

*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

### FINAL DECISION AND ORDER

Student's Name: P.M.

Date of Birth: [redacted]

ODR No. 14400-1314AS

### CLOSED HEARING

Parties to the Hearing:

Parent[s]

Muncy School District  
125 New Street  
Muncy, PA 17756

Representative:

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Dates of Hearing: 02/21/2014, 03/21/2014, 04/17/2014, 04/25/2014  
05/05/2014, 06/04/2014

Record Closed: 06/30/2014

Date of Decision: 07/14/2014

Hearing Officer: Brian Jason Ford

## INTRODUCTION AND PROCEDURAL HISTORY

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4., as effectuated by 22 Pa. Code § 15 *et seq.* (Chapter 15).

The Parents' original complaint was filed on October 18, 2013. That matter was conditionally dismissed on November 6, 2013. The matter was then reinstated on January 14, 2014. Next, the matter was bifurcated to address an issue concerning the IDEA's statute of limitations (the Parents claimed exceptions to the statute of limitations). A hearing to take evidence concerning the limitations issue convened on February 21, 2014. On March 7, 2014, I issued a Preliminary Decision wherein I found that the IDEA's two-year statute of limitations applies to this case. Five additional hearing sessions then convened regarding the issues identified below.

### ISSUES

1. Is the Student IDEA-eligible (meaning, is the Student a "child with a disability" as defined by the IDEA at 20 U.S.C. § 1401(3)(a))?
2. Is the Student Section 504-eligible or Chapter 15-eligible (meaning, is the Student a "handicapped person" as defined at 34 CFR § 104.3(j) or a "protected handicapped student" as defined at 22 Pa. Code § 15.2.<sup>1</sup>)
3. Must the District fund an independent educational evaluation (IEE) for the Student?
4. Must the District provide a Functional Behavioral Assessment (FBA) and a Behavioral Support Plan (BSP), regardless of the Student's eligibility under the IDEA or Section 504?
5. Is the Student entitled to compensatory education to remedy any denials of either the IDEA or Section 504?

### FINDINGS OF FACT

All evidence and testimony was carefully considered, but not every document that was entered into the record is referenced in this decision. Facts are found only as necessary to resolve the issues noted above.

A substantial number of the Parents' exhibits were admitted over the District's standing hearsay objection. During the hearing, I explained that hearsay was admissible but

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<sup>1</sup> The parties frame this issue in the context of Section 504 eligibility. In Pennsylvania, Section 504 is effectuated via Chapter 15.

could not be used to form the basis of this decision. Consistent with this determination, no hearsay evidence or testimony was used to form the basis of this decision.

Twenty seven (27) findings of fact were made in the Preliminary Decision concerning the statute of limitations. As explained to the parties, those facts are incorporated into this final decision. So that this decision will not be disjointed, the first 25 of those 27 findings are repeated below, interspersed with and/or supplemented by new findings.

1. The 2007-08 school year was the Student's first grade year.
2. During the 2007-08 school year, the Student's first grade teacher expressed concerns regarding the Student's handwriting and organizational skills. (NT at 32-33).
3. The Student's report cards for the 2007-08 school year note some concerns about writing and organization. (S-2).
4. The same report card shows that the Student received an "S-" for penmanship – with "S" meaning "satisfactory" – in all four quarters of the 2007-08 school year. (S-2).
5. The same report card also shows "S-" for "Demonstrates organizational skills" in the first, second and fourth quarters of the 2007-08 school year. The Student received an "N" – with "N" meaning "needs improvement" for "Demonstrates organizational skills" in the third quarter. (S-2)
6. The District relies upon its intermediate unit (IU) for occupational therapy evaluations.
7. The District referred the Student to the IU for an occupational therapy evaluation towards the end of the 2007-08 school year. The record does not reveal the exact date of the referral.
8. The IU sent a "Parental Consent for Occupational Therapy Evaluation" form (Consent Form) to the Parents on April 21, 2008. That form was not the standardized IDEA consent form promulgated through the Pennsylvania Training and Technical Assistance Network (PaTTAN).<sup>2</sup> That form contained no reference to the IDEA or its procedural safeguards. (P-3).
9. The Parents completed and returned the Consent Form to the IU. (P-3).
10. The IU also provided an "Occupational Therapy Student Information" form to the Parents to be completed by the Student's physician. The Parents had that form completed by the Student's physician and returned it to the IU. (P-4).

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<sup>2</sup> I take judicial notice that the current version of the PaTTAN consent forms became effective on October 9, 2008.

