

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

PENNSYLVANIA

## SPECIAL EDUCATION HEARING OFFICER

### DECISION

Child's Name: B.W.  
Date of Birth: [redacted]

### CLOSED HEARING

ODR File No. 18146-16-17 AS

Parties to the Hearing:

Parent[s]

Local Education Agency  
The Preparatory Charter School of  
Mathematics, Science, Tech, and  
Careers  
1928 Point Breeze Avenue  
Philadelphia, PA 19145

Dates of Hearing:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney  
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October 18, 2016; November 15, 2016;  
December 2, 2016

December 19, 2016

Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a mid-teenaged student attending The Preparatory Charter High School (hereafter School). Student has been identified as a protected handicapped student under Section 504 of the Rehabilitation Act of 1973<sup>2</sup> based on a diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD), and has been provided with accommodations pursuant to Section 504 Accommodation Plans (hereafter Section 504 Plan(s)).

In August 2016, Student's Parent filed a Due Process Complaint against the School, asserting that it denied Student a free, appropriate public education (FAPE) under Section 504 and the Individuals with Disabilities Education Act (IDEA),<sup>3</sup> as well as the federal and state regulations implementing those statutes. Specifically, the Parent sought to establish that the District violated its Child Find obligations in failing to identify Student as eligible under the IDEA, and further that it denied Student FAPE through the program that it implemented during the 2014-15, 2015-16, and 2016-17 school years. The School maintained that Student was not eligible under the IDEA and that its program, as implemented, was appropriate for Student. The hearing concluded in three sessions.<sup>4</sup>

For the reasons set forth below, the Parent's claims will be granted and compensatory education will be awarded.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

<sup>2</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>3</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 711.1 – 711.62.

<sup>4</sup> The hearing officer appreciates the cooperation of the parties and counsel in coordinating a single set of joint exhibits. The parties and counsel were also very collaborative with respect to hearing dates, although the decision due date was extended on joint request to allow for the dates that accommodated all schedules, including a witness under subpoena.

## **ISSUES**

1. Whether the School violated its Child Find obligations in failing to identify Student under the IDEA;
2. Whether the School denied Student appropriate educational programming for any part of the 2014-15, 2015-16, and 2016-17 school years;
3. If the School did deny Student appropriate educational programming, is Student entitled to compensatory education and, if so, in what form and amount;
4. Whether the Parent should be reimbursed for expenses incurred for summer school; and
5. Whether the Parent should be reimbursed for testimony and expenses incurred for retention of an expert witness?

## **FINDINGS OF FACT**

1. Student is a mid-teenaged student enrolled in School currently in tenth grade. Student has been identified by School as a protected handicapped student under Section 504. (N.T. 29-30)
2. Student attended a different charter school in first through eighth grades. Student was provided with a Section 504 Plan at the other charter school during the 2012-13 and 2013-14 school years with Attention Deficit Disorder (ADD) noted as the qualifying disability. (N.T. 782-83; J-3, J-43)
3. The Section 504 Plan from December 2013 at the other charter school included preferential seating away from distractions, particularly during instruction and when directions were provided; key points provided in writing and reviewed orally when necessary; checks for understanding; typed notes and provision of study aids; organization assistance from peers and teacher; positive reinforcement; cues for remaining on task; extended time for homework and tests; testing in a smaller environment; scheduled breaks; an extra set of books at home; mathematics support; and counseling as needed. (J-43)

### **2014-15 School Year**

4. The School did not have a copy of any evaluation report when Student was first enrolled, and ultimately learned that the prior charter school had not conducted a psychoeducational evaluation. (N.T. 692-93; J-38 pp. 90-91)

5. When Student first began attending the School at the start of the 2014-15 school year, Student's most recent Section 504 Plan from the previous charter school was reviewed by Student's teachers with the case manager. That Plan was to be implemented by all teachers. (N.T. 215-16, 313-14, 316, 358-59, 374-77, 694, 696-97, 744-45, 768-69)
6. There are inclusion classes in some major content subject classes at the School where the regular education teacher is supported by special education staff, who sometimes was a special education teacher. (N.T. 54-56, 58-59)
7. At the start of the 2014-15 school year, Student was assigned to a class section with some inclusion classes for major content areas such as biology, history, and mathematics. All students with Individualized Education Programs (IEPs) were in that section. In the inclusion classes, a special education teacher or paraprofessional provided support to the students. In other sections, inclusion classes were not available to students. (N.T. 57-58, 235, 250-52, 254-55, 260-61, 319, 338, 357, 366, 377-78, 716, 773)
8. From the start of the 2014-15 school year, the Parent observed Student struggling and contacted Student's case manager. She requested an evaluation of Student in early October to determine whether Student had learning problems, and expressed concerns with Student's ability to concentrate in addition to declining self-esteem. (N.T. 787, 790-92; J-6, J-37 p. 1)
9. The Parent advised Student's case manager in October 2014 about medication changes for treatment of Student's ADD. (J-37 pp. 3, 6)
10. When a parent or teacher requests a special education evaluation from the School, information from all of the student's teachers is obtained, as well as parent input. A team then meets to decide whether an evaluation should be conducted based on the information obtained. (N.T. 71-72)
11. The School conducted an evaluation of Student after receipt of consent by the Parent on a Permission to Evaluate (PTE) form specifying the following types of assessments:

