

*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:

I.B.

ODR #19476/17-18 KE

Date of Birth:

[redacted]

Date of Hearing:

August 18, 2017

OPEN HEARING

Parties to the Hearing:

Southeast Delco School District  
1516 Delmar Drive  
Folcroft, PA 19032

Representative:

Gabrielle Sereni, Esquire  
Raffaele & Puppio  
19 West Third Street  
Media, PA 19063

Parent[s]

Pro Se

Date of Decision:

September 6, 2017

Hearing Officer:

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

## Background

Student<sup>1</sup> is a pre-teen aged student who was formerly enrolled in a District school. The Student was identified in 1st 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) and a Speech/Language Impairment. As such, the Student was also regarded 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, on July 6, 2017 the Parent requested this hearing in a complaint written on a form promulgated by the Pennsylvania Training and Technical Assistance Network (PaTTAN). On July 14, 2017 the Parent filed an amended complaint.<sup>2</sup> 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.

On the original complaint the Parent wrote:

“[Student] should not have been placed in special education. That was a mistake on the District’s part. [Student] was able to be in a regular setting. Because Student sat in special education when it wasn’t needed [Student] is behind.”

On the amended complaint the Parent wrote:

“and gets SSI for this skin disorder also depression. Both situations affected the way [Student] could learn especially since the school nurse constantly sent [Student] home for said skin disorder condition. [Student] should have been given a 504 plan not thrown in special education. That was not the proper placement. Now [Student] is far behind because [Student] sat in special education for so long [Student] may never catch up. [Student] was able to be in a regular education setting with 504 accommodations.”

“They said you said [Student] wasn’t disabled this complaint should be dismissed. I never said that as I explained above.”

The only remedy the Parent seeks is “compensatory education and a tutor with Title One funds”.

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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. 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).

<sup>2</sup> Notably the copies of both complaint forms in the files of the Office for Dispute Resolution are missing page 2 of 3. At the hearing the Parent maintained that the missing pages contained information about the LEA that was not material to the hearing, although page 3 starts in the middle of a sentence. [NT 11-13]

The District maintains that no remedy is due. First, the District argues in an August 16, 2017 motion to dismiss that the Parent has no right to a due process hearing under IDEA because the Parent claims that the Student is not disabled. Second, at the hearing the District argued that it did not receive notice of the Parent's belief that Student required a Section 504 Plan rather than an IEP until it received the amended complaint. Third, the District argues that it provided a FAPE to the Student and the Student suffered no educational harm.

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

### Procedural History

The Parent requested this hearing, *pro se*, on July 6, 2017 and amended her complaint on July 14, 2017.

On August 16, 2017 the District through counsel noted that the Parent had filed her complaint under both the IDEA and Section 504, and filed a motion to dismiss the IDEA claims. The District argued that the IDEA claims were 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 under the IDEA. In deference to the Parent's *pro se* status, and unwilling to dismiss potentially proper but inartfully plead claims, I denied the District's motion. The hearing then proceeded so that the Parent could be heard on her issues, and so that a factual record could be developed as a basis for granting or denying the District's motion and deciding the case under either the IDEA or Section 504.

### The District's Motion and Jurisdictional Issues

As described above, the District's motion to dismiss the Parent's IDEA claims 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.

Given the Parent's initial and amended complaints, the facts of this case and the *S.H.* case appeared to be similar and the District's motion to dismiss the IDEA claims 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 IDEA claims immediately on the District's motion because I will not penalize a *pro se* parent for what may simply have been an inartful pleading.

In her amended complaint, and at the hearing, the Parent argued that Student *did* have disabilities, major depression and a chronic skin disorder, but that Student did not have a specific learning disability. She maintained that the District should have provided Student a Section 504 Plan to address depression and the skin condition rather than an IEP. The District argued that the Parent never informed the District that Student had major depression or a debilitating skin disorder and that at no time did she ask for a Section 504 Plan.

I agree with the District that in accord with *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 am sympathetic to the District's argument that it did not receive proper notice of this claim, as the Parent's 504 claim appears to have surfaced for the first time in the amended complaint. However, the District did provide a defense to the Section 504 claim, and did so ably.

#### Issue

As the Parent's IDEA claim was not dismissed upon the District's motion at the outset of the hearing, the parties agreed on the record to the following issue:

Did the District improperly place the student in special education, and if so, was there harm, and if so, what is the remedy?

In light of the Parent's Section 504 claims, the second issue in this matter is:

Was Student denied FAPE under Section 504?

## Findings of Fact

1. Student was evaluated at age 4 years, 2 months as part of a private school admissions process. On the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III) cognitive functioning was estimated to be at the mid-average to lower end of high average ranges as follows: Full Scale IQ 110, Verbal 104, Performance 110, Processing Speed 110, General Language 103. On the Beery Test of Visual-Motor Integration Student scored a 96, at the lower end of the average range. All<sup>3</sup> [NT 58; P-1]
2. Student attended a private school for Kindergarten and began attending a District school in 1<sup>st</sup> grade. [S-2]
3. In spring of 1<sup>st</sup> grade the Parent had concerns about Student's reading ability, and on March 13, 2012 she requested that Student be given an IEP immediately. [NT 18, 38]
4. The Parent completed a "Permission to Evaluate – Evaluation Request Form" on March 17, 2012. The form notes parental concerns as: lack of ability to read, understand, and keep (up) with the schoolwork at a normal pace. [Student] also sees numbers backwards." [S-1]
5. After discussion with the Parent the District issued a "Permission to Evaluate" form on March 28, 2012 and the parent returned it as approved on April 23, 2012. [NT 18-19]
6. Medical information from Student's pediatric care group revealed no medical limitations. [S-2]
7. The Parent revealed no medical concerns for the Student at the time of the initial evaluation. [NT 20]
8. In completing a developmental history questionnaire and in her discussions with the school psychologist the Parent did not mention that Student had a skin condition which was of concern. [NT 19-2, 36]
9. In completing a developmental history questionnaire and in her discussions with the school psychologist the Parent did not mention that Student suffered from depression. [NT 20, 36]
10. At the time of the due process hearing the District school psychologist who evaluated Student had completed approximately one thousand (1,000) evaluations, about 60-70 % of which involved children with specific learning disabilities. [NT 16]
11. The evaluation was completed on June 11, 2012. The evaluation report (ER) notes that the Parent reported Student had difficulties from kindergarten. In 1<sup>st</sup> grade at the time of the evaluation Student was receiving reading intervention from a special education

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<sup>3</sup> Scores are presented as standard scores which have a mean (average) of 100 and a standard deviation of 15. The average range spans scores 90 to 109.

teacher under the Response to Intervention model and attended after school tutoring four times a week. Despite intervention, teachers noted that Student was not able to read vocabulary or sight words independently, did not comprehend stories when reading independently, and in addition to reading deficits showed weaknesses in math and in spelling. A strength was noted in writing skills. [S-2]

12. On the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) Student’s cognitive functioning was assessed as follows: Full Scale IQ 95 (average), Verbal Comprehension Index 98 (average), Perceptual Reasoning Index 112 (high average), Working Memory 74 (borderline), Processing Speed Index 94 (average). [NT 21-23; S-2]
13. Academic skills were assessed by the Wechsler Individual Achievement Test – Third Edition (WIAT-III). Scores were as follows: Basic Reading Composite 88 (low average), Early Reading Skills 88 (low average), Reading Comprehension 69 (extremely low); Written Expression 89 (low average), Spelling 89 (low average), Alphabet Writing Fluency 118 (high average); Mathematics Composite 84 (low average), Math Problem Solving 93 (average), Numerical Operations 77 (borderline). [NT 23-27, 31-33; S-2]
14. Student’s underachievement in reading and writing were not due to lack of appropriate instruction or lack of English proficiency. [S-2]
15. 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]
16. Testing with the Beery-Buktenica Developmental Test of Visual-Motor Integration yielded a score of 114 (high average) reflecting the Student did not have deficits in the areas of visual-motor tasks, visual-perceptual tasks, or grapho-motor tasks. The evaluator concluded that the reported letter reversals could be attributed to developmental errors. [NT 25; S-2]
17. In the feedback session the Parent noted that Student took a very long time to do homework, could not do it independently, and needed someone right by Student’s side in order for Student to complete the work. [NT 27]
18. The multidisciplinary evaluation included a speech/language assessment. Parental input included that a family member has a history of speech/language needs, that Student speaks softly and is difficult to understand, and that Student speaks with head down or looking away, and “seems to have a hard time saying words”. [S-2]
19. On the Test of Language Development – Primary Fourth Edition (TOLD) Student scored as follows on the aspects of language development Composite Indices: Listening 108 (average), Organizing 89 (below average), Speaking 91 (average), Grammar 100 (average), Semantics 92 (average), Spoken Language 95 (average). [S-2]

20. On the Photo Articulation Test (PAT – Third Edition) Student’s articulation was found to be in the average range. However Student had great difficulty on the portion of the test requiring the child to tell a short story about the pictures. There was no sense of sequence, Student required help to pay attention to the visual details and was very reluctant to speak. [S-2]
21. On the Test of Narrative Language (TNL) Student’s scaled score on Narrative Comprehension was 7 and the score on Oral Narration was a 4<sup>4</sup>, resulting in an Index (Standard) Score of 73 (poor). [S-2]
22. On the Test of Problem Solving Student received a Total Test score of 82 which is at the 11<sup>th</sup> percentile. Student often shrugged Student’s shoulders or said Student didn’t know rather than hazard a guess. [S-2]
23. Student was found eligible for special education learning support and speech/language support under the classifications of specific learning disability and speech/language impairment. [NT 27-28; S-2]
24. Parent input, Student’s presentation in class and in the evaluation resulted in a recommendation for participation in a school-based social skills group through the Student Assistance Program. [NT 30; S-2]
25. The Parent approved the recommendations and signed the Notice of Recommended Educational Placement (NOREP) for 2<sup>nd</sup> grade on September 25, 2012. [NT 27-28, 39; S-2, S-3]
26. The Parent approved the IEP for the next year (3<sup>rd</sup> grade) via a NOREP she signed on May 30, 2013. [NT 39; S-4]
27. The Parent approved the IEP for the following year (4<sup>th</sup> grade) via a NOREP she signed on May 20, 2014. [NT 40; S-5]
28. In December 2014 Student was re-evaluated to determine whether there was still a need for speech/language special education services as Student had mastered all Student’s speech/language goals. [S-6]
29. On the Goldman-Fristoe Test of Articulation – Second Edition (GFTA-2) Student scored within the average range for age.
30. On the Test of Language Development – intermediate – Fourth Edition (TOLD-4) Student’s Composite Scores were as follows: Listening 102 (average), Organizing 100 (average), Speaking 100 (average), Grammar 98 (average) Semantics 104 (average) and Spoken Language 100 (average). [S-6]

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<sup>4</sup> Scaled scores are reported for performance on individual subtests. Scaled scores from 8 to 12 represent the average range.

31. On the Comprehensive Test of Spoken Language (CASL) Student scored as follows: Antonyms 108, Syntax Construction 89, Paragraph Comprehension 99, Grammatical Morphemes 112, Nonliteral Language 112, Inference 102 and Pragmatic Judgment 89. The Core Composite was 98, in the average range. [S-6]
32. Given that Student had met the speech/language goals in the IEP, standardized test scores on receptive and expressive language were within the average range for age, and speech was deemed 100% intelligible to unfamiliar listeners, it was recommended that Student be exited from speech/language services. [S-6]
33. In a NOREP dated January 12, 2015 the Parent disapproved the exit from speech language services but approved Student's continuation in the learning support program<sup>5</sup>. [NT 40-42; S-7]
34. In a NOREP dated May 6, 2015 the Parent approved both the continuation of learning support and the provision of ESY services. [NT 42; S-8]
35. In a NOREP dated April 6, 2016 the Parent approved both the continuation of learning support and the provision of ESY services. [NT 43; S-9]
36. On August 31, 2016 the Parent wrote to the District requesting that Student be removed from special education and requested an immediate IEP team meeting. [NT 43-44; S-10]
37. On September 8, 2016 the Parent approved a NOREP exiting Student from special education. [NT 44-45; S-11]
38. Student's end of the 2016-2017 school year report card noted final grades in major subjects as follows: Social Studies B-, Science C+, Mathematics C, Language Arts C+. [NT 59; P-9]

#### Dermatology

39. On October 4, 2013 Student's pediatrician made a referral to dermatology for "chronic dermatitis" with the additional information "s/p scabies rx multiple times". [P-6]
40. On October 4, 2013 the physician also provided two similar documents stating Student could return to school. [P-5, P-7]
41. An October 28, 2013 doctor's notes show prescription of a cream to be applied for ten days and that Student was treated for "rash". [P-4, P-5]
42. A medical record from Student's "Well Child" visit dated August 5, 2015 noted that a prescription was issued for a topical cream to be applied once and repeated in 14 days if necessary. A diagnosis was not given. [P-2]

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<sup>5</sup> The record is silent on how the parties resolved their disagreement about speech language services.



43. Sometimes the skin condition made Student uncomfortable and sometimes Student was sent to the nurse. [NT 53]

#### Depression

44. The Reason for Referral in a Psychiatric Evaluation dated January 4, 2013 noted, “[Student] is depressed, always sad, says [Student] doesn’t have friends. [Student] is always crying. [Student] says [Student] does not want to live”. [P-11]
45. The psychiatrist noted Clinical Disorders to be Learning Disorder NOS<sup>6</sup>; Anxiety Disorder NOS; and Major Depressive Disorder, Single Episode. [P-11]
46. The Parent does not remember giving anyone in the District a copy of the Psychiatric Evaluation of January 4, 2013. [NT 68-69]
47. A medical record from Student’s “Well Child” visit dated August 5, 2015 noted a diagnosis of depression and noted that Zoloft was prescribed. [P-2, P-3]
48. A Psychiatric Re-Evaluation dated June 22, 2017 notes an updated Diagnostic Impression: Recurrent Major Depression without psychosis, moderate; ADHD inattentive type; high stress family situation. [P-12]
49. Medications prescribed at the time of the June 22, 2017 psychiatric re-evaluation were Zoloft and Methylphenidate Extended Release. [P-12]

#### 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 (3<sup>rd</sup> 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

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<sup>6</sup> Not Otherwise Specified

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 presented no credibility issues. Student's testimony, though sincere, added little to the overall body of credible evidence. The Parent presented as a loving mother who is doing her best to ensure her child's welfare. In particular she has taken steps over several years to procure psychiatric medication management for Student. Given positive psychoeducational results from testing at age four, Mother in retrospect is concerned about the classification of learning disability given several years ago, and retrospectively attributes student's academic difficulties to a skin condition and depression. What is clear is that she did not inform the District of the medical conditions at the time of the initial evaluation, nor did she raise these concerns at the time of the annual IEP meetings, or when Student was given a speech/language evaluation. Even though she withdrew her permission for Student to receive special education, at the time of making this decision she still did not discuss these concerns with the District. These factors lessen the extent to which I can rely on the mother's testimony.

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).

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.

504 FAPE is strictly about regular education accommodations that enable access to the general curriculum and educational programs. 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)

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 Parent maintains that Student should not have been placed in special education and that a Section 504 Plan should have been issued instead, identifying her child's disabilities as depression and a skin condition. She asserts that it was these conditions, rather than a specific learning disability, that compromised Student's learning.

Part of the basis for the Parent's disagreement about the specific learning disability classification were the results of a cognitive evaluation conducted prior to kindergarten when Student was four years old as part of the process for admission to an independent school. The Parent may have an incomplete understanding 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.

Additionally, children as young as four years do not often obtain cognitive test results that indicate signs of learning disabilities, and such a classification at that age in most cases would not be appropriate. Although the various iterations of the WPPSI have been well-researched and respected in the field over the years, cognitive testing during the preschool years is best used as a broad indication of whether a child is generally considerably below average, considerably above average or broadly average and/or whether skills are significantly skewed in favor of verbal or non-verbal areas.

Regardless of Student's early IQ test results, this conscientious Parent noticed Student's learning difficulties from kindergarten in private school, and when Student had been in 1<sup>st</sup> grade for about six months her concerns crystalized such that she requested that Student be given an IEP immediately. When Student was tested by the District's very experienced school psychologist, it was found that the mother's concerns were justified and Student was identified as eligible for special education under the classifications of specific learning disability and speech language impairment.

The Parent's reasons for exiting Student from special education services are not at all clear on this record. Student remained in special education through fifth grade receiving learning support services; the only documentation provided regarding academic functioning was an end of the year report card for 6<sup>th</sup> grade, the 2016 2017 school year, after Student had been exited from special education. Contrary to the Parent's assertion that special education services harmed Student and put Student "far behind" final grades in major subjects are noted to be average overall, with a B-, two C+'s and a C.

Student also received speech/language special education services, the success of which was documented in a speech/language reevaluation report dated December 14, 2014 wherein data from a variety of instruments supported the finding that Student had met all speech language goals and therefore could be exited from speech/language services. Interestingly the Parent objected to exiting Student from speech/language services and indicated her opposition in a NOREP which she signed on January 12, 2015.

Student's success in the year following exit from special education services as well as Student's having accomplished all speech/language goals provide a preponderance of evidence that Student was not harmed by being in special education and in fact received educational benefit.

Turning to the Parent's argument that rather than an IEP Student should have been given a Section 504 plan based upon a skin condition and depression, the record contains no evidence that the Parent directly informed the District of these two conditions, and at no time prior to her written complaint and her testimony at the due process hearing did she suggest that either condition was affecting Student's ability to learn.

The Parent offered return to school notes dated October 28, 2013 to establish that she had notified the District that Student was seen for a skin condition [NT 35]. The Parent argues that because Student visited the nurse with regard to itchy skin the District should have inferred that Student's rash constituted a disability that required accommodations [NT 8-9], although what those may have been in addition to letting Student visit the nurse as was already being done is not readily apparent. I find that the notes to the nurse do not represent notice to the school of a medical disability.

Likewise, although the Parent provided an August 5, 2015 physical exam document [P-2] that noted "depression" in order to illustrate that this was the sort of form she submitted every year to satisfy the requirement for an annual physical, this was not evidence that she had provided such a report at the time of the evaluation to the school psychologist or any other member of the evaluation or IEP team [NT 34]. Further, the Parent acknowledged in the hearing that she did not provide the District with the initial January 2013 psychiatric evaluation diagnosing depression. Had she done so the District could have reconvened the IEP team meeting in order to consider adding SDIs and related services to address this condition, in addition to the SAP socialization group already in place.

The District established with a preponderance of the evidence that Student was not incorrectly classified as learning disabled, was not inappropriately given special education services, and

suffered no educational harm by being in special education. In fact the evidence shows that after several years in special education Student was holding Student's own in regular education classes. Further, as well as Student's having met speech/language goals after intervention, the speech/language re-evaluation demonstrated using nationally normed instruments that Student also benefitted from this area of special education programming. Student was not denied FAPE under Section 504.

### Conclusion

Student was correctly identified as a child with a specific learning disability and a speech/language impairment and was eligible for special education under the IDEA. The District had no basis of knowledge upon which to create a Section 504 Plan rather than an IEP. Further, the District provided a FAPE from which Student derived meaningful educational benefit and therefore no compensatory education is due.

### Order

It is hereby ordered that:

1. The District did not inappropriately place Student in special education.
2. Student suffered no educational harm from receiving special education services.
3. Student derived educational benefit from the District's special education programming.
4. The District did not deny Student FAPE under Section 504 and therefore no compensatory education is due.
5. The Parent's claims under the IDEA are dismissed.

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

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

September 6, 2017

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