11. A Registered Licensed Occupational Therapist (OTR/L) (the evaluator) conducted an occupational therapy evaluation on May 14, 2008. The test included observations of the Student in school, and the Bruininks-Oseretsky Test of Motor Proficiency. (P-7)
12. The OT evaluation was not substantively different from evaluations that the evaluator conducts as part of special education evaluations. (See NT at 121-114).
13. The OT evaluator understood that the OT evaluation was not part of a special education evaluation at the time it was conducted. (See *id.*)
14. During the OT evaluation, the Student “was fidgety, anxious, and sat on [Student’s] knees during the evaluation.” (P-7)
15. Based on the Student’s presentation during the OT evaluation, the evaluator completed a Sensory Profile School Companion. (P-7).
16. The Sensory Profile Companion revealed both “borderline” and “definite” sensory issues. (P-7).
17. The OT report included two measurable, objective OT goals for handwriting and five general “sensory recommendations.” (P-7)
18. Pursuant to the OT report, OT services were provided to address the Student’s fine motor skills. (P-7).
19. Regarding the sensory needs, the report states that the occupational therapist “will assist the teacher in monitoring the sensory issues, and will make further changes or suggestions as necessary.” (P-7).
20. The Student received occupational therapy for 30 minutes per week. The record does not reveal an exact date when those services started, but it appears that services started either at the end of the 2007-08 school year or the start of the 2008-09 school year. (See P-10).
21. The Parents were aware that the Student was receiving occupational therapy. (NT at 79).
22. Although the Parents were aware that the Student was receiving occupational therapy, these services were not provided pursuant to an IEP or Section 504 service agreement. The Parents did not formally approve these services via a Notice of Recommended Educational Placement (NOREP).<sup>3</sup>

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<sup>3</sup> Although there is no true stipulation as to these facts, they are not in dispute.

23. An IU-employed occupational therapist (not the same person who conducted the evaluation) provided occupational therapy to the Student in school. The therapist drafted Occupational Therapy progress reports. (P-10).
24. The Parents obtained a private Neuropsychological Assessment of the Student (the Neuropsych). That report is dated July 29, 2011. The Neuropsych diagnosed the Student with “Learning Disorder (NOS)” and “Adjustment Reaction with Mixed Disturbance of Emotions and Conduct.” (P-16)<sup>4</sup>
25. The Parents shared the Neuropsych before January 30, 2012. The Neuropsych is referenced in the District’s own report of January 20, 2012 (discussed below). (P-19 at 8). See *also* NT at 862-863, 867, 1096.
26. Although the Neuropsych was shared, it was not broadly distributed amongst the people who worked with the Student in school. See, *e.g.*, NT at 209, 296 (correcting testimony at 294-295), 406.
27. The Student received OT services from the IU until November 14, 2012. (P-10).
28. On November 22, 2011 the Parents sent a “Permission to Evaluate (PTE) - Evaluation Request Form” to the District. (S-2). This is a PaTTAN-promulgated form that makes reference to Pennsylvania’s Notice of Procedural Safeguards.
29. On the PTE, the areas of concern noted by the Parents were: “amount of homework,” “stress over forgetting homework,” “stress over homework,” and “stress over grades and missing recess.” (S-2).
30. Based on parental input, the District’s evaluator, an IU-employed Certified School Psychologist (CSP), understood that the Parents were also concerned about the Student’s “difficulties with organization and difficulty regulating [Student’s] emotions/behaviors at home.” (P-19 at 8).
31. On December 19, 2012, the IU wrote to the Parents indicating that the Student was being dismissed from OT services. (P-11).
32. The District provided a copy of Pennsylvania’s Notice of Procedural Safeguards to the Parents for the first time in December of 2011 or January of 2012. (NT at 51-53).
33. In response to the PTE, the District evaluated the Student. That evaluation culminated in an Evaluation Report (ER) dated January 30, 2012. (P-19). The ER was provided to the Parents on February 1, 2012. (P-19).

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<sup>4</sup> As this report is hearsay, I will not accept its contents for substantive fact-finding. In straightforward terms, I do not accept the report as evidence that the Student has the diagnoses stated therein. This was explained to the parties at NT 212-213. The same is true of a privately obtained Evaluation of Vision and Learning Related Problems (P-18) which, even if its author testified, is cursory. Facts concerning when reports were transmitted to the District, and what the District did with them, have some relevance to these proceedings.