“general intelligence, academic achievement, background information, adaptive behavior skills, emotional/behavioral functioning, attention and memory, articulation, receptive and expressive language, fine-motor, gross motor, speech and language evaluation, review of records observations and teacher input.” (J-7 p. 1)

A sentence following that list of tests and assessments explaining that “unnecessary or duplicate assessment” (*id.*) would not be conducted if preliminary evaluation suggested any type of assessment was not required. The school psychologist understood the reason for the evaluation referral to be a determination of whether Student had a learning disability because of academic concerns. She did not review the PTE form signed by the Parent but relied on an email message making the referral. (N.T. 73-74, 104-05, 107, 204-05; J-7)

12. The school psychologist was not aware that Student had a Section 504 Plan at the time of the initial evaluation. (N.T. 107, 180)
13. The school psychologist obtained parent input through a form, but did not speak with the Parent as part of the evaluation process. The Parent's input described Student's difficulties with concentration and focus and resulting inability to keep up with schoolwork; lack of motivation and self-esteem; possible anxiety disorder and/or depression; and developmental, educational, and medical history that included ADD and two medications for that condition. The Parent specified that she sought information on a possible learning disability in addition to the effects of ADD on Student's education through the evaluation. (N.T. 792-94; J-8)
14. The school psychologist conducted all assessments of Student on the same day. An Evaluation Report (ER) was completed in late November 2014. (N.T. 112-13, 163; J-10, J-37 p. 22)
15. The Reynolds Intellectual Assessment Scales (RIAS) was used for cognitive assessment for the ER. Student scored in the below average range on the Verbal Intelligence Index and in the moderately below average range on the Nonverbal Intelligence Index, with Composite Intelligence and Memory Index Scores in the below average range. The school psychologist noted Student's tendency to respond without taking time to complete tasks on one of the Nonverbal Intelligence subtests, and also explained that Student's scores on the RIAS suggested that Student's nonverbal memory was better developed than verbal memory. (N.T. 111-12, 164-67; J-10 pp. 4-5)
16. Academic achievement in reading and mathematics was assessed using the Kaufman Test of Educational Achievement – Third Edition. Student scored in the average range on all subtests and composites with the exception of Math Concepts and Applications, which was in the upper level of the below average range. The Spontaneous Writing subtest of the Test of Written Language – Fourth Edition (TOWL-4) revealed average range scores. The school psychologist did not conclude there was a need to administer other subtests of the TOWL-4 because of Student's performance on the Spontaneous Writing subtest. (N.T. 121-23, 165-67, 182-83, 191-93; J-10 pp. 5-6)
17. The school psychologist did not conduct a classroom observation of Student, but the ER included Student's grades in the first quarter reflecting that Student was failing three courses and was very close to failing two others. Teacher input was summarized with Student's difficulties with focusing and remaining on task a consistent theme. Other noted concerns of the teachers were independent writing ability, both in taking notes and with longer written assignments; completing multi-step problems and tasks; understanding directions; maintaining attention; and need for frequent redirection. Teacher comments included uncertainty over whether Student found the work too challenging; success with small group environments free of distractions; and Student's lack of motivation, tendency to socialize at inappropriate times, and inconsistent homework completion. (N.T. 113, 115; J-10 pp. 2-3)

