

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: M.G.

ODR #16121 / 14-15-AS

Date of Birth:
[redacted]

Dates of Hearing:
June 13, 2015
September 9, 2015

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Representative:
Pro Se

Parkland School District
1210 Springhouse Road
Allentown, PA 18104

Erin Kernan, Esquire
Eastburn and Gray
60 East Court Street PO Box 1389
Doylestown, PA 18901

Date Record Closed:

September 15, 2015

Date of Decision:

September 28, 2015

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is an early teen-aged student residing in the District who had been identified as a qualified handicapped person / protected handicapped student under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the federal regulations implementing §504 (34 C.F.R. §§104.32—104.37), and Chapter 15 of the Pennsylvania Code. Student was educated in District schools until the end of the 2014-2015 school year, Student's 8th grade year. The Parents have enrolled Student in a cyber charter school for the current 2015-2016 school year.

Student received 504 Service Plans (504 Plans) from the 2011-2012 school year through the 2014-2015 school year. In December 2014 the District believed that Student no longer had a qualifying disability and recommended terminating the 504 Plan; although they initially agreed, the Parents later objected and the District kept the 504 Plan in place through the end of the 2014-2015 school year.

The Parents² requested this hearing because they believe that Student remains eligible for a 504 Plan. They also assert that the District failed to implement and to revise the 504 Plan in the 2014-2015 school year and that this denied Student educational benefit. Further, they are requesting reimbursement for private evaluations they obtained after the District denied their request for an evaluation. Finally the Parents assert that the District discriminated against Student because of their previous advocacy on behalf of their other children.

The District argues that its recommendation that Student no longer qualifies for a 504 Plan was correct, that the 504 Plan was implemented during the 2014-2015 school year, that the 504 Plan did not require the revision Parents sought, that it was correct in declining to evaluate Student, and that the Parents are not entitled to reimbursement for the private evaluations they obtained. Further, the District denies that it engaged in discrimination against Student or the Parents.

The Parents proceeded pro se, but were accompanied by an advocate for the first session and half of the second session.

For the reasons put forth below I find in favor of the District.

Issues

1. Did the District fail to implement Student's 504 Plan during the 2014-2015 school year, specifically with regard to providing an FM system and preferential seating?
2. Should the District have revised Student's 504 Plan to include providing a quiet area for Student to take tests during the 2014-2015 school year?

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² The term Parents is used throughout this decision although the Mother served as the primary contact with the District. Father was present and assisted Mother at both hearing sessions.

3. Did the District err in recommending that Student is no longer eligible for a 504 Plan, and if so what is Student's disability that would qualify Student for a 504 Plan?
4. Did the District err in not providing an educational evaluation every three years and/or refusing the Parents' request for an educational evaluation in spring 2015 when the Parents suspected that Student had a disability that would confer eligibility for special education under the IDEA?
5. Must the District reimburse the Parents for the cost of the private evaluations (auditory evaluation, psychological evaluation, neurological evaluation and sensory evaluation) they obtained for Student?
6. Did the District discriminate against Student thus causing educational harm to Student?
7. Is Student entitled to compensatory education, and if so in what form and in what amount?

Findings of Fact³

The Student:

1. In 8th grade, the 2014-2015 school year, Student took [a foreign language class] and Algebra I, which are challenging high school level courses. Student attained above average grades in those subjects. [S-4]
2. In 8th grade Student took a [Specific, Redacted (SR)] Language Arts course which is the hardest language arts course an 8th grade student can take with demands that are more challenging than 7th grade. Student received above average grades. [NT 91, 404, 569-570; S-4]
3. The students that participate in [SR] classes have the same curriculum as do the students in the traditional classes but they are required to do more independent work than the students in the traditional courses and are also exposed to content at a deeper level. Generally [SR] students are very motivated, although they occasionally have slip-ups. [NT 255-257, 505-506; S-4]
4. In 8th grade Student also took an [SR] Science course. Due to one low score on a particularly difficult open book test on the Periodic Table Student earned a C+ in [SR] Science in the third marking period. The C+ was based on an average of 79, one point short of the 80 needed to make a B. Student subsequently received grades of B+, B, and A- and ended the year with a Science [SR] course grade of B. [NT 255-256, 391, 476-477, 479, 481, 509; S-4, P-33]

³ The testimony of every witness, and the content of each exhibit, was reviewed and considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

5. In general, 8th grade work is more rigorous than in the previous grades and Student's 8th grade courses were demanding. [NT 461-463]
6. Students in the [SR] Science course are required to participate in the school's science fair, which involves a long-term project over the course of several months wherein a student designs and carries out a scientific study, and then presents the findings to a group of teachers. [NT 256-257]
7. Student subsequently chose to enter the science project in [a local] Science Fair, and won Third Place from among two to three hundred students entered into that competition. [NT 158-159, 256, 513, 519]
8. Student was a member of the [Redacted] Team. This group is a select body of students, chosen by teachers; the members have outstanding leadership qualities and a proclivity for technology. [NT 157-158; S-30]
9. In 8th grade Student signed up for and participated in extracurricular activities on Student's own initiative. [NT 164]
10. Student was a member of the District's [specific athletic] team. [NT 154]
11. Student played [a specific sport] on a team not affiliated with the District. [NT 155]
12. Student played a musical instrument [redacted]. [NT 155]
13. [Redacted.]
14. On the basis of Student's application essay Student was selected to attend a workshop at a local college. Afterwards Student was required to present information from that workshop to the language arts class. [NT 573-574; S-29]
15. Student was selected to attend a Leadership and Ethics conference at a local university. [NT 574; S-31]
16. [Redacted.]
17. At the end of the 2014-2015 school year Student was chosen to present a speech at the 6th grade (sic) awards ceremony. [NT 158]
18. At the end of the 8th grade school year Student was awarded a Presidential Academic Achievement Award which is based on PSSA scores and GPA. [NT 159, 532]
19. Student was voted by classmates as [redacted]. [NT 532-533]
20. Student is a high average student who, according to the [SR] teachers, has "great independent work habits" and is able to acquire and retain instructional objectives

presented in [SR] classes. Student is a hard worker showing consistent effort, is conscientious, volunteers to participate in class, collaborates with peers productively, and is focused and organized. [NT 258, 507, 522, 571-572, 653]

21. Student had a lot of friends in school and was well-liked among peers. Student is pleasant, well-mannered, and has good social skills. Behavior has never been an issue in school. [NT 510, 571-572]
22. The Parents regard Student as being “extremely motivated” and an “independent learner”. [NT 164; S-42]
23. Student was previously evaluated twice by the District and was not identified as being eligible for special education under the IDEA. [NT 145]
24. The recent private psychological evaluation specifically ruled out a learning disability and an autism spectrum disorder. The private evaluator did not find that Student was eligible for special education under the IDEA. [P-2]

Implementation of the 8th grade 504 Plan

25. The purpose of an FM system is to clarify the acoustics signal. Student’s 6th and 7th grade 504 Plans included use of an FM system. Student used the system in 6th grade. For 7th grade (2013-2014) the Parents agreed that the FM system would only be used in language arts class. [NT 125, 135-136, 438-440, 732; S-1, S-40]
26. Although the FM system was located in the language arts class in 7th grade, Student did not use it. As in 6th grade, in 7th grade Student earned straight A’s in all subjects. In 6th grade Student used the FM system but in 7th grade Student did not use the FM system. [NT 248-249, 422; S-6, P-21]
27. In the fall of 2014 there was a 504 Plan meeting between Student’s mother and the District guidance counselor to discuss the 504 Plan for 8th grade. [NT 132-134, 137-138, 435-437; S-1]
28. At the 504 Plan meeting the guidance counselor and the mother discussed the use of the FM system and the fact that Student had not used it in 7th grade at all. The mother agreed that it could be used/available in 8th grade as needed but was not required. [NT 423-424, 439-440; S-1]
29. During the 504 Plan meeting for 8th grade the mother was made aware that the FM device would be located in the guidance office. [NT 244, 434-436, 439]
30. The Parents approved and signed the 504 Plan as written. [NT 446-447; S-1]
31. When a private audiologist previously found Student had auditory processing disorders and recommended the use of an FM system, the District did an assessment of whether an FM system would be necessary or helpful in-school. The audiologist carried out two

