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: M.B.

Date of Birth: [redacted]

ODR No. 13762-12-13-KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent	Harry P. McGrath, Esquire McGrath Law Office 321 Spruce Street, Suite 600 Scranton, PA 18503
Abington Heights School District 200 East Grove Street Clarks Summit, PA 18411-1776	William J. McPartland, Esquire Marshall, Dennehey, Warner, Coleman & Goggin 50 Glemaura National Boulevard Moosic, PA 18507
Dates of Hearings:	May 14, 2013; June 12, 2013
Record Closed:	July 11, 2013
Date of Decision:	July 20, 2013
Hearing Officer:	William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in the title page of this decision (Student) is a resident of the school district named in the title page of this decision (District). (S-6.) The Student's Parent, named on the title page of this decision (Parent), requests compensatory education for Student, and an order to create or revise an existing Service Agreement (Agreement) for Student pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504) and Chapter 15 of the Pennsylvania Code, the state regulations implementing section 504. Parent asserts that the District discriminated against Student on the basis of disability, specifically by failing to permit parental participation in developing the Agreement contrary to the federal and state regulations implementing section 504. Parent also asserts that the Agreement proposed by the District did not provide Student with a free appropriate public education (FAPE) as defined in the section 504 regulations and Chapter 15. The District denies these allegations and asserts that its Agreement addressed Student's needs sufficiently to provide equal access to and equal benefit of the District's educational services.

The hearing was concluded in two sessions, and the record closed upon receipt of written summations. I conclude that the Parent was denied meaningful participation, the Student was denied a FAPE, and both remedial and prospective relief will be ordered.

ISSUES

1. Did the District fail to comply with the procedural requirements of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504) and Chapter 15, by failing to allow Parent to fully participate in the planning and development of a section 504 service agreement?
2. During the relevant period, December 14, 2012 to May 14, 2013, did the District fail to provide Student with equal access to or benefit of the educational services provided to all

District students, by failing to provide a section 504 service agreement that appropriately accommodated for all of Student's disabilities that interfere with education?

3. Should the hearing officer order the District to provide compensatory education to the Student for all or any part of the relevant period?

4. Should the hearing officer 1) order the District to convene an educational planning meeting for purposes of developing or revising an Agreement; and 2) specify the participants to attend such meeting and other considerations?

FINDINGS OF FACT

1. The District was aware that Student had a history of disruptive and inappropriate behavior in classes and on the playground, during Student's second, fourth and fifth grade years. Behaviors included silly behavior, inattention, not listening to directions, an incident of inappropriate touching, and threatening behavior. These behaviors required various interventions, including suspension and an individualized behavior contract. (NT 30-41, 263, 267-271, 275; P-1, 3 p. 2, 5- 10.)

2. By Student's second grade, the District was aware that Student had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). (NT 36-38; P 4, 6.)

3. From January 1, 2010, when Student was in fourth grade, to January 24, 2012, when Student was in sixth grade and was suspended for bringing [an item] to school, Student did not incur any major disciplines, but received detentions and a half day suspension for various inappropriate behaviors. (NT 41, 228-229.)

4. In January 2012, during Student's sixth grade year, the District's middle school suspended Student, and subsequently it continued that suspension, for bringing [an item] into school on two occasions. (NT 41-44, 271-272; P-11, 12.)

5. Student attended a cyber-school from home for the remainder of the 2011-2012 school year. (NT 41-44.)

6. The middle school's vice principal did not review Student's elementary school record in any detail at the time of the incident that led to suspension, and was unaware of Student's diagnosis with ADHD until October or November 2012. (NT 263-273.)

7. Student's sixth grade homeroom teacher attributed Student's school difficulties to impulsivity. The teacher reported behavioral problems including poor homework quality, inability to follow rules, disruptiveness, poor organizational skills, short attention span, lying, flat affect, inability to work in a group setting, shyness and withdrawal when with peers and poor self-control in unstructured settings. (P 13 p. 4.)

8. On May 8, 2012, the homeroom teacher's observations were conveyed to the District's child study team as part of a referral for further evaluation, including possible evaluation for a section 504/Chapter 15 service agreement. (NT 44; P 13.)

9. On May 9, 2012, the District requested Parent's permission to evaluate Student, indicating an intention to conduct a psychoeducational evaluation, and forwarding behavior inventories. District officials met with Parent to discuss possible evaluation of Student. (NT 44-46; P 14, 15.)

10. Parent declined permission to evaluate. (NT 45-46.)

11. Parent requested due process in September 2012, and reached a settlement of claims with the District on September 24, 2012. (NT 47-49; P 16-18.)

12. Subsequent to the settlement, the District initiated and funded an independent educational evaluation (IEE) of Student, which was pending when Student returned to the District's middle school in November 2012 as a regular education seventh grade student. (NT 49-50; P 19.)

