

*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

ODR No. 2595-1112 KE

Child's Name: J.A.

Date of Birth: [redacted]

Dates of Hearing: 3/1/12

### CLOSED HEARING

#### Parties to the Hearing:

##### Parents

Parent

##### School District

Abington Heights

200 East Grove Street

Clarks Summit, PA 18411-1776

#### Representative:

##### Parent Attorney

Harold McGrath, Esquire

321 Spruce Street, Suite 600

Scranton, PA 18503

##### School District Attorney

William McPartland, Esq.

Marshall, Dennehey, Warner,

Coleman & Goggin

50 Glemaura National Boulevard

Moosic, PA 18507

Date Record Closed:

March 23, 2012

Date of Decision:

March 31, 2012

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student, a District resident expelled from school during the current school year and receiving homebound instruction, has been provided with a §504 Service Agreement since the 2008/2009 school year due to the effects of ADHD.

Parent filed a due process complaint in November 2011 alleging violations of §504 and IDEA due to the District's failure to conduct a full psycho-educational evaluation, provide adequate and appropriate services to assure that Student received a free, appropriate public education (FAPE) and to properly consider Student's disability before imposing a disciplinary change of placement. In addition to compensatory education, Parents seek reimbursement for the cost of an independent psycho-educational evaluation they obtained in 2011 as well as an appropriate program/placement in the future.

Based upon a myriad of procedural and substantive violations established by the record of the March 1, 2012 hearing as described and explained below, the District will be required to fully comply with IDEA and §504 requirements, reimburse Parent for the costs of the independent evaluation and provide Student with compensatory education for part of the 2010/2011 school year and permit Student to return to school for the 2012/2013 school year with appropriate accommodations and services in place.

### **ISSUES**

1. Did the School District conduct appropriate evaluations of Student sufficient to
  - a. Determine whether Student is eligible for IDEA special education services and correctly determine that Student is not IDEA eligible and/or
  - b. Determine all educational needs arising from Student's ADHD diagnosis in order to design appropriate §504 Service Agreements to address such needs?
  
2. Did the School District provide Student with sufficient and appropriate services under §504 of the Rehabilitation Act of 1973?

3. Did the School District provide Student with all required procedural safeguards in connection with Student's violation of the District's Code of Student Conduct that resulted in expulsion?
4. Did the School District's actions/inactions with respect to Student constitute procedural violations of the District's obligations under either the IDEA statute or §504, and did any such violations adversely impact Student's substantive rights?
5. Is the School District required to provide Student with one or more of the following as a remedy for violation of Student's rights under IDEA or §504:
  - a. Reimburse Parent for the cost of an August 2011 independent educational evaluation;
  - b. Conduct additional evaluations, specifically including a functional behavioral assessment and provide Student with an appropriate program/placement based upon a full assessment of Student's needs;
  - c. Compensatory education, and if warranted, for what period, in what amount and in what form?

### **FINDINGS OF FACT**

1. Student is a [teenaged] child, born [redacted]. Student is a resident of the Abington Heights School District and was first provided with a §504 Service Agreement by the District in March 2008 due to a diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD). (Stipulation, N.T. p. 10; J-6 p. 2<sup>1</sup>)<sup>2</sup>
2. The District offered Student a §504 Service Agreement after an Attention Deficit Disorders Screening that included the Attention Deficit Disorders Evaluation Scale (ADDES--home and school versions); the Integrated Visual and Auditory Continuous Performance Test (IVA); a structured classroom observations by the instructional support teacher; classroom-based and state assessments, including the PSSA. (N.T. pp. 114; J-3, J-4 pp. 1, 2)
3. After participating in the District's pre-referral process and receiving some remedial instruction, Student was referred for the ADD screening by teachers due to classroom difficulties they noted with attention/focus, impulsive behaviors and failure to turn in assignments. During the 20 minute classroom observation in January 2008, Student

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<sup>1</sup> Commendably, the parties agreed to submit joint exhibits in this matter, which avoided an unnecessarily long and duplicative documentary record. The joint exhibits are designated by the letter "J" followed by the exhibit number (J-#). During the testimony the parties often reverted to the traditional exhibit designations of "P" for Parent but all exhibits admitted to the record are joint exhibits and will be referred to only as "J-#" throughout the decision. All exhibits referenced in the record as "P-#" bear the same number as the "J" exhibits referenced in the decision.