18. The school psychologist did not obtain rating scales because there was information from the teachers relating to Student's attention difficulties. She did not conclude that Student exhibited behaviors of concern, since Student was not violating school or class rules. For the same reason, she did not believe a Functional Behavioral Assessment (FBA) was necessary. (N.T. 131-32, 136, 139-40, 184)
19. The school psychologist was not provided with any formal written diagnosis of ADHD,<sup>5</sup> and noted in the ER that the diagnosis could therefore not be confirmed. (N.T. 138, 156, 157, 189, 202; J-10 p. 4)
20. The ER concluded that Student did not have a disability and was not eligible for special education, but suggested that a Section 504 Plan be considered if a written medical diagnosis for ADHD was provided. The school psychologist did not complete the portion of the ER that was required for determination of a specific learning disability, nor was that information included in other sections of the ER. (N.T. 159; J-10 pp. 8, 10-11)
21. Student's case manager sent the Parent a copy of the ER via email, and stated that Student did not have a learning disability and did not qualify for special education. (J-37 p. 22)
22. School developed a Section 504 Plan for Student at a meeting on December 4, 2014, specifying ADHD as medically documented and the qualifying disability. That Plan included five accommodations: preferential seating; 100% extended time for tests and quizzes; the ability to take tests and quizzes in a small environment; the ability to meet with the guidance counselor or case manager when needed for support; and breaks of up to five minutes when feeling restless in class. The accommodations applied to all classes. (N.T. 218; J-11)
23. The Biology teacher provided notes to the entire class that contained blanks for the students to fill in. Student was permitted to take breaks as needed, and was given preferential seating and cues to begin work as well as extended time on tests and quizzes that could be taken in a smaller environment at Student's option. The Biology teacher also modified Student's tests and quizzes on her own accord to help Student pass the course. (N.T. 318-19, 324, 326, 332, 346, 348-49, 355-56, 358; J-38 p. 10)
24. The History teacher generally provided the accommodations in the prior charter school's Section 504 Plan, as well as School's December 2014 Section 504 Plan. Student met with the History teacher a number of times after school for assistance. All students were permitted to retake tests and were given unlimited time to complete them. Student's tests were occasionally modified. (N.T. 384-85, 388-90, 395, 413-15, 416-17, 421-22)
25. On one occasion in April 2015, Student used an illegal drug and was suspended for one day. Student had tried that drug on a couple occasions around that time. (N.T. 818-20, 821, 856-58, 877; J-17 p. 2)

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<sup>5</sup> It is unclear from the record whether and when Student's diagnosis may have changed from ADD to ADHD.

26. Around the time of the drug incident, Student was engaging in problematic behavior at home. Student then entered a residential mental treatment facility for approximately six days for treatment of depression. (N.T. 818-19)
27. In mid-May 2015, Student's teachers reported that Student was in danger of failing most classes. (J-14)
28. Students who are failing, or in danger of failing, a subject at School are required to attend mandatory tutoring. Anything below 70% is considered failing. (N.T. 93, 230, 427, 437-38; J-23 p. 4)
29. Student was not required to attend mandatory tutoring. (N.T. 809-10)
30. Student's Section 504 Plan was revised in late May 2015 to add 100% extended time for assignments and a set location for turning in completed assignments; an extra set of textbooks at home; and weekly meetings with the guidance counselor. (J-15)
31. Throughout the 2014-15 school year, Student's teachers reported to the Parent that Student was missing assignments and having difficulty concentrating in class, paying attention, and completing tests and classwork, with resulting poor grades. They also described efforts to re-direct Student. (J-37, J-38)
32. At the end of the 2014-15 school year, Student failed classes in Algebra, Biology, World History, and the foreign language. Student barely passed Art and Technology, but earned better grades in Career Development, English, and Health/Physical Education. On the Pennsylvania Keystone Exam, Student scored in the below basic range in Biology and Algebra. (J-12, J-16)
33. Student's Section 504 Plan was again revised on June 4, 2015 to change the accommodation for extended time on tests, quizzes, and assignments to be at teacher discretion and not to exceed 100%. The remainder of the Section 504 Plan was unchanged. (J-18)
34. Students who fail one or two subjects during the school year are required to attend summer school at School. Tuition for summer school is \$250 per class. (N.T. 68-69, 810-11; J-23 p. 3)
35. Student attended two summer school classes in 2015 at School. (N.T. 810)

#### Independent Educational Evaluation

36. The Parent made a request for an Independent Educational Evaluation (IEE) at public expense during the summer of 2015, and the School ultimately agreed and retained a qualified private neuropsychologist suggested by the Parent. (N.T. 582, 817; J-19, J-24, J-36, J-47)
37. The private neuropsychologist met with both of Student's parents and Student prior to conducting various assessments for the IEE. (N.T. 583, 585, 817; J-26 p. 1)