13. The District received the IEE on or about November 8, 2012. The evaluator administered cognitive and achievement tests, and two behavior inventories. One inventory was a standard instrument that elicits symptoms of a wide-range of diagnostic categories and behavioral difficulties. The other was a more specific instrument that probes deeper to elicit symptoms of attention and executive functioning problems. Both inventories were filled out by Parent and Student, but not by middle school teachers, because Student was not in school, and had not been in school for months. The evaluator obtained an oral report from a tutor who was working with Student at the time on the seventh grade core curriculum. (P 22.)

14. The evaluator found average to high average cognitive ability, and academic functioning in the average to high average range in most academic skill areas. Two areas of relatively poor performance on the achievement tests were attributable to Student's attention difficulties. (P 22.)

15. The evaluator found elevated levels of symptoms in the home, including symptoms of attention deficit hyperactivity disorder (ADHD), conduct disorder and oppositional/defiant disorder. Symptoms reported at home included hyperactivity, impulsivity, executive functioning deficits, and defiance. Behavior inventories showed elevated levels of attention problems and family difficulties, but not clinically significant levels of these difficulties. Inventories did not disclose elevated levels of defiance or oppositional behavior in the home. The evaluator interpreted inventory responses to indicate that ADHD was having a significant impact on Student at home and "potentially by extension" at school. (NT 404-407, 419-427; P 22.)

16. The evaluator found that Student was "very impulsive." The evaluator warned that this, combined with both a tendency to be argumentative and executive functioning deficits, could result in difficult situations for Student in the school setting, implying that Student's decision to bring [an item] to school was an example of such a situation. The evaluator warned that Student was likely to have social skills deficits and a tendency to act without thinking due to impulsivity. (P 22.)

17. The evaluator did not recommend identification under the IDEA as a child with a disability, or a particular placement. The evaluator did recommend accommodations

under section 504 through a Chapter 15 service agreement, due to the history of school suspension and other incidents of poor judgment. The evaluator recommended that the service agreement address the impact of Student's disorder upon Student's behaviors and choices in the school setting. (NT 407-409; P 22.)

18. The evaluator recommended that the Student be monitored for social difficulties, and that a school counselor or social worker help Student realize the consequences of Student's decisions and behaviors as part of the recommended service agreement. (P 22.)

19. At the time of the IEE, and as a result of Student's symptoms of ADHD and executive functioning deficits, Student was more likely than not to exhibit dysfunctional behaviors in school upon Student's return to the District's middle school. Student was and is in need of an Agreement containing interventions that are not available through the regular education program offered by the District, including monitoring of Student's behavior and counseling services. (NT 407-413, 426.)

20. Parent wanted the proposed Chapter 15 service agreement to address Student's impulsiveness, so as to prevent another suspension for violating the District code of student conduct. (NT 53.)

21. In late November or early December, 2012, District officials asked Student's teachers to collect data on Student's behavior without notifying or obtaining consent from Parent; however, teachers decided among themselves not to collect objective data utilizing data gathering forms, due to the short time frame for observation. Instead, teachers related subjective impressions of Student's behavior when asked to report on Student's class performance in a meeting or meetings that took place sometime prior to December 10, 2012. (NT 59-60, 93, 130, 142-143, 149, 222; P 30 p. 1.)

22. The District's director of special education did not review Student's prior elementary school behavioral history prior to the December 2012 meeting or meetings. (NT 327-328.)

23. In early December, prior to December 10, 2012, District officials met without inviting Parent. (NT 60, 173, 182-183; P 21, 27, 30, 31, 32, 34-36.)

24. At and after the meeting, with teacher input, administrators formulated the Agreement, which did not contain accommodations designed to address Student's impulsiveness, poor behavioral choices, social needs, or potential to violate rules due to impulsiveness. (NT 54, 94, 116, 121, 142-143, 206, 224-227; P 25-34.)

25. The IEE report was not considered at the December meeting. There was no review of Student's behavioral history prior to November 2012, although there was general reference to a history of problematic behaviors and teachers were asked if they were seeing anything. It was disclosed that Student was diagnosed with ADHD, but this was not discussed in detail. There was no discussion of the reasons for Student's suspension from school in sixth grade or any accommodation that might be needed due to Student's history of inappropriate behaviors, impulsiveness, emotionality or hyperactivity. Teachers reported on Student's class performance during the approximate month in which student had been with them. At least one teacher reported that Student continued

to be disruptive in the classroom, and exhibited behaviors consistent with past behavioral problems. (NT 94-97, 106, 115-116, 121-123, 133-135, 137, 146-148, 157-159, 162, 166-176, 254, 258, 283-285, 289, 292-295, 310-311, 350, 353; P 13 p. 4.)

26. During the December meeting, no one was aware of the recommendations of the IEE except the administrators present, who did not inform the rest of the participants. The administrators did not include any of the IEE recommendations concerning Student's behaviors in the Agreement. (NT 166-176, 195, 276; P 28, 34.)

