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

**PENNSYLVANIA**

# SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child:
H.B.

ODR #19461/17-18 KE

Date of Birth:
[redacted]

Date of Hearing:
August 7, 2017

OPEN HEARING

| Parties to the Hearing: | Representative: |
|---|---|
| Southeast Delco School District<br>1516 Delmar Drive<br>Folcroft, PA 19032 | Gabrielle Sereni, Esquire<br>Raffaele & Puppio<br>19 West Third Street<br>Media, PA 19063 |
| Parent[s] | Pro Se |
| Date of Decision: | August 30, 2017 |
| Hearing Officer: | Linda M. Valentini, Psy.D. CHO<br>Certified Hearing Official |

## Background

Student[1] is an early teen-aged student who was formerly enrolled in a District school. The Student was identified in 2nd grade as a "child with a disability," as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. Specifically, the Student was eligible for special education pursuant to the IDEA and its Pennsylvania implementing regulations, 22 Pa. Code § 14 *et seq*. (Chapter 14), as a child with a Specific Learning Disability (SLD). As such, the Student was also protected as an "individual with a disability" as defined by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*., and as a "protected handicapped student" under the Pennsylvania regulations implementing Section 504 in schools, 22 Pa. Code § 15 *et seq.* (Chapter 15).

At the beginning of the 2016-2017 school year the Parent revoked consent for special education services. A year later, the Parent requested this hearing in a complaint, written on a form promulgated by the Pennsylvania Training and Technical Assistance Network (PaTTAN). The form asks two questions, prompting a parent (or an LEA if the LEA is requesting a hearing) to describe the nature of the problem and the proposed resolution. Regarding the nature of the problem in this dispute, the Parent wrote:

> The District "placed [the Student] in special education because the school psychologist said so. It wasn't the proper placement so now [Student] is far behind and may never catch up because [Student] sat in special education. [Student] was placed in special education incorrectly. Now [Student] is far behind and [Student] may never catch up."

The only remedy the Parent seeks is "compensatory education and a tutor so [Student] can catch up with Title One funds."

During the hearing, the Parent clarified that her belief is that the Student should have had a Section 504 service agreement, and not an Individualized Educational Plan (IEP), that is, the Student should have received regular education accommodations, but not special education.

The District maintains that no remedy is due, making three alternative arguments. First, the District argues that the Parent has no right to request a due process hearing because the Parent claims that the Student is not disabled. Second, the District argues that it did not receive notice of the Parent's belief that Student required a Section 504 Plan rather than an IEP prior to the day of the hearing. Third, the District argues that it provided a FAPE to the Student.

The evidence brought forth in the hearing clearly establishes that Student was correctly identified as a child with an SLD, and was eligible for special education under the IDEA. Further, up to the

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[1] 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. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

time the Parent revoked consent for special education programming, the District provided a FAPE and, therefore, no compensatory education is due.

## Procedural History

The Parent requested this hearing, *pro se*, on July 6, 2017.

On July 12, 2017 the District through counsel filed what it styled as a sufficiency challenge and motion to dismiss. I denied that motion, but recognized the District's right to ask for reconsideration at a different procedural point. At the start of the hearing the District asked for reconsideration of its motion. The District argued that the hearing was barred by *S.H. v. Lower Merion School District*, 729 F.3d 248 (3d Cir. 2013). More specifically, the District argued that under *S.H.*, special education due process hearings can only be requested by (or on behalf of) children with disabilities. Since the Parent alleged that Student did not need, and should not have received special education, the family had no right to request a special education due process hearing. In deference to the Parent's *pro se* status, and unwilling to dismiss potentially proper but inartfully plead claims, I again denied the District's motion. The hearing then proceeded so that the Parent could be heard on the issue, and so that a factual record could be developed as a basis for either dismissing the case or rendering a decision. (NT 12).

## The District's Motion and Jurisdictional Issues

As described above, the District's motion to dismiss relies upon *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248 (3d Cir. 2013). In the *S.H.* case, the parents claimed that a student was incorrectly identified as a student with a disability. The parents then sought compensatory education under the IDEA, Section 504, and the ADA, claiming that the student was entitled to relief for time spent in special education that should have been spent in regular education.

The Parents in *S.H.* claimed that the time in special education was harmful because it damaged the Student's self-confidence and academic progress. The Hearing Officer, the District Court, and the Third Circuit Court of Appeals all agreed that only children with disabilities (or their parents) have standing to bring a claim under the IDEA. Because the parents alleged that the student was never a child with a disability, the family had no standing to bring an IDEA claim. The IDEA claim was dismissed for that reason. The court stated: "under the Act's plain language, it is clear that the IDEA creates a cause of action *only* for individuals with disabilities. Because Appellants assert that S.H. is not, and never was, a child with a disability, S.H. is excluded from the IDEA's provisions and may not bring a claim under that Act" (emphasis in the original). The Section 504 and ADA claims were dismissed later because the family failed to show intentional discrimination.

Although IDEA pleading standards are minimal, the District has a right to notice of what claims it must defend. Based on the complaint alone, the facts of this case and the *S.H.* case appeared to be similar and the District's motion to dismiss was not misplaced. However, it is important to note that the family in *S.H.* was represented by an attorney, while the Parent in this case is *pro*

*se*. I did not dismiss the Parent's complaint on the District's motion because I will not penalize a *pro se* parent for what may simply have been an inartful pleading.

At the hearing the Parent argued that Student *did* have disabilities, depression and Attention Deficit Hyperactivity Disorder (ADHD), but that Student did not have a specific learning disability. She maintained that the District should have provided a Section 504 Plan rather than an IEP. Moreover, the Parent argued that the Student should not have received any individualized instruction outside the regular education classroom (NT 12-13). The District argued that the Parent never informed the District that Student had depression or ADHD and that at no time did she ask for a Section 504 Plan.

I agree with the District that under *S.H*. the Parent is not entitled to a hearing under the IDEA. Under *S.H.*, IDEA hearings are available only to children with disabilities. Students who have disabilities but do not require specially designed instruction are not "children with disabilities" as defined by the IDEA. *See* 20 U.S.C. § 1401. In this case, the Parent consistently argued that the Student was never in need of special education, but rather should have received a Section 504 Plan. Section 504 Plans provide regular education accommodations, not special education. For this reason, the Parent has not raised a claim that can be heard under the IDEA. The Third Circuit has unambiguously precluded IDEA claims regarding children who were improperly placed into special education, and seek a remedy for a denial of regular education.

The same is not true for claims arising under Section 504. In this case, the Parent claims that the Student was protected by Section 504 and Chapter 15, and should have received regular education accommodations through a Section 504 Plan.

I appreciate the District's position. The Parent's 504 claim is not presented in a literal reading of the Complaint. This information was clarified during the hearing, and I am sympathetic to the District's argument that it did not receive proper notice of this claim. However, the District was given the opportunity to provide a defense to the Section 504 claims that were clarified during the hearing, and did so ably (although under protest).

## Issue

Was Student denied FAPE under Section 504?

## Findings of Fact

1. Student is beginning 8th grade in September in a cyber charter school program after having attended school in the District from 2nd through 7th grades. [NT 23-24, 47]

2. In October 2009 when Student was five years old and in Kindergarten Student received a psychological evaluation conducted as part of the admissions process for an independent school. The evaluator found that as assessed by the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III) Student demonstrated overall cognitive

functioning in the mid to upper end of the average range, although the General Language Composite was at the lower end of the average range (Verbal IQ 106, Performance IQ 110, Processing Speed 102, Full Scale IQ 109, General Language Composite 94). [NT 14; P-5]

3. The evaluator commented on the "mildly below expectancy" score on one section of the Language Composite and hypothesized as follows: "[Student] functioned within the Low Average range when attempting to meet receptive language demands…in a way which suggested quite strongly that had [Student's] experiential background been more adequately developed, [Student] would have enjoyed far greater success". [P-5]

4. The evaluator noted that Student earlier had exhibited a developmental motor delay, not walking independently until age 18 months. [P-5]

5. Student enrolled in the District at the beginning of 2nd grade for the 2011-2012 school year. [S-1]

6. On March 13, 2012 the Parent contacted the District because Student was having difficulty reading and asked that Student receive an IEP "immediately". [NT 34, 50-52; S-12]

7. In this communication the Parent did not mention that Student had been diagnosed with ADHD or depression. [NT 34; S-12]

8. In the Permission to Evaluate the Parent signed on March 17, 2012 the Parent noted that Student, had a "lack of ability to read, understand, and keep up with school work at a normal pace". Again, there was no mention of ADHD or depression. [NT 35; S-14]

9. In filling out a developmental information form supplied by the school psychologist the Parent did not include any information about the Student having depression or ADHD. The Parent testified that she did not think this was relevant information. [NT 37-40, 45; S-13]

10. The District conducted an evaluation and issued the evaluation report [ER] on July 2, 2012. [S-1]

11. Student attended a parochial school for Kindergarten and another parochial school for 1st grade. The Parent told the evaluator that she noticed academic difficulties as soon as Student started school, with poor performance in all subjects. [S-1]

12. The only medical condition the Parent shared for purposes of the evaluation was that Student suffered from constipation and had difficulty falling asleep. [S-1]

13. The District's evaluation included observation of Student in the 2nd grade classroom and during a small-group reading intervention period. [S-1]

14. At the time of the District's evaluation Student was receiving 30 minutes of Intervention daily in a small group setting, 20 minutes of classroom-based small group instruction, and worked with an Ambassador of Learning person for 50 minutes per day on reading decoding, reading fluency and reading comprehension. Student was also receiving after-school tutoring. [S-1]

15. Despite these interventions, by March of the 2nd grade year the teacher reported that Student was reading at the Kindergarten level and writing on the Kindergarten level. Meanwhile Student was doing math at the 2.4 grade level. [S-1]

16. Student's Reading Fluency was assessed in 1st grade and in 2nd grade. In 1st grade the DIBELS expectation is 40 words per minute (wpm) by the end of the year. At the beginning of March Student read 21 wpm with 75% accuracy, in the middle of March Student read 23 wpm with 79% accuracy, and at the beginning of April Student read 27 wpm with 82% accuracy. In 2nd grade the DIBELS expectation for September is 44 words per minute; Student only read 9 wpm with 56% accuracy. In January of 2nd grade the DIBELS expectation was 68 wpm; Student read 10 wpm with 53% accuracy. [S-1]

17. Despite having modified reading and spelling tests, Student's curriculum-based testing scores were variable and frequently below expectations. Report cards showed that Student 'Needed Improvement' for all four marking periods in Reading, for marking periods 2 through 4 in Writing, and for marking periods 1 and 2 in Math. Math moved up to 'Satisfactory' in marking periods 3 and 4. [S-1]

18. Cognitive ability testing results from the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) were as follows: Full Scale IQ 96, Verbal Comprehension Index 98, Perceptual Reasoning Index 106, Working Memory Index 97, Processing Speed Index 83. With the exception of Processing Speed which was in the low average range, scores were in the average range. [S-1]

19. Academic achievement testing with the Wechsler Individual Achievement Test – Third Edition (WIAT-III) showed a significant discrepancy between language arts ability as assessed through IQ test results and achievement: Reading Comprehension 74, Word Reading 69, Pseudoword Decoding 73, Sentence Building 63, and Spelling 74. [S-1]

20. Student's WIAT-III Mathematics Composite of 90, on the other hand, was commensurate with expected levels based on cognitive ability. [S-1]

21. Student's underachievement in reading and writing were not due to lack of appropriate instruction or lack of English proficiency. [S-1]

22. Based upon the Student's educational history as related by the Parent, poor response to regular education Intervention, variable but generally below expectation curriculum-based assessments and data from nationally norm-referenced standardized ability and achievement testing the District concluded that Student was eligible for special education

under the classification of specific learning disability. [S-1; See also testimony of school psychologist NT 92-105]

23. In determining Student's classification the District reviewed and documented the 10 necessary criteria for determining whether or not a child has a specific learning disability. [S-1]

24. The ER provided specific strategies for how learning support should be provided to Student. [S-1]

25. After Student had been receiving special education services for three years the District conducted a reevaluation and issued a reevaluation report (RR) on April 20, 2015. [S-2]

26. Under the medical section of the RR there was a notation of previously disclosed information from the time of the initial evaluation that Student "suffer[ed] from constipation and had difficulty falling asleep". [NT 41-42; S-2]

27. The April 2015 RR noted that the District was still waiting for written parental input at the time the report was being written. [NT 42-43; S-2]

28. The Parent did not provide the District with any input regarding depression or ADHD for purposes of the completion of the RR. [S-2]

29. The April 2015 RR input from three teachers noted a deficit in homework completion. [S-2]

30. The April 2015 RR noted that PSSA scores in 4th grade had been Below Basic in Reading and Proficient in Math and Science. [S-2 P-3]

31. The April 2015 RR noted that in 5th grade Student took the Benchmark test three times. Reading Scores for the three probes were Proficient, Basic, and Proficient. Math Scores for the three probes were Basic, Basic, and Proficient. [S-2]

32. On April 25, 2015, toward the end of 5th grade, Student's reading progress was assessed using the AIMSweb protocol. On a curriculum-based 5th grade measure Student read 124 words per minute with one error at a 98% accuracy level. The RR noted that Student read fluently on grade level. [S-2]

33. On a 5th grade curriculum-based math computation assessment Student had 22/39 items correct with a goal of 30/39 items correct in eight minutes. On a math concepts and applications assessment Student had 6/30 items correct with a goal of at least 12/30 items correct in eight minutes. [S-2]

34. Based on results of the RR the District determined that Student continued to be eligible for special education programming. [S-2]

35. When reviewing the IEP proposed for Student's 6th grade year the Parent checked the box indicating that she had no concerns about the IEP and believed that the IEP revisions would enhance her child's education. The Parent approved the accompanying Notice of Recommended Educational Placement (NOREP). [NT 55-56; S-3, S-8]

36. The last approved and implemented IEP which governed Student's 6th grade provided the following Specially Designed Instructions (SDIs): multi-modal instruction with repetition, rephrasing, visual cues, graphic organizers, study guides, chunking of material, wait time and memory strategies across educational settings. [NT 155-156; S-3]

37. The last approved and implemented IEP also provided these SDIs: preferential seating, oral directions accompanied by written directions, asking Student to repeat directions, assignment book checks, extended time for tests and quizzes, and cuing to remain on task. [NT 155-156; S-3]

38. At the end of 6th grade, Student's final end of year report card grades in core subjects were as follows: Language Arts D+, Social Studies B, Science C+, and Math C+. [P-2]

39. Although an IEP was prepared for Student's 7th grade reflecting that Student remained eligible for special education, and the Parent approved the NOREP, on August 31, 2016 the Parent revoked consent for special education for Student's 7th grade, the 2016-2017 school year. The District issued a Notice of Recommended Educational Placement (NOREP) reflecting Student's exit from special education at the Parent's request. [NT 28-30, 57-58, 68-73, 80, 122-123, 128; S-4, S-9, S-10, S-11]

40. At the time of her request to exit Student from special education, or at any previous time, the Parent did not inform the District of Student's diagnoses of depression and ADHD and did not request a Section 504 Plan. Despite multiple contacts with the Director of Special Education the Parent never gave any indication that she was researching, considering or wanting a Section 504 Plan for Student. [NT 80-81, 149-150, 152-153]

41. The Parent came to her conclusion that Student did not require special education when she started working with Student on her own in 6th grade on weekends and after school and perceived that "there was not a problem learning. [Student] just needed to be in a different environment and with different accommodations. That [Student] could learn just fine like everybody else." [NT 45-46, 48-49]

42. Final end of year grades for 7th grade are not in the record. Grades for the second marking period were as follows: Language Arts D-, Social Studies B-, Science N/A, and Math D-. [P-2]

43. Student has been diagnosed and treated for depression and ADHD since 2012 and according to the Parent has been prescribed Remeron[2] and Clonidine[3]. The Parent produced a recent prescription for Methylphenidate ER[4]. [NT 13, 15-17; P-1, P-4]

44. Although the Parent maintains that she told Student's teachers and the guidance counselor that Student had depression and ADHD, she admitted she did not disclose this information at the time of her initial request for an IEP, at the time of the District's first evaluation in 2012 or at the time of the District's reevaluation in 2015 because she didn't think it was important. The Parent did not disclose this information at the time she requested Student be removed from special education. The District psychologist did not receive information that Student had been diagnosed with depression and/or ADHD. [NT 30-33, 35-43, 61-65, 83-84, 106, 108-109, 149-151]

45. Student sleeps excessively during the day for reasons that according to the Parent Student's pediatrician and psychiatrist cannot explain, although the Parent thinks this is due to Student's depression but also alluded to a belief that the medication might be causing Student to fall asleep. [NT 13, 30, 167]

46. The Parent believes that the reason Student did not know how to do the class work was that Student was sleeping during instruction and that Student "just needed to be accommodated for the sleeping and the inattentiveness, [164-165]

47. The Parent acknowledged that the teachers "did try that waking [Student] up, making [Student] stand up. The teacher would call me every day, we're trying to wake [Student] up, we can't wake [Student] up. We're trying to wake [Student] up, we can't wake [Student] up".

48. Student confirmed that Student could sleep through a whole class, including during tests. The teachers would try to wake Student up during class, and Student would go back to sleep. The teachers also would have Student stand rather than sitting and at times Student fell asleep while standing up. [NT 20, 166-167, 170-173]

49. Although Student slept for about eleven hours the night before the hearing, Student was observed to be sleeping for about 80% of the approximately four hour proceedings as well as during the approximately thirty-minute proceedings concerning a sibling[5]. [NT 13, 160-161]

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[2] Remeron is used to treat major depressive disorder. https://www.drugs.com/remeron.html

[3] The Catapres brand of clonidine is used to treat hypertension (high blood pressure). The Kapvay brand is used to treat attention deficit hyperactivity disorder (ADHD).

[4] Methylphenidate is used to treat attention deficit disorder (ADD), attention deficit hyperactivity disorder (ADHD), and narcolepsy. https://www.drugs.com/methylphenidate.html

[5]The hearing officer observed this as well and can corroborate the witness' testimony.

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]. In special education due process hearings, 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). In this case the Parent asked for the hearing and thus assumed the burden of proof.

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); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014);.*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); *Rylan M. v Dover Area Sch. Dist*., No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). The school psychologist was painstakingly candid and it was clear that she was very serious about testifying accurately. The director of special education was deemed to be testifying truthfully to the best of her recollection. As will be discussed below, the Parent, although clearly loving and concerned, carried misconceptions about her child's classification and thus her opinion about Student's placement were not judged to be reliable. In addition the Parent was vague on how and when she supplied information to the District about Student's depression and ADHD and this added to the difficulty in relying on her testimony. For example, her response to a question addressing this point was "No. I don't know. Yes, probably, yes. I don't remember" (NT 43-44). Further the Parent first stated that she was looking into 504 Plans for Student "before and after" she asked for Student's removal from special education, but then later maintained that she did not do this until after the removal (NT 80-82). Student testified, and although the transcript does not reflect the extent of response latency, Student's hesitancy in answering questions as well as apparent sleepiness undermined the reliability of much of this testimony.

504 FAPE: The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). As was discussed earlier, given the Parent's arguments, I am deciding this matter though the lens of Section 504. Section 504 of the Rehabilitation Act of 1973, § 794 ("Section 504") protects "handicapped

persons". The definition is provided in the Section 504 regulations at 34 CFR § 104.3(j)(1): "Handicapped person 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 Section 504 and its implementing regulations, 34 C.F.R. §§ 104.31 *et seq.*, public school districts must provide a FAPE to each qualified disabled child in elementary and secondary school. For purposes of Section 504, a FAPE is "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36." 34 C.F.R. § 104.33(b)(1).

The federal court in the Eastern District has held, "[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not." *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002). An appropriate education under the Rehabilitation Act is one that reasonably accommodates the needs of a handicapped child. *Ibid.* The Third Circuit opined that "to offer an 'appropriate education' under the Rehabilitation Act, a school district must reasonably accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits." *Ridley Sch. Dist. v. MR.*, 680 F.3d 22 260, 280 (3d Cir. 2012) *See also Blunt v. Lower Merion Sch. Dist.*, 2014 U.S. App. LEXIS 17629 (3d Cir. Sept. 12, 2014*)* 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*.

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.

Compensatory Education: Compensatory education is an appropriate remedy that accrues from the time when 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); *P.P. v, West Chester Area Sch. Dist., 585 F.3d 727, 739 (3d Cir. 2009)* (quoting *Lauren W. v. DeFlaminis, 480 F.3d 259, 272 (3d Cir. 2007)).* The "child is entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem." *M.C. v. Central. Regional; Ridgewood*.

## Discussion

The evidence in this matter unfolded in a manner similar to unpacking Russian nesting dolls but not in as organized a fashion. The Parent's written complaint alleged that Student should not have been in special education despite her concern in 2nd grade about Student's learning and her asking for an IEP "immediately". At the hearing Parent testified that to her an IEP did not

necessarily mean special education. [NT 51-52] The Parent acknowledged that Student has disabilities in the form of depression and ADHD (which may or may not have been disclosed to the District at some point, but certainly not at the time of either District evaluation) but that these disabilities warranted a Section 504 Service Plan, not an IEP. Very late in the hearing it became clear that one of the major problems the Parent had with the District is that teachers did not make Student stay awake during class. Although this last point seems reasonable, after all a teacher should awaken a sleeping student, it turns out that for an as yet undiagnosed reason Student simply cannot remain awake. After having argued that the Parent was not entitled to a hearing in the first place, as the layers of the Parent's case became evident, the District found itself in the position of defending against the various allegations as they unfolded. While I appreciate the District's difficulty in trying this case, I believe that hearing the matter under Section 504 was the correct option as it gave this concerned Parent the opportunity to be heard and it gave the District the opportunity to demonstrate that it had afforded Student appropriate services.

When all is said and done, the Parent was not able to produce persuasive evidence that Student was found eligible for special education in error, or that being in special education compromised Student's right to FAPE under either the IDEA or under Section 504, or that the District should have offered any accommodations under a 504 Service Plan than those provided in the SDIs in the IEP, or that the District was responsible to keep Student awake during class, a feat which she herself cannot accomplish.

The District, under duress and faced with a moving target, was able to establish that Student was not incorrectly classified as learning disabled, that Student suffered no educational harm by being in special education and in fact made appropriate progress, that through the lens of Section 504 the IEP SDIs were in fact appropriate accommodations that would address the disabilities the Parent did acknowledge and that it in fact attempted to address the Student's somnolence with the Parent and in the classroom.

The Parent is clearly a very loving and involved mother who has made and is making significant efforts to get her child help. She initially provided private schooling for Student, then made sure Student was evaluated and given an IEP, and has been seeing to Student's mental health needs through medication treatment with a psychiatrist. She is now preparing to begin working with Student at home in a cyber-schooling environment. Unfortunately, she seems to have certain misunderstandings that may underlie her beliefs that the District did not provide her child what was needed.

The Parent accepts that Student suffers from depression and ADHD, but strongly rejects the classification of learning disabled. This may be due to a misunderstanding of the meaning of a learning disability. A child with a learning disability has average or above intellectual ability, but requires specially designed instruction in order to learn in one or more academic areas. Children with specific learning disabilities may be gifted as well as learning disabled; children with specific learning disabilities do not have an intellectual disability. Part of the basis for the Parent's disagreement about the specific learning disability classification was the evaluation conducted when Student was five years old and in Kindergarten as part of the process for admission to an independent school. [NT 73, 75-76] Although some children are identified as having a specific learning disability as early as Kindergarten, at that stage in a child's

educational career it is not at all uncommon for learning disabilities not to have manifested yet. The WPPSI instruments have been well-researched and respected in the field over the years, but testing during the preschool and primary years is best used as a broad indication of whether a child is generally considerably below average, considerably above average or broadly average rather than as a diagnostic measure to detect learning disabilities.

Children with depression and/or ADHD may be and often are found eligible for special education services rather than a Section 504 Plan. The key difference is that special education under the IDEA entitles the child to specially designed instruction whereas a Section 504 Plan entitles the child to accommodations. The Parent's logic in arguing that Student's depression and ADHD formed the basis for Student's academic difficulties seems fundamentally flawed. If her theory were correct, these conditions would be expected to compromise Student's learning across the board, but this was not the case. While Student struggled, despite Intervention, with reading and writing, Student performed very close to grade level in math.

As the hearing went on, it became evident that the Parent had withdrawn Student from special education partly because of what she interpreted as a lack of progress based on PSSA scores. Notably, PSSA scores are not a robust indicator of an individual child's progress but rather are designed to assess a school's success. In fact the record showed that Student had made considerable progress in reading fluency from being only at the kindergarten level in late 2nd grade to reading fluently at grade level in late 5th grade. The Parent also maintains that when she herself instructed Student individually Student clearly could learn and that this was a further indication that Student did not have a learning disability and did not require specially-designed instruction under an IEP. I submit to the Parent that the fact that she saw progress when her child received one-to-one targeted intervention from her argues for Student's need for some targeted small-group instruction in areas of need.

The Parent holds the position that the District was responsible for keeping Student awake during the school day while at the same time admitting that she herself has difficulty in this regard. The record shows that the District was quite concerned about this issue. The teacher repeatedly called the Parent about Student's sleeping in class, and staff made attempts to keep Student awake through verbal prompting and even requiring Student to stand. While not specifically referencing sleepiness, the IEPs' Specially Designed Instructions (SDI) provided strategies to address Student's attention and focus which would be exactly the same if they were written into a 504 Plan.

Dicta: According to the Parent Student has been and is currently taking medication for depression as well as medication for ADHD. The Parent testified that she has told the pediatrician and the psychiatrist about Student's sleepiness, and that while they reportedly have told her they do not know what is causing it the psychiatrist reportedly has speculated that depression is the cause. The record is unclear as to whether the Parent has advised the physicians of one another's prescriptions for Student. In an off-the-record discussion, and repeated here now, I strongly advised the Parent to ask one of the physicians for an urgent referral for Student to be seen by a neurologist, and that at the neurological appointment she describe Student's excessive sleepiness in detail as well as list the medications Student is taking,

so that the physician practicing in that specialty area can properly evaluate Student's unusual presentation.

## Conclusion

I conclude that Student was not denied FAPE under Section 504 and is therefore not entitled to compensatory education. The Parent's claims under the IDEA are to be dismissed.

## Order

It is hereby ordered that:

The District did not deny Student FAPE under Section 504 and therefore no compensatory education is due.

The Parent's claim under the IDEA is dismissed.

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

*Linda M. Valentini, Psy.D., CHO*

August 30, 2017

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