38. The private neuropsychologist administered a number of assessments for the IEE to determine Student's cognitive, academic achievement, and social/emotional/behavioral functioning. (J-26 p. 3)
39. Cognitive ability was assessed by the Wechsler Intelligence Scale for Children – Fifth Edition. Student attained scores ranging from the borderline impaired range (Processing Speed) to the low average range (Verbal Comprehension and Fluid Reasoning) to the average to low average range (Visual Spatial Reasoning) to the high average range (Working Memory). (J-26 pp. 3-4)
40. The Wechsler Individual Achievement Test – Third Edition was administered and reflected overall average performance with some variability among subtests in all content areas assessed. Student's performance in the area of reading ranged from the high average to borderline impaired range; in the area of mathematics ranged from the high average to low average range but with a borderline impaired score in untimed problem solving skills; and in the area of writing ranged from the high average to borderline impaired range. (J-26 pp. 4-5)
41. Student's behavioral functioning was assessed through rating scales. On the Behavior Assessment System for Children – Third Edition (BASC-3), the scales from both Parents reflected concerns in the areas of attention problems, behavior and mood, functional communication, leadership, adaptability, self-control, and social skills. The private neuropsychologist did not obtain BASC-3 rating scales from teachers because he believed he had sufficient information from them in the areas that that instrument measures. On the Behavior Rating Inventory of Executive Functioning (BRIEF), Student's Parents and the teachers reported concerns with behavioral regulation, task-management, self-monitoring, and overall executive functioning. In assessment of Student's attention, various Conners' instruments provided support for ADHD, Oppositional Defiant Disorder, and significant weaknesses with continual auditory attention. (N.T. 606-07; J-26 pp. 4, 5)
42. The private neuropsychologist made a number of recommendations for Student's educational programming: school counseling; participation in non-academic activities; written presentation of materials to support auditory information; simplified visual presentation of information; extra time for all reading tasks; chunking of tasks with breaks from sustained attention; avoidance of multiple tasks at the same time; and continuation of the Section 504 Plan accommodations. (J-26 pp. 6-7)

#### 2015-16 School Year

43. Students who fail three or more classes are subject to grade retention the following year. Student repeated ninth grade during the 2015-16 school year. (N.T. 67; J-23 p. 3)
44. The then-current Section 504 Plan was provided to the teachers prior to the start of the school year for their review. (N.T. 377, 432-33, 507-08)
45. For the 2015-16 school year, at the request of the Parent, Student was removed from the section where inclusion classes were provided. The Parent was not aware that Student



had been provided special education support in the classes in that section, but made the request because of concerns with behavior of other students in that section. (N.T. 57, 250-52, 789, 838-39, 872-73, 883)

46. Shortly after the start of the 2015-16 school year and continuing through its end, Student's teachers reported to the Parent that Student was missing assignments and having difficulty concentrating in class, paying attention, and completing tests and classwork, with resulting poor grades. (J-39, J-40)
47. The School offers tutoring four or five days each week before and after school. Student was referred for and sometimes attended tutoring. (N.T. 274-75, 366, 552, 718-19, 728, 866, 878, 880-81; J-37 p. 33)
48. A meeting to discuss the IEE convened in November 2015. The private neuropsychologist attended that meeting by telephone to review its results. (N.T. 638, 640-41, 764-65, 822-23)
49. The Parent shared a number of suggestions for Student's educational program to be discussed at the November 2015 meeting, including an IEP for Student. (J-25)
50. The School issued a Notice of Recommended Educational Placement (NOREP) on November 19, 2015, declining to make changes to Student's regular education program supported by the Section 504 Plan. Its representatives of the team believed that the private neuropsychologist had concluded that Student only required a Section 504 Plan to meet Student's needs as of November 2015. (N.T. 266-67; J-28)
51. The private neuropsychologist issued an Addendum to the IEE in November 2015 to provide better explanation of his IEE recommendations. In that Addendum, he reiterated his suggestions for participation in non-academic activities; written presentation of materials to support auditory information; simplified visual presentation of information; extra time for all reading tasks; chunking of tasks with breaks from sustained attention; avoidance of multiple tasks at the same time; and continuation of the Section 504 Plan accommodations. He clarified that a majority of his recommendations went beyond the accommodations in the existing Section 504 Plan and that an IEP should be considered. (J-26 p. 8)
52. The School representatives including teachers believed that Student needed to put more effort into classes. (N.T. 268, 350, 352, 356, 361-62, 364, 390-92, 397-98, 418-19, 425-26, 460-61, 485-86, 498-99, 502, 512-13, 556; J-29 p. 3, J-37 pp. 28, 35, J-38 p. 39)
53. The private neuropsychologist issued a second Addendum to the IEE in January 2016 to include a report of his observation of Student at School, which had not been in session at the time of the original IEE. The private neuropsychologist found the observation to be consistent with the findings in the IEE, and repeated his suggestions from the earlier Addendum. (N.T. 616-18; J-26 pp. 10-11)
54. Student's Section 504 Plan was revised in February 2016. The accommodations provided were: preferential seating in all classes based on acoustics and proximity to the