34. The ER includes significant input from Parents and teachers. (P-19 at 1-3).
35. The ER notes the existence of both the Neuropsych and a privately obtained Evaluation of Vision and Learning Related Problems (P-18). See P-19 at 12.
36. The ER included new testing. The tests were: Woodcock-Johnson III Test of Cognitive Abilities, Normative Update (WJ-III COG NU); Woodcock-Johnson III Test of Academic Achievement, Normative Update (WJ-III ACH NU); Test of Visual Perceptual Skills, Third Edition; Behavioral Assessment System for Children 2 (BASC-2); and The Behavior Rating Inventory of Executive Function (BRIEF). (P-19).
37. The ER correctly reports that “Teachers and parents continue to express concerns over the legibility [of the Student’s] writing...” but incorrectly reports that “OT services are ongoing.” (P-19 at 8).
38. The WJ-III COG indicated that the Student is of average intellectual ability. The WJ-III ACH indicated that the Student’s academic achievement was also average and consistent with intellectual ability. Testing also revealed somewhat slow reading fluency, but verbal comprehension was a relative strength. This, combined with a relatively weaker performance in “Fluid Reasoning” prompted the evaluator to conclude that the Student “may have more difficulty with novel problem solving activities.” (P-19)
39. The BASC-2 assesses a student’s risk for emotional and behavioral disorders. Scores fall into these ranges: Clinically Significant, At-Risk, Average, Low, and Very Low. See P-19 at 5-6.
40. The BASC-2 included a self-report from the Student. This self report places the student in the “Average” range for a significant majority of risk factors, including attitude to school, atypicality, locus of control, social stress, anxiety, depression, sense of inadequacy, attention problems, and inattention/hyperactivity. The Student’s self report placed the Student in the “At-Risk” range for attitude towards teachers, school problems and hyperactivity. (P-19 at 6).
41. The BASC-2 included reports from two of the Student’s teachers. One of the teachers scored the Student in the “Average” range in all areas measured. The other teacher rated the Student in the “Average” range for most areas, but rated the Student in the “At-Risk” range for learning problems, social skills, leadership, functional communication, and adaptive skills. It is noteworthy that the same teacher rated the Student in the average range for both adaptability and study skills. (P-19 at 6).
42. The BASC-2 includes reports from the Student’s mother. This is the only report that places the Student in the Clinically Significant range in any measure. The Student’s mother rated the Student in the Clinically Significant range for hyperactivity, conduct problems, atypicality, adaptability, and adaptive skills. The Student’s mother rated

the Student in the At-Risk range for aggression, anxiety, atypicality, social skills, leadership, activities of daily living, and functional communication. (P-19 at 6).

43. The BRIEF, like the BASC-2, is also a rating scale. The BRIEF assesses a student's self-control and problem-solving skills by rating a student across eight domains of executive functioning. Generally, executive functioning is closely linked to emotional responses while problem solving, which may impact upon the ability to plan and organize.
44. The BRIEF includes a self-report from the Student. This report indicated that the Student has some concerns about the ability to modulate emotions, which is an aspect of emotional and behavioral control. Otherwise, the Student expressed no areas of concern. (P-19 at 7)
45. The BRIEF includes a report from one of the Student's teachers. This report indicated no areas of concern. (P-19 at 7)
46. The BRIEF includes a report from the Student's mother. This report indicated that the Student had difficulty managing both behavior and emotions. The Student's mother reported that the Student had difficulty planning and organizing, working memory problems, and difficulty with impulsivity and changes to routine. (P-19 at 7).
47. The ER concluded that the Student does not have a disability and is not eligible for special education. (P-19 at 9).
48. The District presented the ER to the Parents during a meeting on February 1, 2012. Although the Parents initially approved the ER during the meeting, the Parents disapproved of the ER, via email, later that same day. The Parents disagreed with the conclusion that the Student is not IDEA-eligible and requested seven accommodations to help the Student cope with school and homework related stress. (P-47).
49. The Parents obtained a Psychological Evaluation (Psych Eval) from a licensed psychologist. The purpose of the evaluation was to determine if the Student qualified for at-home BHRS services and, in fact, was used as an initial evaluation for BHRS. (P-27 at 1). Consequently, and unsurprisingly, the focus of the Psych Eval is the Student's behaviors at home.
50. The Psych Eval resulted in a report dated December 2, 2013. (P-27). Unlike parentally obtained reports discussed above, the psychologist who authored the report testified. NT starting at 724.
51. The Psych Eval included clinical observations and a review of the prior Neuropsych. New testing included: Child and Adolescent Needs and Strengths (CANS) version 3.13 and Alcohol Use Disorders Identification Test (AUDIT). (P-27).
52. The report says: "Difficulties in school are being carried over into the home environment." (P-27 at 1). In context, this comment is attributable to the Parents.

The evaluator for the Psych Eval obtained no information from the District and had no basis to conclude that the Student was experiencing difficulties in school.

53. With the exception of the CANS and AUDIT, nearly all of the information in the Psych Eval is a report of concerns expressed by the Student's mother. (P-27).
54. The AUDIT indicates that the Student does not use drugs or alcohol. (P-27 at 3).
55. The CANS produced only one significant rating. This rating was triggered by the fact that the Student spent [Student's] first year in a foreign orphanage. In the words of the Psych Eval: "There is no history of sexual, physical or emotional victimization, although the majority of [Student's] first year of life, [Student] was institutionalized (CANS TRAUMA = 4). (P-27)
56. The Psych Eval concluded that the Student qualified for BHRS services at home, and included diagnoses of both Post Traumatic Stress Disorder (PTSD)<sup>5</sup> and Learning Disorder, NOS. In context the Learning Disorder, NOS diagnosis was carried over from the prior Neuropsych and was not an independent finding based on the Psych Eval itself. (P-27)
57. There is not a dispute that the Student exhibits severe, negative behaviors at home. NT, *passim*. There is no dispute that the Student has a long standing history of receiving private and family-based psychological and behavioral services, and medication for psychological conditions. See, e.g. P-28<sup>6</sup>, NT *passim*.
58. The 2013-14 school year was the Student's 7th grade year. The Student transitioned from an elementary school to Jr./Sr. high school at the start of this school year.
59. On September 27, 2013, the Student had an anxiety reaction, possibly worsened by medication, and was taken by the Parents to a local emergency room. There, the Student's medications were adjusted and the Student was discharged. (P-30).
60. The District evaluated the Student again, at the Parents' request. That evaluation resulted in another ER, dated December 17, 2013. At this time, the Parents were concerned about what the Parents described as a "dramatic drop in the Student's grades," high anxiety about homework ("explosive" reactions when asked to do homework), handwriting, organization, dyscalculia, dysgraphia, social problems, organizational problems, sensory problems, and vision problems. (P-34 at 1).
61. The same CSP who completed the first ER completed the second ER. (P-34).

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<sup>5</sup> The apparent disconnection between the PTSD diagnosis, and the lack of a traumatizing event after the Student's adoption at a very young age is not explained in the Psych Eval or by testimony. It is quite possible that there is no disconnect or relationship whatsoever between these factors, but this was not addressed during these proceedings.

<sup>6</sup> As with other documents described above, P-28 is hearsay. Therefore, I cannot accept it as evidence that the Student actually has any of the diagnoses detailed therein.



62. The second ER included input from the Parents, extensive teacher observations, a review of the Student's grades and PSSA scores, an in-school observation by the CSP and an IU-employed Autism consultant (who holds a BCBA), a new administration of the WJ-III COG NU, a new administration of the WJ-III ACH NU, selected sub-tests of the Test of Written Language - Fourth Edition (TOWL-IV), a new administration of the BASC-2, the Children's Category Test (CCT), a Conners-3, a new administration of the BRIEF, an Autism Spectrum Ratings Scale, and the Adaptive Behavior Assessment System, second edition (ABAS-II). (P-34).
63. All of these tests were administered under normal conditions. (P-34).
64. There was variability between the teachers' reports in regard to the Student's attentiveness in class – the Student was more attentive in some classes and less attentive in others. (P-34). All teachers reported that the Student's grades were lowered by the Student's frequent absences and failure to make up work. (P-34).
65. Both teacher input, student input, and testimony from teachers establishes that the Student had difficulty with transitioning to a new school building at the start of the 2013-14 school year, but adjusted to the transition as the year progressed. After this adjustment, the Student appeared less stressed and more attentive in some classes. P-34, NT *passim*.
66. At the time of the second ER, the Student had missed 17 days of school. These were excused absences. (P-34).
67. The ER reports the Student's grades in the first and second quarter of the 2013-14 school year. All grades were passing, but many grades in the first quarter were low. Grades improved significantly in the second marking period. (P-34). The Student's grades in 5th and 6th grade, which are also reported in the ER, were higher.
68. The ER reports the Student's PSSA scores from 3rd (2010), 4th (2011), 5th (2012) and 6th (2013) grades. The Student was proficient in both mathematics and reading in each of those administrations, which are assessed each year. Science was assessed in 2011, and the Student scored in the advanced range. Writing was assessed in 2012, and the Student scored in the basic range. (P-34)
69. The ER includes informal recommendations by the Student's teachers. These recommendations include regular school attendance, completion of make up work, having teachers sign the Student's homework book, and implementation of a more structured organization system. (P-34 at 6).
70. On the WJ-III COG NU, the Student scored in the Average range of intelligence. Composite scores indicate that the Student is in the Average range for Verbal Ability and Thinking Ability, and in the High Average range for Cognitive Efficiency. The Student scored in the Low Average range on a Processing Speed sub-test, which is part of the overall Cognitive Efficiency rating. The Student also scored in the Low Average range on the Retrieval Fluency sub-test. (P-34)

71. On the WJ-III ACH NU, the Student scored in the Average range for Academic Skills, Academic Fluency, Academic Applications, Broad Reading, Broad Written Language and Broad Math. The Student scored in the High Average range for Oral Language. Those are the major composite scores of the test, and the most meaningful results. Nearly all of the sub-tests that make up these results were scored in the Average or High Average range. The only sub-test score in the Low Average range was Math Fluency and the only sub-test score in the Low range was Quantitative Concepts. (P-34)
72. The scores of the BASC-2 included ratings from both of the Parents and three teachers. The results were reported in detail within the ER, and accurately summarized in the ER as presenting a stark contrast between home and school ratings. At home, the Parents rated the student in the at risk or clinically significant range in all areas except for withdrawal. Three teachers who provided ratings rated the Student as average almost uniformly, with one teacher noting attention and hyperactivity problems. (P-34).
73. An identical pattern is repeated on the BRIEF and the ABAS-II. (P-34)
74. Scores on the CCT were average. (P-34).
75. The Conners-3 rates symptoms associated with ADHD. Consistent with the BASC-2, both Parents rated the Student in the "Very Elevated" range across the board while ratings from three teachers were average. A self-report by the Student showed high average scores in the areas of hyperactivity/impulsivity, and defiance/aggression. (P-34).
76. All testing was conducted under standard conditions. (P-34).
77. In addition to the above, as part of the second ER, the District also had the IU conduct an Occupational Therapy Evaluation and issue a report. The report is dated November 25, 2013, suggesting that it was started in advance of the testing reported in the second ER. Regardless, the OT Report clearly notes that it is one component of a "comprehensive evaluation" that was being completed around the same time. (P-64).
78. In sum, the OT testing found that the Student is *able* to write legibly, but sometimes does not write legibly. Some social ratings were completed by teachers as part of this evaluation. There was some inconsistency between the teachers but, on average, the Student scored in the average range with some elevations (which were more pronounced with one particular teacher). (P-64).
79. The second ER concluded that the Student does not have a disability and is not in need of special education. (P-34).
80. The second ER was provided to the Parents on December 19, 2013. (P-34).

81. On January 9, 2014, the District provided a Section 504 Service Agreement (504 Agreement). The 504 Agreement notes that the Student has been diagnosed with ADHD. The 504 Agreement says that “the team agrees that a section 504 service agreement is warranted since [Student’s] ADHD is affecting a major life activity to *some degree*.” P-53 at 1, emphasis added.
82. The 504 agreement includes eleven accommodations. These include sensory breaks, extra time on tests, assistance with note taking, placement in a study skills class, and monthly OT consultation. The 504 Agreement also permitted the Student to submit an audio recording instead of writing, and consultation with an IU Assistive Technology Specialist.<sup>7</sup> (P-53)
83. The Parents accepted the 504 Agreement by signing it on January 15, 2014. (P-53).
84. In general, the Student refused the sensory breaks provided by the 504 Agreement. (P-55). However, an extra PE period was added to the Student’s schedule. The Student participated in, and by all accounts enjoyed, this extra PE.
85. The IU conducted an assistive technology consultation as required by the 504 Agreement. (P-56).
86. On January 20, 2014, the Parents requested that the District fund an IEE for the Student. In their letter requesting an IEE, the Parents do not state any reason for disagreement with the second ER other than its conclusion that the Student was denied eligibility under the IDEA. (P-75).
87. On January 22, 2014, the Student engaged in a serious behavioral incident at home, during which time the Student was a danger to self and others. As a result of this incident, the Student was hospitalized at a children’s in-patient psychiatric hospital until January 29, 2014. (P-35).
88. Over the school years in question, the District has implemented strategies to enable the Student to complete homework while still in school. These strategies have been successful to a degree when the Student chose to take advantage of them. These strategies are not successful when the Student does not take advantage of them. All of these strategies are components of regular education programs offered to all students in the District. NT *passim*.
89. Over 200 pages of the Student’s work product was admitted into the record of this hearing. P-38, P-39, P-40, P-41, P-42, P-43, P-44, P-45, P-46, P-47, P-56, S-30. Although several witnesses commented on a tiny fraction of these samples, I draw the following conclusions from my own review: The Student’s handwriting is usually sloppy but readable and has spelling errors. The Student’s handwriting is sometimes

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<sup>7</sup> Contrary to arguments by the Parents, the 504 Agreement does not call for an assistive technology evaluation. Rather, the 504 Agreement calls for consultation only.

illegible. The Student's handwriting is sometimes quite good, but such instances are rare.<sup>8</sup>

## **LEGAL PRINCIPLES**

### ***The Burden of Proof***

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3d Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents the party seeking relief and must bear the burden of persuasion except regarding the IEE. Regarding the IEE, I have assigned the burden to the District because the District was obligated to request a hearing on this issue and did not do so.<sup>9</sup>

### ***IDEA Eligibility***

The IDEA and its implementing regulations establish a two-part test to determine eligibility. First, a student must have a qualifying disability. Second, by reason thereof, the Student must require specially designed instruction (SDI). See 34 C.F.R. § 300.8.

### ***Section 504 / Chapter 15***

"Eligibility" under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504. Section 504 protects only "handicapped persons," and the question of whether a student is a handicapped person calls for an inquiry into how that term is defined. The definition is provided in the Section 504 regulations at 34 CFR § 104.3(j)(1): "Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."

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<sup>8</sup> I have no expertise in the area of handwriting, and this finding of fact should be given no deference based on an assumption of my expertise. With the exception of an Occupational Therapist, none of the witnesses who commented on the writing samples have any more expertise than I do, and the OT therapist commented on only a small sample compared to the whole. In reviewing the entirety of the Student's work product, my primary consideration was whether I could read what was written. The answer to that question was almost always "yes," although the writing was very sloppy, and not what I would expect, as a layman, of someone the Student's age.

<sup>9</sup> The District has preserved an objection to this determination.

The test is somewhat more defined under Chapter 15. Chapter 15 defines a “protected handicapped student” as a student who:

1. Is of an age at which public education is offered in that school district; and
2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program; and
3. Is not IDEA eligible.<sup>10</sup>

See 22 Pa. Code § 15.2.

If a student is a handicapped person, Section 504 prevents school districts from discriminating on the basis of disability by denying the student participation in, or the benefit of, regular education. See 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from *regular* education.

Chapter 15 also defines a service agreement as a “written agreement executed by a student’s parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student.”

After providing these definitions, Chapter 15 explains what schools must do for protected handicapped students at 22 Pa Code § 15.3:

a “school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student’s abilities.”

From this point, Chapter 15 goes on to list a number of rules describing what must happen when schools or parents initiate evaluations to determine if students are protected handicapped students.

After evaluations, Chapter 15 goes into more detail about service agreements. In doing so, Chapter 15 first sets out rules for what must happen when parents and schools are in agreement at 22 Pa Code § 15.7(a):

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<sup>10</sup> All IDEA-eligible students are also protected by Section 504. However, for IDEA-eligible students, school districts satisfy their obligations under both laws by compliance with the IDEA and its regulations. For example, IDEA-eligible students receive an IEP, not an IEP and a Section 504 plan. The particular requirements of Chapter 15 apply when a student is a protected handicapped student, but is not IDEA-eligible.

If the parents and the school district agree as to what related aids, services or accommodations should or should no longer be provided to the protected handicapped student, the district and parents shall enter into or modify a service agreement. The service agreement shall be written and executed by a representative of the school district and one or both parents. Oral agreements may not be relied upon. The agreement shall set forth the specific related aids, services or accommodations the student shall receive, or if an agreement is being modified, the modified services the student shall receive. The agreement shall also specify the date the services shall begin, the date the services shall be discontinued, and, when appropriate, the procedures to be followed in the event of a medical emergency.

When parents and schools cannot reach an agreement, a number of dispute resolution options are available, including formal due process hearings. 22 Pa Code §§ 15.7(b), 15.8(d).

### ***IEE at Public Expense***

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

“If a parent requests an independent educational evaluation, the public agency may ask for the parent’s reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.” 34 C.F.R. § 300.502(b)(4).

## **DISCUSSION**

### ***IDEA Eligibility***

In its closing brief, the District notes the striking similarities between this case and *Arlington Inde. Sch. Dist.*, 60 IDELR 267 (SEA Tex. 2012). *Arlington* is just one of countless cases in which a student’s presentation at home is strikingly - even shockingly - different from the same student’s behavior in school. The record of this case, taken as a whole, leaves no doubt that the Student is one person at home and a very different person at school. The emotional but highly credible testimony from the Student’s mother concerning the Student’s presentation *at home* leaves no doubt that the Student’s

behaviors at home are the cause of exasperating frustration and, occasionally, fear. However, the Parents have no basis to draw any conclusions about the Student's presentation in school. Similarly, to the very small extent that reports drafted by people outside of the District or the IU are not hearsay, they are weakened by exclusive reliance upon the Parents' unsubstantiated statements about problems in school.

No evidence suggests that the Student exhibits serious behavioral problems in school. The Student is uniformly described as polite and courteous, and has no history of disciplinary infractions. Some of the Student's teachers describe the Student as inattentive. Taken as a whole, the record clearly shows that the Student has an affinity for certain classes and teachers, and stays engaged during those classes. Sometimes the Student is inattentive in other classes. Even if this inattentiveness were wholly attributable to the Student's ADHD, establishing that an IDEA-recognized disability manifests in school does not prove that the Student is eligible. Assuming that the Student exhibited symptoms of an IDEA-recognized disability (such as ADHD) in school would satisfy only the first prong of the IDEA's eligibility test. The Parents would still have to prove that the Student required SDI. There is hardly a mention of a need for SDI anywhere in the extensive record of these proceedings.

Homework, however, is the nexus between home and school. Some of the Student's teachers reported that the Student has difficulty organizing while in school to be able to do homework at home. This disorganization, combined with the Student's altered presentation at home, leaves no doubt that homework is a nightmare in the Student's house. There is also no doubt that the Student's homework difficulties have had a negative impact upon the Student's grades. It is less clear that effect of homework on the Student's grades is a current problem but, historically, this was the impetus for the District to offer programs to allow the Student to complete homework at school and/or get organized to do homework at home.

The record does not establish whether the Student's homework issues are a manifestation of the Student's overall behaviors at home. Regardless, the record establishes that the District is aware of these problems, and is actively trying to address them both through the 504 Agreement and through less formal means. Even assuming that the homework problems are the result of some unspecified but IDEA-recognized disability, the Parents have not established the need for SDI. To establish this, the Parents must prove that the Student required SDI in order to receive a meaningful educational benefit. Again, this is the second prong of the IDEA's eligibility test. Nothing in the record establishes this fundamental component of IDEA eligibility.

Regarding the Student's handwriting, the fact that some of the Student's work product is legible proves that the Student is able to write legibly. The Student's teachers uniformly testified that the Student can write not only legibly but neatly when the Student does not rush to complete work. This testimony is consistent with what I observed in the Student's work. There are important differences between a student who *cannot* write legibly and a student who *does not* write legibly. If anything, the Student in this case is the latter, although the majority of work that I reviewed is readable.

I generally agree with comments made during the District's opening statement: poor handwriting is not one of the 13 categories of disability recognized by the IDEA at 34 C.F.R. § 300.8(c). In doing so, I acknowledge that dysgraphia, or a writing disability, *may* fall under the definition of Specific Learning Disability found at 34 C.F.R.

§ 300.8(c)(10): "Specific learning disability means 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 the imperfect ability to... write..." In this case, however, the Parents have not established that the Student has a writing disability. Dysgraphia is not called out in any of the parentally obtained evaluations, hearsay notwithstanding, and was not found in the IU's OT evaluations. Everybody acknowledges the Student's sloppy penmanship, but that neither establishes an IDEA-recognized disability *per se*, nor the need for SDI. Again, the record is surprisingly silent as to the Student's need for SDI – especially regarding the handwriting issue. Nothing in the entirety of the record draws a connection between the Student's handwriting and the Student's ability to learn.

In sum, the Parents have proven two things beyond any doubt: 1) the Student's handwriting is sloppy more often than not and 2) the Student's behaviors are radically different at home and in school. Regarding handwriting, the Parents have not established that the Student requires SDI in order to receive a meaningful educational benefit. Regarding behaviors, as the Texas Hearing Officer said in *Arlington*, "I believe that both [the Parents] and school staff are truthfully reporting what they see in the home and school environment; they simply do not see the same things." *Arlington Inde. Sch. Dist.*, 60 IDELR 267 (SEA Tex. 2012). I do not hold that that the Student does not have a disability in an absolute sense.<sup>11</sup> Rather, I hold that whatever disabilities the Student may or may not have, those disabilities do not manifest in school.

### ***Section 504 Eligibility***

The District's position as to whether the Student actually has ADHD is difficult to discern, as the District's witnesses were somewhat more equivocal on this point than was the District's counsel. Regardless, the Student's ADHD diagnosis is well documented in the District's own documents (and the documents that the IU drafted while acting as the District's agents). This includes the document that has "**Section 504 Service Agreement**" in big bold lettering at the top. (P-53).

The District argues that the 504 Agreement that it asked the Parents to sign on January 15, 2014 is *not* a 504 Agreement.<sup>12</sup> Rather, the District argues that the 504 Agreement is some other type of agreement between the District and the Parents to provide regular education supports to the Student, despite the fact that the Student is not a protected handicapped student. Very bluntly, I do not accept this argument. In the overall context

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<sup>11</sup> Were I able to consider the hearsay evidence, I would very readily agree that the Student has one or more disabilities.

<sup>12</sup> The District made this argument during the hearing, but it does not appear in its closing brief.



of the case, the 504 Agreement *is* a 504 Agreement. It was offered as a 504 Agreement and was accepted as such. The statement in the 504 Agreement that the Student's ADHD is affecting a major life activity to "some degree" as opposed to "substantial limitation" language used in Chapter 15 does not change what the document is.

By offering a Section 504 Agreement to provide regular education accommodations to accommodate the Student's ADHD, the District both acknowledged that the Student has ADHD and requires accommodations. As a result of these actions, the District cannot now claim that the Student was not "504 eligible" from the time that it offered the Section 504 Agreement (at least through the date of this decision). This compels an inquiry into whether the 504 Agreement provided appropriate accommodations, and whether the Student is 504-eligible on an ongoing basis. The District masks a much stronger argument regarding these two questions.

The District argues that whatever disability the Student may have, the District did not discriminate against the Student on the basis of that disability. In the language of Section 504, the District argues that there is no regular education program that is offered to non-handicapped students that was denied to the Student. In the language of Chapter 15, the District argues that whatever physical or mental disability the Student may have does not substantially limit or prohibit the Student's participation in or access to any aspect of the Student's school program.

The District is correct that these are threshold considerations. Nothing whatsoever in the substantial record of this case establishes that the Student was denied access to any regular education program offered by the District at any time (either before the 504 Agreement or since). Before 7th grade, the Student did well academically, and nothing suggests that the Student was denied any other regular education benefit. At the start of 7th grade, the Student's academic performance declined in the first quarter, then increased in the second. Again, by itself, this does not indicate a denial of any regular education benefit. In the language of Chapter 15, the Parents have not established that any disability substantially limits or prohibits the Student's participation in school.<sup>13</sup>

I now must balance the Parents' failure to establish the threshold criteria for eligibility under Section 504 and Chapter 15 with the District's action of providing a Section 504 Agreement. It is tempting to simply hold that the District issued the 504 Agreement without any obligation to do so, and cannot be held liable for exceeding its legal mandate. In the context of this case, such a holding would reward the District for offering a misleading document designed to appease the Parents. Consequently, I find that the District conceded the Student's eligibility under Section 504 from January 15, 2014 through the day of this decision. As a result of this agreement between the District and the Parents, the Student was protected by Section 504 and Chapter 15 during this period of time. From the date of this decision forward, the Parents have not established

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<sup>13</sup> An inability to write is certainly a substantial limitation or prohibition of the Student's participation in school. As discussed above, the Student's writing is usually sloppy but readable.

that the Student is protected by either Section 504 or Chapter 15 for the reasons stated above.

For the period of time that I have found the Student was a protected handicapped student, the Parents have not established any violation of Section 504 or Chapter 15 for the same reasons that the Parents have not established eligibility. Said simply, the Parents have not proven that the Student was denied any regular education benefit.

### ***IEE at Public Expense***

I note, again, that it is the District's burden to establish that its own evaluation was appropriate. That being said, it is important to recognize that parental disagreement with an evaluation's conclusions is not evidence that an evaluation is inappropriate. An evaluation may be inappropriate if its conclusions are not supported, but parental disagreement with supported conclusions is irrelevant to the inquiry (otherwise parents could defeat any LEA's defense of its own evaluation by simply disagreeing with the ultimate result).

The District's last evaluation, the December 17, 2013 ER (P-34), was appropriate. As an initial evaluation, the ER must substantively comply with 20 U.S.C. § 1414(b) and (c). These requirements are numerous, but all have been satisfied. The CSP used multiple, technically sound instruments, and no one instrument was used as the sole criteria for the eligibility determination. All areas of suspected disability were assessed by trained, knowledgeable personnel (this includes the IU's OT assessment completed shortly before the full ER). The ER includes a tremendous quantity of standardized, normative assessments, and both formal and informal input from teachers, the Parents and the Student. All assessments conformed to the publisher's guidelines. The resulting report was thorough and comprehensive.

Regarding the ER's ultimate conclusions, I am concerned that the ER affirmatively concludes that the Student does not have a disability. Were I permitted to use hearsay evidence for fact finding, I would conclude that the Student has a history of many diagnoses, some of which are recognized by the IDEA. I agree, however, with the ER's conclusion that the Student does not require SDI and, therefore is not eligible. This conclusion is very well supported by the ER itself, and is not contradicted by anything in the large record of this case. For this reason, the ER's ultimate determination that the Student is not IDEA-eligible is supported, and the ER is appropriate.

### ***FBA and BSP***

The Parents demand a functional behavioral analysis (FBA) and a behavior support plan (BSP) regardless of eligibility. I have found that the Student is ineligible. I am unaware of anything that would compel the District to provide an FBA or BSP absent eligibility under either the IDEA or Section 504. As a practical matter, with the exception of occasional inattentiveness, I have found that the behaviors that are so vexing for the Parents at home do not manifest in school.

### ***Compensatory Education***

I have found no substantive violation of the Student's rights. Therefore, I will not award compensatory education.

### **CONCLUSION**

The Parents have not met their burden to establish that the Student is IDEA-eligible or a protected handicapped student under Section 504. The District has established that its latest ER is appropriate. While I empathize with the Parents' significant challenges with the Student at home, and commend their zealous advocacy for the Student, the record of this case does not establish the violations that they claim.

### **ORDER**

Now, July 14, 2014, it is hereby **ORDERED** as follows:

1. For purposes of the IDEA, the Parents have not established that the Student is a "child with a disability" as defined at 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8.
2. Except for the period of time from January 15, 2014, though the date of this decision, for purposes of Section 504, the Parents have not established that the Student is a "handicapped person" as defined at 34 CFR § 104.3(j)(1) or a "protected handicapped student" as defined at 22 Pa. Code § 15.2.
3. For the period of time from January 15, 2014 though the date of this decision, the District conceded through its actions that the Student was a "handicapped person" as defined at 34 CFR § 104.3(j)(1) and a "protected handicapped student" as defined at 22 Pa. Code § 15.2.
4. The Parents did not establish any violation of Section 504 or Chapter 15 during the period from January 15, 2014 though the date of this decision.
5. The District has proven that its last Evaluation Report of December 17, 2013 is appropriate, and so the District will not be ordered to fund an independent educational evaluation for the Student.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER