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

Student's Name: MB

Date of Birth: [redacted]

ODR No. 2432-11-12-KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Mr. Ms.	Pro Se
Boyertown Area School District 911 Montgomery Avenue Boyertown, PA 19512-9699	Jennifer Donaldson, Esquire Sweet, Stevens, Katz & Williams LLP 331 East Butler Avenue New Britain, PA 18901
Dates of Hearing:	December 19, 2011
Record Closed:	December 19, 2011
Date of Decision:	December 26, 2011
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The captioned student (Student) is an eligible resident of the captioned school district (District), and has attended a high school operated by the District, during the time relevant to the captioned matter. (NT 15.) Student is not identified as a child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Child is recognized as having a disability within the meaning section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). (NT 15-17.)

Parents, named in the caption above, filed this due process request, asserting that the initial evaluation provided by the District on September 27, 2011, declining to identify Student as a child with a disability under the IDEA, was inappropriate. Parents requested the hearing officer to order the Student identified with an emotional disorder, to order creation of an individualized education program (IEP) with various elements included, and to order implementation of a section 504 service agreement with various elements included.

The District asserts that its evaluation was appropriate, and that any deficiencies in the evaluation are due to parental obstruction. It argues that its section 504 service agreement was appropriate, and that it is ready to modify that service agreement to respond to parental concerns, but that the Parents have refused to collaborate for that purpose.

The hearing was concluded in one session. On the basis of the testimony and documents admitted into evidence, I conclude that the District's evaluation was inappropriate, that an independent educational evaluation is warranted, and that further relief is not warranted.

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ISSUES[1]

1. Was the initial evaluation provided by the District on September 27, 2011, declining to identify Student as a child with a disability under the IDEA, inappropriate?

2. Should the hearing officer order that the District identify the Student as a child with a serious emotional disturbance?

3. Should the hearing officer order that the District provide an IEP addressing the Student's needs with regard to attention and also with regard to behavior?

4. Should the hearing officer order that the District modify any existing section 504 Service Agreement to address behavioral issues?

FINDINGS OF FACT

1. Student is in high school and exhibits average to high average intelligence. Student performed academically at an average to above average level throughout grade school; however, Student's performance dropped precipitously in the academic year previous to the present academic year. For that year, Student scored "C minus" in four major subjects, "D plus" in three subjects, and "D" in one subject. (J-20 to 24, 28.)[2]

2. Student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), a history of Oppositional Defiant Disorder (ODD), and Bipolar Disorder. Student has a history of receiving medication for ADHD. (J-19, 20, 31.)

3. The District has recognized that the Student is disabled within the meaning of section 504 and there have been service agreements to provide Student with accommodations; however, the parties presently are in dispute as to the appropriate contents of any such service agreement. (J-25, 27; NT 15-17.)

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[1] Prior to the hearing, the District moved to dismiss on grounds that the Parents had signed a written mediation agreement that resolved the issues in this matter. I declined to dismiss on grounds that dismissal would have called for me to both interpret and enforce the mediation agreement; in my view, an administrative hearing officer lacks jurisdiction under the IDEA to construe or enforce a mediation agreement. See J.K. v. Council Rock Sch. Dist., 111 LRP 76392 (E.D. Pa. 2011). (J-1 to 18.)

[2] The designation "J" refers to the parties' joint exhibits, which were admitted in evidence in their entirety.

4. The District performed an initial evaluation on Student in March 2007, and determined that Student was a child with the disability of ADHD but was not in need of specially designed instruction and related services; thus the District did not identify Student. (J-20.)

5. The March 2007 evaluation report noted a history of mood swings, defiance and temper outbursts. There was history of trial on a medication for mood stabilization or obsessive and compulsive thinking. (J-20; NT 117-118.)

6. The Student experienced school related difficulties, including failure to hand in homework, cutting classes, truancy, social conflicts and ostracism in school athletics, minor disciplinary sanctions, and significantly lower grades in relation to Student's cognitive and academic abilities. (J-23, 25, 28, 29; NT 319, 332, 258-26, 268-270.)

7. In April 2011, District personnel and Parents met and reviewed the then existing section 504 service plan and made revisions. After the meeting, Parents expressed concern to the high school principal and Student's assigned guidance counselor that teachers were not accommodating Student for behavior including impulsive behavior such as talking out of turn and confrontational behavior. Parents requested modification to the service agreement. (J-25.)

8. The principal responded by indicating that Student was expected to follow teachers' direction regarding speaking out in study hall and homeroom announcements. (J-25.)

9. In April 2011, Parents requested a functional behavioral assessment, and later that month, requested an evaluation for eligibility under the IDEA. (J-26.)

10. The District's evaluator conducted an evaluation in the beginning of the present school year. This consisted of a review of school records, a review of a note from a Student's psychiatrist in 2007,the section 504 service agreement in 2008, cognitive testing, achievement testing, a parent input questionnaire, teacher input forms, a failed attempt to obtain valid responses to the behavior reporting forms of the Behavior Assessment System for Children (BASC), Self Report and Teacher Reports, and behavior reporting forms returned and scored for the Behavior Rating Inventory of Executive Functioning (BRIEF) for two teachers. (J-29; NT 107-146.)

11. The Parent Input Form indicated concerns including defiance of rules, mood swings, self-criticism, irresponsibility, temper outbursts, lack of peer relationships, disrespect for authority, arguing with adults, anger when criticized, over aggressiveness, change in friendships, tension, and not listening. (J-28; NT 212-221.)

12. The teacher input forms were given to two teachers from the Student's previous school year, and other teachers from the present school year, who had taught Student for less than one month, in September 2011. The teachers from the previous year filled in few items, but did express criticism of Student for failure to complete homework lack of effort; these teachers gave conflicting assessments of Student's social skills. The current

teachers reported good behavioral control and good social behavior and academic performance. (J-28; NT 121-122.)

13. The evaluator requested BASC teacher report forms from only teachers in the present school year; no such reports were requested of teachers in the previous school year. The teacher reports were invalid because the teachers were unable to check off a sufficient number of items on the inventory report forms. This return of BASC teacher forms and their invalidity was not reported on the evaluation report given to Parents. (J-29; NT 68-72.)

14. The BASC self-report returned by Student was rated clinically significant for atypical behaviors, feelings of lack of control, anxiety, hyperactivity and attention problems; however, these scores were invalid because the validity index score was in the "Extreme Caution" range, meaning that the scores indicated possible embellishment or malingering. This was reported in the evaluation report. (J-29.)

15. The evaluator did seek and obtain behavior inventory reports for executive function from a teacher from the previous year, utilizing the BRIEF behavior inventory. This report showed clinically significant difficulties in emotional control with concomitant difficulties in cognitive functions necessary for academic achievement. (J-29; NT 127-132.)

16. Some of Student's school-wide test scores ("4Sight") showed performance in the Basic and Below Basic ranges for reading and mathematics. (J-29.)

17. The evaluation report declined to identify Student as a child with a disability, because the Student's disability of ADHD does not prevent Student from receiving meaningful educational benefit. (J-29; NT 136-137.)

18. In September 2011, the District's evaluator called Student's Mother to ask for more information on clinical evaluations and treatment of Student by a private behavioral health agency and a psychiatrist. Student's Mother declined to provide such data. (NT 108-114, 325-329.)

19. The Student's Parents declined to provide psychiatric information to the District because they did not believe that the District would give any weight to the statements in favor of providing services to Student, based on statements made by the evaluator. (NT 328.)

20. In September 2011, Parents asked the District to provide a different evaluator for Student's evaluation. The District declined to change evaluators. Student's Parents then asked the District to stop the evaluation. (J-30.)

21. Parents did not disclose that Student is diagnosed with bipolar disorder or has had serious disturbances outside of school until after Parents filed for due process. (J-31; NT 322.)

22. The evaluator expressed the opinion that the Student should not be allowed to take honors classes because of the Student's learning disability. (NT 325-327.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[3] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[4] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce

[3] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[4] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

a preponderance of the evidence in support of its claim, or if the evidence is in "equipoise", the Parents cannot prevail under the IDEA.

LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF EVALUATION

The IDEA obligates a local educational agency to conduct a "full and individual initial evaluation … ." 20 U.S.C. §1414(a)(1)(A). The Act sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to "determine the educational needs of such child … ." 20 U.S.C. §1414(a)(1)(C)(i). In 20 U.S.C. §1414(b)(1)(A)(ii) and (B), the Act requires utilization of assessment tools and strategies aimed at enabling the child to participate in the "general education curriculum" and "determining an appropriate educational program" for the child. The purpose of assessment tools and materials is to obtain "accurate information on what the child knows and can do academically, developmentally and functionally … ." 20 U.S.C. §1414(b)(3)(A)(ii).

The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs … ." 34 C.F.R. §300.304(c)(6). Evaluation procedures must be sufficient to "assist in determining … [t]he content of the child's IEP. 34 C.F.R. §300.304(b)(1). Brett S. v. West Chester Area School District, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The child must be "assessed in all areas of suspected disability." 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes "social and emotional status … ." 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must "include those tailored to assess specific areas of

educational need … ." 34 C.F.R. §300.304(c)(2). The purpose of assessment tools and materials is to obtain "accurate information on what the child knows and can do academically, developmentally and functionally … ." 20 U.S.C. §1414(b)(3)(A)(ii). Selected instruments should "assess the relative contribution of cognitive and behavioral factors … ." 20 U.S.C. §1414(b)(2)(C).

The IDEA requires the local educational agency to conform to specified procedures in order to be deemed appropriate. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U. S. Dist. Lexis 20646 (W.D. Texas 2002). These procedures must include the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information … ." 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency may not use "any single measure or assessment" as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2).

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1).

Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

The IEP team and appropriate professionals, with "input from the child's parents," must "identify what additional data, if any, are needed to determine … [t]he present levels of academic achievement and related developmental needs of the child … ." 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2).

I conclude that the District's evaluation failed to comply with all of the IDEA's procedural requirements. The District failed to give serious consideration to the input of the Parents. The evaluation essentially relied upon a single strategy in a perfunctory inquiry into Student's emotional and behavioral needs in the school setting. The evaluation failed to use any instrument that is designed to assess the relative contribution of cognitive and behavioral factors to Student's difficulties in school.

UTILIZING PARENTAL INPUT

The IDEA's implementing regulations repeatedly emphasize the District's obligation to give serious consideration to the input of parents. The District is required to notify the parents of the evaluation procedures that it proposes to use. 34 C.F.R. §300.304(a). The evaluating team must review existing evaluation data including that

supplied by the parents. 34 C.F.R. § 300.305(a)(1)(i). The variety of assessment tools and strategies that the IDEA requires to be utilized must include information provided by the parent. 34 C.F.R. § 300.304(b)(1), 34 C.F.R. §300.306(c)(1)(i). The multidisciplinary team doing the evaluation must consider parental input when determining whether or not additional information is needed. 34 C.F.R. § 300.305(a)(2). The parents must participate in the identification decision. 34 C.F.R. § 300.306(a)(1). The law's emphasis on parental participation demands that parental input be taken seriously.

I conclude that the District did not consider the Parents' input seriously and with an open mind. The documentary record leaves no doubt that the Parents had clearly flagged emotional health and behavior as the purpose of requesting an evaluation, but the evaluation instead focused upon ruling out a specific learning disability. (FF 1-7, 9, 11.) The evaluator meticulously described the cognitive and achievement testing that underlay the conclusion of no discrepancy, but the description of the inquiry into emotional functioning and behavior was perfunctory and even implied that the Parents' concerns were based on the Student's malingering. (FF 10-14.) The standard behavior inventory that elicits data on emotional disturbance the BASC, was administered in such a way as to render it invalid. (FF 13, 14.) There was no effort to find a different strategy to elicit data on emotional disturbance. (FF 10.) There was no determination as to whether additional data was needed, 34 C.F.R. §300.305(a)(2), let alone parental participation in that determination. 34 C.F.R. § 300.305(a)(2). (FF 10.)

The evaluation of emotional disturbance reveals that the District's response to the Parents' concerns was superficial and perfunctory. The BASC inventory was

administered to Student, whose responses invalidated it. At the same time, the evaluator made a judgment to obtain teacher responses for the BASC only from teachers who had known Student for less than a month; this led to invalid teacher inventories. It was never explained why the evaluator did not present inventories to the Parents, as permitted by that evaluative instrument.[5]

An inference arises from these facts that the evaluation was skewed against obtaining data that would support Parents' assertions. Moreover, the method of assessment clearly failed to be "tailored to assess specific areas of educational need", 34 C.F.R. §300.304(c)(2), such as social development and skills. I conclude that the evaluation violated the District's obligations to use a variety of assessment tools and strategies to gather relevant information about the child that includes information provided by the Parents, 34 C.F.R. §300.304(b)(1), and to utilize appropriately tailored evaluation methods, 34 C.F.R. §300.304(c)(2).

UTILIZING A VARIETY OF ASSESSMENT TOOLS AND STRATEGIES

The IDEA regulations forbid the District from using "any single measure or assessment as the sole criterion" for the identification decision. 34 C.F.R. §300.304(b)(2). Failure to obtain valid BASC scores reduced the basis for the District's determination to a single measure: whether or not the current year teachers had seen evidence of the Student experiencing emotional disturbance. The testimony makes clear that the evaluator relied entirely upon this finding, thus relying upon a single kind of

[5] I am cognizant of the fact that there is not record support for premise that it is frequent practice for evaluators to obtain parental inventories in administering the BASC. I nevertheless find that this is the case, based upon my inherent agency-based expertise. This derives from hearing scores of cases over the course of several years where I reviewed parents' responses to the BASC questionnaires.

assessment – informal observation – to determine that the Student did not have an emotional disturbance. Thus, I conclude that the evaluator relied upon a single measure or assessment, contrary to the IDEA.

This was held to outweigh the clear input of Parents to the contrary, the concerns expressed by the few teachers from the previous year, and even the results of the BRIEF, which showed that the Student had experienced clinically significant inability to regulate Student's emotions in the previous year. (FF 12, 15.) On this record, it is likely that these high school teachers - who had known Student for a less than a month in their classes – did not have a reliable opportunity to observe the Student for signs of emotional disturbance.

This assessment measure – the informal observations of teachers – failed to fulfill the IDEA's requirement that the evaluator use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors to the student's difficulties. 34 C.F.R. §300.304(b)(3). While these may have been an imperfect assessment of impact on school achievement in the present year, they cannot be said to be "technically sound" or to be capable of differentiating behavioral and cognitive etiology of the Student's disability. Thus, I conclude that the evaluation failed to fulfill this requirement of the law.

The District argues that these deficiencies are entirely the fault of the Parents. The District points to the Parents' failure to disclose the full extent of Student's emotional difficulties, exemplified by a history of suicidal thoughts. (FF 21.) It notes that the evaluator tried to obtain access to Student's psychiatrist, but the Parents refused to sign a release. (FF 18.) It notes that the Parents insisted that the District stop the

evaluation, and it did, leaving the emotional, behavioral and social areas of concern with little data upon which to reach a conclusion. (FF 20.) The Parents do not deny their actions. They assert that they took these actions because they came to distrust the motives of the evaluator, and that when they requested a different evaluator, the District refused their request. (FF 19, 20.)

I reject the District's defense of obstruction for three reasons. First, there was evidence that the Parents' distrust of the evaluator was not unreasonable in the circumstances. (Although I do not make any finding that the Parents' interpretation was correct, I conclude that their interpretation was within the bounds of reason, given the circumstances.) The evaluator made comments during the telephone conversation that Parents could have interpreted as implying a discriminatory bias against children with disabilities. (FF 22.) Second, the overall tenor of communications between the parties reasonably could have been led Parents to worry that the District would resist providing an IEP to Student. Third, the psychiatric material that the Parents refused to provide is of the most sensitive and private nature, and many people reasonably fear to disclose it broadly for fear that a child could be stigmatized by its disclosure. Thus, equitably, I conclude that the Parents' refusal to cooperate was not an equitable reason to deny some relief intended to assure an appropriate evaluation of the Student.

Under the IDEA, moreover, parent's refusal to cooperate with part of an offered service does not absolve the education agency of all responsibility to provide services. 34 C.F.R. §300.300(d)(3). The agency remains responsible to offer and provide any other services that are permitted by the parent and for which the child is eligible. Here, the District was not boxed into an impossible position, as it seems to claim. It had

options. It could have obtained BASC questionnaires from teachers from the previous year. It could have solicited a parent questionnaire for the BASC. It could have found that additional data was necessary, in consultation with the Parents. It could have administered other instruments (such as projective instruments) aimed at eliciting data on emotional functioning through a properly qualified provider other than the evaluator originally assigned. It could have changed evaluators altogether. However, notwithstanding its duties under 34 C.F.R. §300.300(d)(3), the District simply allowed the Parents' refusal to end the inquiry into emotional disturbance.

In reaching these conclusions, I made determinations of the credibility and reliability of the witnesses. This factored into my assignment of weight to the evidence. In so doing, I found that the documentary evidence gave substantial weight to the Parents' contentions. There was considerable historical evidence that the Student was diagnosed and treated for emotional disturbances and that the Student's behavior was at times problematic in school. (FF 1-5.) There was a clear drop in grades in the previous year. (FF 1.) Thus, Parents' concerns were corroborated by documentary evidence.

On the other hand, I found the testimony of the District's evaluator to be less reliable than the documents themselves. The evaluator's testimony was sometimes vague or equivocal, and the above discussed documentation contradicted the evaluator's contention, (J-29), that there was nothing in the existing record to suggest a serious emotional disorder.

I was concerned, also, about the evaluator's handling of the two behavior rating inventories, the BASC and the BRIEF. The evaluator failed to report that the evaluator had sought BASC inventories from two current teachers, but that those responses were

invalid due to not filling out the forms sufficiently – in other words, not knowing Student well enough to report validly. (FF 13.) Yet, the evaluator did report the invalid response of the Student, with its inference of malingering or embellishment. (FF 14.) This differential reporting of scores leads me to question the objectivity of the evaluation.

My concern is enhanced because the invalidity of the teacher BASC forms raises an inference against the conclusions of the report. It suggests that the present teachers' informal reports should be given little weight; yet the evaluator relies entirely upon these teachers' informal reports to show that there is no evidence of emotional difficulties at school.

The obvious question is why the evaluator did not obtain rating forms from teachers in the previous year, since they would have had a full year's experience with Student at the very time when Student's performance in school deteriorated. (FF 13.) When I asked this question, the evaluator answered that in the evaluator's judgment, it would not be good practice to obtain such information, because the Student's emotional state or behaviors could have improved over the summer. Significantly, the evaluator was unable to ground this judgment in the BASC manual.

The evaluator's decision in this regard begs the question whether such information would have revealed a history that could have led to more thorough investigation of Student's emotional and behavioral needs. Given the choice here, I am not satisfied that older data from teachers who knew Student for a year is necessarily inferior to newer data from teachers who hardly knew Student at all.

The evaluator's explanation is further undercut by the fact that the evaluator did obtain a rating form from a previous year teacher, using a different behavior inventory

instrument, the BRIEF. (FF 15.) The BRIEF focuses on executive function, and thus helps to assess a narrower range of behaviors. However, the difference in the scope of the tests is does not explain why it would be good practice to obtain behavior data on executive functions from last year's teacher and bad practice to obtain behavior data emphasizing emotional functioning from last year's teacher. Thus, the strategies selected in this evaluation lead me to question whether it was designed to make a reasonable inquiry into Student's emotional functioning and its impact, (FF 1, 6), on Student's school performance. (NT 323.)

For all of the above reasons, I accorded reduced weight to the evaluator's self serving explanations of the omissions in the evaluation process. I find those explanations to be insufficient under the IDEA.

Given that the record corroborated Student's emotional depiction of Student's emotional difficulties. I accorded some weight to Student's testimony to the effect that Student has been experiencing problematic dyscontrol of mood and behavior, affecting performance in school. This is corroborated also by the testimony of Student's [sibling], whose testimony was consistent with the record and depicted numerous social and emotional problems affecting Student at school. (FF 6.)

I also accord weight to the testimony of Student's Mother. I found this witness to be forthright and frank about the harsh confrontations between her and District personnel. The witness' testimony is consistent with the documentary record. (J-23; NT 332.)

REMEDY

Having found that the District's evaluation was inappropriate, I must fashion a remedy. Parents ask that I declare the Student to be a child with a disability, essentially

overriding the District's determination. They also request that I order the District to write into the IEP a considerable list of provisions for specially designed instruction. I decline to take such steps for two reasons. First, I do not find it to be prudent or appropriate for an administrative hearing officer to substitute her or his judgment for the professional judgment of school officials, in the absence of preponderant, directly contradictory expert evidence. Second, my essential conclusion here is that there was inadequate data to reach a proper conclusion as to whether or not the Student meets the two prong test of the IDEA: that the child both suffers from a disability and also suffers harm to educational opportunity as a consequence of that disability. Thus, even if I considered it appropriate to reach the question of ordering identification – a proposition of which I am highly skeptical, to say the least - I believe that more and better data is needed here. Therefore, another evaluation is the appropriate remedy.

In the exercise of my equitable, remedial discretion under the IDEA, I conclude that the appropriate remedy is to order the District to provide an independent educational evaluation at public expense. Given the history of this matter, it is important that the Parents be given the chance to participate in an educational evaluation that they can feel is objective. Therefore, I will so order, providing for a time frame and for appropriate conditions upon such an evaluation.

SETION 504 VIOLATION

The same considerations counsel against entering an order to amend the section 504 service agreement to deal with behavioral issues. (FF 7, 8.) It remains to be seen, through an appropriate and searching evaluation, whether or not the Student's

oppositional behaviors are secondary to a disability. Thus, until an independent evaluation is completed, I conclude that the request for an order to modify the section 504 service agreement is not yet ripe – that is, appropriate for decision.

CONCLUSION

I conclude that the evaluation provided on September 27, 2011 was inappropriate. Therefore, I order that the District provide an IEE at public expense. I decline to decide that the Student should be identified, to order creation of an IEP, or to order amendment of the section 504 service agreement, for reasons stated above.

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The initial evaluation provided by the District on September 27, 2011, declining to identify Student as a child with a disability under the IDEA, was inappropriate.

2. I hereby ORDER that the District provide to Parents a comprehensive independent educational evaluation at public expense, as defined at 34 C.F.R. §300.502, to be completed within ninety days of the date of this order. The evaluation shall be performed by an appropriate evaluator of Parents' choice, who shall be a Pennsylvania certified school psychologist. The ordered evaluation shall comply with the agency criteria as defined at 34 C.F.R. §300.502(e). Within ten days of the date of this order, the District shall give notice to Parents of such agency criteria, and the Parents shall select the evaluator within thirty days of the date of this order.

3. The hearing officer will not order the District to identify Student as a child with a serious emotional disturbance.

4. The hearing officer will not order the District to provide an IEP.

5. The hearing officer will not order the District to modify any existing section 504 Service Agreement.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

December 26, 2011