27. The administrators who attended the meeting were not aware of Student's history of prior suspensions and behavioral problems in grade school. (NT 180-181, 266-275, 326-331.)

28. The Agreement acknowledged that Student had an impairment – ADHD - which substantially limited the life activity of learning. It noted the area of need to be "classroom accommodations necessary to assist" Student. (P 34.)

29. The Agreement did not change Student's regular education placement. The Agreement listed three accommodations and services: 1) seating with proximity to teacher; 2) utilization of an agenda book, to be initialed by both the teacher after each class and Parent after each day; 3) one day of extra time to complete homework. (P 34.)

30. District administrators posted the Agreement they had drafted on the District's computer website "Sapphire", which usually indicates a final and effective document. They posted the Agreement before meeting with Parent. (NT 147; P 36.)

31. Teachers implemented the accommodations discussed in the December meeting and written in the Agreement immediately after the meeting. (NT 94, 135-136, 147, 260.)

32. District officials did not provide the proposed Agreement to Parent or obtain Parent's consent to its implementation, or send procedural safeguard notices to Parent, before implementation of the Agreement. (NT 55, 61, 206-208; P 25-34.)

33. The District Director of Student Services met with Parent on January 17, 2013 and reviewed the Agreement for less than 30 minutes. The Director did not discuss the recommendations of the IEE with Parent during this meeting, and did not discuss the fact that none of the behavioral recommendations of the IEE were part of the Agreement. The Director did not notify Parent that the plan had been implemented one month before the meeting date. The Director promised to send a copy to Parent but did not do so. Parent did not sign the Agreement. (NT 56-58, 70, 240.)

34. The Director was aware in January 2013 that Student had a propensity to commit many errors in judgment. (P 59 p. 1.)

35. Parent declined to initial the agenda book daily, because Parent did not understand the reason for this procedure. (NT 56.)

36. Teachers did not require Student consistently to utilize the agenda book and Student threw the book away. (NT 79, 99-100, 104, 110-111, 124, 126, 132, 136, 144, 253, 256-257.)

37. Teachers did provide Student with preferential seating and, if needed, extra time to complete homework. (NT 103-104, 126, 132, 138-139, 144-145, 151, 253; P 34, 45, 47-49, 56.)

38. In April 2013, the District obtained data on Student from teachers utilizing a behavior inventory that addresses specifically a student's attention and executive function difficulties. The District did not notify Parent ahead of time, obtain Parent's consent, or provide Parent with notice of procedural safeguards. The results were not sent to Parent. (NT 62-64; P 43.)

39. The report after scoring the inventory indicated that Student had an elevated global index for symptoms of ADHD, and that Student remained at that time moody, emotional, restless, impulsive and inattentive. Student did not display these symptoms in all classes, but the scores indicate that Student was at risk for future problematic behaviors. (NT 137-139, 145, 367-368; P 22, 43.)

40. In the first quarter of the Student's seventh grade year at the District's middle school (2012-2013 school year), Student failed to turn in on time numerous homework assignments. (NT 66; P 51.)

41. After the Agreement was signed and partially implemented, Student's grades for homework completion improved significantly. (P 51.)

42. After Student's return to the District middle school in November 2012, Student has not presented behavioral or disciplinary problems for the teachers, and Student's grades have been "A"s and "B"s. (NT 81, 106-107, 124, 127, 137, 151-152, 154; P 42, 51.)

43. The Director of Special Education was of the opinion that the test of whether a disability affects a major life activity is whether or not it affects the student's access to the curriculum; thus, the director did not believe that a revision of the Agreement was necessary, as Student's grades indicated access to the curriculum. (NT 339.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[1] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[2] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)[3]

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent's claim, or if the evidence is in "equipoise", the Parent

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[1] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[2] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

[3] Although Parent brings this matter solely under section 504, the Supreme Court's analysis in Schaffer was based upon basic principles in the common law and in administrative law. I see no reason to deviate from this analysis under section 504. Moreover, the Third Circuit Court of Appeals has recognized that the two statutes are unusually similar with regard to the rights that they protect, and that at least one procedural requirement of the IDEA should be applied in section 504 cases. P.P. v. West Chester Area School District, 585 F.3d 727, 736 (3d Cir. 2009)(applying the IDEA statutory limitation of actions to section 504 cases). I conclude that the reasoning in these cases is applicable to section 504 cases; thus, I follow those cases here.

cannot prevail under section 504 or the federal and state regulations that implement section 504 in Pennsylvania.

FAPE AND PROCEDURAL SAFEGUARDS UNDER SECTION 504 AND CHAPTER 15

The Rehabilitation Act of 1973, section 504, provides:

> No otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance … .

29 U.S.C. §794. Federal regulations implement this prohibition in school districts receiving federal financial assistance.[4] 34 C.F.R. §104 et seq. The regulations define discrimination to include denying a qualified person with a disability the opportunity to participate in or benefit from the state-provided aid, benefit, or service, 34 C.F.R. §104.4(b)(i); affording benefits or services that are not equal to those afforded others, 34 C.F.R. §104.4(b)(ii); providing services or benefits that are not as effective as those provided to others, 34 C.F.R. §104.4(b)(iii); and providing different or separate benefits or services, unless different services are needed to provide equal and equally effective benefits or services, 34 C.F.R. §104.4(b)(iv).

These regulations require school districts to provide a FAPE to qualified handicapped children[5], but the federal regulations implementing section 504 define that obligation differently than under the IDEA. Districts must provide "regular or special education and related aids and services that (i) are designed to meet individual educational needs of [persons with disabilities]

[4] I take administrative notice that the District receives federal financial assistance within the meaning of section 504, because the District is bound by the IDEA, which is a federal funding statute. The District has provided Student with an Agreement, thus implicitly acknowledging that it is subject to section 504, and it has not denied section 504 applicability.

[5] As with federal funding and obligation under section 504, I also take notice that the District implicitly acknowledged Student's status as an otherwise qualified person under section 504, when it provided Student with an Agreement; the Agreement recites that Student is a child with a disability qualified under section 504. (P 34.) This was not disputed in the present matter.

as adequately as the needs of [non-disabled] persons are met and (ii) are based upon adherence to procedures that satisfy" the procedural requirements of section 504. 34 C.F.R. §104.33(b)(1).

Districts are obligated to evaluate children within their jurisdiction appropriately to determine whether or not they need special services and accommodations under section 504. 34 C.F.R. §104.32(a). The District must evaluate "any person who, because of [disability], needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 C.F.R. §104.35(a).

While the federal regulation's evaluation requirement applies explicitly to placement decisions, Pennsylvania's Chapter 15 provides that a district may need to evaluate in order to provide related aids, services or accommodations. 22 Pa. Code §15.5(c). A district must request parental consent to evaluate, and specifically identify the evaluative procedures or tests to be utilized. 22 Pa. Code §15.5(c), (d).

Section 504 requires districts to provide notice to parents of any action taken with regard to the identification, evaluation, or educational placement of a qualified child with a disability. 34 C.F.R. §104.36. Chapter 15, moreover, provides Parents with explicit rights that enable them to participate in the planning of any section 504 service agreement. Parents are entitled to prior written notice of any proposed change in the Student's section 504 status or agreement, and notice of procedural safeguards. 22 Pa. Code §15.5(a), (b)(3), (9). The district must notify parents that they have a right to review relevant records and meet with school officials to discuss any evaluation or accommodations to be implemented. 22 Pa. Code §15.5(b)(4), (5). Services are to be memorialized in a service agreement between parents and the district. 22 Pa. Code §15.7.

PARENTAL PARTICIPATION

As noted above, section 504 requires districts to notify parents regarding identification, evaluation or placement of a qualified child with a disability, and Chapter 15 makes clear that parents are to be given notice and a meaningful opportunity to participate in the devising of the service agreement. I conclude that the District in the present matter failed to comply with these procedural requirements in November 2012 and subsequently.

The District failed four times to notify Parent as required by Chapter 15. First, in November 2012[6], District administrators initiated an evaluation within the meaning of Chapter 15 without giving Parent a chance to consent or withhold consent. Second, administrators devised a section 504 service plan without parental input in December 2012. Third, the administrators failed to notify Parent that services were being provided to Student pursuant to the December plan. Fourth, administrators initiated an evaluation in April 2013 without giving Parent a chance to give or withhold consent.

Parent contends that the District should have notified Parent before it directed teachers to collect data on Student's classroom behavior in November 2012. While Chapter 15 does not define what constitutes an "evaluation", it does require that districts notify parents when they conclude that a child should be identified under Chapter 15, 22 Pa. Code §15.5(a)(1), and it also requires districts to seek permission to evaluate, 22 Pa. Code §15.5 (c). Thus, I conclude that Chapter 15 requires districts to seek prior consent before initiating an evaluation.

[6] Parent argues that the homeroom teacher's report of observations of the Student violated Chapter 15 because the District did not notify Parent of the intention to evaluate Student or obtain Parent's consent to evaluation before the teacher forwarded the observations to District officials. 22 Pa. Code §15.5(d). I conclude that the teacher observations were not the kind of "tests" or "strategies" that Chapter 15 intended to subject to procedural constraints. Rather, these observations were simply a routine report from a teacher who saw Student in class frequently, for purposes of referring Student for further evaluation. Chapter 15 does not require parental participation or consent for such communications.

The record is preponderant that the District was evaluating Student in order to plan a Chapter 15 service agreement when it asked the teachers to collect data on Student. This data collection would not have been part of the ordinary routine of the classroom. Data collection targeted only Student. I conclude that the request was for an evaluation within the meaning of 22 Pa. Code §15.5, and that the District failed to comply with the regulation's requirements when it failed to notify Parent and solicit Parent's consent to evaluate for Chapter 15 purposes.

Parent was excluded from meaningful participation in the planning process. Parent was not present at the December meeting or meetings[7] where interventions proposed by District administrators were discussed and accepted by Student's teachers. Moreover, at those meetings, only the administrators were aware of the results of the November 2012 IEE in which the evaluator had recommended a service agreement providing counseling and behavioral interventions. The record is preponderant that the administrators did not even disclose the report to the teachers at the meeting. As the IEE had been requested by Parent, it was part of the Parent's input into the planning of a service agreement, yet it was ignored.

The teachers implemented the plan devised by the administrators immediately after the December meetings; however, no one from the District notified the Parent, as required by Chapter 15. 22 Pa. Code §15.7 (requiring agreement of parent to services included in or omitted from service agreement.) It was not until a meeting between Parent and the District's director of student services in late January 2013, about one month after implementation began, that Parent was notified that a plan had been proposed. Even then, the director did not notify Parent that the

[7] The record is mixed as to why the District did not have Parent present at the December meeting or meetings. District officials depicted difficulty finding a date for Parent to be present; yet, administrators also stated that it is the practice of the District to formulate section 504 service agreements without consulting the parent beforehand. On balance, the evidence is preponderant that the District went ahead without Parent deliberately, and that it was not obstructed in a good faith attempt to have Parent attend.

plan was being implemented.[8] Nor did the director advise Parent that the IEE recommendations had been ignored at the December meeting with teachers, and were not part of the recommended or implemented services. The record shows that the meeting in January with Parent was perfunctory and that it could not have lasted even one half hour; I conclude that the meeting was not sufficient to comply with the notice and parental participation requirements of Chapter 15, including solicitation of parental consent.

PROVISION OF A FAPE

I conclude that the District failed to provide Student with an appropriate section 504 service agreement, and thus failed to provide Student with a FAPE as required by section 504 and Chapter 15 during the relevant period. Regarding the appropriateness of the Agreement, I conclude that it failed to address all of the Student's educational needs that arose from Student's disability. Regarding the provision of a FAPE, I conclude that the District failed to provide Student with an equally effective education in the social and behavioral skills that are a necessary part of the District's curriculum.[9]

The evidence is preponderant that the Agreement should have addressed Student's behaviors. Parents also proved that the District knew this or should have known it. I conclude also that the Agreement failed to address all of Student's needs arising from Student's disability, because it ignored the recommendations of the IEE report, and because it was not implemented consistently.

[8] The District points out that the Parent knew about its implementation through Student's report of the requirement for utilization of a daily journal or log. However, this is beside the point. Parent never had a clear opportunity to formally consent or withhold consent to the proposed Agreement as the law requires.

[9] I find the District's cited case on the elements of a section 504 claim, to be inapposite. Andrew M. v. Delaware County Office of Mental Health and Mental Retardation, 490 F.3d 337, 349 (3d Cir. 2007). This case arose under Part C and was based upon a very narrow set of facts and its holding cannot be generalized to the extent that the District suggests.

The District knew or should have known that Student's disability of ADHD repeatedly had manifested itself in problematic behavior, and was likely to do so again. It was on notice of Student's history of unusually and seriously problematic behaviors in elementary and middle school that pointed to a potential for problematic behaviors in the future. Moreover, before devising the Agreement in December, District administrators knew that Student had exhibited problematic behavior in the first half of sixth grade, before Student's serious rule violation and lengthy suspension. The administrators knew that the behaviors reported in sixth grade constituted evidence of a substantial behavior problem, and that Student had exhibited seriously problematic behaviors at home while suspended from school in the latter half of sixth grade and in the subsequent summer and fall of 2012. District officials were aware that an independent evaluator had warned in November 2012 that Student was at risk for seriously problematic behaviors in school whenever Student should be returned from suspension,[10] and that the evaluator had recommended monitoring of Student's behavior and counseling as part of a section 504 service agreement. [11]

The District failed to address the behavioral aspect of Student's ADHD, and thus failed to address all of Student's educational needs arising from Student's disability. The Agreement accommodated for attention difficulties, but these were not the only problematic aspect of Student's disability. Student had a documented propensity to act out in self-destructive ways in school, and this record shows preponderantly that such impulsive and dysfunctional behavior

[10] This prediction was bolstered by the previous report of the sixth grade teacher, known to the District when it received the IEE report, and was corroborated by the subsequent April 2013 Connors inventory of teachers, which showed a serious behavior problem in seventh grade.

[11] The District argues that the evaluator's opinion should be disregarded because the evaluator did not recommend a functional behavioral assessment (FBA) upon Student's return to school. I conclude that this judgment does not vitiate the evaluator's opinion, because there were numerous practical reasons not to recommend an FBA at that juncture, not the least of which is that the evaluator considered the behavior to be a product of internal rather than external functions, and that these needed to be treated medically, while such treatment was supported by monitoring and counseling at school. Thus, the judgment not to recommend an FBA was not inconsistent with the overall findings and recommendations.

was a symptom of Student's ADHD. While some behavioral supports are generally available in the middle school, such as a counselor by request, those were no substitute for a section 504 service agreement that could assure timely provision of services and reliable monitoring of behavior. Thus, the Agreement as implemented was not reasonably calculated to effectively address Student's behavioral needs.[12]

Moreover, the Agreement, with its flaws as explained above, was not implemented consistently. Within weeks of Student's return from a months-long suspension for serious violation of the Student Code of Conduct, Student tested the available limits by tossing the "agenda book" (required by the Agreement to be signed by teachers and Parent) in the trash. Teachers asked Student once or twice and then forgot about that aspect of the Agreement. Parent did not follow up, since Parent did not understand the purpose of the accommodation.[13] As Parent's expert explained, this taught Student how easy it was to simply disregard the controls and supports available through the Agreement, thereby increasing Student's risk for more serious acting out in the future.

Fortunately, Student has not committed any serious breach of school discipline from Student's return to school in November 2012 until the last day of the hearing in the present matter. The District argues that this, in addition to good grades overall, is proof that its Agreement was sufficient to address Student's needs and that, therefore, it did not fail to offer a FAPE. However, the record shows preponderantly that Student has not yet learned to control Student's behavior in school to an extent equal to the behavioral control of non-disabled

[12] I weighed the evidence supporting this conclusion against the opinion testimony of the Director of Special Education, who opined that there was no such risk, based in large part on defensive statements that had been made by Parent seeking to minimize the significance of the Student's disciplinary record. (NT 353-358.) I conclude that the preponderance of the evidence is contrary to the Director's opinion.

[13] This is hardly surprising since Parent did not get a chance to participate in the formulation of the Agreement – or even to give or withhold consent to it.

students. I conclude that this is an essential part of the curriculum for middle school.[14] Thus, the District has failed to provide educational services that are equal to those provided to non-disabled students, who are taught appropriate behavior and behavioral self-control in the District's educational program.

It is well accepted that education in Pennsylvania must address basic developmental needs in the emotional, behavioral and social domains. The regulations promulgated by the Pennsylvania Department of Education for public education require local education agencies to "prepar[e] students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens." 22 Pa Code § 4.11(b). Thus, public education in Pennsylvania is intended to provide opportunities for students to: (1) Acquire knowledge and skills. (2) Develop integrity. (3) Process information. (4) Think critically. (5) Work independently. (6) Collaborate with others. [and] (7) Adapt to change. 22 Pa Code § 4.11(c). The Department's regulation entitled "Elementary Education: primary and intermediate levels" mandates that "curriculum and instruction in the primary program shall focus on introducing young children to formal education, developing an awareness of the self in relation to others and the environment, and developing skills of communication, thinking and learning". 22 Pa Code 4.21(b). I conclude that none of these educational benefits are attainable without a basic ability to regulate emotions and control one's behavior. Thus, a failure to address these developmental skills when impaired by disability is a failure to provide equal educational benefits, contrary to section 504 and Chapter 15. Cf., M..C. v. Central Regional S. D., 81 F.3d 389 (3rd Cir. 1996),

[14] The District's Director of Special Education agreed that this is a goal of middle school education, but countered that it is measured by grades, a proposition which I do not find to be self-evident, and for which I find inadequate basis in the record. (NT 344-346.)

cert. den. 117 S. Ct. 176 (1996)(education includes progress in emotional and social domains); Breanne C. v. Southern York County School District, 2010 WL 3191851 (M.D. Pa. 2010)(education includes progress in all relevant domains under the IDEA, including behavioral, social and emotional.)

Student showed good grades during the relevant period; however, this metric alone does not show that Student made educational progress in emotional regulation and self-control, the two developmental areas prominently impacted by Student's ADHD.

CREDIBILITY

In reaching my findings and conclusions, I assigned varying weight to the testimony. I found the Parent to be credible and reliable, and gave full weight to the Parent's testimony.

I gave some weight to the teachers' testimony, but found reason not to rely upon their conflicting responses as to the degree to which they discussed Student's behavior in school during the December meeting. The teachers gave conflicting testimony that also conflicted with the testimony of the director of student services and with the documentary record. Two teachers denied that behavior was discussed and two indicated that it was discussed. The director asserted that it was discussed and that behavioral problems were reported (something that none of the teachers had admitted), but that teachers stated that behaviors could be addressed through normal classroom behavior management techniques. Thus, they did not consider it necessary to include behavioral accommodations for Student in the Agreement. All of this testimony stands in stark contrast to the director's contemporaneous email message dated December 10, 2012, which states:

> [Name redacted] and I met with [Student's] teachers last week. [Student's] observed behaviors seem to be consistent with what teachers have observed in the past. [Student] continues to be disruptive and gravitates toward students with whom [Student] can disrupt the classroom. They reported some inattentiveness, but not a great deal. [Student] is inconsistent with [Student's] homework and is not giving much effort in completing class work.

(P 33 p. 2.) Considering all of the evidence, and the irreconcilable conflicts among teachers' testimony, the director's testimony, and the documentary record, I give reduced weight to the teachers' statements about what was said at the meeting about Student's behavior.

There was no conflict in the District witnesses' testimony that neither Student's longstanding history of behavioral issues in grade and middle school, nor the recommendations of the IEE were discussed at the meeting. Thus, I can accord some weight to this testimony, especially since it comports with the Agreement itself, which shows no attention to behavioral issues such as those stated in the director's summary of the meeting on December 10, 2012.

I cannot accord weight to the testimony of the District's director of student services. This witness, called by Parents, displayed a way of answering questions that required Parent's attorney to cross examine. On the pertinent question concerning who decided not to include the recommendations of the IEE in the Agreement, the witness steadfastly avoided answering, when the evidence was plain that it was a decision of administration – either consciously or by default. Even when confronted by the witness' own statement in a contemporaneous email message that the director had forgotten about the existence of the IEE when meeting with teachers (NT 157, 162; P 33 p. 1), the witness testified that the witness had not yet read the document. The witness also embellished as to what the witness had reviewed prior to the December meeting at which recommendations were discussed for the Agreement, and minimized as to the extent of the witness' contribution to the substance of the Agreement. (NT 162-163, 179-181.) In view of

these contradictions with the testimonial and documentary record, I cannot rely upon the witness's testimony.

The director of special education asserted that Student has recently changed Student's ways, in that Student has moved away from a social peer group that was causing Student to behave inappropriately. When asked, the Director was unable to say where the director heard this information, but thought that it might be from a counselor at the middle school. (NT 342-349.) I give no weight to this assertion, as it is uncorroborated hearsay that does not even identify the source of the hearsay.

I accorded substantial weight to Parent's expert report and the testimony of Parent's psychologist witness. This individual had a doctorate in psychology, Pennsylvania school psychology certification, and many years' experience in both evaluation and administration of educational services. The expert was fully qualified by education, training and experience to administer psychological tests, conduct an educational evaluation, and interpret the meaning of the various sources of data, including recorded and orally related history, observation of the Student, interviews and testing. Called as on cross examination by the District, the expert was able to defend her opinions effectively and consistent with sound practice in the field of psychology. Therefore, I relied upon her opinion in making the finding that Student was more likely than not at the time of evaluation to need interventions and accommodations to address Student's behavior.

The District sought to undermine the expert's opinion based upon two weaknesses: first, the expert's opinion was not supported by sufficient objective data, and second, the expert characterized the Student's scores on the Connors behavior inventory inaccurately. While I gave

both of these lines of attack considerable importance in weighing the evidence, ultimately I conclude that they do not undermine the expert's testimony to a substantial extent.

The expert did report scores on two different inventories that indicated no clinically significant problems with oppositional and defiant behavior; the only very high score was for inattention, the area that the District did address in the Agreement for Student. On the broader inventory, no responses were elicited from Parent that indicated any kind of emotional disorder or difficulty. However, on the narrower inventory, the Connors, which seeks to delve more deeply into behaviors associated with attention deficit hyperactivity disorder, elevated scores were elicited indicating that Student was struggling with problems of attention and executive functions. The expert credibly and reliably concluded that these scores constituted evidence of substantial problematic behaviors associated with ADHD. The expert credibly explained that the scores from the inventories did not undercut the expert's conclusions.

As to the mislabeling of the score ranges for the Connors inventory, the expert, confronted with a page from the manual, admitted that this was incorrect. The expert never explained why this appeared in her report, and such inaccuracy did give me pause. However, I note that the expert's report characterizes the scores of the Connors as "elevated", which is the nomenclature recommended in the manual. (NT 420-423; P-22 p. 9.) Thus, the report is substantially consistent with the Connors manual on this record.

In sum, based upon the entire record, and I found that the expert's testimony was reliable despite the error in the report. I found no basis upon which to infer that the inaccuracy was deliberate; thus, it did not affect the expert's credibility. I found no other instance of inaccuracy. Thus, I relied upon the expert's report and testimony as substantial evidence.

COMPENSATORY EDUCATION AND PROSPECTIVE RELEIF

Compensatory education in due process matters is equitable in nature. In determining what relief is due in this case based solely upon section 504, I choose between the hour for hour approach to compensatory relief approved and common in the Third Circuit, and the approach which seeks to bring the student up to the level of educational achievement that the student would have attained if not deprived of a FAPE.[15] Neither approach is fully supported in the record, but I choose the latter remedy because it addresses at least the purpose of addressing Student's future risk of dysfunctional acting out.

In this matter, I find the hour for hour remedial approach to be unsatisfactory. While there was sufficient and preponderant evidence of a denial of a FAPE, there was little evidence from which to derive an hour for hour measure of compensatory education. Moreover, I see little to gain by ordering additional hours of counseling above and beyond that which will be ordered prospectively. There is no record basis from which to infer that simply adding hours of counseling will benefit Student, and there is reason to be concerned that large amounts of counseling per week for someone of Student's age, in the educational setting, would rapidly reach a point of diminishing returns or interfere with attendance in other important school activities.

In a matter involving a student with a gifted exceptionality, the Pennsylvania Commonwealth Court recently explained the "make whole" equitable approach to awarding compensatory education:

> [W]here there is a finding that a student is denied a FAPE and the Panel determines that an award of compensatory education is appropriate, the student is

[15] These principles are derived from IDEA case law by analogy. As noted above, at footnote 3, the Third Circuit has approved the reference to IDEA principles in procedural matters. I conclude that IDEA case law concerning equitable relief is at least instructive when fashioning an equitable remedy in the closely analogous section 504 situation, and provides an appropriate guide for my exercise of equitable authority in this matter.

> entitled to an amount of compensatory education reasonably calculated to bring [the student] to the position that [the student] would have occupied but for the school district's failure to provide a FAPE....
> [B.C. v. Penn Manor Sch. Dist., 906 A.2d 642, 650-651 (Pa.Commw.Ct. 2006).]

The Court noted that this standard differs from the one-for-one approach, because it can require awarding either more or less than would be awarded one-for-one. Ibid. This standard has been applied in IDEA cases in at least one federal district court in the Third Circuit. Marple Newtown School District v. Rafael N., No. 07-0558, 2007 WL 2458076 (W.D. Pa. 2007).

I find that the B.C. approach is especially appropriate to this matter. By its very nature, the past deprivation of behavior monitoring and counseling is amenable to remedy by simply ordering counseling now, to bridge the time from the present to the time when a new section 504 plan with appropriate counseling and monitoring is in effect pursuant to my order. There was no evidence to show how to restore Student to the level of educational achievement that Student would have attained if FAPE had been delivered in this matter. However, the Parent's expert indicated that the recommendation of counseling was primarily for purposes of providing a safety factor in the face of risk and active symptoms of ADHD. Therefore, I am satisfied that an immediate start to counseling at the beginning of the school year, coupled with an order for a revised Agreement containing regularly scheduled counseling in the 2013-2014 school year, will be most likely to "bring [the student] to the position that [the student] would have occupied but for the school district's failure to provide a FAPE." Penn Manor, above.

CONCLUSION

I conclude that the District failed to comply with the procedural and substantive requirements of section 504, thus depriving Student of a FAPE within the meaning of section 504. I will order both prospective and remedial relief, including counseling and behavior

monitoring, as discussed above. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

The District failed to comply with the procedural requirements of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504) and Chapter 15 of the Pennsylvania Code, by failing to allow Parent to fully participate in the planning and development of a section 504 service agreement.

During the relevant period, December 14, 2012 to May 14, 2013, the District failed to provide Student with equal access to or benefit of the educational services provided to all District students, by failing to provide a section 504 service agreement that appropriately accommodated for all of Student's disabilities that interfere with education.

The hearing officer orders the District to provide compensatory education to Student in the form of weekly scheduled meetings with the assigned counselor at the middle school, in the amount equivalent to one school period per week, beginning in the second week of Student's eighth grade year (2013-2014 school year), and ending upon provision of a revised section 504 service agreement, subsequent to the meeting ordered herein.

Within fourteen days of the start of the 2013-2014 school year, the District shall convene a meeting with the individuals designated herein in order to revise the existing section 504 service agreement by including counseling services, monitoring of Student's behaviors, and any other service or accommodation that the group so convened deems appropriate to assure provision of equal and equally effective educational services to Student for purposes of section 504 compliance.

The group shall consider fully the Student's entire behavioral history at the District, including grade school behaviors, as well as the October 22, 2012 report and recommendations of the Independent Educational Evaluator, and any other assessments or evaluations deemed appropriate by the group in conformance with 34 C.F.R. §104.35, all other regulations implementing section 504, and Chapter 15 of the Pennsylvania Code.

The group shall include Parent, the Student if Parent requests, appropriate teachers from Student's seventh and eighth grade years (as determined by agreement of the parties), an administrator authorized to commit District resources and approve all revisions to the section 504 service agreement, and any other person deemed appropriate by the parties, including counsel, or required by law to be present.

Services pursuant to the revised section 504 service agreement shall be implemented upon the delivery of Parent's written consent to the District or to its agent.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

July 20, 2013