- teacher; extra time for tests and quizzes and the option for a smaller environment; extended time for assignments and projects if requested before the due date; access to the school counselor including weekly sessions; breaks up to five minutes; a second set of textbooks at home; support for assignments and organizational skills weekly at Student's option; development of an organizational system with School staff; teacher initialization of agenda book; options for submitting assignments; and availability of tutoring. (J-30)
55. The Parent approved the February 2016 revised Section 504 Plan so that Student would continue to be provided with accommodations, but expressed her belief that Student required special education. (N.T. 828-29; J-30 pp. 6-7)
56. Student's teachers implemented the Section 504 Plans during the 2015-16 school year:
- a. The History teacher provided the accommodations in the Section 504 Plans. (N.T. 417-20)
  - b. The Algebra teacher provided the accommodations in the Section 504 Plan, including preferential seating, extended time on assessments and assignments as needed, the opportunity to take tests and quizzes in a smaller environment at Student's option, taking five-minute breaks, a set of textbooks at home. This teacher also redirected all students in the class, including Student, as needed. All students' agendas were checked by the teacher daily and all were required to keep binders. (N.T. 432-34, 435-36, 438, 443-45, 450-51, 479-84)
  - c. The foreign language teacher provided preferential seating, and Student had an extra textbook at home. Student was not given the opportunity to take tests and quizzes in a smaller environment because only that teacher would be able to answer any questions that Student might have during the test or quiz. Student did not ask for extra time for assignments, and frequently failed to complete tests, quizzes, and assignments. After the February 2016 Plan became effective, this teacher signed Student's agenda book. (N.T. 509-13, 515-16, 522-24, 549-51, 553; J-39 pp. 33-34)
57. At the request of the Parent in April 2016, Student was removed from the foreign language class taken for the second time during the 2015-16 school year. Student was in danger of failing the class again, and would receive a failing grade if withdrawn. Student could make up the credit in summer school or retake the class during the 2016-17 school year. (N.T. 67, 88, 93-94, 544, 554, 835, 865-66; J-32, J-40 p. 89)
58. At the end of the 2015-16 school year, Student failed the foreign language class. Student barely passed Algebra, and achieved passing grades in all other classes, with averages ranging from 75-95%. On the Pennsylvania Keystone Exam, Student scored in the below basic range in Biology and in the basic range in Algebra. (J-33; P-1)
59. Student attended one summer school class in 2016 at School, for the foreign language class. (N.T. 810-11)

## 2016-17 School Year

60. Student's Section 504 Plan was revised in September 2016. The provision for extended time for tests and quizzes was changed to 100% extra time; and the weekly counseling session expressly included organization, self-advocacy, self-monitoring, and planning. The accommodation for developing an organizational system was removed, and two new accommodations were chunking tasks and instruction in small increments for attention, and use of simple visual components in instruction where possible. (J-34)
61. The Parent approved the September 2016 Section 504 Plan but again noted her belief that Student required direct instruction. (J-34 pp. 5-6)
62. Student is more mature in the 2016-17 school year and requires less redirection than in the prior two school years. (N.T. 453-55, 488-90, 498-99)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that 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). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found

each of the witnesses to be generally credible, testifying to the best of his or her recollection, and the testimony necessary to decide the issues was remarkably consistent.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' respective closing arguments. The testimony of the private neuropsychologist was extremely cogent and thoughtful and was accorded significant weight in understanding Student's needs and how they are manifested in the school environment; whereas the testimony of the school psychologist who conducted the initial evaluation for the School was given minimal consideration on those questions, as it was of limited value in deciding the issues presented.

#### GENERAL SECTION 504 PRINCIPLES

Section 504 specifically prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). "Major life activities" include learning. 34 C.F.R. § 104.3(j)(2)(ii). "The question of whether an individual is substantially limited in a major life activity is a question of fact." *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751, 763 (3d Cir. 2004).

In the context of education, Section 504 and its implementing regulations "require that [local education agencies (LEAs)] provide a free appropriate public education to each qualified handicapped person[.]" *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a).

#### GENERAL IDEA PRINCIPLES

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to students who qualify for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood, supra*, 172 F.3d at 247. LEAs meet the obligation of providing FAPE through implementation of a program that is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Charter schools in Pennsylvania are public schools, and required to comply with applicable laws including the IDEA and Section 504. 24 P.S. § 17-1703-A; 22 Pa. Code §§ 711.1 – 711.62.

#### EVALUATION/ELIGIBILITY FOR SPECIAL EDUCATION

The first issue is whether the School erred in failing to identify Student as eligible under the IDEA. That statute and its implementing state and federal regulations obligate LEAs to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a). This obligation is commonly referred to as “child find.” LEAs are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, an LEA is required to identify a student eligible for special education services within a reasonable time after notice of behavior

that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). LEAs are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. Those classifications or categories are “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a).

With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). Further,

*Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

In order to consider the eligibility question, it is necessary to examine a related issue, namely whether the LEA conducted an appropriate evaluation of Student in reaching its eligibility determination in the fall of 2014. In conducting the evaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child

is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1). In interpreting evaluation data and

making these determinations on eligibility and educational needs, the team must:

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

34 CFR 300.306(c). LEAs are responsible for conducting the required assessments, and also must provide a copy of the evaluation report and documentation of the eligibility determination to parents at no cost. 34 C.F.R. §§ 300.305(c) and 300.306(a)(2). If a medical assessment is deemed to be necessary as part of a complete special education evaluation, such as a diagnosis of ADHD, that assessment must be without cost to the parents. 34 C.F.R. §§ 104.33, 104.35; *see also Dear Colleague Letter and Resource Guide on Students with ADHD*, (OSEP 2016) at 23. Thus, a sufficiently comprehensive evaluation may go well beyond cognitive and achievement assessment, but the cost of necessary assessments cannot be imposed on a parent.

There can be no doubt that the School's initial evaluation of Student in the fall of 2014 failed to examine all areas of suspected disability. At the outset, it is quite concerning that the school psychologist who conducted the initial evaluation did not review the PTE form, and was not aware that Student had a Section 504 Plan. However, she and the School understood that Student had a diagnosis of ADD and/or ADHD going back at least to the fall of 2012, that Student was taking medication for that condition, and that the Parent had concerns that Student's educational performance was adversely impacted as a result of the condition. The school psychologist who conducted the evaluation was also aware of the teachers' remarkably consistent comments with Student's lack of focus and concentration, which were also shared by the Parent. Nevertheless, and contrary to the legal requirement that Student be evaluated in all



areas of suspected disability, the ER reflected consideration only of a specific learning disability under an ability-achievement discrepancy review, and did not include the analysis required in making that determination; further, it suggested that a Section 504 Plan could be considered only if the Parent obtained written documentation of Student's ADHD. The ER itself provided little if any meaningful information to the team that was to develop School's first Section 504 Plan for Student. Moreover, the determination of whether Student was IDEA-eligible was clearly not made by the team; the school psychologist's conclusion was adopted by the School and shared with the Parent as a foregone conclusion. The evaluation process was flawed both procedurally and substantively and operated to deprive the team of adequate information necessary to understand and meet Student's educational needs.

Turning next to eligibility, the evidence is preponderant that Student has a disability, and requires specially designed instruction as a result. As of the fall of 2016, the School did include accommodations in the Section 504 Plan that addressed adaptations to the content and delivery of instruction to Student in order to access the general education curriculum; *i.e.*, the School at that time recognized Student's need for specially designed instruction. Critically, the very well qualified private neuropsychologist provided compelling and persuasive testimony about Student's auditory working memory and processing speed deficits and how they manifest themselves at school. (N.T. 588-601, 603-04, 607-08, 656) That testimony, which was consistent with the information in the IEE, establishes Student's need for special education due to an identified disability, and relates back to the fall of 2014. This hearing officer also concludes that, had the initial ER been sufficiently comprehensive in identifying all areas of suspected disability, an affirmative eligibility determination would have been properly made by the School at the start of the 2014-15 school year.

The School suggests that it reasonably relied on the original IEE report that did not include a specific recommendation for an IEP. Unlike the school psychologist who conducted the initial evaluation for the School, the private neuropsychologist properly left the decision on IDEA eligibility to the team. However, his IEE report provided a wealth of information about Student's strengths and weaknesses, describing a learning style that cannot be sufficiently addressed without significant instructional adaptations and accommodations. The School was required to consider the IEE as a resource in developing a program that was specific to Student's needs, and this hearing officer concludes that the School did not adequately reflect on its content before or after the Addendums were provided. In order for the team to properly do so, the attached Order will include a provision for inclusion of the private neuropsychologist as a member of Student's IEP team at its initial meeting.

#### FAPE

Whether or not the School erred in its eligibility determination, the next issue is whether Student was provided with FAPE through its implementation of the Section 504 Plans. The record unequivocally supports a conclusion that Student was not.