“exhaustive” observations, analyzed on and off task behaviors, and he found no difference between when Student used the FM system and did not use it. Nevertheless Student was given an FM system. [NT 678, 714; S-38]

32. Student’s FM system has been available to Student during the entirety of the 8th grade year. Student was aware of the location of the FM system. Student did not use the FM system at all in 8th grade. [NT 239, 442, 472, 464-465, 575]
33. All Student’s 8th grade teachers were trained in the use of the FM system and each was made aware of its location in the guidance counselor’s office. [NT 243, 441, 483, 488, 574-575, 602-603, 639, 662]
34. At the beginning of the year the science teacher repeatedly asked Student, “Are you good? Can you hear me?” [NT 483]
35. The first time the math teacher saw Student in 8th grade he asked Student if Student had the FM system with Student. Student told the teacher that Student did not need it and did not require it. [NT 639-640]
36. It is unlikely that Student would lack self-advocacy with teachers if Student needed or wanted to use the FM system. The language arts teacher’s relationship was such that she believes that Student would have asked for the FM system if Student needed it or asked about its location if Student did not know. Student asked the language arts teacher for things if they were needed. Student came up to the science teacher on occasion to ask for clarification or assistance. Student wanted to be selected for a workshop at a local college and wrote an effective essay explaining why Student should be chosen. [NT 544, 572-573, 600; S-29]
37. Teachers of the [SR] science class, the [SR] language arts class and the Algebra I class all testified that Student never used the FM system, never asked to use the FM system, never showed any indication of needing the FM system, and would have been allowed to use it if Student asked. Student’s Parents never contacted these teachers to ask if the FM system was being used. [NT 511-512, 576, 662]
38. The Parents assert they were under the impression that Student was using the FM system but when they asked Student, Student indicated that Student “had not seen it all year”. [NT 113-114’ P-84]
39. Student’s 8th grade 504 Plan provides for preferential seating, defined in part as being away from noise sources, such as windows, hallways, or vents. The accommodation does not specify that Student should be seated at the front of the classrooms. [NT 239]
40. The IU educational audiologist who evaluated Student at the Parent’s request recommended that Student should be allowed preferential seating upon request. [NT 679]

41. During the first few weeks of school the science teacher repeatedly asked Student if Student could hear him and if Student was “in a good spot” in the classroom. [NT483]
42. The science teacher moves around the room when he is instructing the class. His classroom has tables in three rows across (front, middle, back). Student was seated at the end of the middle row, away from the door and away from the window. When the Parents expressed concern about middle row seating the teacher moved Student to the front row. [NT 484-487]
43. Student’s science grades before and after moving to the front row from the middle row were comparable, with no appreciable change. [NT 519-520]
44. Because of the location of the Periodic Table in his classroom, for the several weeks when the science teacher was teaching the lessons covered by the open book Periodic Table test Student was sitting in the middle row end table, right in front of him. [NT 488-491]
45. In the science classroom it is impossible to move Student away from vents. The vents cannot be heard. Student never told the science teacher that there was any issue with the vents. [NT 513]
46. In language arts class Student was seated in the front of the room. Student was away from noise sources. [NT 576-577]
47. In Algebra I class Student was seated in the middle of the room. When Student was in the second row the teacher asked if Student was comfortable there and if Student could hear. Student indicated that Student was fine. Student volunteered answers frequently and had no trouble paying attention or completing work. The teacher noted “outstanding” grades. [NT 634-635, 641-642; P-8]
48. The math teacher was also Student’s [athletic sport] coach. He believes that if Student had an issue with hearing or seeing the board, Student would have let him know as Student was conscientious in class and participated frequently. [NT 642-643]
49. The 8th grade 504 Plan called for guidance services as needed. These services were available to Student through a designated guidance counselor or any of the other guidance counselors at the middle school, or through the District psychologist assigned to that school. Student did not choose to use guidance services during the 2013-2014 or the 2014-2015 school year. [NT 241, 446]
50. The Parents did not request that Student receive guidance services during the 8th grade school year. [NT 241, 446]
51. In addition to the FM system, preferential seating, and guidance services the remaining accommodations on the 8th grade 504 Plan were best practices that District teachers employ on a daily basis for their students. These included obtaining Student's attention,

establishing eye contact prior to giving oral instructions, repeating and rephrasing information as needed, providing positive feedback, verbalizing sentences or lists to allow extra processing time and emailing parents if any concerns arise. [NT 240, 443, 520, 577, 663-664; S-1]

Need for Revision of 8th grade 504 Plan to Provide Quiet Place for Testing:

52. When filling out a questionnaire for purposes of an Intermediate Unit CAPD evaluation, the Parents answered 'no' to the question of whether Student had difficulty maintaining attention in the classroom. [NT 140; S-11]
53. When the mother discussed revision of the 504 Plan for 8th grade with the guidance counselor she suggested that they remove references to ADHD. Mother and the counselor agreed that this was no longer impacting Student's education. [NT 375-376, 442-443]
54. In an email dated March 25, 2015 the Parents indicated that Student may require "a change or modification to [Student's] current service agreement". The Parents did not tell the District that the change they sought was to provide Student with a quiet testing space. [NT 470; P-34]
55. Student never complained to the Algebra I teacher about extraneous noise in the classroom. [NT 565]
56. The Algebra I teacher did not notice a need for Student to be tested in a separate quiet space. [NT 665]
57. Student never asked the language arts teacher to be tested in a quiet space. [NT 595]
58. Reportedly Student told the Parents that after an open book science test on which Student did poorly Student "shut down" because of the noise. Student did not appear to be distracted during this Periodic Table science test, and did not tell the teacher that there were distracting noises. [NT 517, 552]
59. The science teacher does not attribute Student's poor grade on the open-book test to background noise. That Periodic Table test is particularly difficult and historically many pupils do not do well on it. [NT 479, 513-515; S-24]
60. Although he does not believe that shuffling of pages was an issue during the open book test, and has found that poor test grades correlate to unpreparedness for the test rather than paper noise, the science teacher would not have had a problem allowing Student to take the open book test in a quiet location. [NT 478, 482-483]
61. In the time leading up to and during the third marking period in which instruction/preparation for the test on the Periodic Table was happening there were various other activities going on for Student including practices for [other events] and intense preparation for the school science fair. [NT 516-519]

Recommendation for Discontinuation of 504 Plan:

62. Student first received a 504 Plan before the beginning of the 2011-2012 school year. Student entered the middle school in 6th grade with a 504 Plan pursuant to diagnoses of Attention Deficit Disorder (ADD), Central Auditory Processing Disorder (CAPD) and sensory integration issues. [NT 236, 459]
63. The District reviews students' data relative to 504 Plans on an annual basis. [NT 458-459]
64. The District requires Parents to update their children's diagnoses for purposes of 504 Plans periodically and along with parents of other rising 8th graders Parents were asked to provide an update for Student's 8th grade year. [NT 51-52, 237, 433-434, 459-460; S-9, P-60]
65. The Parents obtained an historical list of diagnoses from the pediatrician on or about September 16, 2014. The Parent provided the list of diagnoses to the District guidance counselor via email. [NT 53; P-60; P-74]
66. On September 8, 2014, prior to obtaining the historical list, the Parents responded to the District's request and informed the District that Student was no longer under medical treatment for Attention Deficit Disorder. [NT 128-123, 154; S-10]
67. The Parents also reported that Student was doing much better, and while they did request that Student still have preferential seating, they questioned whether or not Student still needed the FM system. [NT 128-130, 377, 435; S-10, P-10]
68. Preferential seating does not require a 504 Plan. [NT 377, 443]
69. At the 504 Plan meeting in the fall of 2014 the mother did not raise the question of Student having a vision problem, having issues with sensory integration or having autism. [NT 443-446]
70. Although a sensory processing issue was on the 504 Plan, the District considered that all the accommodations in the Plan were geared toward addressing CAPD and previous ADD rather than sensory processing. [NT 249; S-1]
71. The guidance counselor who worked with Student's 504 Plan since 6th grade neither saw nor had reported to him any concerns that a sensory processing issue was present/impacting Student's learning. [NT 449]
72. The Parents questioned whether Student still had a Central Auditory Processing Disorder and requested that the District do an evaluation of this area of functioning. The District agreed to do a CAPD evaluation through the IU. [NT 52, 58, 238-239; P-8]
73. The District and the Parents agreed to keep the 504 Plan in place pending the results of the CAPD evaluation. [NT 238]

74. The District engaged an Intermediate Unit educational audiologist with over 20 years' experience, approximately 15 of these years in the education system, to complete the CAPD evaluation that the Parents requested to determine if Student still had CAPD. [NT 669, 671-672, 675; S-12, S-45]
75. The educational audiologist is licensed by the State of Pennsylvania for the independent practice of audiology and holds an Instructional II certification from the Pennsylvania Department of Education in the Education of the Hearing Impaired. [NT 673-674]
76. The educational audiologist provided Student's FM equipment and gave in-service training to the teachers starting in 2012. [NT 674-675; P-71]
77. The educational audiologist's evaluation was performed under normal testing conditions, the assessments administered were used for their intended purposes, and the evaluator was qualified to administer these assessments. [NT 676]
78. During the evaluation Student was pleasant and cooperative, on one assessment asked if Student's understanding of directions was correct and it was, and did not lose track of what the evaluator was saying. [NT 676]
79. On the educational audiologist's evaluation Student performed within normal limits on all the tests of auditory processing administered. Student had auditory strengths in the areas of binaural separation, binaural integration, auditory figure-ground, auditory closure, temporal ordering, temporal resolution and phonemic synthesis. Since the skills as measured by this test battery were within normal limits, the IU evaluator concluded the Student does not have CAPD and that the use of an FM system was not recommended at that time. [NT 678-679]
80. The educational audiologist reviewed her findings with the Parents who did not dispute the conclusions. The Parents did not disagree with the evaluation report at the time it was issued. The findings confirmed what the Parents had suspected. [NT 144, 244, 447, 450 679; S-12, P-8]
81. The District reviewed the IU's CAPD evaluation report and on December 16, 2014 notified the Parents that the District was recommending that Student no longer needed a 504 Plan and that the District understood that the Parents were in agreement with terminating the 504 Plan. [NT 42, 149, 242, 244-245, 378-379, 447-448; S-13, P-62]
82. When the District recommended discontinuing the 504 Plan Student had superior and above average grades in the second marking period in all core subject areas, including Algebra-1, [foreign language class], [SR] Language Arts, and [SR] Science. Individual teachers' report card comments indicated that Student was participating, displaying consistent effort, completing assignments, listening, and following directions. The guidance counselor who had worked with Student since 6th grade believed that Student "was doing wonderfully". [NT 246, 448; S-4]

83. In recommending discontinuation of the 504 Plan, the District also considered that Student was not using the FM system, that preferential seating was in place and did not require a 504 Plan, that Student was not using guidance services and that the other elements of the 504 Plan were good teaching practices used by the teachers for all students. [NT 247]
84. In recommending discontinuation of the 504 Plan the District did consider the previous issues around sensory integration but there were no specific accommodations relative to sensory processing needed or included on the 504 Plan. The existing 504 Plan accommodations addressed auditory processing and attention issues. [NT 250; S-14]
85. On January 27, 2015 the Parents responded in disagreement to the recommendation to discontinue the 504 Plan on the grounds of “noise intolerance, processing issues and struggles in back of class”. [NT 150-152,188, 374-375; S-14, P-62, P-63]
86. Prior to the District’s recommendation to end the 504 Plan the parents had not expressed any concerns to the District about these or other possible unspecified disabilities. [NT 252]
87. When filling out a questionnaire for purposes of the IU CAPD evaluation, the Parents answered ‘no’ to the question of whether Student was having difficulty with phonics, reading, spelling, or word attack skills. [NT 138-139; S-11]
88. When filling out a questionnaire for purposes of the IU CAPD evaluation, the Parents did not indicate that Student had ‘short attention span’, was ‘overly active or impulsive’, ‘easily distracted’ or ‘awkward or clumsy’, experienced ‘anxiety’ or had ‘inappropriate social behavior’. [NT 140-142; S-11]
89. The District psychologist was surprised that the Parents opposed ending the 504 Plan given the answers to the questions/mother’s correspondence with the IU CAPD evaluator as well as her correspondence with the guidance counselor. The District psychologist also noted Student’s strong performance without the use of the FM system over the last year and a half, Student’s ongoing performance on state assessments, and Student’s day-to-day participation and assessments in the classroom. [NT 252]
90. Since the Parents did not agree with ending the 504 plan, the District informed them that the 504 plan would remain in place. The District further indicated that the team would consider any outside reports and recommendations on which to base a 504 Plan, and that if the Parents would forward those reports to the District psychologist the team would see if any findings needed to be incorporated into the existing 504 Plan. The District did not choose to initiate a Due Process request to terminate the 504 Plan. [NT 251]

Private Evaluations/ Need for a 504 Plan:

91. The Parents expressed concerns to Student's pediatrician and upon the pediatrician's recommendation they obtained a private psychological evaluation for Student. [NT 79; P-2]
92. The District received the private psychological evaluation less than a week prior to the first due process hearing session. The District psychologist reviewed the private psychological evaluation. [NT 268; P-14]
93. The private psychologist found that Student was not eligible for special education under the IDEA and PA Chapter 14. [NT 271; P-14]
94. Student's full scale IQs obtained during the two prior District evaluations were 116 and 113. The IQ recorded by the private psychologist was 117. The scores are consistent, all falling within a narrow band in the high average range. [NT 272]
95. The private psychologist found that Student was performing commensurate with Student's cognitive ability, as assessed by the Wechsler Intelligence Scales for Children-5th Edition (WISC-V) and the Wechsler Individual Achievement Test 3rd Edition (WIAT-III). The private psychologist also confirmed that Student was performing at a consistent level from previous evaluations. [NT 271; P-14]
96. The private psychologist concluded that Student was performing commensurate with tested ability in reading comprehension and reading fluency, a conclusion consistent with what was observed in school. [NT 272]
97. Drawing school-based input from only two teachers, neither of whom noted signs indicative of auditory processing difficulties, the private psychologist recommended that Student should be classified as an individual with an auditory language processing disorder and weakness in auditory working memory. She recommended that Student receive a 504 Plan to accommodate these conditions. However, the teachers had indicated that Student follows directions, answers questions, participates, remains attentive, has not been distracted nor failed to achieve at a level commensurate with ability. [NT 272-273; P--14]
98. The private psychologist is not an audiologist. Two audiologists who evaluated Student in the fall of 2014 (IU educational audiologist) and in the spring of 2015 (private hospital-based audiologist) declined to diagnose Student with an auditory processing disorder. The IU educational audiologist found no disorder or difficulty in auditory processing and the private audiologist, while reporting some positive findings, fell short of conferring the diagnosis of an auditory processing disorder. [NT 678-679, 684-689; S-45, S-48]
99. The District psychologist disagrees with the recommendation of the private psychologist for several reasons. The IU CAPD evaluation indicated that Student was obtaining average scores in all areas of auditory processing. On the WISC-V ancillary index,

Auditory Working Memory (made up of the digit span and the letter/number sequencing subtest, both of which are pure auditory working memory subtests) Student obtained a standard score of 108, in the upper portion of the Average Range⁴ at a percentile rank of 70. These scores would not be seen in a student with CAPD. [NT 273]

100. The Private psychologist also recommended that Student have a 504 Plan to accommodate an auditory working memory deficit. The evaluator based that finding on the results of one score on the C-TOPP which is a test not of working memory but an assessment of phonologically-based reading related disorders. [NT 275]
101. On the WISC-V, Student's overall working memory score was in the average range with a standard score of 100. [NT 291]
102. The District psychologist disagrees that Student has an auditory working memory deficit, again because Student obtained an auditory working memory standard score of 108 at the 70th percentile and because other than the C-TOPP not being an instrument for assessing working memory, it is inappropriate to base a conclusion on only one part of one test result. [NT 274-275]
103. The District psychologist found it unusual that when concluding that Student had an auditory working memory deficit the private psychologist did not reference Student's strong performance on the auditory working memory subtest, and only referenced the score on a memory for digits subtest. [NT 275-276]
104. If Student had auditory working memory difficulties, Student would not have performed well within the average range on the non-word repetition subtest. [NT 277]
105. The District psychologist noted that if Student had auditory working memory issues, Student would have been asking the private psychologist to repeat questions, to clarify directions, and to ask that the math problems be read multiple times. Student would have had to consistently refer back to the reading passages when answering comprehension questions. None of those behaviors were noted in the private psychologist's report. [NT 291-292]
106. Neither of Student's teachers who provided input to the private psychologist indicated that Student had any signs that would indicate difficulties with auditory working memory. Student can participate in class, follow directions, take notes in class, and take notes as the [elected position], all of which suggest that Student is able to utilize good working memory skills effectively. [NT 277-278]
107. Student's WIAT-III results do not suggest that Student's achievement is being impacted by working memory issues. Several of the WIAT-III subtests involve working memory, including reading comprehension and math problem solving, subtests on which Student achieved scores commensurate with cognitive ability. [NT 278]

⁴ The Average Range is 90 to 109.

108. Student's teachers did not report memory issues for Student to the IU educational audiologist who performed the fall 2014 CAPD evaluation. They submitted "glowing reports". [NT 692-693]
109. On May 25, 2015, about three weeks prior to the start of the due process hearing, Student was interviewed for about seventy-five minutes by a pediatric neurologist⁵ who saw Student and then Student and the mother together. The pediatric neurologist testified under cross-examination that she had met Student before, and that Student lives near her, but that they "didn't hang out together because she (the doctor) is "never home". Later the pediatric neurologist admitted upon questioning that she lives "right next door" to Student. [NT 297, 301, 317, 322; P-10]
110. The Parents had not informed the pediatric neurologist that they themselves had requested the IU CAPD evaluation. The pediatric neurologist opined on the differences between the IU CAPD evaluation and the private one, and commented on the credentials of the private evaluator (who also saw her [family member] who has CAPD, autism and ADHD) and the IU evaluator. Although she characterized the private CAPD evaluator as "unbiased" she was unaware that the private CAPD evaluator offered some of the services he was recommending for Student to have. [NT 301, 308-315]
111. Reportedly Student told the pediatric neurologist that Student was finding it very hard to pay attention and focus, particularly if there was noise in the room such as someone chewing, mumbling under their breath, using an eraser or moving papers. Student particularly referenced in detail the open book science test on which Student received a low grade. [NT 297-298]
112. According to the pediatric neurologist Student claimed that Student "really didn't have the FM system all year, but that it had helped when Student had access to it". Student reportedly told her that Student "didn't see one (FM system) in the back of anything in the class". The Parents had not informed the pediatric neurologist that at the beginning of the school year they themselves had questioned whether or not Student still needed the FM system. [NT 299, 309, 321]
113. Student told the pediatric neurologist that Student didn't want to stand out and was hoping there would be something like the FM system that wouldn't be so obvious. [NT 321]
114. Student reportedly told the pediatric neurologist that Student was "really worried Student wasn't going to be able to get [Student's] good grades to go on to college, because [Student]'s scared [Student]'s not going to have any extra help, you know, [Student]'s ability to have time, et cetera." [NT 298-299]

⁵ The hearing officer was informed that this witness had exactly 30 minutes free on her schedule in which to testify. Accordingly each side was permitted 12 minutes of examination and an additional 3 minutes for follow-up examination. The witness also had produced a report that was admitted into evidence. Between testimony and the report I find that the witness had ample time to provide information. [NT 326]

115. The pediatric neurologist testified to a “marked drop” from when Student used the FM system and did not use the system, clearly being unaware of the evidence that in 7th grade Student did not use it and received all As. Neither did she seem aware that in 8th grade Student did not use it and received all As and Bs in difficult courses except for one C+ in one marking period in one subject. [NT 302, 318, 323]
116. The pediatric neurologist stated that Student has “very mild” autism that is manifested in social and emotional immaturity, and inability to read cues but “not enough to necessarily affect [Student] academically” but which could cause problems with abstraction. [NT 302-303]
117. The pediatric neurologist based her opinion about autism on her interview with Student, because it was “evident” “just talking to [Student]”. In the interview Student was impulsive, forgot what Student was about to say, had issues with eye contact and had a “social awkwardness”. [NT 302-303]
118. The private psychologist found that Student does not present with any symptoms of an autism spectrum disorder. [P-14]
119. The pediatric neurologist said that Student has ADHD based on fidgetiness in the interview, moving around, touching some equipment, and forgetting what Student wanted to say. She pointed out that she also based her opinion on the fact that Student had previously been diagnosed with ADHD. [NT 305; P-19]
120. On a Vanderbilt Diagnostic ADHD Teacher Rating Scale the science teacher, the language arts teacher, the algebra teacher and the SMS teacher endorsed none of the 35 items at the level of “often” or “very often”; [nor] any concerns about Student. The clear majority of the items were given a “never” rating and a few were given an “occasionally” rating. [NT 561; P-15]
121. Asked what could happen if Student did not get accommodations next school year, for example if Student were “in the back of the classroom” the pediatric neurologist opined that Student “would not meet [Student’s] full potential”, “would become frustrated” and that “self-confidence will go down” . [NT 306]
122. Neither the private psychologist, the pediatric neurologist nor the private audiologist observed Student’s functioning in class. The Parents never observed Student in class. [NT 169-170, 269-270, 530, 596, 666]
123. Teachers on the class teams meet about twice a week to discuss their students. Concerns about Student were never raised. [NT 533-534]
124. In reviewing the report from the pediatric neurologist, the science teacher never noticed that Student was any more anxious than other students when taking tests, and never noticed that Student was confused by noise or sensitive to loud noises. Student did

not ever complain to the science teacher about any noise issues. Student did not have difficulty organizing Student's thoughts, retrieving words to express thoughts, being fidgety, being all over the place, or talking excessively. [NT 523-524, 528-529, 547; P-19]

125. In science class the teacher observed Student sometimes wore glasses and sometimes did not. Student never complained to him about headaches, blurred vision, eyestrain or words moving on the page. The science teacher has not observed Student to lose the place when reading, cover one eye when reading, be sensitive to lights in the room, become fixated on spinning objects, be distracted by auditory stimuli, seek out tactile stimulation or be clumsy. [NT 523-526; P-10]
126. The language arts teacher has never seen Student reverse b's and d's while writing. [NT 577; S-23]
127. In language arts class Student never had difficulty reading aloud and would volunteer to read aloud. When the class read Romeo and Juliet Student volunteered to play a role that involved a very challenging text. Student read well and seemed to enjoy it. [NT 578]
128. On a standardized reading assessment given three times a year in 8th grade Student worked rapidly and scored at 8th grade, 8th month (8.8) in September and again worked rapidly and scored at 9th grade, 7th month in February (9.7). On the third assessment, which Student took on the first day of the due process hearing when Student's teachers were on call as witnesses and a substitute teacher was present in language arts, Student did not do as well, scoring at the 6th grade, 1st month (6.1) level. [NT 578-581, 609-610; S-19, P-95]
129. Accelerated Reading Program (ARP) assessments are designed to encourage independent reading and are not designed to assess reading comprehension. Student's scores on ARP assessments were variable, although Student scored better on the assessments with higher lexile counts, that is, on more difficult assessments. Based on all Student's other achievements in language arts the teacher was not concerned about the times Student received a lower ARP score. [NT 583-586, 621]
130. In the experience of the language arts teacher it is not uncommon for even [SR] students to slip once in a while and receive a lower than usual score. In her opinion the few low ARP scores were an exception and not the norm for Student. Based on the totality of Student's other work in language arts the teacher was not seeing any red flags that Student was having difficulty. Notably Student took a number of ARP assessments on the same day toward the end of the marking period, possibly being a last ditch attempt to score some points. [NT 586-588, 598]
131. In an email the Parents postulated that Student's lower scores on one of the ARP assessments may have been due to events happening in the home. [NT 887-588; S-42]

132. A text-dependent analysis essay, which requires that a student read something, comprehend it, analyze it, and then construct a response about it, is a higher level type of essay that the language arts teacher just introduced this year. Student did very well and the writing reflected an analytical ability to read a text and comprehend it. Student was asked to read an anthem, Beasts of England, from *Animal Farm* by George Orwell, compare it to the *Internationale*, an anthem used during the French Revolution, and prove that Beasts of England was based on the *Internationale*. [NT 589-590; S-23]
133. The language arts teacher has experience teaching students with ADD or ADHD. Student did not exhibit symptoms of either condition in her classroom. Student did not shift from one task to another without finishing something, Student was not easily distracted, Student did not miss important details or make careless mistakes on homework or on tests, Student generally attended when the teacher was teaching and was paying attention. Student did not display difficulties in organization, and never appeared confused when the teacher was lecturing. Student sometimes asked for clarification but no more than other students. [NT 593]
134. Student did not appear anxious in the language arts class and performed well on tests in class. [NT 594]
135. The language arts teacher did not observe Student to be sensitive to loud noises, and Student never asked to be tested in a separate quiet space. During the one or two open notes assessments during 8th grade Student did not exhibit any issues. Student never seemed fixated by noises in the classroom, and never reported any issues with vision, complained of headaches, or used a finger to track words on a page. [NT 594-596]
136. The language arts teacher did not see Student as being “all over the place”, rather Student always seemed “completely with it”. [NT 596]
137. Student never complained about being sensitive to the lights in the language arts classroom and never sought out any tactile stimulation, touching things, more than typical. [NT 595-596]
138. The language arts teacher answered “absolutely not” when asked if she had ever seen any symptoms of Asperger’s in Student. Student interacts with peers appropriately. [NT 596]
139. The language arts teacher agrees with the recommendation to discontinue the 504 Plan. [NT 597-598]
140. In Algebra I, a challenging high school course taught at a fast pace that Student took in 8th grade, Student achieved a final grade of B. Student had some incomplete or not attempted assessments in Study Island; the math teacher believes that although Student was conscientious throughout the year Student was not doing Student’s best on those assessments. Alternatively, the concepts are difficult and some students have more trouble on certain concepts than others. However, if Student was having difficulty with

the work Student did not make the teacher aware of it. [NT 537, 643-644, 646-647, 653-659, 661-663; P-97]

141. The Algebra I teacher did not note any attention issues, or that Student appeared confused or unable to follow him when he was giving information verbally any more than any other student. Student did not complain about extraneous noise in the classroom, or to appear especially anxious in the classroom. Student was able to follow multi-step directions in the class. [NT 664-665]
142. Student was observed by the Algebra I teacher to have friends in the class, and to interact well with peers. [NT 665]
143. Student never complained to the Algebra I teacher about issues related to vision, nor about any ailment. [NT 666]
144. The Algebra I teacher did not notice that Student was sensitive to light in his classroom, or that Student was especially clumsy. [NT 666]
145. The Algebra I teacher agreed with the recommendation to discontinue the 504 Plan. [NT 668]
146. Although they had not originally disagreed with the IU educational audiologist's CAPD evaluation, the Parents later obtained an audiology evaluation from the private audiologist who had first diagnosed Student with auditory processing difficulties. The private audiologist has over 25 years' experience practicing audiology in hospital settings. [NT 711; S-35]
147. In his original report dated May 15, 2015 the private audiologist stated that his assessment "suggests that [Student] had difficulty in a number of the areas investigated, specifically speech-in-noise, tolerance-fading memory, auditory closure and auditory vigilance". The private audiologist followed a certain protocol from an older construct developed in the sixties, called the Buffalo Battery. [NT 680, 682-683; S-48]
148. The Buffalo Battery in part includes a check-off Questionnaire that the Parents filled out. The Parents checked off the items "has difficulty understanding speech-in-noise", "is distracted by noise", and "is hypersensitive to noise". [NT 689-690; S-48]
149. The private audiologist's statement that, "the Buffalo Model Questionnaire results suggest that [Student's] reported profile is similar to children" "...with CAPD", is based solely on the questionnaire that the Parents completed when contesting the IU educational evaluator's findings. [NT 690; S-48]
150. Parents had previously responded to the Buffalo Questionnaire for the private audiologist in 2009 and in 2011. The Parents' responses at those times were not similar to those children who have been diagnosed with or who have characteristics of central auditory processing deficit, as was the private audiologist's conclusion based on parental

responses for his first two tests. In 2015, the profile generated by the Parents' Buffalo Questionnaire responses was similar to those children who have been diagnosed or characterized with auditory processing disorder. [NT 691]

151. The private audiologist did not solicit input from Student's teachers for his recent evaluation nor, it appears, for his previous evaluations of Student. [NT 689]
152. The private audiologist did not solicit input from the IU educational audiologist who had completed the most recent audiological evaluation in fall 2014. [NT 689]
153. The private audiologist submitted his report to Student's mother on May 15, 2015 as noted in the margin of page 7 of the evaluation report. [NT 683; S-48]
154. On page 8 of the evaluation report there is a margin note, "Submitted to the parents 5/20. Changed at the request of Mrs. [Mother of Student]". [NT 683; S-48]
155. Words added to the private report that were not in the original report reviewed by the IU educational audiologist read as follows: "Today's central auditory processing assessment suggests that [Student] does have a central auditory processing deficit. Specific areas of concern are speech-in-noise, tolerance-fading memory, auditory closure and auditory vigilance." [NT 683; S-48]
156. The IU educational audiologist testified that the second wording stated more affirmatively that Student had a CAPD issue. She also noted that the private audiologist wrote that Student had a CAPD "deficit", and not a "disorder" and also opined that this wording "was a way of not committing to an auditory processing disorder". [NT 684-686]
157. On page 7 of the private audiologist's report, it reads, "As part of the differential diagnostic process, we are looking for the presence of a clear pattern of auditory processing deficits existing along with auditory specific complaints. [Student]'s pattern ... supports a more global or motivational deficit, not solely an auditory processing disorder." These two sentences are not present on page 8 of the private report. [NT 685; S-48]
158. On page 2 of the private audiologist's report the following note with the mother's name appears: "Can you write in your report a little clearer that the result supports [Student] still has CAPD?" [NT 685]
159. Student's mother also wrote, "Would you amend your impression to take out the global, as [Student] is [redacted], and motivational deficit? Put before or after the comment about the auditory processing something to the effect of, 'while inattention in patients with ADHD can contribute to these results, it's clear that [Student] is functioning as a child with an auditory processing disorder and would benefit from the recommendations outlined below'." The private audiologist did not include the language that the mother requested. The IU educational audiologist opined that the private

audiologist was unwilling to say that Student is clearly functioning as a child with auditory processing disorder. [NT 688-689]

160. The guidance counselor who has worked with Student since 6th grade does not believe that Student needed a 504 Plan in the 2014-2015 school year and does not believe that Student needs one going forward. [NT 465]

Denial of Educational Evaluation:

161. Despite their responses to the IU educational audiologist's parent questionnaire and the IU CAPD test results, in late December 2014 the Parents raised concerns about Student having CAPD symptoms, ADD issues and sensory issues. Based on the Parents' raising these issues with the pediatrician, the pediatrician suggested further testing. Student had not yet received the one low science test grade or the language arts grade about which the Parents later became concerned. [NT 145-147; P-20]
162. Although they did not disagree with the IU CAPD evaluation initially, and it in fact confirmed the Parents' suspicions, the Parents later decided that they disagreed and wanted another opinion. The Parents obtained another CAPD evaluation privately from a practitioner who had evaluated Student in the past. They did not ask the District for an independent CAPD evaluation. [NT 81-85; P-9]
163. On January 27, 2015 the Parents requested an educational⁶ evaluation. The expressed concerns were a low grade on a particular science test and Student's report of difficulty with noise during that test. The Parents also referenced some difficulty Student was reportedly having in [a physical extracurricular activity]. The teachers did not report seeing, or the Student's having told them, of any difficulties of this sort in school. [NT 68-69, 252-252; P-62]
164. The District psychologist did not agree that Student required an evaluation given the existing data that Student was making academic progress and obtaining above average and superior grades. [NT 254]
165. None of Student's teachers were indicating any difficulty with Student following directions, difficulty with reading, or difficulty with reading comprehension of any sort. [NT 254]
166. The District psychologist noted that while students may obtain low scores on a particular test or in a marking period he looks for a pattern of scores, and that one low score on one assessment and a few low scores on another type of assessment could be attributed to any number of situational factors. [NT 254]

⁶ The Parents used the term educational evaluation. I deem their intent to be a multidisciplinary evaluation of the type Student received previously. The NOREP corroborates this finding. [P-66]

167. The Parents did not request that the District fund an independent educational evaluation at the time of their January 27th letter and did not request such until the due process proceedings began. [NT 253]
168. In a letter dated February 3, 2015 the District denied the Parents' request for an evaluation. [NT 69; S-14]
169. After the District concluded in February 2015 that Student did not require an evaluation the Parents again requested an evaluation in an email dated March 24, 2015. The Parents expressed concerns about executive dysfunction, language processing issues, and ADD, bringing up these issues for the first time in the 2014-2015 school year. Earlier in the year, in correspondence with the guidance counselor, the mother indicated Student was not under any type of care or treatment for ADD. [NT 259-260; S-15]
170. The Parents did not request an independent educational evaluation at the time of their March 24th email. [NT 262]
171. None of Student's teachers were expressing any concerns about the issues raised in the Parents' March 24th email. If they had noticed such difficulties they would have shared this in ongoing team meetings with the guidance counselor who would have shared the information with the District psychologist. [NT 261]
172. The Parents did not ask Student to curtail any of Student's extracurricular activities when they became concerned about the low grades. The mother had previously acknowledged that colleges look for well-rounded students who participate in extracurricular activities. [NT 160, 165-166; S-44]
173. The District psychologist conducted a record review from 4th grade onwards including PSSA scores, and carried out a structured observation on March 27, 2015; he asked the guidance counselor to also do a structured observation which was completed on April 2, 2015. He spoke to all Student's core teachers and reviewed all Student's individual grades for each class. He reviewed Parents' written concerns. [NT 50, 198, 200, 202-203, 211-212, 229, 263, 265-266; S-16, S-19, S-46]
174. The District psychologist conducted the formal classroom observation using the Behavior Assessment System for Children, Student Observation System. This is a structured observational method that allows the observer to chart adaptive and maladaptive behaviors using momentary time sampling. A student's behavior is assessed for three seconds every 30 seconds over a 15-minute period. [NT 266-267]
175. Student was observed in the [SR] science class, and exhibited adaptive behavior for 90 percent of the observed intervals, a performance that is considered above average. Student had an assignment completed, listened, followed directions, participated, was called on and correctly answered the question posed by the classroom teacher. [NT 267]

176. Student's most recent reading and math PSSA scores (obtained at the 7th grade testing) were both Advanced. It would be "next to impossible" for a student with a learning disability in reading comprehension to attain an Advanced PSSA level in reading. [NT 265]
177. Student's February 2015 STAR reading scores placed Student at a 9.6 instructional grade level. [NT 264-265]
178. In reviewing Student's records the District psychologist noted that Student had made the honor Roll in 15 of 17 middle school marking periods and that Student had raised the Science [SR] grade back up to a B+. {NT 262-263}
179. Although it was always available to Student, Student did not use the FM system at any time in 7th grade or up to the third marking period in 8th grade. [NT 266]
180. Student had received two previous District evaluations and was found not to be eligible for special education services. Student had consistently obtained scores indicating high average intellectual ability, average to high average academic achievement, and functioned within or above benchmarks in reading, math, and writing. [NT 265-266]
181. By letter dated April 2, 2015 the District psychologist reiterated in detail the District's position that Student did not require an evaluation. [NT 71; S-16]
182. The District issued a Notice of Recommended Educational Placement (NOREP) indicating that it was rejecting the Parents' request for a multidisciplinary evaluation. [NT 364-365, 632; P-66]
183. The private psychological evaluation, when received just prior to the start of the hearing, confirmed for the District psychologist that Student had not required an evaluation from the District. [NT 269]
184. At, or up to, the time of the April 2nd letter, the Parents had not provided the District with any documents from any medical professionals that suggested that Student required an evaluation. [NT 268]
185. The Parents indicated they were going to pursue a sensory evaluation; the District encouraged them to share the results when they were available. [P -63]
186. The District psychologist and the team reviewed the sensory evaluation when it became available. [NT 268]
187. The District psychologist and the team reviewed a handwritten note from Student's former psychiatrist's office. [NT 268]

188. When filling out a questionnaire for purposes of an IU CAPD evaluation, the Parents indicated Student had “Minor vision correction with glasses. Almost out of them. Wears when eye fatigue.” [NT 142, 676-677; S-11]

Discrimination:

189. The District psychologist made an independent determination to deny the Parents’ request for an educational evaluation after reviewing records, parent input, teacher input and observational data. [NT 204-210]

190. The guidance counselor who has been involved with Student’s 504 Plans since 6th grade is not aware of any intentional effort on the part of the District to deny Student an evaluation because the Parents exercised strong advocacy on behalf of their other children. [NT 94-95, 432]

191. In the science teacher’s opinion and to his knowledge the decision not to evaluate Student was not based on prejudice or bias. [NT 534]

192. The language arts teacher testified that she agreed with the decision not to evaluate Student and that to her knowledge and information the decision was not based on bias or prejudice. [NT 597-598]

193. The Algebra I teacher agrees with the decision not to evaluate Student and to his knowledge that decision was not based on bias or prejudice. [NT 669]

194. The decision not to evaluate Student was based solely on Student’s academic performance and how Student functioned in school. [NT 458]

195. The IU educational audiologist testified that other than reviewing input from Student’s teachers, no one in the District influenced her findings or asked her to reach a certain result. [NT 689]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012).⁷ In this case therefore the Parents asked

⁷ Although the Parents currently bring 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

for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). The Parents are to be commended for their devotion and commitment to their child’s educational success. The mother, a professional woman, was assiduous in seeking procedural direction from the hearing officer and the case manager after filing for due process and during the preparation of the Parents’ case. During the hearing the mother did a more than adequate job of presenting the Parents’ case *pro se*, and despite her occasional statements about being anxious or dialogue moving too fast was perfectly capable of eliciting direct testimony and cross examining witnesses. I did find some of the information she provided to be questionable, for example that she did not read the 8th grade 504 Plan before signing it and missed the “as needed” clause about the FM system, and that these active Parents thought Student was using the FM system in 8th grade when Student was not. I also find that her requests that the private audiologist alter his report were unfortunate attempts to secure an outcome that supported the Parents’ case, and this diminished her credibility. I find that the Parents’ choice of their next door neighbor to be a last minute evaluating pediatric neurologist was clearly an attempt to bolster the Parents’ case for litigation. Neither the private psychologist nor the private audiologist testified and therefore their reports were not subject to cross examination; however the criticisms provided by the District’s psychologist and the IU educational audiologist were well reasoned and I accepted them. Although her willingness to make herself available for part of a busy schedule was appreciated, I accorded reduced weight to the pediatric neurologist’s testimony. Although she said that she lived ‘near’ the Student, the fact that she is the Parents’ next door neighbor was a fact only elicited by a question from the hearing officer. Additionally, her testimony and report were overtly prepared for the purpose of supporting the Parents in this litigation, and with the attendant and well recognized detriment to reliability that such a purpose implies. Had Student testified in the hearing some of these concerns could have been further explored, although I fully acknowledge the Parents’ right to decide not to have Student testify.

Section 504: The claims in this case were asserted solely under the statute prohibiting disability-based discrimination, commonly referred to as “§504 of the Rehabilitation Act of 1973” or simply “§504,” found at 29 U.S.C. §794(a). §504 provides that, “No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this

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.

title, 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.”

The protections of §504 are implemented by federal regulations found at 34 C.F.R. §§104.32—104.37. In addition, Pennsylvania has adopted regulations implementing §504 in the context of prohibiting discrimination on the basis of disability and providing educational services in the public schools, which are found in 22 Pa. Code §§15.1—15.11 (Chapter 15). As explained in §15.1: This chapter addresses a school district’s responsibility to comply with the requirements of Section 504 and its implementing regulations at 34 CFR Part 104 (relating to nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from federal financial assistance) and implements the statutory and regulatory requirements of Section 504. Section 504 and its accompanying regulations protect otherwise qualified handicapped students who have physical, mental or health impairments from discrimination because of those impairments. The law and its regulations require public educational agencies to ensure that these students have equal opportunity to participate in the school program and extracurricular activities to the maximum extent appropriate to the ability of the protected handicapped student in question. School districts are required to provide these students with the aids, services and accommodations that are designed to meet the educational needs of protected handicapped students as adequately as the needs of nonhandicapped students are met. These aids, services and accommodations may include, but are not limited to, special transportation, modified equipment, adjustments in the student’s roster or the administration of needed medication. For purposes of the chapter, students protected by Section 504 are defined and identified as protected handicapped students.

Notwithstanding language which, by its plain terms, proscribes discriminatory conduct by recipients of federal funds, in the context of education the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled student with a free, appropriate public education (FAPE). *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009)

However, the IDEA and §504, statutes differ in focus. The primary focus of §504 is to “level the playing field,” *i.e.*, to assure that an individual, specifically, a school-aged student in this context, is not disadvantaged in education based upon a disability. As stated in *Chavez v. Tularosa Municipal Schools*, 2008 WL 4816992 at *14, *15: (D.N.M. 2008): “In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to a FAPE. In other words, the drafters of Section 504 were not only concerned with [a student] receiving a FAPE (as was the case with the IDEA), but also that a federally funded program does not treat [the student] differently because [he/she is disabled]...Unlike the IDEA, Section 504 does not only look at what is a FAPE, but also what is fair.” *Ellenberg v. N.M. Military Inst.*, 478 F.3d at 1281-82 n.22 (quoting C. Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School*, 58 Stan. L.Rev. 1563, 1589 (2006)).

To assert a successful §504 educational discrimination claim, a parent must prove four elements: 1) that the student has a disability; 2) that he or she is otherwise qualified to participate in school

activities; 3) that the LEA receives federal financial assistance; 4) that the student was excluded from participation in, denied the benefits of or subjected to discrimination at school. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490 F.3d 337, 350 (3rd Cir. 2005); *School District of Philadelphia v. Deborah A.*

Pennsylvania law defines a §504/chapter 15 “protected handicapped student” as a student who meets the following conditions: (i) Is of an age at which public education is offered in that school district. (ii) 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 Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under §15.10 (relating to discrimination claims). Section 504 protects “handicapped persons”. 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.” Under Pennsylvania Chapter 15, a “protected handicapped student” is 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. *See* 22 Pa. Code § 15.2.

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 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.”

Our Third Circuit has made it clear that a school district must reasonably accommodate a student’s disabilities so as to assure the student meaningful participation in activities and meaningful access to educational benefits. *Blunt v. Lower Merion Sch. Dist.*, 2014 U.S. App. LEXIS 17629 (3d Cir. Sept. 12, 2014). Borrowing from analogous IDEA case law “meaningful” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996), *cert. den.* 117 S. Ct. 176 (1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988). However, again borrowing from IDEA case law, what is guaranteed is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Discrimination: Recent case law from another circuit, although not binding in this circuit, provides instructive language when, as in this case, parents allege discrimination: “Even if an

Alabama fourth-grader's repeated removals from the general education setting amounted to an IDEA violation, they did not qualify as disability discrimination under Section 504 or Title II. The District Court held that the parents' failure to establish bad faith, gross misjudgment, or deliberate indifference entitled the district to judgment. *J.S. III by J.S. Jr. and M.S. v. Houston County Bd. of Educ.*, 66 IDELR 8 (M.D. Ala. 2015).

When a physician provides a diagnosis or makes a recommendation for specific accommodations or services, this information should be viewed in the proper perspective. Simply stating a diagnosis does not dictate that a student will qualify for a Section 504 Plan (or an IEP). Diagnosis is simply one piece of the eligibility puzzle. A medical diagnosis in and of itself does not entitle a student to a 504 Plan (or an IEP). Rather, a medical diagnosis would require the team to look at whether or not a student's ability to access the curriculum is being impacted or impaired due to their medical condition, and as a result they require provision of accommodations. If the medical diagnosis impacts a student's ability to access the curriculum then a 504 Plan is needed.

Independent Educational Evaluations: 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).

Although neither Section 504 nor Pennsylvania Chapter 15 addresses independent evaluations, courts have held that when applied to educational issues the IDEA, as the closest analogous statute may be applied.

Standards for Evaluations: The general standards for an appropriate evaluation are found at 34 C.F.R. §§300.304—300.306. The District is required to 1) "use a variety of assessment tools"; 2) "gather relevant functional, developmental and academic information about the child, including information from the parent"; 3) "Use technically sound instruments" to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using "any single measure or assessment as the sole criterion" for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be "sufficiently comprehensive to identify all of the child's special education and related service needs" and provide "relevant information that

directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). An initial evaluation must also include, if appropriate: 1) A review of existing evaluation data, if any; 2) local and state assessments; 3) classroom-based and teacher observations and assessments; 4) a determination of additional data necessary to determine whether the child has an IDEA-defined disability, the child’s educational needs, present levels of academic achievement and related developmental needs, whether the child needs specially-designed instruction and whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(1),(2). 305(a)(1)(2).

Although the IDEA obligates a local educational agency to conduct a “full and individual initial evaluation ...” [20 U.S.C. §1414(a)(1)(A)], there is less specificity regarding reevaluation. C.F.R. §§ 300.304 – 300.305. As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2). The IDEA requires utilization of assessment tools and strategies aimed at enabling the child to participate in the “general education curriculum” and “determining an appropriate educational program” for the child. 20 U.S.C. §1414(b)(3)(A)(ii). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related service needs” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). If additional data from testing is utilized in a reevaluation, then that portion of the reevaluation must comport with the requirements set forth in 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(c).

Compensatory Education: Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child’s educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d. Cir. 1999). *Ridgewood* provides that a school district has a reasonable period of time to rectify a known issue. Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Discussion

Implementation of 504 Plan

FM System: Student used the FM system consistently in 6th grade. In 7th grade there was an agreement between the Parents and the guidance counselor that language arts was the only course for which Student would use the FM system, and the FM system was kept in the language arts classroom. Student did not elect to use the FM system in that class in 7th grade, nor did Student request to use it in any other class. Without using the FM system in 7th grade Student had all As. The 8th grade 504 Service Plan, approved with mother’s signature, provided that Student would use the FM system “as needed”. The mother and the Student were informed that

the device was kept in the guidance office. All Student's teachers were trained at the beginning of the year on how to use the device by the IU audiologist who conducted the CAPD evaluation. The District was ready and willing to implement this aspect of the 504 Service Plan.

There is no evidence to refute the Parents' allegation that Student did not use the FM system in 8th grade, but the Parents' contention that they did not know that Student was not using the FM system is rejected as is the mother's claim that she did not read the 504 Service Plan carefully before she signed it. Parent was exacting in her preparation of exhibits, going so far as to collate all Student's grades onto a poster, and also exploring a point system whereby a theoretical student could do poorly on tests and quizzes and still get an overall good cumulative grade; this belies her claim of acting inattentively when signing a document. As for using the FM system, given the totality of Student's stellar presentation in the school setting as a learner, as a communicator and as a self-advocate I have no doubt that Student would have retrieved it from the guidance office, or asked about its location if not remembering the location, and used it if Student felt it was helpful. Forcing Student to use the device would not serve Student well; Student chose not to use it and there is no evidence that this choice undermined Student's achievement in 8th grade.

I conclude that the District implemented the 2014-2015 504 Plan as it was written. The FM system was to be used "as needed", the device was available in a set location and the teachers knew how to use it. Student did not find it to be needed. Student's decision did not adversely impact Student's learning.

Preferential Seating: The Parents assert that the District failed to implement the 504 Plan in the area of preferential seating. Each of the teachers called by the parties testified clearly and credibly that Student received preferential seating. Teachers checked with Student to be sure that the seating worked for Student, and on the occasion when the Parents asked that Student be moved from the middle of three rows to the first of three rows in a classroom where the teacher [w]alked around during his instruction the District complied.

I conclude that the District implemented the 2014-2015 504 Plan with regard to preferential seating. It is here noted that the District established that Student may have preferential seating upon request with or without a 504 Plan.

Guidance Services: The 504 Plan for 2014-2015 provided for the availability of guidance services. Guidance services were available from the designated guidance counselor as well as from any other guidance counselor in the suite. Student did not use this service, and the Parents did not request that guidance sessions be regularly scheduled. I conclude that this did not constitute non-implementation of the 504 Plan.

Additional 504 Plan Accommodations: All other accommodations listed in the 8th grade 504 Plan are best teaching practices that the teachers in the District employ for all students.

Revision of the 504 Plan: In an email to the District late in March of 8th grade the Parents noted that the 504 Plan needed to be revised. The Parents did not indicate what needed revision or what needed to be added. In the hearing the Parents asserted that Student required a quiet place

for testing based upon Student's report to them that the noise of shuffling papers during an open book science test caused difficulty. While this may have been the case, there are other valid reasons for the low grade Student earned on this particular test. None of the teachers who testified noted that Student was distracted by noise in the classrooms, and Student never asked to move to another location for a test. All teachers testified that had the Student asked, the request would have been granted.

Eligibility for 504 Plan: Through the report of the private psychologist, the report of the private audiologist, and the testimony and report of the pediatric neurologist the Parents elicited evidence that Student has one or more of the following handicapping conditions: Central Auditory Processing Disorder; Auditory Language Processing Disorder; Attention Deficit Hyperactivity Disorder; Attention Deficit Disorder; Weaknesses in Auditory Working Memory; Autism (Asperger's Disorder); Sensory Integration Disorder; Visual Impairment. After reviewing the evidence I cannot find that any of these handicapping conditions currently exist. It should be noted that each of the private evaluations the Parents proffered for consideration was produced very close to the start of the hearing.

At the beginning of the 8th grade year the Parents indicated that ADD was not a consideration and they questioned whether Student still had CAPD. The IU educational audiologist offered credible testimony that, as the Parents suspected, Student does not have CAPD and she effectively pointed out elements of the private audiologist's report that caused it to be given less weight than hers. The District psychologist, reviewing the private psychologist's report, cast considerable doubt on the private psychologist's process of reaching her opinion that Student has an auditory working memory deficit. In addition, the testimony of Student's teachers and a review of Student's grades does not support that Student has difficulties with memory. The private psychologist, who is not an audiologist, conferred the diagnosis of an auditory processing disorder. This is notable and surprising given that the IU educational audiologist ruled out CAPD and the private audiologist stopped short of diagnosing CAPD, even when Student's mother asked that he strengthen his report and make the diagnosis.

The testimony and report of the pediatric neurologist was given reduced weight. Other than the fact that she is the family's next door neighbor called on to assess Student three weeks before the start of the hearing, I found that she reached conclusions about the diagnoses of CAPD, ADHD and Autism (Asperger's) on insufficient evidence. Other than endorsing the opinion of the private hospital-based audiologist who has evaluated her own [family member] over the opinion of the IU educational audiologist, particularly of concern were the behavioral observations upon which the doctor seemed to base her diagnoses of Autism and ADHD. Each of the behaviors she observed, and the behaviors in their totality, could be explained through alternative hypotheses. This witness failed to consider in her report the many reasons other than mild Asperger's/Autism and ADHD that could generate Student's behaviors during the interview, including Student being aware that this was a "high stakes" interview three weeks before the due process hearing, being concerned about not being able to go to college with a low grade or have time accommodations when applying, being defensive about the reasons for a minimal number of lower grades, knowing that the choice had been Student's not to use the FM system, and, as a very good student, having to share information about purported difficulties with [redacted] next door neighbor.

Scant evidence was provided in the hearing about a possible sensory integration disorder or a visual impairment, and I will not reach a conclusion either way about the presence of lack thereof of these conditions.

Assuming for purposes of argument that Student has any or all of the handicapping conditions the Parents sought to establish, testimony from District witnesses, in particular the [SR] Language Arts, the [SR] Science, and the Algebra I teachers, in concert with Student's academic achievements, supports the finding that if they are present they pose no substantial limits to nor prohibit participation in or access to any aspect of the student's school program. At this time Student does not require any of Chapter 15's "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." Student has benefitted very well from all the District has to offer.

Denial of Evaluation: The District established its reasons for denying the Parents' request for a District evaluation. Having considered and denied the Parents' first request, the District carried out a second, rather intensive, investigation when the Parents renewed their request. I find that the District's reasons for denying an evaluation were reasonable and will not disturb its conclusion. I do add, however, as a matter of dicta, that it would have been far more cost effective for the District to perform what it saw as an unnecessary evaluation than to incur the costs of legal representation and teacher substitutes that this due process hearing made necessary.

Reimbursement for Private Evaluations: I find that the District did not act unreasonably in denying the evaluation the Parents requested. The Parents, in their diligence and wanting to leave no avenue unexplored, commissioned a private psychological evaluation, a private audiological evaluation and an evaluation by a pediatric neurologist, as well as a sensory integration evaluation. At no time prior to obtaining these evaluations did the Parents ask for independent evaluations at public expense. Given their somewhat belated disagreement with the IU CAPD evaluation, had they requested an independent audiological at public expense the District would have had to grant one or file for due process to defend the IU evaluation. The IDEA or Section 504 do not provide the opportunity for parents to obtain a "second opinion" at public expense. Again, the standard is whether the District's evaluation was appropriate. However, this is a moot point as I do find the IU CAPD evaluation to be appropriate. Neither the private psychological evaluation nor the pediatric neurological evaluation were undertaken in disagreement with a corresponding District evaluation. It is clear that each of the private evaluations was undertaken for purposes of litigation, which is certainly an appropriate measure for parents to take, but they are not reimbursable.

Discrimination: I find no basis upon which to find that the District acted in a discriminatory manner towards the Student or the Parents in denying the request for an evaluation or in determining that Student's 504 Plan should be discontinued.

Compensatory Education: As Student has been able to successfully access the regular education curriculum and participate in extracurricular activities there has been no educational deprivation and therefore no compensatory education is due.

Order

It is hereby ordered that:

1. The District did not fail to implement Student's 504 Plan during the 2014-2015 school year, specifically with regard to providing an FM system and preferential seating.
2. The District was not required to revise Student's 504 Plan to include providing a quiet area for Student to take tests during the 2014-2015 school year.
3. The District did not err in recommending that Student is no longer eligible for a 504 Plan.
4. The District did not err in not providing an evaluation every three years and/or refusing the Parents' request for an evaluation in spring 2015.
5. The District is not required to reimburse the Parents for the cost of the private evaluations (auditory evaluation, educational evaluation, neurological evaluation and sensory evaluation) they obtained for Student.
6. The District did not discriminate against Student.
7. Student is not entitled to compensatory education.

Any claims not specifically addressed by this decision and order are denied and dismissed.

September 28, 2015

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official