

*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: A.S.  
ODR #2144/11-12 AS

Date of Birth:  
[redacted]

Dates of Hearing:  
September 19, 2011  
December 2, 2011

CLOSED HEARING

Parties to the Hearing:  
Parents

Council Rock School District  
The Chancellor Center  
30 North Chancellor Street  
Newtown, PA 18940

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:  
Pro Se

Grace Deon, Esquire  
Eastburn and Gray  
60 East Court Street PO Box 1389  
Doylestown, PA 18901

January 6, 2012

January 21, 2012

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

## Background

Student<sup>1</sup>, who was enrolled in the District from Kindergarten to fall of 10<sup>th</sup> grade, is a late-teen-aged individual who graduated from high school in June 2011 and is currently attending a local university. Although the District evaluated Student on several occasions, Student was never found eligible for special education, or disabled and entitled to a 504 Service Plan, although a private evaluator established a diagnosis of ADHD after the Parents removed Student from the District in favor of a unilaterally-chosen private placement. The Parents filed this hearing request because they believe that the District failed to offer Student FAPE and are seeking reimbursement for a portion of time Student attended the private placement.

For the reasons presented below I find for the Parents.

## Issue<sup>2</sup>

This decision addresses Parents' request for tuition reimbursement. In deciding the matter, this hearing officer had to examine three distinct questions:

1. Did the Council Rock School District deny Student a free appropriate public education [FAPE] during the 2009-2010 and the 2010-2011 school years by failing to identify Student as being in need of special education and related services or failing to offer Student a 504 Service Plan?
2. If the District denied Student FAPE for any part of or all the specified time period, was the placement unilaterally selected by the Parents appropriate?
3. Are there equitable considerations that would reduce or eliminate the District's responsibility for tuition reimbursement?

## Findings of Fact

1. Student's Parents described Student as displaying attention difficulties since age five. [S-1]
2. Starting in Kindergarten Student had many fights on the playground and there were disciplinary issues in specials classes such as music and art. [NT 635]

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

<sup>2</sup> After the District filed for due process to defend its evaluation pursuant to a parental request for an Independent Educational Evaluation [IEE], the Parents withdrew that request and the District withdrew the hearing request. The Parents then obtained an evaluation at their own expense. Although not in their written complaint relevant to this hearing, in their verbal opening statement and in their closing written statement the Parents requested reimbursement for the private evaluation. This issue was removed by the hearing officer given that the Parents had previously forfeited the opportunity to have the matter adjudicated and is not addressed in this decision. [NT 27-30]

3. The teacher's report card comments note that they were working on self-control, and thank the Parents for "all your support with [Student] (emphasis in the original). The daily notes seem to have made a difference in [Student's] behavior". [HO-1]
4. There were many meetings at school between the Parents and Student's teachers and the principal, and there were also meetings with the school psychologist. [NT 635]
5. Student received an Apology in Action form at least once a month and Student continued receiving these disciplinary notices through elementary school. [NT 635-636]
6. In 1<sup>st</sup> grade at the fourth marking period Student received S- marks in the areas of completes work on time, listens attentively, exhibits organizational skills and demonstrates self-control. Listens attentively and exhibits organizational skills are marked S- for all marking periods of the school year. Teacher comments began in the first marking period addressing needs in the areas of work habits, better listening and putting forth best effort; the second marking period notes difficulties in completing tasks on time, staying focused and working independently; the third marking period notes staying focused and using appropriate behavior as needs; the fourth marking period notes fluctuations in staying focused and work quality. [HO-1]
7. In 1<sup>st</sup> grade the Instructional Support Team was called in and offered strategies for attention and focus which the teacher implemented to keep Student in Student's seat. [NT 635]
8. Student stood in class, and swayed and rarely sat in the seat during elementary school. [NT 637]
9. On the 2<sup>nd</sup> report card, check marks rather than plus marks were noted on the final marking period in the areas of uses time wisely, listens attentively, and demonstrating self control. [HO-1]
10. Student's 2<sup>nd</sup> grade teacher's notes praised academic work in reading effusively ["excellent", "fabulous" and "wonderful"] but notes the need to practice math facts. The teacher notes "prefers talking to writing", time management problems that were improving "lately", and impulsivity in reactions to others and their work, frustration in games because of not knowing the facts fast enough, and "when given external rewards or checklists [Student] seems better able to control [self]". [HO-1]
11. The 3<sup>rd</sup> grade report card notes checks rather than plus marks in follows directions, working independently and listens attentively. [HO-1]

12. Student's 3<sup>rd</sup> grade teacher, in the context of high praise for spelling and reading, notes that Student "can be very immature at times", tends to lack focus and organizational skills in the area of writing, and at year's end the comment was "[Student] really needs to buckle up next year and put forth [Student's] best effort on a consistent basis". [HO-1]
13. In 4<sup>th</sup> grade, Student's excellent academic performance deteriorated. Student received B- for all academic subjects as a final grade, but received C+ in language arts, math, and social studies in the first marking period, C in math and science for the second marking period, and C in science and social studies for the third marking period. [HO-2]
14. In 4<sup>th</sup> grade Student's self-evaluation noted deficits in completing homework and paying more attention, as well as being sure study guide and notebooks are complete. Student criticized self for these deficits. [HO-1]
15. Student's 4<sup>th</sup> grade teacher noted that Student was "bright" and "with focus and responsibility, would be more successful in school". She noted that Student "does not complete many writing assignments" and "when [Student] was able to focus in class, [Student] learned new concepts quickly and was anxious to participate".<sup>3</sup> [HO-1]
16. Student's 4<sup>th</sup> grade teacher described difficulty focusing, organizing and starting/completing assignments. [S-1]
17. In April 2003 in 4<sup>th</sup> grade the Parents had Student evaluated by the Center for Management of ADHD at a prominent hospital for children.<sup>4</sup> The reasons for referral included disorganization, low frustration tolerance, rushing through homework, making careless errors, poor sleep habits, tension and difficulty focusing in school. Additionally Student was described as "on the go" and very impulsive. [S-1]
18. The Center found Student to have high average cognitive abilities with a significant difference between verbal and nonverbal skills, moderate levels of anxiety and moderate levels of peer social relationships. Recommendations included a home/school signed communication book, positive reinforcement in the classroom for appropriate behaviors, therapy to teach coping skills and relaxation techniques. [S-1]

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<sup>3</sup> For reasons not mentioned on the record, it seems from HO-1 that Student's classroom was changed after the second marking period. [HO-1, page 6]

<sup>4</sup> Although the District cited the Center evaluation at the time it completed its own evaluation in December 2003, and thereby establishes that the District had a copy of the Center evaluation at that time, neither the District nor the Parents could locate a copy of this document for use in the hearing. The District's referral for a later evaluation notes "ADHD diagnosed at [hospital] 4-20-03". Student's symptoms as described at that time are consistent with diagnostic criteria as set forth by the American Psychiatric Association. [NT 187; S-1, S-3, HO-2]

19. Student's 5<sup>th</sup> grade report card for the first two marking periods noted meeting expectations in successful learner criteria, although academically Student generally exceeded expectations. Improvements were seen by the fourth marking period. [HO-1]
20. The 5<sup>th</sup> grade teacher noted difficulty in time management and that Student needed to work to stay focused to get the most from Student's strengths. [HO-1]
21. In December 2003 in 5<sup>th</sup> grade pursuant to a parental request for an evaluation to consider a learning disability and/or ADHD, the District evaluated Student. On cognitive testing Student scored in the high average range on verbal comprehension, in the average range for perceptual reasoning and working memory, and in the low average range for processing speed. The evaluator noted that the 16-point spread between Student's Standard Scores on verbal comprehension and perceptual reasoning was statistically significant at the .05 level. Although there was a 29-point spread between Student's Standard Scores on verbal comprehension and processing speed the evaluator did not draw attention to the statistical significance of this differential. [S-1]
22. On the December 2003 evaluation all Student's academic areas were high average or above, with the one exception [numerical operations] being solidly average. [S-1]
23. When the District's evaluator observed Student in the classroom Student seemed attentive to the lesson although Student "was moving about the room to throw things out, standing at [Student's] desk or tipping back in [Student's] chair" and "at one point stopped attending and played with [Student's] pen and [Student's] nails. [S-1]
24. Student's teachers provided input for the December 2003 evaluation. They noted Student was recently banned for two weeks from recess sports games because of getting so angry that Student could not calm down, that Student seemed to get angry about once a week at recess, that Student could calm down with teachers' help but not with recess aides' help, that although Student could accept redirection from teachers Student could become angry when other adults provided correction. The teachers noted that Student "seems t lack the tools to calm []self down when [Student] becomes angry and upset". [S-1]
25. The District evaluator found Student had Needs in the areas of attention and focus, organization skills, and anger management. However, the evaluator opined that the structure of the classroom was very beneficial and cited the teacher's allowing standing at the desk when working and giving opportunities for moving around the room. It was also noted that "teaching [Student] some self-calming strategies could be beneficial for [Student's] social interactions". [S-1]

26. The District did not identify Student as having disability categories of emotional disturbance [e.g. mood disorder, impulse control disorder] or other health impairment [ADHD], and did not therefore find Student eligible for special education under an IEP or for accommodations under a 504 Service Agreement.<sup>5</sup> [S-1]
27. Student was excluded from an unofficial recess sports activity because of fighting, and in 5<sup>th</sup> and 6<sup>th</sup> grades Student was excluded from an after school sports program for fighting. [NT 636-637]
28. In middle school fighting continued and bullying incidents occurred. A My Space issue drew police involvement. [NT 637-638]
29. In 6<sup>th</sup> grade the report card evidences a noticeable decline in successful learner traits to nearly all notations being approaching expectations or meeting expectations with many fewer exceeding expectations. [HO-2]
30. The 6<sup>th</sup> grade teacher wrote, first marking period that Student did well when focusing energy into schoolwork but it is “difficult for [Student] to do this resulting in “inconsistent performance”. The teacher noted a “not great” second marking period, with an 81% in math and a 68% in science. She wrote that Student needed “to adopt a more conscientious attitude toward school”, needed to “focus better during read-aloud time” and to “substantially increase [Student’s] effort towards academics”. In the third marking period the teacher noted that Student reads quite often but did not do a good job in completing reading homework, did not turn in bookmarks until reminded to do so. She stated “lack of focus and organization severely impacted [Student’s] ability to achieve to [Student’s] potential. math was 62% and science was 80%. On the last marking period comment the teacher noted a 79% in math, reiterated that Student was bright and had “so much potential”. [HO-1]
31. Student’s grades in middle school varied, and final grades in core academic classes were in the “C” range, with B’s and A’s in non-core classes. [S-12]
32. In August 2006, prior to entering 8<sup>th</sup> grade, Student was evaluated at a private agency. The evaluators concluded that Student exhibited low level symptoms of inattention and difficulty organizing, but the symptoms at that time did not meet full diagnostic criteria for ADHD. [S-2]
33. The August 2006 private report contains no observation of Student in a school setting, contains no review of educational records, and the evaluators appeared to rely on two rating scales, one completed by Student alone and the other completed by Student and Parents to draw the conclusion that Student did not meet full

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<sup>5</sup> The accommodations allowed by the current teacher were not in any way enforceable given that there was no disability acknowledged and therefore no 504 Service Agreement.

- ADHD criteria. No rating scales were obtained from teachers and no teacher input was sought. [S-2]
34. In 9<sup>th</sup> grade Student left a sports team because of fights with team mates, and in high school was pretty much an outcast among peers. [NT 638-639]
  35. In April 2008, 9<sup>th</sup> grade, due to Student's declining academic performance and reports of depression from teachers, Student was referred by the District for an evaluation addressing "Cognitive & Academic – Social/Emotional". The Referral form noted "ADHD – diagnosed at [hospital] 4-20-03". The District issued a Permission to Evaluate [PTE] which the Parents signed in May. [NT 496; S-3]
  36. Because of Student's absences in the fall of 10<sup>th</sup> grade, the District psychologist found it difficult to schedule the evaluation, and because Student was in other locations the District psychologist did not complete the evaluation until June 2009, at the end of 10<sup>th</sup> grade, over a year from when the PTE was signed.<sup>6</sup> [NT 484-500; S-3]
  37. From fall of 10<sup>th</sup> grade Student was psychiatrically hospitalized as an inpatient in September and again in October 2008 and then attended a partial hospitalization program. In November 2008 Student was arrested and detained in [Redacted] County until December 2008<sup>7</sup>. From December 2008 until April 2009 Student was placed in a probation group home and attended a school connected with that facility; Student returned home in April 2009, but continued at the group home school. Subsequently Student was placed by the Parents at the private placement. The District psychologist did not attempt to bring Student in for an evaluation or to travel to Student's location to conduct the evaluation. [NT 56-57, 145-146, 490-491, 493-500, 638-639]
  38. Student began seeing a private psychologist for psychotherapy shortly after the legal involvement in November 2008. Student also saw a private psychiatrist for medication management directed toward ADHD starting in December 2008. The therapist's and psychiatrist's diagnoses of Student included ADHD. [NT 106-107; P-22]
  39. The District psychologist holds a Masters Degree in Applied Behavior Analysis and a Doctoral Degree in psychology. He is a certified school psychologist in Pennsylvania and in New Jersey, and is a Licensed Psychologist in Pennsylvania. His professional work history is consistent with his education and by virtue of training and experience he is qualified to offer expert opinions in school psychology. [NT 475-476, 484]

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<sup>6</sup> In July 2008 Pennsylvania's regulations regarding timelines for completion of an evaluation changed from 60 school days to 60 calendar days; both regulations excluded summer break. The PTE was signed in May 2008 under the old regulation.

<sup>7</sup> The involvement of the juvenile justice system, as an extra support, was suggested by the treating psychologist, agreed to by the Parents, and effected through a judicial contact. [NT 92-94]

40. A few times a year the District psychologist is asked to conduct a private evaluation on behalf of a school district or a parent or parent's attorney. [NT 484]
41. Commenting on questionnaires soliciting parental input, Student's mother noted that Parents found it difficult to complete the questionnaires because Student was then completely different than at the time of the Referral and PTE when Student was in the high school. The mother noted that although the high school teachers would likely have a picture of a "disinterested student who looks depressed and uncaring", Student's demeanor at the private school and with medication and counseling "is completely changed". [S-3]
42. At the time of the District's June 2009 evaluation Student was attending the private school, receiving weekly psychotherapy, and having monthly medication management checks. [S-4]
43. The District psychologist noted that both times he evaluated Student, Student was on medication, Vyvanse and Wellbutrin, had been receiving psychological counseling and psychiatric medication management, had already had an incarceration, and had lived in a probation group home. [NT 613]
44. The clinical psychologist who has been treating Student since the fall of 2008 testified that 60 percent of his practice is devoted to adolescents and he has diagnosed ADHD. Student was referred initially with behaviors such as acting out, running away, truancy and school avoidance. Student's initial diagnosis was ADHD, untreated and Oppositional Defiant Disorder, untreated. At the time of initiating treatment, Student was exhibiting inattentiveness, impulsivity, and poor judgment, and had a history of skipping classes, not doing schoolwork, and difficulty concentrating. The treating psychologist noted a high school student with untreated ADHD is more likely to also have other co-existing diagnoses and that adolescents with ADHD tend to self-medicate and that when Student was started on the appropriate medication for ADHD the need for self-medicating began to decrease. [NT 72-90, 92, 100, 106-107]
45. Behavioral difficulties in the home still noted by Parents at the time of the District evaluation included impulsivity, overstimulation in play activities, fears, expressing feelings, and attention span. [S-4]
46. Teachers at the private placement noted good academic skills, good attendance, good social interactions and good behavior. Occasionally Student would become "stressed out" and these incidents were characterized by rapid and wandering speech but they had only minor interference with Student's functioning. [S-4]
47. The District psychologist administered tests of cognitive abilities and achievement. General intellectual ability was found to be in the high average range in line with scores on thinking ability and cognitive efficiency. Auditory



- processing was in the superior range, but processing speed was in the low average range, with a 45-point spread between the two Standard Scores. Academic achievement scores ranged from high average to average, with the lowest score being in academic fluency. [S-4]
48. The District psychologist has diagnosed ADHD in other students and noted an early history including pre-school is helpful. Additionally, he noted that elementary school records would include behaviors such as calling out, fighting, not staying in one's seat. Although the District psychologist testified that he reviewed all elementary records and evaluations, he was unaware Student was permitted to stand in class during instruction, was unaware of any disciplinary issues, and did not review the Instructional Support Team report. In the cases of middle school students he testified he would look for similar behaviors which are viewed as more severe, but he failed to review disciplinary records from the middle school, only reviewing high school disciplinary records for cutting class. The District psychologist admitted disciplinary records as well as records of Student's impulsive behavior in the elementary and middle schools would have been helpful in making a diagnosis. [NT 597-601, 611-613]
  49. The District concluded that Student was not a child with a disability and was not eligible for special education. [S-4, S-5]
  50. The Parents requested an independent evaluation and this request was denied by the District. The Parents then obtained their own independent evaluation in November and December 2009, with the report being issued in January 2010. [NT 22-23; P-16]
  51. Student's private evaluation was completed by was evaluated privately by a psychologist who holds a Masters Degree in Education and a Doctoral Degree in School Psychology, is certified as a school psychologist in Pennsylvania and New Jersey, is a Licensed Psychologist in Pennsylvania and New Jersey, and is a doctoral level board certified Behavior Analyst. His professional work history is consistent with his education and by virtue of training and experience he is qualified to offer expert opinions in school psychology. [NT 332, 355; P-16A]
  52. The private psychologist has testified both on behalf of parents and on behalf of school districts. [NT 333]
  53. The private evaluation was conducted over the course of ten hours in three days and included review of developmental history and educational records, and assessment measures in the areas of cognitive, educational, social, emotional and behavioral functioning. [NT 336-337; P-16]
  54. As part of an evaluation for ADHD, the private evaluator refers to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition [DSM-IV], looking at the symptomology and the necessary

- multiple criteria. He looks for substantiating history prior to age seven to see if there are significant symptoms of inattention and/or hyperactivity and impulsivity, and determines whether those symptoms are manifesting in terms of the impact on the child's functioning in multiple settings, including community based, school, and home. Those symptoms must have been sustained for a period of at least six months. To ascertain that information, the private evaluator noted, it is important is to complete a developmental history, to review records, to gather information from school personnel working with the student, and to gather information from the child's family and from the child or adolescent, him or herself. The private evaluator testified that disciplinary records can be useful. [NT 357-358; HO-2]
55. The private evaluator attached significance to the fact that in the elementary years Student demonstrated difficulties with sustaining attention, activity level and behavior, and weaknesses in organization and assignment completion in the context of doing fairly well academically initially. [NT 338-339]
  56. The private evaluator noted that around the end of elementary school and entering into middle school Student's behaviors escalated in terms of difficulties with attention, concentration and organization and this began to impact academic performance and social interaction. [NT 339-340]
  57. Continuing into middle school and into high school, Student demonstrated difficulties with timely arrival at school, attendance at school, and work completion and there was a significant deterioration in overall academic performance and emotional functioning. [NT 340]
  58. Cognitive testing done for the private evaluation showed that while Student possesses well above average verbal comprehension skills, strong working memory skills, and average visual motor and visual processing skills, Student's processing speed was not only low relative to Student's other scores, but in comparison to the general population of same-age peers was significantly below average, in the borderline to deficient range. [NT 343]
  59. The low processing speed relates to academic performance because it impedes Student's ability to quickly perform on tasks requiring scanning material, looking at stimuli and responding quickly. In addition to the clear manifestation of this weakness on cognitive testing, Student's academic testing showed that fluency scores were notably lower than other subtests. [NT 344]
  60. While Student took all cognitive and achievement tests while on medication, Student was asked to take a specific measure of attention and focus once off medication and once on medication, with a significant difference in the results. [NT 346]
  61. Although Student was reported to have some weaknesses in organization and attention when Student's teachers in the private school rated behavior on a scale,

- there were relatively few ADHD symptoms endorsed given that Student took medication at school. [NT 347]
62. At the time of the private evaluation Student was relatively well adjusted. Student's mood seemed appropriate and medication seemed to be working. In addition to ADHD, which the private evaluator diagnosed in accord with the diagnostic criteria outlined in the DSM-IV<sup>8</sup>, the private evaluator diagnosed Student with Adjustment Disorder with Mixed Disturbance in Emotions and Conduct, in Full Remission. [NT 349-350, 353-354; P-16, HO-2]
63. The private evaluator attributed Student's remission to multiple factors including the amelioration of struggling and frustration in school by placement in the private placement. Other factors included cessation of self-medication through the use of illegal substances, participation in residential programs, individual and group therapy and a decision to change. [NT 351-353]
64. Because of his understanding that conferring an IDEA classification is the prerogative of a Multidisciplinary Team, the private evaluator did not include a disability classification for educational purposes in the report. Had he participated on the MDT he would have recommended Emotional Disturbance and/or Other Health Impairment for the team's consideration. [NT 392-393]
65. Although at the time of the private evaluation, conducted approximately eighteen months after the District issued its PTE, Student's emotional and behavioral difficulties were largely in remission and Student's ADHD symptoms were largely controlled, the private evaluator attributed this presentation to Student's having emotional supports in therapy and academic supports in the private placement. [NT 394-395]
66. The private evaluator's recommendations spoke to maintaining the types of supports Student was receiving. [NT 395]
67. The evaluation data obtained by the District psychologist in June 2009 and the private evaluator in December/January 2009 was similar, but their interpretations of the data differed. The District psychologist found Student did not have a disability and was therefore ineligible for special education or a 504 Service Agreement, whereas the private evaluator found Student has a disability and was eligible for special education or a 504 Service Agreement. [NT 370-372]
68. Contrary to the District psychologist's assertion in his evaluation, the private evaluator did observe Student at the private placement and noted Student received various accommodations. [NT 360, 400-401; P-22]
69. The private evaluator described the school as offering a nontraditional program in terms of the flexibility students are afforded in having access to move around,

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<sup>8</sup> The American Psychiatric Association's *Diagnostic and Statistical Manual, Fourth Edition*.

- greater opportunity than a traditional setting to converse with staff, having relaxation exercises once or twice a day. It was the private evaluator's opinion that the private placement was an appropriate placement for Student. [NT 357, 359-361]
70. The private evaluator's recommended accommodations for Student included high staff-to-student ratio, study guides, repetition/rephrasing, check-ins, extended time for homework, time and a half for classroom exams and quizzes, use of an agenda book, and planned movement breaks. [P-16]
71. Upon its receipt of the private evaluation in or around March 2010, the District told the Parents that in order for the District to review the evaluation the Student had to be dually enrolled in the District and the Parents must prove residency. The District's procedure that did not accept Student's two siblings' being enrolled in the District as proof of residency. [NT 273, 292, 311-312]
72. Ultimately the District reviewed the private evaluation and conducted a re-evaluation in May/June 2011 to "determine the sufficiency of and to correct the possible deficiencies in the [private evaluator's] report". The same District psychologist who had administered the June 2009 evaluation conducted the re-evaluation. [NT 274-375; P-22]
73. This re-evaluation was conducted after three full school years from the first referral for an evaluation made by the District, two full years after the District's June 2009 evaluation, and eighteen months after the private evaluation of December 2009/January 2010. Student had received psychotherapy, medication and education at a small private school, all of which served to ameliorate previous symptoms. At the time the evaluation was completed Student was weeks away from high school graduation and the report itself was issued after graduation. [P-22]
74. In critiquing the private evaluator's findings, the District psychologist opined that Student's relatively low processing speed scores and fluency scores were not low enough and their educational relevance not high enough to warrant an extended discussion though they were considered. [NT 383; P-22]
75. The private evaluator testified that he disagreed, pointing out that the processing speed deficits on the cognitive tests, combined with Student's history of school performance and relative weaknesses on academic fluency tests, as well as accommodations offered in the private placement all were important to consider in terms of the educational impact of Student's deficits.<sup>9</sup> [NT 384]

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<sup>9</sup> Both the District psychologist and the private evaluator testified in some detail about the use of a computerized test [Continuous Performance Test – CPT] in diagnosing ADHD, with the private evaluator using and favoring the test and the District psychologist not using and not favoring the test, and both supported their opinions with references to research in the field. This hearing officer finds that although

76. Reviewing and considering the District psychologist's 2011 critique of the private evaluator's 2009 evaluation, the private evaluator stood by his conclusions. [NT 404-409]
77. Regarding the private placement, the District evaluator noted that Student "did not have a formal service plan under Chapter 15, the 'accommodations' [Student] received were informal and part of the [private placement] milieu. It would remain a matter for further evaluation as to whether [Student] would have qualified for Chapter 15 accommodations at [the District high school]...Simply having a diagnosis does not automatically entitle a student to Chapter 15 accommodations (although the criteria have become more liberal recently)".<sup>10</sup> [P-22]
78. The District evaluator concluded that Student does not have a disability. [P-22]
79. The private evaluator described the private placement as having about 25 pupils and as being "nontraditional" in that it offered flexibility regarding movement in the classroom and a common area, greater opportunity to converse with staff, and relaxation exercises once or twice during the day. [NT 361]
80. The District psychologist observed Student at the private placement. He observed that the class had 4 pupils including Student; the classroom was plain, quiet and clean; there was a relaxed atmosphere to the room; there was a high level of pupil participation in the lesson, with Student being the most engaged. He noted that Student as well as the other pupils there received extra time for tests and assignments. [NT 592; P-22]
81. Although Student was earning As and Bs in all subjects at the private placement, some of Student's teachers noted reservations about Student's chances to be successful in a large college. One teacher mentioned an "emotional component"

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interesting, the CPT discussion was in the end irrelevant, given that other substantial supports for a DSM-IV based ADHD diagnosis were in the record. [NT 386-390, 543-546]

<sup>10</sup> The District psychologist was here acknowledging changes to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213; ADA Amendments Act of 2008 (Amendments Act). These changes became effective on January 1, 2009, and broadened the definition of a person with a disability by, for example, providing that a person is considered to have a disability even if the disability is ameliorated or controlled by treatment such as medication. This hearing officer finds that Student met the criteria as a person with a disability under the old regulations and therefore the new regulations while clearly relevant are not determinative, but questions why the District psychologist noted but did not apply the revised criteria. To effectuate the ADA's purpose, the Amendments Act: directs that the ameliorating effects of mitigating measures (other than ordinary eyeglasses or contact lenses) may not be considered in determining whether an individual has a disability; expands the scope of "major life activities" by providing nonexhaustive lists of general activities and major bodily functions; clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and clarifies how the ADA applies to individuals who are "regarded as" having a disability. [January 19, 2012 "Dear Colleague" Letter from the Office of Civil Rights]

- that might interfere; specifically they worried that Student would not receive individual attention and might not seek it out. [P-22]
82. The District issued a NOREP dated June 22, 2009 advising the Parents that Student was not found to be eligible for special education. The Parents rejected the NOREP on July 10, 2009. [S-5]
83. On July 28, 2009, the Parents notified the District that they were continuing Student's unilateral private placement and requested that the District fund the placement. [NT 265-266]
84. The District witnesses testified that the [Redacted] School, an alternative high school in the District with about 40 pupils, was an available placement for Student. In October 2008, in the context of truancy issues among others, the District's school social worker talked about the [Redacted] School to the Parent. No special education services or accommodations were offered were Student to attend [Redacted]. No written communication regarding placement at [Redacted] was presented to the Parents by the District. [NT 207, 222-223, 244, 247, 253, 312, 458, 472]
85. There was no evidence presented in the record of an attempt on the District's part at any time in the 2009-2010 or the 2010-2011 school years to transition Student back to the District from the private placement, with or without accommodations.<sup>11</sup> [NT 399-400]

## Discussion and Conclusions of Law

### Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in "equipoise," as otherwise one party's evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer* and also bore the burden of production. The evidence was not in equipoise in this matter, as the Parents clearly more

<sup>11</sup> The Parents offered the District the opportunity to produce any documents establishing such an effort by the District that were not previously disclosed but the District did not produce any such documents. [NT 399-400]

than met their burden and prevailed, given the preponderance of their case and the resulting lack of evenly balanced evidence as between the parties.

### Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

The Parents were represented by counsel until a day or two prior to the hearing, but then appeared as pro se in this matter. Although Student’s mother is an attorney she practices in a field unrelated to special education. She conducted herself during the entirety of the proceedings with professionalism and courtesy, and when permitted to testify on a discrete point of fact she did so briefly, succinctly, without embellishment or rancor and credibly. She was able to support her testimony about Student’s early school history by report card documentation provided before the record closed. Although not typically addressed by hearing officers, it must be noted here that the conduct of District’s counsel toward the pro se Parents reflected her consistent and long-standing courtesy and kindness observed over many due process hearings, and this hearing officer wishes to commend her presentation in this case.

This matter boiled down in large part to a battle of the experts, specifically the evaluating psychologists. Given the Student’s school history, the testimony of the district psychologist regarding whether or not Student has a disability was puzzling. This witness was well credentialed and his credentials balanced those of the private evaluator. However, he was found to be considerably less credible than the private evaluator because, despite skillful testing and testimony, it appeared that in completing his evaluations in 2009 and again in 2011 he had not reviewed Student’s early school records, particularly important since a diagnosis of ADHD is not conferred if symptoms are absent before age seven. In 2011, although he also had the advantage of the private psychologist’s 2009 report, he did not revise his earlier opinion. On the other hand, the private evaluator took Student’s early school records, and all available records into consideration, presented his testimony clearly and persuasively, and therefore his input was credited with a great deal of weight.<sup>12</sup>

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<sup>12</sup> Although she relied solely upon the testimonial and documentary evidence presented, as a licensed clinical psychologist and certified school psychologist this hearing officer thoroughly understood by training and experience the reports submitted and the requirements for diagnosing ADHD.

Question One: Did the Council Rock School District deny Student a free appropriate public education [FAPE] during the 2009-2010 and the 2010-2011 school years by failing to identify Student as being in need of special education and related services or failing to offer Student a 504 Service Plan?

#### Identification

IDEA: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 [IDEA] which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act. 20 U.S.C. § 1400 *et seq.* (as amended, 2004). The IDEA sets forth the responsibilities (commonly referenced as “child find” responsibilities) borne by school districts for identifying which children residing in its boundaries are in need of special education and related services such that “[all] children with disabilities residing in the State...regardless of the severity of their disabilities...are identified, located and evaluated...” 20 U.S.C. §1412(a)(3). Parents do not have a duty to identify, locate, or evaluate their child pursuant to IDEA. This obligation falls squarely upon the district. *Hicks, ex rel. Hicks v. Purchase Line School Dist.* 251 F.Supp.2d 1250, 1253 (W.D.Pa., 2003), citing, *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir.1996).

Section 504: The non-categorical criteria for determining eligibility under Section 504 are generally broader, or more inclusive, than the categories of eligibility under the IDEA. As a result, there are students eligible for educational program adaptations and services under Section 504 who are ineligible under the IDEA. A district is on notice of the possibility of a disability where a student is experiencing failing grades, or where it has notice that the student has been identified for ADHD. See, *S.W. v. Holbrook Public Schools* 221 F.Supp.2d 222, \*226 -227 (D.Mass.,2002). The possibility that the student’s difficulty *could* be attributed to something other than a disability does not excuse the district from its child find obligation. See *Richard V. v. City of Medford*, 924 F.Supp. 320, 322 (D.Mass.1996)

Section 504 of the Rehabilitation Act of 1973 protects all qualified persons with a disability who have a physical or mental impairment which substantially limits one or more major life activities. A student is considered “qualified” when the student is of an age at which the student qualifies to attend school. The Section 504 regulations define a “physical or mental impairment” as any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or endocrine: or any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

To fall within the protection of Section 504, a person's physical or mental impairment must have a substantial limitation (permanent or temporary) on one or more major life activities - functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working. Students who qualify for services under IDEA also are protected under Section 504, although not all students



protected under Section 504 are eligible for special education services.

The Parents brought this case under both the Individuals with Disabilities Act [IDEA] and Section 504 of the Rehabilitation Act of 1973 [Section 504], and PA Chapters 14 and 15. Although there is some supporting evidence, and a case can be made, for Student's being eligible for special education under the IDEA, this hearing officer finds that while the Parents clearly established the first prong of eligibility - that Student has a disability - they did not establish the second prong required - that Student was in need of specially designed instruction. What they succeeded in proving was that Student has a disability and required accommodations in order to benefit from the general education curriculum.

There is no substantive distinction between Section 504's prohibition against discrimination on the basis of handicap and a School District's affirmative duty under the Individuals with Disabilities Education Improvement Act (IDEA) to assure that eligible students with disabilities receive a free and appropriate public education (FAPE). *Ridgewood Board of Education v N.E.*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999) In fact, when a school district provides services under IDEA to an eligible student, it fulfills its Section 504 obligation. 34 CFR §104.22(b)(2). Similarly, private school tuition reimbursement is an available remedy in both IDEA and Section 504 cases. *Borough of Palmyra Board of Education v. F.C.*, 2 F. Supp 2d 737 (D.N.J. 1998)

To establish a violation of § 504, the Parents must demonstrate that (1) Student is disabled as defined by the Act;<sup>13</sup> (2) Student is "otherwise qualified" to participate in school activities; (3) the school or the Board receives federal financial assistance; and (4) Student was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *Ridgewood Board of Education v. N.E.* 172 F.3d 238, 253 (3d Cir. 1999); *J.F. v. School District of Philadelphia*, 2000 U.S. Dist. LEXIS 4434, No. 98-1793, (E.D.Pa. 2000); *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1380 (3d Cir. 1991); 34 C.F.R. § 104.4(a). In addition, to be liable, the District must have known or have been reasonably expected to know of Student's disability. *Nathanson*, 926 F.2d at 1381. However, plaintiffs "need not establish that there has been an intent to discriminate in order to prevail under § 504." *Id.* at 1384. See, *Alexander v. Choate*, 469 U.S. 287, 297, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985); *Ridgewood*, 172 F.3d at 253; *Matula*.

An "appropriate" education "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." 34 C.F.R. § 104.33(b)(1). There are no bright line rules to determine when a school district has provided an appropriate education as required by § 504. *Eric H. v. Methacton Sch. Dist.*, 265 F. Supp. 2d 513 (E.D.PA 2003). What is known is that §504 requires a recipient of federal funds to make "reasonable accommodation to the known physical or

<sup>13</sup> A "Handicapped person" under Section 504 of the Rehabilitation Act is defined as 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. 34 C.F.R. §104.3(j).

mental limitations of an otherwise qualified handicapped” person. 34 C.F.R. §104.12 (a). Although the Third Circuit has not specifically addressed what is a “reasonable accommodation” in relation to the Rehabilitation Act’s requirement of an “appropriate” education, Courts have concluded that a reasonable accommodation analysis comports with the Third Circuit’s explanation that an “appropriate” education must “provide ‘significant learning’ and confer ‘meaningful benefit,’” *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988), but that it “need not maximize the potential of a disabled student.” *Ridgewood*, 172 F.3d at 247; *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002).

After carefully considering the information to which the District had access when it completed its first evaluation of Student in 5<sup>th</sup> grade, December 2003, this hearing officer has come to the conclusion that Student should have been identified as a child with a disability who, while not in need of specially designed instruction, required a Section 504 Service Agreement. Even in the absence in evidence of a copy of the report from the ADHD management clinic, the teachers’ report card comments throughout elementary school addressing difficulties in attention, focus, and activity level, combined with the numerous incidents of poor frustration tolerance and aggression noted by Student’s mother as early as kindergarten, in themselves represented waving red flags that Student was disabled and had, at the very least, Attention Deficit Hyperactivity Disorder, Combined Type. Furthermore, as Student advanced from year to year, Student’s grades as memorialized on the report cards declined steadily pointing to unaddressed difficulties in the school setting. [FF 1-16, 19-20] The District did not deem Student to have a disability on three evaluations. [FF 26, 49, 78] This hearing officer carefully considered two pieces of evidence that potentially supported the District’s determinations, the private agency evaluation performed and the impact of Student’s illicit substance use starting around age 12 [S-20]. First, the August 2006 evaluation is not persuasive, and was given little weight, as it was devoid of any information from classroom observation, from school records or from teacher reports. [FF 32, 33] Second, Student’s use of illicit substances in or around age twelve cannot account for the decline in this bright child’s grades that had begun several years prior and the persistently documented teacher observations of inattention, lack of focus, and hyperactivity, among other symptoms of ADHD.

The Parents established that the District committed a child find violation in December 2003. The District repeated its error in May 2009 at the end of 10<sup>th</sup> grade when after conducting another evaluation it again failed to recognize Student as having a disability. When the District conducted its third evaluation in May/June 2011, just short of Student’s graduation, Student was again found not to have a disability. Although in his final report the District psychologist acknowledges that the criteria under the ADA for having a disability had changed [the report says the change happened “recently”, although the changes went into effect on January 1, 2009), it appears that at the time he conducted the two evaluations for which he was responsible, he did not apply the criteria which confers regard as having a disability even if the disabling condition is ameliorated by medication or other means.

Although the Parents did not request compensatory education for the District's December 2003 child find failure, to complete the record this hearing officer notes that no recovery could have been awarded at this time, as the IDEA provides no "carve out" in the two-year statute of limitations for child find violations. The Court applied the IDEA's two year statute of limitations to a child find claim in *Daniel S., ex rel. Michael S. v. Council Rock School District*, See *Daniel S., ex rel. Michael S. v. Council Rock School District*, 2007 WL 3120014, \*2 (E.D.Pa. October 25, 2007) (IDEA's two year statute of limitations is applicable to child find claim). Although Section 504 does not contain a statute of limitations, the federal courts have applied that state statute which is most analogous to the federal claim. *Sutton v. West Chester Area School District*, 2004 U.S. Dist. LEXIS 7967 at 25 (E.D. Pa. 2004). In Pennsylvania, courts have held that a two-year statute of limitations for personal injury claims is applicable to Section 504. *Zankel v. Temple University*, 2006 U.S. Dist. LEXIS 22473; *Barclay v. Amtrak*, 343 F. Supp. 2d 429, 433 (E.D. Pa. 2004) (quoting *Saylor v. Ridge*, 989 F. Supp. 680, 686 (E.D. Pa. 1998)). Further, in *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Cmnwlth. 2005) the Commonwealth Court analyzed the applicability of IDEA standards to Section 504 requirements and explicitly determined that requirements under the IDEA apply with equal force to Section 504.

Program/Placement: As the District did not find that Student has a disability and therefore did not offer Student an IEP or a 504 Service Plan, and as this hearing officer has found that Student does have a disability and should have been offered a 504 Service Plan, the first prong of the tuition reimbursement analysis favors the Parents.

Question Two: If the District denied Student FAPE for any part of or all the specified time period, was the placement unilaterally selected by the Parents appropriate?

It is the explicit obligation of the hearing officer to base hearing decisions on the substantial evidence of record and upon a determination whether the child in question received FAPE. 20 U.S.C. §1415(f)(3)(E). Moreover, just as courts hearing civil actions brought to challenge a decision of a hearing officer are directed by the IDEA statute to "grant such relief as the court determines is appropriate," the hearing officer must, at times, fashion an appropriate equitable remedy where FAPE has been denied but the substantial evidence of record does not support the totality of Parents' claim. See, 20 U.S.C. §1415(i)(2)(C); *Simchick v Fairfax County School Board*, 553 F.3d 315 (4<sup>th</sup> Cir. 2009). Here, there is no question that the District was not providing this disabled Student with accommodations that would have conferred FAPE from the time of its December 2003 evaluation, through Student's middle school years and into high school. Despite its insistence that children not found to be disabled are not just "thrown to the wolves" in the absence of an IEP or a 504 Service Plan, at no time did the District establish that it actually offered Student a program or a placement with appropriate supports and services to address the difficulties Student had experienced through all the school years, whether those supports and services were packaged as a 504 Service Plan or not. Not having been successful in having the District acknowledge that their child had a disability and needed help to access the curriculum, the Parents reasonably relied upon the advice and guidance

of Student's private therapist to secure a placement for Student. Although the school they selected was not a special education facility, and the District points to Student's not having an IEP or a 504 Service Plan in the private placement, the private placement certainly provided Student with exactly the types of accommodations that Student needed to be successful. The descriptions of the District psychologist and the private evaluator's visits to the private placement have established to this hearing officer's satisfaction that the entire unilaterally selected school was an accommodation that enabled Student to use the outside supports of therapy and medication to achieve success for the first time after ten years of difficulties in the District's educational settings. This hearing officer finds support in case law. "[A] private school's failure to meet state education standards is not a bar to reimbursement under the IDEA." *Warren G. v. Cumberland County School District*, 190 F.3d 80, 83 (3d Cir. 1999), citing *Florence County*, 510 U.S. at 14. In other words, a private school "may be a proper placement even if it does not conform to all of the 'extensive' procedural and substantive requirements set forth in the IDEA." *David P. v. Lower Merion Sch. Dist.*, 1998 WL 720819, at \*6 (E.D. Pa. Sept. 18, 1998) (holding that a private placement that "may not be the long-term choice" was "a proper placement which was reasonably calculated to provide [the student] with educational benefit"), citing *Rowley*, 458 U.S. at 179.

This hearing officer finds that the program and placement unilaterally selected for Student by the Parents was appropriate.

Question Three: Are there equitable considerations that would reduce or eliminate the District's responsibility for tuition reimbursement?

The record establishes that the equities in this matter favor the Parents. The Parents sought and paid for private evaluations and therapy, provided copies of all evaluations they obtained to the District, and informed the District of their intention to unilaterally place Student. In all respects they have been open and fair with the District and nothing in their conduct reduces or eliminates the District's responsibility for tuition reimbursement.

## Order

It is hereby ordered that:

1. The Council Rock School District did deny Student a free appropriate public education [FAPE] during the 2009-2010 and the 2010-2011 school years by failing to identify Student as having a disability and failing to offer Student a 504 Service Plan.
2. The placement unilaterally selected by the Parents was appropriate.
3. There are no equitable considerations that would reduce or eliminate the District's responsibility for tuition reimbursement.
4. The District shall reimburse the Parents for tuition and fees related to the private placement for the 2009-2010 and the 2010-2011 school years, and shall also reimburse the costs of transportation to and from the private placement.

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

January 21, 2012

Date

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

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