Even without a comprehensive ER, it is puzzling that the School abandoned a majority of the accommodations in the prior school's Section 504 Plan. Those that were included in the initial and subsequent Plans through February 2016 did little more than allow Student extra time for some tests and assignments, largely ignoring Student's attentional deficits. Different teachers took varying approaches to the accommodations provided to Student, some doing more and others doing less. Regardless of how they implemented the Plans, however, throughout the 2014-15 and 2015-16 school years teachers continued to report concerns with Student's focus and concentration, and test and assignment completion remained obstacles that Student did not

overcome despite the availability of extra time. Student's 2014-15 school year was wholly unsuccessful, with Student failing four classes despite the accommodations that were provided, both those in and beyond the face of the Section 504 Plans. Rather than making an attempt to respond to Student's lack of success by taking steps to investigate whether and how Student's disability was adversely impacting Student's education, the School simply allowed Student to flounder and attributed Student's difficulties to a perceived absence of motivation and effort. With failing grades that should have resulted in mandatory tutoring, Student was instead required to attend summer school in 2015 and then repeat ninth grade.

There was little change in programming during the 2015-16 school year, with Student no longer in classes with special education support, although organizational skills were addressed for the first time in February 2016. It was not until the fall of 2016 that Student's needs in the areas of focus and attention were recognized and addressed through new accommodations suggested by the private neuropsychologist. While the evidence with respect to the 2016-17 school year was rather limited, one can infer that Student continues to experience an adverse impact on Student's education due to the disability, despite the indications that Student is faring better than in the earlier two school years through a combination of maturity and increased support.

The School's firmly held belief that Student needed to put forth more effort, and its suggestion that Student was engaging in ongoing recreational drug use (an assertion not supported by the record), simply are not convincing reasons for its failure to acknowledge Student's disability and to program appropriately based on Student's needs. Furthermore, its reliance on *D.K., supra*, 696 F.3d at 249, for the proposition that it was not obligated to ascertain Student's disability "at the earliest possible moment" is misplaced, since Student's disability was

already identified when Student first enrolled, and its manifestations were evident within the first few weeks of the school year as information was gathered for the ER. Student was, thus, denied FAPE from the start of the 2014-15 school year, and Student is therefore entitled to a remedy.

Finally, having concluded that the School denied Student FAPE under the IDEA, there is no need to separately address the issue under Section 504. The same conclusions apply to the Section 504 claims.

### REMEDIES

The first remedy will be a directive to the School to convene an IEP team meeting to confirm Student's eligibility under the IDEA and to develop a program of special education for Student. Unless agreed by the entire team including the Parent, the IEP shall incorporate all of the accommodations in the current Section 504 Plan, and shall also address Student's needs in the areas of social and emotional regulation, self-advocacy, and ADHD and executive functioning skill deficits. The team shall also consider whether any additional assessments, including an FBA, are warranted. The private neuropsychologist shall be included as a member of the IEP team at its first meeting at no expense to the Parent to assist in the development of annual goals, program modifications and specially designed instruction, and related services.

The Parent seeks compensatory education, which is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award may compensate the child for the period of time of deprivation of educational services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has recently endorsed a different approach, sometimes described as a "make whole" remedy,

where the award of compensatory education is designed “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

This hearing officer concludes that the record does not include sufficient evidence on an appropriate equitable remedy that would place Student in the position where Student would be had FAPE been provided. The evidence does establish that the 2014-15 school year was entirely unsuccessful, and that Student was required to repeat the grade rather than being promoted with peers. Student’s disability and educational needs clearly pervaded the school day; in addition, they were known to the School at the start of the school year, and, thus, no reasonable rectification period is warranted. Accordingly, this hearing officer concludes that Student is entitled to the equivalent of one school year of compensatory education, or 990 hours,<sup>6</sup> for the 2014-15 school year.

With respect to the 2015-16 school year, the educational program and resulting lack of achievement continued largely unchanged in the fall. Following recommendations by the private neuropsychologist, the School began to increase its support in February 2016, and Student ultimately experienced some academic success. It is this hearing officer’s considered estimation that an equitable award for the 2015-16 school year is for full school days for the first half of that school year (495 hours, from the start of the school year through the end of the second quarter), and two hours per day for the second half of the school year (the approximate time of

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<sup>6</sup> 22 Pa. Code § 11.1, 11.3.

implementation of the February 2016 Section 504 Plan through the end of the school year, a sum of 180 hours), together amounting to 675 hours. In addition, in recognition that Student's current high school classes necessarily depend on having acquired knowledge from prior courses in which Student was not appropriately supported, Student will also be awarded ten hours of tutoring services in the subject area relating to any class in which Student has a 75% or lower average at the end of the second marking period in the 2016-17 school year. This tutoring shall be in addition to any Keystone Exam preparation that Student would ordinarily undertake.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product, or device that furthers Student's academic or social/emotional/behavioral needs and skills. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the School. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents, and may be used at any time from the present until Student turns age twenty (20). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent.

The Parent also seeks reimbursement for certain expenditures. This hearing officer considers it to be equitable to order reimbursement the Parent for the tuition paid during the summer of 2015, following failing grades but without participation in tutoring that should have been mandatory. Student was not able to successfully earn credit for any ninth grade class during that year of summer school. The same conclusion may be reached for the summer of

2016, since Student was not provided the testing accommodations in the Section 504 Plan in the foreign language class during the 2015-16 school year, resulting in Student taking that class in the summer.

The remaining issue is the Parent's request for reimbursement for the fees incurred by them for their expert, the private neuropsychologist who conducted the IEE, to testify at the hearing. That witness provided testimony that was quite insightful, and helpful to the hearing officer in reviewing the record as noted above; his expertise will also undoubtedly be valuable to the IEP team as well. However, the basis for this requested remedy is Section 504, which provides in relevant part that "*the court*, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k) (emphasis added). Similar language in the IDEA has been construed as not applying to administrative hearing officers. *B. ex rel. M.B. v. East Granby Board of Education*, 201 Fed. Appx. 834, 837, 2006 U.S. App. LEXIS 27014, \*6 (2d Cir. 2006) (concluding that an attorney fee award "is a district court function" under 20 U.S.C. § 1415(i)(3)(B), which provides district courts with discretion to "award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party"). Accordingly, this hearing officer declines to order that remedy.

Finally, this hearing officer observes that the parties will need to continue to work together collaboratively to develop an IEP and communicate regularly until Student graduates. Should the parties believe that a neutral IEP facilitator may be helpful to the team now or in the future, that service is available through the Office for Dispute Resolution.

## CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the School failed in its obligations to Student under the IDEA and Section 504, and that compensatory education and some reimbursement is warranted.

## ORDER

AND NOW, this 19<sup>th</sup> day of December, 2016, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The School erred in its determination that Student is not eligible for special education under the IDEA.
2. Within ten school days of the date of this decision and Order, the School shall convene an initial meeting of an IEP team for Student.
  - a. The team shall confirm Student's eligibility for special education.
  - b. The team shall identify Student's educational needs and develop an IEP to address them.
  - c. The private neuropsychologist who conducted the IEE shall be a member of the IEP team for its initial meeting. The cost of that professional's attendance at the IEP meeting shall be at public expense.
  - d. The IEP team shall also consider and determine whether any additional assessments, including an FBA, are necessary to identify Student's educational needs.
3. The School failed in its FAPE obligations to Student under the IDEA and Section 504.
4. The School shall provide Student with 1,665 hours of compensatory education for the denial of FAPE during the 2014-15 and 2015-16 school years, subject to all of the following conditions and limitations:
  - a. Student's Parent may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student's academic or social/emotional/behavioral needs.



- b. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the School.
  - c. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent, and may be used at any time from the present until Student turns age twenty (20).
  - d. The compensatory services shall be provided by appropriately qualified professionals selected by the Parent.
  - e. The costs to the School of providing the awarded hours of compensatory education may be limited to the average market rate for private providers of those services in the [local area].
5. The School shall provide Student with 10 hours of tutoring services in any subject area in which Student has a 75% or lower average at the end of the second marking period in the current 2016-17 school year, subject to all of the following conditions and limitations:
  - a. Student's Parent may decide how and by whom the hours of tutoring services are provided. The tutoring services, as compensatory education, shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the School.
  - b. The tutoring services may occur after school hours or on weekends, and may be used at any time from the present until Student graduates from School or another high school.
  - c. The tutoring services shall be provided by appropriately qualified professionals selected by the Parent and may be provided by School personnel.
  - d. If not provided by School personnel, the costs to the School of providing the awarded hours of tutoring services may be limited to the average market rate for private providers of those services in the [local area].
6. Within ten school days of the date of this decision and Order, the School shall reimburse the Parent \$750 for the cost of tuition to summer school in 2015 and 2016.
7. Nothing in this decision and order should be read to prevent the parties from mutually agreeing to alter any of the terms of this Order.

8. All other requests for relief are **DENIED** and **DISMISSED**.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are **DENIED** and **DISMISSED**.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER