on the District's finding of non-eligibility under the Individuals with Disabilities Education Act (hereinafter "IDEA") the District through its IEP team developed Chapter 15 Service Agreement (hereinafter "504 Plan") to delineate the delivery of direct occupational therapy services for 30 minutes twice a week and 30 minutes of consultation once a month. The 504 Plan also addressed Student's behavioral needs.<sup>7</sup> [SD-5; NT pp. 106-107] Parents did not sign and return the 504 Plan until December 3, 2008. [SD-6; NT p. 109]
17. A month after the 504 Plan was issued, Parents wrote a letter to Ms. R, (hereinafter Ms. R") a District counselor confirming the accommodations to address Student's behavior and the delivery of the OT services outlined in the 504 Plan. [P-29] Parents also indicated that the amount of OT services offered essentially cut in half from Student's private OT services, and inquired as to whether the District could also provide Social Skills Therapy.[P-29]
18. On December 2, 2008, Student's first marking period report card was issued and reflected that although Student was making academic progress Student's behaviors were interfering with Student's learning; Student was easily distracted; had trouble with organization. [P-11; NT p. 42-43; 183]
19. On December 3, 2008, Parent met with Ms. O for the Parent/Teacher conference and discussed her classroom observations. [NT p. 45] Specifically, Parent stated that she observed Ms. O stop the class on several occasions to tell Student to sit down and do Student's work. [NT p. 45] She also testified that other children gave Student a wide berth and did not usually share with Student. [NT p. 45]
20. However, Parent also acknowledged that Ms. O employed strategies to address the Student's behaviors throughout the school year. [NT p. 108] Ms. O advised

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<sup>7</sup> The 504 Plan included the following accommodations: 1) alternate seating in the lunch room as needed due to high noise level; 2) Student would be informed of programs and expectations on behavior prior to the event; and 3) Student would be allowed to sit with Student's legs stretched out in front when sitting on the floor. [SD-5, 6]

- Parent of some strategies that worked and other strategies that did not work with the Student. [NT p. 107]
21. Ms. O testified that during the times that Student's mother was in the classroom, Student demonstrated a completely different demeanor which included an unwillingness to participate in classroom activities.<sup>8</sup> [NT pp. 309-310]
  22. By mid-December, Student's behaviors worsened<sup>9</sup> as documented in emails between the Parents and Ms. O. [NT p. 51]
  23. On December 18, 2008, a referral was made to the Child Study Team (hereinafter "CST") and a meeting was held on January 12, 2009. [P-2, 22] Parents stated that they believed that the 504 Plan was insufficient.<sup>10</sup> [SD-7]
  24. At the CST meeting, Ms. O provided information at the meeting regarding the developmental reading assessment (hereinafter "DRA") results which demonstrated that the Student had made substantial progress in reading during the first half of the kindergarten school year. Although Parents communicated the behaviors they were seeing the Student demonstrate at home, Ms. O stated that the Student was not demonstrating those same behaviors from the standpoint of severity or frequency in school. [NT pp. 140-141] Additionally, Ms. O discussed how the Student demonstrated appropriate remorse when Student engaged in a behavior in school. [NT p. 141] Ms. O denied that Student's behavior was "spinning out of control" but was instead clearly controllable." [NT pp. 311-312]
  25. On January 16, 2009, the District's CST issued a PTE in order to conduct a multi-disciplinary evaluation. (hereinafter "MDE") [SD-7]
  26. In the meantime, Parents had obtained a private psychological evaluation from Dr. K, Ph.D., which found Student to have an attention deficit hyperactivity disorder (hereinafter "ADHD") and recommended, *inter alia*, that the 504 Plan be updated. [SD-8; P-21; NT p. 55]

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<sup>8</sup> When mother present, Student did not participate; Student just kind of sat there and then Student sometimes would start grunting and making noises; Student wouldn't sing any of the songs; Student didn't want to read Student's letters. [NT p. 310]

<sup>9</sup> Student spit in Student's friend's face, and Ms. O noted Student's lack of progress with behavior, "I am sorry Student is having such a difficult time, I hope that we will see some improvement in Student's behavior soon." [P- 2; NT pp. 52, 53, 54]

<sup>10</sup> At the meeting, Parents were concerned that "Student [was] not succeeding" and [was] "not doing well at home or in school." [SD-7; NT p. 39] Parents acknowledged that Student was **not** manifesting the behaviors in September and October, 2008, but claimed that they began to show in November and December, 2008. [*Id.*] Parents stated that they "[felt] that they [were] losing Student and Student's behavior [was] spinning out of control." [*Id.*] At the meeting, Ms. O stated that Student's behavior in school was "controllable" and "Student [didn't] get a lot of room to get out of control." [*Id.*]

27. The District received the signed PTE on February 4, 2009. [SD-9; SD-10] Parents had checked the box indicating that the MDE was “to assist in [the] Functional Behavioral Process.” [SD-10]
28. In a letter dated February 24, 2009, Dr. S, Student’s private psychiatrist confirmed Student’s diagnosis of ADHD and prescribed medication. [SD-8; SD-12; P-2; NT p. 58]
29. Parent stated that Student was started on medication on February 6, 2008 but that due to adverse effects on Student’s appetite and sleep patterns, four different medications were attempted between February and June 2008.<sup>11</sup> [P-2; NT pp. 92-94]
30. April 3, 2009 was the end of the second marking period [NT p.183] and Ms. O commented in her own handwriting on Student’s Progress Report that Student was, “Easily distracted. Behavior interferes with learning. Behavior causes distraction to classmates.”<sup>12</sup> [P-10, p.4; NT pp. 47, 381]
31. Ms. O testified that Student’s behavior deteriorated even further in April and May 2009. [NT p. 325] Parent agreed that Student’s behavior was escalating in the classroom but contended that the behavior had existed all year. [NT p. 88-89]
32. Ms. O stated further that she observed **new behaviors** starting in April and continuing through May which had not been demonstrated previously during the school year. [NT p. 337] Specifically, these new behaviors included the Student mumbling, smiling back at Ms. O in a mocking way when she tried to correct Student, destroying property, wandering aimlessly around the room, trying to leave the classroom, engaging in crying episodes, engaging in wailing and screaming and marching like a soldier in the classroom. [NT pp. 340-341] Ms. O also expressed her concerns about the changes in the frequency and severity of the Student’s previously demonstrated behaviors in school. [NT p.42] She stated that prior to the end of April, 2009, the strategies that she had utilized had been very successful with the Student. [NT p. 343] but were no longer effective to address the significant deterioration in behavior by the end of April and in May, 2009. [NT p. 343]

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<sup>11</sup> Student was started on Concerta (for only one day), then changed to Adderall, then on to Tenex, which Parent testified that Student needed to be “weaned” off of before Trileptal could be started. [NT pp. 92-94]

<sup>12</sup> Ms. O referenced the report card drop down menu which included a category in the comments section stating “Behavior interferes with learning.” She acknowledged that this form comment was selected by her, and included along with other comments, during the first and third marking periods. [SD-24; NT pp. 315-316] She stated that the Parents needed to be aware of what was occurring in the classroom and she felt that this was the only descriptor that had anything to do with behavior and therefore, it should be included in the report card to note her behavioral concerns about the Student. [NT p. 315] She stated that the interference occurred at times, but was also manageable and that this information was shared with Parents. [NT pp. 313-315]

33. On March 23, 2009 Student was sent to the Principal's office as a result of a "strangling" incident<sup>13</sup> because in Student's words "Student was angry [that] [Student] didn't get enough time to finish [something]." [P-19 at p. 11; NT pp. 62, 64, 412]
34. The District conducted a psycho-educational evaluation and issued an evaluation report (hereinafter "Re-ER") dated April 3, 2009. [SD-14] The school psychologist, Ms. M's (hereinafter "Ms. M") evaluation included an observation of the Student in the classroom on two occasions, once for a half an hour and once for forty-five minutes. [NT pp. 135-136] as well as input from the Parents who identified the Student's needs as follows: attention issues, sensory issues, easily distracted, easily overwhelmed and over-stimulated and sometimes aggressive. [SD-14 at p. 74]
35. The Re-ER included input from Ms. O<sup>14</sup> and noted that the District utilized various strategies with the Student, including behavior modification, clarification of directions, identifying schedule changes, identifying expectations, frequent communications with parents, redirection, making the Student aware of Student's behaviors, alternate seating and permitting Student to sit with legs stretched out in front of Student during lessons on the carpet in the kindergarten class. [SD-14]
36. The Re-ER included aptitude and achievement testing. Student's Verbal IQ was 134, Student's Perceptual IQ, 110, Student's Working Memory, 99, Student's Processing Speed was 100 resulting in a full scale IQ of 117 and a 124 on the General Ability Index (hereinafter "GAI") on the Wechsler Intelligence Scale for Children, Fourth Edition (hereinafter "WISC-IV"). [SD-14]
37. Ms. M also administered a Developmental Neuropsychological Assessment, Second Edition (hereinafter "NEPSY-II") wherein Student functioned above expected levels on the following subtests: Narrative Memory; and Memory for Names-Delayed. Student functioned at expected levels in: Design Copying; Memory for Faces; Memory for Faces-Delayed; and Memory for Names. In Auditory Attention and Response Set, Student's functioning was in the Borderline range. [SD-14]
38. In order to further assess processing speed, selected subtests from the Woodcock-Johnson III Tests of Cognitive Abilities were administered. Student achieved a

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<sup>13</sup> Ms. O clarified that this wasn't strangling or choking; this was Student wanting to go into an area where the other kids were and there was a boy blocking Student's way, so Student grabbed Student and pushed Student out of the way. [NT p. 412]

<sup>14</sup> Student can be very distractible, but Student's behavior is manageable within a regular classroom setting. Student responds to prompts and reminders to refocus Student's attention. Student's behavior will deteriorate if there is a substitute in the classroom. Student has shown some aggression toward peers (spitting on another child), but Student has shown improvement. Mrs. O also notes that Student is making academic progress in school. She notes that Student is immediately aware of any inappropriate behavior, and Student apologizes for it. [SD-14 at p. 74]



standard score of 85 in Processing Speed which places Student in the 16% with an age equivalent of 5-3; In Visual Matching, Student was in the 24% with a standard score of 89 which placed Student at 5-5 years. Next, in Decision Speed, Student achieved a standard score of 85, which placed Student at the 15% with an age equivalent of 4-11. In Pair Cancellation where Student achieved a standard score of 92 at the 29% and with an age equivalent of 5-2. [SD-14]

39. On the Woodcock-Johnson III Tests of Achievement, Student earned the following scores:

CLUSTER/Test	Age Equivalent	Standard Scores	Percentile	Grade Equivalent
Brief Achievement	6-11	119	90	1.6
Brief Reading	6-11	119	90	1.7
Brief Math	6-5	111	76	1.2
Brief Writing	7.0	123	94	2.0
Basic Reading Skills	7.3	122	93	2.0
Academic Skills	7-9	114	82	2.5
Academics Apps.	7-7	110	75	2.3

40. Student achieved the following results on the Form A of the W-J III:

CLUSTER/Test	Age Equivalent	Standard Scores	Percentile	Grade Equivalent
Letter-Word Identification	7-3	123	94	2.0
Calculation	6-5	111	76	1.1
Spelling	6-8	114	83	1.4
Passage Comprehension	6-7	113	81	1.3
Applied Problems	6-7	108	70	1.3
Writing Samples	7-3	123	94	1.9
Word Attack	7-4	119	90	2.0

41. At the time of the District's evaluation, the Student was xx years, x month in age. [SD-14 at p. 73] Student's scores on the Woodcock Johnson III Test of Achievement were above Student's age equivalency and grade equivalency at that time. [SD-14 at pp. 79-80]
42. Academically, the Student's skills fell within or above age and grade level expectations in all areas assessed. (SD-14 at p. 86). Cognitively, the Student's skills fell within the high average to very superior ability range. [SD-14 at p. 86]
43. Ms. M determined that Student was not eligible for special education services or an Individual Education Plan (hereinafter "IEP") at that time, although she

- acknowledged that Student did “appear to be experiencing some significant attentional concerns within the classroom and [that] adaptations to Student’s program should be implemented.”<sup>15</sup> [SD-14; NT p. 86]
44. Ms. M explained her finding of non-eligibility further: “We don’t do IEPs for kids who have good skills to have better skills. We don’t do an IEP for kids that have high average to superior skills. We don’t do that.” [NT p. 234]
  45. Ms. M did, however, recommend that Student’s 504 Plan be continued and Student’s behavior monitored. [SD-14 at p. 86; NT p. 86]
  46. On April 8, 2009, Parents disagreed with the NOREP indicating Student’s continued placement in regular education. [SD-16]
  47. Parents reported credibly that at the April 27, 2009 meeting to formally review the Re-ER and update the 504 Plan, the teacher stated something to the effect that “[Student] may be rolling around on the floor, but at least Student’s still answering the questions right.” [NT p. 71]
  48. Parent also reported credibly that when she expressed her “unhappiness” about the non-eligibility finding, Ms. M responded by asking “under [which] of the nine categories of an IEP do you think [Student] would qualify”, and then added: “it’s not like Student’s blind”. [NT p. 71-72]
  49. On April 13, 2009, Parents obtained a report<sup>16</sup> from a psychiatrist, Dr. S, M.D. indicating that in addition to Student’s ADHD and motoric and visual/spatial deficits, Student met the criteria for a Non-Verbal Learning Disability (hereinafter “NVLD”). [P-14]
  50. Dr. S identified the appropriate environment for Student given Student’s NVLD, ADHD, multiple sensorimotor diagnoses and psychological factors affecting Student’s physical condition which he described as a placement in a small classroom setting in a special education program with a teacher who had special expertise in working with children with clinical constellations which Student displays. Dr. S further recommended an all-day self-contained, academically challenging classroom with an appropriate peer group.<sup>17</sup> [P-14]
  51. On April 16, 2009 Student hit another student in the face because she had something Student wanted. [NT p. 65]

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<sup>15</sup> She suggested the following adaptations: preferential seating; having Student repeat directions; frequent breaks and opportunities for movement within the learning environment. [SD-14 at p. 86]

<sup>16</sup> However, the S Report was not provided to the District until mid-June, 2009. The report was sent to the District along with the due process complaint dated June 16, 2009 and received by the District on June 18, 2009. [NT pp. 78, 79-80, 82]

<sup>17</sup> The Parties had previously agreed to Student’s program and placement for the 2009-2010 school year so that is not an issue in this hearing.

52. On April 27, 2009, Student's 504 Plan was revised to include the recommended behavioral and sensory adaptations. [SD-25]
53. On May 13, 2009 the District issued another PTE as a result of yet another significant increase in the severity and frequency of Student's behaviors.<sup>18</sup> [NT pp. 170-171]
54. The District conducted a Functional Behavioral Assessment (hereinafter "FBA") as part of the evaluation. [NT p. 171]
55. On June 19, 2009, the District issued a second Re-ER finding Student eligible for special education services under the category of "Other Health Impairment" (hereinafter "OHI"). [SD-20]
56. The Re-ER stated that as of April, 2009, the Student had begun to exhibit behaviors that were interfering with Student's ability to successfully to attend to all academic tasks in school and impeding the learning of others. [SD-20 at p. 116]
57. On July 22, 2009, the IEP team convened and developed an IEP including Behavior and OT goals and specially designed instruction (hereinafter "SDI") [SD-21]
54. Parents did not sign the corresponding NOREP indicating that Student would receive special education services through the itinerant learning support program. [SD-22]
55. On June 16, 2009 Parents filed a due process complaint asserting that the 504 Plan Agreement dated April 27, 2009 was deficient 'in that the accommodations [were] minimal, generalized, and failed to meet Student's educational, behavioral and social/emotional needs.'" [SD-23, p. 165] Parents further asserted that "The District ha[d] been on notice as to Student's escalating behavioral problems and ha[d] not meaningfully addressed them." [SD-23 at p. 165] The due process complaint enclosed a report from Dr. S, dated April 13, 2009. [SD-23, at pp. 170-173)]

## **Discussion and Conclusions of Law**

### Burden of Proof

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<sup>18</sup> This significant behavioral change demonstrated that the Student required more than just modifications within the classroom and instead, warranted specially designed instruction and monitoring through goals in an IEP. [NT pp. 175-177] Ms. M also acknowledged the significance of Ms. O's concern that the Student **no longer demonstrated remorse** for Student's behaviors, which was contrary to Student's recognized remorse throughout the school year up until late April, 2009. [NT pp. 176-177]

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, Parents bear the burden of persuasion because they contend that the School District failed to meet its Child Find obligations under IDEA and Section 504, and denied Student a FAPE by failing to timely and appropriately evaluate Student. However, the 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. In this matter however, the evidence was not in equipoise.

#### 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.<sup>19</sup> 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, since the evidence was heard by two different hearing officers, credibility played a less critical role than usual in shaping the perceptions of this Hearing Officer. That being said, however, a review of the testimonial and documentary evidence did reveal some notable inconsistencies. For example, the school psychologist's testimony that when she was conducting the evaluations for the Re-ER, she had no knowledge that [Student's] behaviors were interfering with Student's learning, lacked sufficient legal weight to counter the other evidence in the record indicating that Student's behaviors were interfering with Student's learning. [P-10, 11; NT p. 186] Similarly, Ms. M's claims that she observed [Student] in the classroom twice but forgot to include the observations in the Re-ER also brings her credibility into question. [NT pp. 187-188]

However, equally troubling is Parents' contradictory testimony that Student desperately needed behavioral interventions but when the 504 Plan was issued on October

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<sup>19</sup> 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).

16, 2008, Parents inexplicably did not sign and return it until December 3, 2008.

Furthermore, Parents assert that the 504 Plan did nothing to address [Student's] behaviors and that Student's behaviors remained the same since the start of the school year, yet they later agreed that Student's behavior had escalated as the year progressed and that Student had in fact, made some progress, [even though] it wasn't the progress Student should have made. [SD-23; NT pp. 85-86] Parent's testimony was also contradicted and contrary to the testimonial and documented evidence when she stated that although she thought that Ms. O was a "great teacher" she was overwhelmed by Student's behavior but then admitted that the teacher used strategies to address Student's behaviors all year; some of which worked and some did not. [NT pp. 107-108] There can be no question that the Parents are clearly committed to their child and concerned that Student receive appropriate behavioral interventions and an appropriate educational program. However, in their efforts to be proactive and not wanting to see their child fall short of Student's potential, they tried to take a short cut around the IDEA process and inadvertently may have caused a delay in procuring the special education services which they so desperately wanted for Student.

Finally, this Hearing Officer found the kindergarten teacher to be highly credible and knowledgeable about using positive behavior interventions to manage Student's behaviors. It was her detailed testimony about how she managed the classroom in order to provide a cooperative yet structured environment which established a significant part of the District's case. The only caveat from this hearing officer's perspective is that the teacher should not be dissuaded, deterred or especially delayed if she believes that a student really needs more intensive interventions and an evaluation for special education services. Such a recommendation would not and should not reflect poorly on her teaching

skills, in fact, in this hearing officer's opinion, it would be a clear indication of her superior teaching skills and understanding of the legal ramifications of delay.

**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 services<sup>20</sup> and evaluate them to determine eligibility. 34 C.F.R. §300.111; *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3<sup>rd</sup> 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.

With respect to the initial identification of potentially eligible students,<sup>21</sup> §14.122 provides as follows:

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<sup>20</sup> "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

<sup>21</sup> A 'child with a disability' means a child evaluated in accordance with §§300.301-300.306 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual

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.

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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. §300.8



(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 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)*

The major issue in this case is one of timing; first, in terms of whether the District unreasonably delayed an evaluation and thereby failed to timely identify Student as a student with a disability in need of specially designed instruction; and second, in terms of whether the District persisted too long in revising Student's 504 Plan.

The timing issue, however, has an additional component in terms of when the District should have determined Student is a "child with a disability" as defined as having one of the conditions listed in 34 C.F.R. §300.8, and who "by reason thereof, needs specially designed instruction."

With respect to both the pre-evaluation screening process and the comprehensive evaluation 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. However, 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. The appropriate time for assessing the effectiveness of screening activities was set at 60 days.

Here, however, Parents contend that when Student enrolled in Kindergarten, the District had sufficient information to reasonably suspect that Student was disabled, and therefore should have evaluated Student for special education services at the start of the school year. Parents based their contention on the fact that they provided the District with both documentary evidence and their personal experiences with Student's behaviors. Specifically, Parents assert that based on the private assessments provided and the fact that Student was receiving occupational therapy to address diagnosed weaknesses in sensory integration and motor planning, the District should have reasonably suspected that Student would qualify for special education services and therefore should have issued a PTE.

I disagree. Apart from the evidence which reveals that the District properly utilized classroom based strategies and practices in response to Student's behavior, the District is entitled to a rectification period in order to work with the student and to implement early intervening strategies.<sup>22</sup> Additionally, this Student had not been receiving "Early Intervention" services during pre-school which would otherwise have triggered the District's obligation to assess upon Student's entrance into the District's kindergarten.

Nevertheless, upon the Parents' request for a PT evaluation, the District issued a PTE in July 2008, which a review of the record reveals, the Parents did not return until

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<sup>22</sup>Early Intervening services are specific activities that District may used to address the needs of children who currently are not identified as needing special education and related services but who need additional academic and behavioral support to succeed in a general education environment. 20 USC 1413(f); 34 CFR 300.226(a)

September 16, 2008. A further review of the record indicates that although the PT evaluation found Student not eligible for PT service in the school environment, on October 16, 2008, the District developed a 504 Plan to delineate the frequency and duration of Student's occupational therapy and provide Student with accommodations pursuant to Student's behavioral needs. [SD-5]

Moreover, the documentary and testimonial evidence confirms that Ms O, Student's kindergarten teacher, had developed and was implementing a positive behavior intervention system in a structured class environment which initially, Student appeared to be benefiting from. [NT pp. 282, 284-287, 290-303]

The IDEA requires that Districts adopt and implement a Response to Intervention (hereinafter "RTI") model in order to screen and identify those students who are at risk for later achievement and behavioral problems. 34 CFR 300.226(a) and (b)

To that end, districts are required to develop a multi-tier system of behavior supports to provide students with supports of varying levels of intensity. The RTI utilizes a three-tier model where Tier 1 is the universal level and consists of behavior supports that are provided to all students. This is essentially what Ms. O provided to Student upon Student's entry into kindergarten. Again, a review of the record confirms that Ms. O utilized strategies which included modeling, positive reinforcement, recognition and discussion of bad choices, pairing the Student with other students with whom Student had a good relationship, effectively utilizing both structured and unstructured time and prompting. [NT pp. 291-301] The positive reinforcement which was effective with the Student included the use of high fives, giving the Student stickers and allowing the Student to write stories on Student's Mac. [NT p. 299] The strategies utilized for the

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Student included allowing Student quiet time to finish Student's work and permitting flexibility of the Student's body positioning, particularly during carpet time. [NT p. 303] Finally, there is further evidence to support the District's assertion that "some strategies worked and some did not;" and that Student had "good days and bad days" but overall, Student responded positively to the interventions; at least for the first three months. [NT p. 39]

Nonetheless, for some students, as is the case here, the first tier of support is not sufficient to address their social behavior needs. These students require secondary or Tier 2 supports which consist of more intensive behavior interventions. In this case, by mid December Student's behavior, although still inconsistent, had worsened and Student was referred to the CST. In January 2009, the CST, based on Parents' concern that the 504 Plan was insufficient, issued a PTE for a multi-disciplinary evaluation on January 16, 2009, but again, inexplicably, Parents did not return the signed PTE until February 3, 2009. [SD-10]

In March and April 2009 as Student's behavior deteriorated further, Ms. O, instituting a new "zero tolerance" plan to address the increase in Student's severe behaviors, sent Student to the Principal's office instead of allowing Student to participate in a M.A.R.K. Celebration. These interventions qualify as Tier 2 more intensive behavior interventions in the RTI model.<sup>23</sup> [P-19; NT 209-303]

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<sup>23</sup> Tier 2 strategies are based on minimal assessment data, in other words, the "best guess" to determine why the student is engaging in the problem behavior or to identify whether the student has a skill or motivational deficit. These interventions may or may be based on the function of the misbehavior. Generally, however, students stay in a particular tier for a minimum of four weeks, although for more severe behavior, the team can decide to expedite the student through the Tier of support so that the student can receive the needed services, which ultimately was the case here.

Parents argue that these behavior interventions and the implementation of the classroom management strategies employed by Ms. O were essentially “good old-fashioned punishment.” [NT 364-365]; Parents’ Closing Brief p. 17] Again, I disagree.

Here, the evidence shows that Student was no longer responding appropriately to the behavioral interventions implemented by Student’s teacher, therefore, a referral was made to the CST in December and the team was convened in January 2009. Although Ms. O presented convincing evidence that in spite of Student’s aberrant behaviors the Student had made substantial progress<sup>24</sup> during the first part of the Kindergarten year, the CST issued a PTE to conduct a multi-disciplinary evaluation, thereby transitioning the Tier 3 in the RTI model.<sup>25</sup> [SD-7; NT pp. 140-141]

. To that end, IDEA provides that “in the case of a child whose behavior impedes Student’s or her learning or that of others, . . . appropriate strategies, including positive behavioral interventions, strategies, and supports to address that behavior" must be considered. 20 U.S.C. § 1414(d)(B)(3)(I). Pennsylvania law implementing IDEA requires that “[b]ehavior support programs and plans must be based on a functional assessment of behavior and utilize positive behavior techniques. When an intervention is needed to address problem behavior, the types of intervention chosen for a particular

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<sup>24</sup> The evidence documents that Student made substantial progress in reading as measured on the DRA. [NT pp. 140141]

<sup>25</sup> Tier 3 or the tertiary levels of support are more individualized and require more assessment and time to implement. Within Tier 3 increasing intensification of assessment, implementation, fidelity monitoring and progress monitoring will be applied. Specifically, District’s are required to first conduct an individualized FBA which is a functional assessment of what is supporting the problem behavior and develop a Behavior Support Plan which will probably include social skills training, replacement behaviors and other services. (cont’d) At that junction, if the student fails to respond to the individualized BSP, or as in this case, the 504 Plan, then, typically, the District should conduct a comprehensive evaluation to determine eligibility for special education services under IDEA.

student or eligible young child shall be the least intrusive necessary.” See 22 Pa. Code § 14.133(a).

In April 2009, the District completed a multi-disciplinary psycho-evaluation finding the Student not-eligible for special education services. [SD-14]

Ms. M’s testimony made it abundantly clear that her findings were based in large part on Student’s superior cognitive ability. In fact Ms. M stated that she didn’t do IEPs for students who have good skills to have better skills. [NT p. 334] This reasoning is contrary to case law as Parents pointed out in their closing argument.

In *West Chester Area School District v. Chad C.*, 194 F. Supp. 2d 417 (E. D. Pa. 2002), the court rejected this logic in a factually similar case. Chad C. was a student in the gifted program diagnosed with ADD. Student also had a large discrepancy between Student’s verbal and performance IQ’s. Student was initially denied services under IDEA, in large part because of Student’s high grades. The Federal District Court found Chad eligible under IDEA despite his satisfactory academic performance. Regarding whether someone could document that their disabilities adversely affect their academic performance where they are performing satisfactorily, the court stated:

“This should not and cannot be the litmus test for eligibility under IDEA. The fact that a child, despite a disability, receives some educational benefit from regular classroom instruction should not disqualify the child from eligibility.... Each child is different, each impairment is different, and the effect of the particular impairment on the particular child’s educational achievement is different. Denying special educational benefits because [a student] is able to pass from grade to grade despite documented impairments that adversely affect his educational performance is wrong.”

Id., 194 F. Supp. 2d., at 421. In *Chad C.* the court overturned the Appeals Panel decision that had found Chad ineligible under IDEA. The Court specifically stated, “[t]hus, as a

matter of law the Appeal Panel erred in focusing on Chad's grades while disregarding Chad's potential." *Id.*, 194 F. Supp. 2d. at 421.

Similarly, 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 not 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).

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, there were significant flaws in the assessment process which resulted in an inappropriate evaluation. Although the school psychologist conducted cognitive and academic functioning evaluations, she did not administer any assessments to measure social emotional, behavioral or attentional areas of Student's suspected disability. The Re-ER mentions that Student had been diagnosed with ADHD and a Sensory Processing Disorder, but it doesn't provide any analysis or synthesis of the information or of how these disorders might impact Student's ability to access Student's education.

In addition, contrary to the abundance of evidence indicating that Student's behaviors were interfering with both Student's and others ability to learn, no FBA was completed nor Positive Behavioral Support Plan ("PBSP") prepared. Furthermore, the Re-ER was silent with regard to the relevant question of whether the Student exhibits behaviors that impede Student's learning or that of others." Since in this case, the answer was "yes", then the evaluation should have included an FBA.

Furthermore, there is no doubt that the District had reason to suspect that Student had a disability but chose to minimize or ignore the behaviors which the teacher and Parents were acknowledging. Contrary to the testimonial and documentary evidence, the Re-ER indicates that "although there are some behavior and attentional concerns, Student's teacher feels that she is able to keep the behaviors of concern to a minimum through the behavioral interventions which she later acknowledged were already starting to lose their effectiveness.

Next, with regard to the criteria applied and Ms. M's analysis used to determine whether Student has a Specific Learning Disability (hereinafter "SLD"), the evidence

reveals that she did not have a clear understanding of the processes which must be implemented in order to qualify under the category of SLD.<sup>26</sup>

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)

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<sup>26</sup> *Specific Learning Disability*. In Pennsylvania, a student with a specific learning disability must be identified using one of two methods, either “a process based on a child’s response to scientific, research-based intervention” or “a process that examines whether a child exhibits a pattern of strengths and weaknesses, relative to intellectual ability as defined by a severe discrepancy between intellectual ability and achievement, or relative to age or grade”. (22 PA Code §14.125(2)).

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 evidence reveals that Ms. M not only did not follow the processes for determining eligibility under the category of SLD delineated above, she also provided very limited analysis of the discrepancies in between Student's verbal IQ and Student's working memory and processing speed subtests on the WISC-IV. Furthermore, there was no consideration or analysis of Student's eligibility under the categories of OHI or ED<sup>27</sup>.

In conclusion, the evidence reveals that although the District timely issued a PTE in order to determine whether Student required special education services and specially designed instruction in January 2009, its' April 3, 2009 evaluation was legally insufficient thereby raising the question of whether Student was denied a FAPE from April 3, 2009 to June 16 2009 when the District did find Student eligible under IDEA. With regard to the District's Child Find requirements under Section 504, the evidence indicates that since the District timely performed the required pre-placement evaluation and provided Student with a 504 Plan in October 2008, which was revised again in April 2009, the District did meet its obligations.

**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. In the present case, the District did timely issue a PTE in order to review the private assessments provided by the Parents and conduct a PT evaluation. In so doing, the District performed the required pre-placement evaluation and offered a §504 Plan which delineated Student's Occupational Therapy services and addressed behavioral concerns with accommodations in October 2008.

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<sup>27</sup> Emotional Disturbance.

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 (3<sup>rd</sup> 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.*

In this case, I agree with the District that Student was not excluded from participation in or denied the benefits of Student’s education because of Student’s disability. Therefore, there was no denial of FAPE in violation of Section 504.

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. Cmwlth. 1998); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3<sup>rd</sup> 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. Cmwlth. 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)

Here the Parents assert that the District’s failure to conduct an appropriate evaluation and identify Student at the start of Student’s kindergarten resulted in a denial of FAPE. I agree in part and disagree in part.

In the present matter, the record establishes that the District provided appropriate behavior interventions during the rectification period from September 2008 though January 2009. Substantively, it does not matter whether strategies and modifications necessary for meaningful progress are provided in a service plan or an IEP, as long as Student received all of the supports Student needed. There is ample evidence indicating

that Student was making meaningful progress academically, and that Student was initially responsive to the positive behavioral strategies and the increasingly intensive interventions, up to March and April, certainly. A further review of the record indicates when the Student demonstrated substantial new and problematic behaviors in the classroom and concurrently demonstrated a significant increase in the frequency and severity of previously demonstrated behaviors that had otherwise been manageable, the District then agreed to evaluate Student to determine whether Student required special education services and SDIs. Had the District conducted an appropriate evaluation in the Spring of 2009, there would have been no denial of FAPE. However, the record evidence confirms that the April 2009 evaluation was not appropriate and that District did not conduct a FBA until May 2009 not finding Student eligible for special education services until June 2009. Finally, it wasn't until July 2009 that the District convened an IEP team meeting to review the newly developed IEP which included the record a Positive Behavior Support Plan (hereinafter "PBSP")

Therefore, I find that the District did deny Student a FAPE in violation of IDEA from April 3, 2009 through the end of the 2008-2009 school year

**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).*

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, the evidence establishes beyond question that Student made academic progress in spite of Student's behavior problems. Parents are correct that grades are not the only factor to consider, and indeed, continued progress does not obviate the need for additional services and supports. It is important to note however, that the dispute encompasses the kindergarten year of school where meaningful progress is measured in terms of acquiring basic academic skills. Student clearly met the standard. Parents expectations, in terms of what they would have considered meaningful progress for their child was not really explained in either testimony or argument.

All in all, the record in this case supports a limited award of compensatory education in the form of 2 hours of compensatory education for every school day from

April 3, 2009 through the end of the 2008-2009 school year.

Here for all of the reasons delineated above, Parents are entitled to a limited award of compensatory education from April 3, 2009 through the end of the 2008-2009 school year. Since there was no evidence presented that Student would suffer regression or recoupment problems in regard to Student's academic skills, Parents request for compensatory education for the 2009 extended school year is hereby denied.

### ORDER

It is hereby ORDERED that:

1. The District did not fail in its Child Find obligation under IDEA and Section 504 to Student .
2. The School District failed to provide Student with a FAPE pursuant to the IDEA from April 3, 2009 through the end of the 2008-2009 school year.
3. The School District is required to provide compensatory education<sup>28</sup> to Student for two hours for each school day from April 3, 2009 through the end of the 2008-2009 school year for violation of FAPE under IDEA.

January 13, 2010

Date

*Deborah G. DeLauro*

Deborah G. DeLauro, Esquire  
Hearing Officer

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<sup>28</sup> 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.