<sup>2</sup> By agreement of the parties, all exhibits referenced at the due process hearing in this matter are admitted into the record. (N.T. pp.11, 12) Accordingly, the following exhibits are **ADMITTED**: J-1, J-2, J-3, J-4, J-5, J-6, J-7, J-8, J-9, J-10, J-12, J-13, J-14, J-17, J-18, J-19, J-20, J-21, J-23. In addition, in order to include the due process complaint in the record, J-25 is also admitted pursuant to the authority of the hearing officer to order the presentation of additional evidence. 22 Pa. Code §14.162(g).

- displayed significant off-task behaviors, remaining on task only 48% of the time. (N.T. pp. 53, 108—110; J-1, J-4 )
4. No other screenings or assessments of Student were conducted by the District school psychologist after the initial screening for ADHD in 2008. No information indicating a need for additional assessments was brought to the attention of the District's school psychologist at any time. (N.T. pp. 67, 143—145, 188)
  5. From shortly after the ADHD screening completed during the winter of the 2007/2008 school year through the end of the 2010/2011 school year, Student was provided with §504 Service agreements that included nearly identical accommodations: seated in close proximity to teacher; decreased length of task/extra time for completion; shorter tasks/assignments; single tasks broken into steps with timelines for each step; repeated instructions; attention breaks during work; encouraged to self-monitor; frequent checks for understanding; assistance throughout the day to organize materials; subtle signals/gestures to cue attention for presentation of key points.<sup>3</sup> (N.T. pp. 60, 152, 153, 156, 186; J-6 p. 2, J-7 p. 3, J-8 p. 8, J-9 p. 6, J-10 p. 6)
  6. Student's Mother met with the school principal and counselor for approximately 20 minutes annually to review the provisions of the §504 Service Agreements. (N.T. pp. 58—60, 62—65, 83, 84, 154)
  7. Despite Parent, teacher, assistant principal and counselor assessments that Student's need for accommodations to address the effects of ADHD fell in the "substantial" to "extreme" range when the §504 Service Agreements were reviewed in 2009, 2010 and 2011, no participant in the §504 meetings suggested a need for a change in the type or level of supports included in the Service Agreements. (N.T. pp. 152—154, 186, 215; J-8 p. 5, J-9 p. 3, J-10 p. 3)
  8. The school counselor who served as case manager for Student's Service Agreements informed Student's teachers of the existence of the Service Agreements at the beginning of each school year but did not at any time explicitly check to determine whether the Agreements were implemented. (N.T. p. 155, 175)
  9. The Service Agreements were not provided to or discussed with Student at any time and no instruction was provided to Student with respect to self-monitoring and means of checking for understanding. (N.T. pp. 31, 36, 38, 155)
  10. The counselor was responsible for assisting Student with organization as provided in the Service Agreements, but met with Student only sporadically to provide such assistance. (N.T. pp. 175, 176)

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<sup>3</sup> For the 2011/2012 school year, Student's §504 Service Agreement was amended to remove the provision for seating close to the teacher. Since Student was to be provided with homebound instruction and preferential seating is a classroom accommodation, it no longer applied. (N.T. pp. 66, 94; J-10 p. 6)

11. Student also recalled infrequent meetings with the counselor for assistance with organization, and recalled one instance of one teacher in one class in one school year providing signals to attend to important information. Student also recalled being permitted to take breaks such as to sharpen a pencil during class, and may have been given shortened homework assignments and extended time. After reviewing the Service Agreements prior to the due process hearing, Student did not recall receiving any of the other accommodations listed in the Agreements. (N.T. pp. 33—37; J-23 p. 2)
12. Student's grades declined considerably during the 2010/2011 school year, which Student attributed partially to socializing with peers who exerted a bad influence and partially to an increased lack of focus that was not relieved by medication for ADHD. (N.T. pp. 47, 68, 69, 196; J-19 p. 1, J-23 p. 2)
13. Student's counselor/case manager, who had been involved with Student since the 2008/2009 school year, was aware of and involved in discussions with Student concerning friendship and social issues. The counselor did not consider those issues to be high priority matters. (N.T. pp. 174, 175)
14. The school counselor and the school principal, who had served on Student's §504 team for the prior two school years, were aware of the significant decline in Student's grades in the first and second quarters of the 2010/2011 school year. (N.T. pp. 167—170, 196)
15. The decline in Student's grades in the fall of the 2010/2011 school year prompted the counselor to speak with Student and Parent periodically and to discuss Student at the teacher team meetings approximately every 3 weeks. The counselor did not discuss Student at instructional support meetings, even after disciplinary incidents increased in January and February 2011. (N.T. pp. 167—170)
16. During the 2009/2010 school year, Student's generally good behavior at home began deteriorating and worsened during the 2010/2011 school year. Parents attributed the discipline problems at home to Student joining with the peers who exerted a bad influence, which, in turn, arose from Student's social difficulties and need to be accepted by peers. (N.T. pp. 87, 102, 104; J-23 p.3)
17. In January and February 2011, Student received several disciplinary referrals for infractions such as failing to return a progress report, misbehavior on the school bus and [redacted]. The school principal who had served on Student's §504 team for the prior two school years was aware of the disciplinary incidents. (N.T. pp. 70—72, 170, 196; J-20 pp. 8-10)
18. In late February 2011 Student admitted to engaging in an illegal activity on school premises, resulting in an immediate out of school suspension and after a school board committee hearing and review by the full School Board, expulsion from school for at least 1.5 years. (N.T. pp. 72—74, 194; J-12, J-13, J-14, J-20 p. 11)

19. Student's disciplinary infraction was reviewed by the school superintendent, who subsequently referred Student for the Board hearing. The school counselor responsible for Student's §504 Service Agreement was not asked for information concerning Student's disability. No mention was made of Student's eligibility for services under §504 in the executive summary of the incident prepared by the assistant principal, but Student's §504 status was information provided to the superintendent. The seriousness of the incident required referral to the superintendent for further action after the 10 day suspension was imposed at the building level. Although the building principal recalls discussing the disciplinary incident with the superintendent, he does not recall a discussion of Student's §504 status. (N.T. pp. 161, 193, 208—210, 216; J-14)
20. The first part of the executive summary noted that during the first quarter of the 2010/2011 school year, Student had received unsatisfactory grades in reading and math. During the second quarter, Student received a "D" in reading and another unsatisfactory in math. Otherwise Student received "C" grades. In the two preceding school years (2008/2009 & 2009/2010), Student had received primarily "B" and "C" along with a few "A" grades. In the 2008/2009 school year, Student received one quarterly "D" grade but finished the year with a "C" average in that subject. (N.T. pp.194, 195, 216, 217; J-14 p. 1, J-17 p. 1, J-18 p. 1, J-19 p. 1)
21. The District has no written policy with respect to disciplinary actions that result in a change of placement for Students protected by §504 of the Rehabilitation Act. The disciplinary process available to Students with IEPs is not used for students protected under §504. The general procedure employed by the superintendent is to discuss students who are protected under §504 with the special education department and make a determination, on a case by case basis, whether to take that into account in imposing discipline that results in a change of placement, including whether referral for an evaluation is warranted. Based upon the superintendent's review of information relating to Student, he concluded that the incident "could not possibly" have been a manifestation of Student's §504 impairment. (N.T. pp.185, 218, 225—228, 230 l. 2, 231)
22. Due to Student's expulsion from school beginning in March 2011 and Parent's choice of replacement instruction, Student is currently scheduled to receive 10 hours of homebound instruction each week, recently increased from 7 hrs./week. At the time the expulsion began, Student received 5 hours of instruction each week. (N.T. pp. 30, 75, 76, 81, 93, 94)
23. When the expulsion was imposed, Student initially received no educational services. Instruction did not begin until approximately 1 month after the expulsion began, and was again delayed for several weeks after the 2011/2012 school year began and for approximately a month after the original homebound teacher resigned because the District did not have a teacher to provide instruction to Student. Homebound instruction for the 2011/2012 school year resumed with a new teacher only after the due process complaint was filed by Parent's attorney. (N.T. pp. 75, 76, 80, 81; J-25)

24. Despite low grades, including three below passing levels in the first and second quarters of the 2010/2011 school year, based, at least in part, upon numerous absences and refusals to turn in assignments and make up missed tests and work while in school during the 2010/2011 school year, Student was able to pass 7<sup>th</sup> grade with the assistance of the homebound instruction after the expulsion. Parents are pleased with Student's current homebound teacher, and Student's academic performance has improved since receiving homebound instruction. (N.T. pp. 76, 77, 105; J-19 pp. 1, 7, 8, J-23 p. 2)
25. During the summer of 2011, Parent engaged the services of an independent neuropsychologist to evaluate Student. (N.T. pp. 77, 78)
26. The independent psychologist administered standardized assessments of cognitive ability and academic achievement as well as tests or standardized rating scales to assess attention, executive functioning, emotional functioning and personality.<sup>4</sup> (J-23 pp. 1, 5-22)
27. Results of the [testing] indicated that Student has average to high average cognitive ability and achievement with strengths in verbal ability, oral expression and listening comprehension/auditory processing, but academic weaknesses in math calculation and reasoning. (J-23 pp. 5-13, 15, 22)
28. The attention and executive functioning assessments included in the evaluation scale indicate that Student has significant issues with inattention, impulsivity and organization, confirming the accuracy of Parent's description of Student as very disorganized, which she had also brought to the school counselor's attention. (N.T. pp. 170, 175; J-23 pp. 2, 10—21)
29. Student related to the evaluator that [Student] believed the ADHD medication that had been prescribed increased focus but did not otherwise help. The ineffectiveness of the medication was demonstrated during the independent evaluation when Student's performance was measured on the TOVA continuous performance test of attention first given to Student while unmedicated and re-administered approximately two weeks later, after Student took the prescribed medication. Student's scores declined during the second administration of the test. (N.T. p. 46; J-23 pp. 18, 22)
30. Parent ratings on the BASC-II rating scale places Student "At Risk" for hyperactivity, anxiety, depression, social withdrawal and in the "Clinically Significant" range with respect to conduct problems, immaturity, attention difficulties, as well as "AT Risk" in the adaptive areas of adaptability, socialization, initiative, internalizing problems and

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<sup>4</sup> WISC-IV (Wechsler Intelligence Scale for Children-Fourth Edition), WJ-III-COG (Woodcock-Johnson Tests of Cognitive Ability-Third Edition); WJ-III (Woodcock-Johnson Tests of Achievement-Third Edition); BASC-II (Behavior Assessment System for Children-Second Edition); BRIEF (Behavior Inventory of Executive Functions); CAT-C (Clinical Assessment of Attention Deficit-Child; Test of Variables of Attention (TOVA); MACI (Million Adolescent Clinical Inventory); Rotter Incomplete Sentence Blank; Murphy-Meisgeier Type Indicator for Children

meaningful communication. Behavioral symptoms were also in the clinically significant range. (J-23, pp. 19, 20)

31. Self-report scales and ratings placed Student is in the “AT Risk” range for hyperactivity, feelings of inadequacy, depression, anxiety, low locus of control and internalizing problems. Student Composite ratings indicate significant inattention/hyperactivity and “AT Risk” with respect to emotional symptoms and personal adjustment. (J-23 pp. 20, 21)
32. The independent evaluator concluded that Student meets the diagnostic criteria for Attention Deficit Disorder, Combined type and Dysthymic Disorder based upon depressive symptoms, self-doubts and self-criticism. (J-23 pp. 22, 23)
33. The independent evaluator made recommendations for specific accommodations and modifications at school, including a structured study hall to receive consistent help with organization, productivity, study skills and developing executive functions; a homework helper to monitor completion of assignments and teach Student executive and organizational skills; individual tutoring to improve math skills and assistive technology to improve writing. (J-23 p. 23)
34. The evaluator also recommended counseling for Student and Parents are currently providing family and individual counseling. (N.T. pp. 78, 95, 97; J-23 p. 23)

## **DISCUSSION AND CONCLUSIONS OF LAW**

In its treatment of Student in this case the District demonstrated a significant and disturbing lack of understanding of its responsibilities under both §504 of the Rehabilitation Act of 1973 and the child find provisions of the IDEA statute. The relevant facts set forth above are straightforward, largely undisputed, and as explained in light of the applicable legal standards, the District’s actions in this matter establish a pattern of nearly continuous procedural and substantive violations that began with the assessments administered to determine whether Student was protected under §504, continued with the District’s failure to implement Student’s §504 Service Agreements in each subsequent school year, and remained completely unrecognized by the District through the events preceding Student’s expulsion, the expulsion proceedings and the due process hearing nearly a year after that.



## Legal Standards Applicable to a §504 Claim

Most of the disputed issues in this case center on whether the District properly fulfilled its obligations under §504 of the Rehabilitation Act of 1973” (§504), found at 29 U.S.C. §794(a), which provides as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Notwithstanding the statutory language which, by its plain terms, proscribes discriminatory conduct by recipients of federal funds, in the context of education the protections of §504 are considered co-extensive with those provided by the Individuals with Disabilities Education Act, 20 U.S.C. §1401, *et seq.* (IDEA), with respect to the obligation to provide a disabled student with a free, appropriate public education (FAPE). *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009)

In 22 Pa. Code Chapter 15, Pennsylvania law makes that obligation explicit for all school-aged children with disabilities, including those students who are not eligible for special education and related services under IDEA. The relevant portions of Chapter 15 provide as follows:

### **§15.1. Purpose.**

- (a) This chapter addresses a school district’s responsibility to comply with the requirements of Section 504 and its implementing regulations at 34 CFR Part 104 (relating to nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from federal financial assistance) and implements the statutory and regulatory requirements of Section 504.
- (b) Section 504 and its accompanying regulations protect otherwise qualified handicapped students who have physical, mental or health impairments from

discrimination because of those impairments. The law and its regulations require public educational agencies to ensure that these students have equal opportunity to participate in the school program and extracurricular activities to the maximum extent appropriate to the ability of the protected handicapped student in question. School districts are required to provide these students with the aids, services and accommodations that are designed to meet the educational needs of protected handicapped students as adequately as the needs of nonhandicapped students are met. These aids, services and accommodations may include, but are not limited to, special transportation, modified equipment, adjustments in the student's roster or the administration of needed medication. For purposes of the chapter, students protected by Section 504 are defined and identified as protected handicapped students.

### **§15.2. Definitions.**

*Protected handicapped student*—A student who meets the following conditions:

- (i) Is of an age at which public education is offered in that school district.
- (ii) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program.
- (iii) Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under § 15.10 (relating to discrimination claims).

*Service agreement*—A written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student.

The federal regulations referenced in Chapter 15 give substance to the statutory language of §504 in the context of the education of protected handicapped students by public schools. The regulations relevant to this case provide as follows:

### **§ 104.33 Free appropriate public education.**

(a) General. A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education.

(1) For the purpose of this subpart, the provision of 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 nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

**§ 104.34 Educational Setting.**

(a) Academic setting. A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

**§1104.35 Evaluation and placement.**

a) Preplacement evaluation. A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

(b) Evaluation procedures. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) Placement procedures. In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 104.34.

(d) Reevaluation. A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

The federal and state regulations further provide procedural safeguards, including the opportunity for a due process hearing, as a means of challenge a school district's conduct for parents who believe that a public school district failed to meet any of the substantive legal standards set forth above:

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

34 C.F.R. §104.36. *See also* 22 Pa. Code §15.8(d), which provides that when parents and school districts are unable to informally resolve disputes concerning §504 issues, may request a formal due process hearing governed by the provisions of 22 Pa. Code §14.64(m), governing IDEA due

process hearings. In Pennsylvania, therefore the procedural safeguards provisions of §104.36 are fulfilled by complying with IDEA procedures.

Evaluation Issues: §504 and IDEA Child Find

Referring to § 104.35, above, it should be obvious that the District's "screening" to establish Student's status as a protected handicapped student fell far short of the evaluation procedures required by the §504 regulations for schools. In addition, the evidence in this case also establishes that regardless whether Student is also a child with a disability as defined by the IDEA statute, the District fell short of its obligation to conduct a full psycho-educational evaluation as required by IDEA, specifically, its child find provisions.

School districts are required by the IDEA statute and federal regulations to identify, locate, and evaluate all potentially disabled children, including those who may be "advancing from grade to grade.". 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a), (c)(1); *G.D. v. Wissahickon School District*, 2011 WL 2411098 (E.D.Pa 2011) at \*6. The obligation to evaluate arises when a district is on notice of facts likely to indicate a disability. Within a reasonable time after a District has such notice, it must "conduct an evaluation of the student's needs, assessing all areas of suspected disability," *P.P. v. West Chester Area School District*, 585 F.3d 727, 730 (3d Cir.2009) (*citing* 20 U.S.C. § 1414(b); *O.F. v. Chester Upland Sch. Dist.*, 246 F.Supp.2d 409, 417 (E.D.Pa.2002) *citing* *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir.1995). "Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE." *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C.2008), *quoted in* *G.D. v. Wissahickon School District* at \*6.

The IDEA further requires school districts to conduct a "full and individual initial evaluation" ...using "a variety of assessment tools and strategies to gather relevant functional,

developmental, and academic information, including information provided by the parent that may assist in determining whether the child is a child with a disability.” 20 U.S.C

§1414(a)(1)(A), (b)(2)(A)(i). A district and may “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. §1414 (b)(2)(B).

The purpose of the evaluation 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). Finally, in order for a school district to properly fulfill its evaluation obligations, the child must be “assessed in all areas of suspected disability, and the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs ... .,” including “social and emotional status ... .” 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6).

Here, despite numerous indications that a full psycho-educational evaluation pursuant to the IDEA statute was warranted from the beginning, such an evaluation not only was never conducted, it was never even considered. (FF 4)

#### 2007/2008—2009/2010 School Years

Student first came to the attention of the instructional support team in elementary school and was ultimately referred for an “Attention Deficit Screening” to determine only whether Student qualified for a §504 Service Agreement. (FF 3) Presumably, the District terms its procedures for determining a need for §504 services a “screening” to distinguish it from a full evaluation psycho-educational evaluation, but apparently without regard to §104.35 of the §504 federal regulations which by its terms requires a substantially similar, if not identical evaluation.

Even with only a screening, the District recognized and acknowledged Student’s substantial need for accommodations, having discovered through the classroom observation

conducted as part of the screening that Student was on task less than 50% of the time during a 20 minute observation. (FF 3) Nevertheless, the District determined that a full psycho-educational evaluation of Student was not warranted during the 2007/2008 school year or subsequently. From the testimony of all District witnesses at the due process hearing, the District appears to be operating under several misconceptions to reach that conclusion, *i.e.*, that an IDEA evaluation and consideration for special education services is required only for students with learning disabilities who cannot maintain average grades in regular education classes and are, therefore, provided with at least some instruction in a special education class; that a student who maintains adequate grades in regular education classes but has another kind of disability, such as ADHD can receive a plan specifying accommodations but is not entitled to a FAPE or to procedural safeguards available to students with learning disabilities; that a student who can be successfully educated in the least restrictive environment (LRE) is not eligible for special education services under IDEA and that ADHD can never be the entire basis for IDEA eligibility.

Although all of the apparent reasons the District had for not conducting a full evaluation of Student are based upon fundamental misunderstandings, it is simply, and glaringly, inaccurate to argue that Student could not possibly have a disability recognized by the IDEA statute because Student's only disability is, or was, ADHD. Although ADHD is not a "stand alone" eligibility category, Other Health Impairment (OHI) is a disability that can support IDEA eligibility, and ADHD is explicitly listed as one of the conditions that can support OHI as a disability category. The OHI disability category is identified if a child has "limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness to the educational environment...due to chronic or acute health problems **such as...attention deficit hyperactivity disorder**...[that] [a]dversely affects a child's educational performance." 34

C.F.R. §300.8(9)(i), (ii)(Emphasis added) *See also, West Chester Area School District v. Bruce and Suzanne C.*, 194 F.Supp.2d 417 (ED. Pa. 2002), where the court determined that the student was IDEA eligible in the OHI category based on an ADHD diagnosis despite the school district's position that the student's passing grades indicated no need for special education.

Although the District had ample information indicating a suspected IDEA disability in the OHI category from the beginning, the discussion above is directed toward prospective relief/assuring that Student is not denied a full evaluation or reevaluation in the future based on the District's erroneous view of its legal obligations. Parent did not request compensatory education for more than two years before the complaint was filed in November 2011. In addition, although there was an increase in behaviors that warranted disciplinary referrals in the winter of 2010 (J-20 pp. 5—7), there was little indication of an impact on Student's educational performance, in terms of academic or social/emotional effects significant enough to amount to a denial of FAPE through the end of the 2009/2010 school year based upon the lack of an evaluation alone. (FF 20)

#### 2010/2011 School Year

For reasons not explained persuasively, apparently no one from the District was sufficiently concerned Student's increased distractibility and organizational difficulties during the first half 2010/2011 school year, as reported by Student and confirmed by rating scales and other assessments administered in connection with an independent evaluation in the summer of 2011. (FF 28, 29; J-23 p. 2)<sup>5</sup> Similarly, the significant decline in Student's grades during the 2010/2011 school year triggered no action, merely a rising concern and more frequent discussions with Student and about Student with Parent and at teacher team meetings, even after

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<sup>5</sup> Although the evaluation occurred well after Student began exhibiting increasing difficulties in school in the fall and winter of 2011, in light of the evidence of Student's deteriorating grades and behaviors, it is quite obvious that had a comprehensive evaluation been done at that time, similar results would have been obtained.



a significant increase in negative behaviors in January and February 2011, culminating in the offense that led to the expulsion. (FF. 12, 14, 15, 16, 17, 18; NT. pp. 180, 197—199)

In testimony and argument, the District referred frequently to Student joining with a group of peers that were a bad influence during that period, and both Student and Parent agreed that the peers were a factor in Student's decline in both academics and behavior during that period. (FF 12) Nevertheless, although the school counselor testified that Student brought social and friendship issues to the counselor, the counselor did not consider those matters to be of any great significance. (FF 13)

To continue justifying its refusal to acknowledge Student's need for a full psycho-educational evaluation in accordance with IDEA standards notwithstanding Student's uncharacteristically low grades during the 1<sup>st</sup> and 2<sup>nd</sup> quarters of the 2010/2011 school year, the District touted Student's PSSA scores that were generally in the proficient and advanced range in both reading and math from the 2008/2009 through 2010/2011 school year. *See* School District's Closing Argument Brief at p. 15. Even if PSSA scores provide an indication that Student's underlying academic knowledge and skills remained strong despite the decline in classroom grades and behaviors, the PSSA scores provide only one limited indication of progress. As stated above, however, both the IDEA and the §504 regulations charge a school district with considering multiple factors in determining whether an evaluation and special education services are warranted, as well as the level and type of services or accommodations needed for adequate school functioning in light of the effects of a disability.

Despite evidence of a substantial, and what should certainly have been an alarming deterioration in Student's school functioning during the 2010/2011 school year, the District clearly did not even consider whether Student's difficulties could have been related to a

different, additional disability such as an emerging emotional disturbance (ED). Emotional disturbance is defined in the IDEA statute as

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or School problems.

34 C.F.R. §300.8(4)(i)

It was notable that throughout the hearing and after, the District made little comment concerning the results of the independent evaluation which placed Student's cognitive ability and scores on standardized achievement tests in the average to high average range, indicating that average to above average grades are well within expectations for Student. (FF 27) More significantly, the District entirely ignored the assessments by the independent evaluator resulting in [Student's] diagnosis of Dysthymic Disorder, suggesting the possibility that an emotional disturbance might have been a factor in Student's declining grades during the first two quarters of the 2010/2011 school year and increased negative behaviors just before the expulsion.

Had the District administered the same or similar assessments of emotional functioning administered a few months later by the independent evaluator, it may have concluded that additional services, such as regular school-based counseling and/or more serious attention to implementation of Student's Service Agreement were warranted, even if a thorough evaluation did not lead to the identification of an IDEA disability.

The District, however, appears to be operating within a rigid construct that does not admit the possibility of either IDEA eligibility or increased accommodations due to a disability that

may still not support IDEA eligibility unless measures of academic performance suggest a learning disability. The District referred to the independent evaluation only to emphasize the absence of any suggestion Student has a learning disability, as if that is the only IDEA disability category that justifies an evaluation if suspected, or a need for special education services. Maintaining that belief, however, is likely to result in multiple IDEA violations with respect to potentially eligible students, since other disabilities can significantly interfere with academic performance, and neither passing grades nor other assessments of academic achievement preclude special education eligibility or services.

Similarly, the District's argument that Student could make progress in the regular education setting and that the independent evaluator recommended that Student continue to be placed in a regular education classroom is unavailing as a defense to the District's failure to evaluate Student in the fall of 2010. Both the IDEA statute and regulations and the §504 regulations incorporate the requirement that students with disabilities must be educated in the least restrictive environment (LRE) appropriate for the student, *i.e.*, one in which the student is educated with children who are not disabled to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2)(i). The ideal for all school districts with respect to all students with disabilities is to educate them in the regular classroom. Achieving that ideal with respect to any student with a disability who can make meaningful academic progress in the regular education setting does not mean, however, that the student is not entitled to whatever supports and services may be necessary to address other effects of the disability.

The evidence that a full psycho-educational evaluation under either IDEA or §504 was warranted early in the 2010/2011 school year is both uncontradicted and strong. During that school year, the failure of the District to evaluate Student, and other lapses discussed below had a

substantively negative effect on Student's educational progress and other aspects of school functioning.

Effectiveness/Implementation of Student's §504 Service Agreements

After determining Student's substantial need for a §504 Service Agreement and proposing an agreement with eight generic accommodations during the 2007/2008 school year, the District offered the identical Agreement through the end of the 2010/2011 school year, except for recognizing that two of the accommodations designed for the classroom do not apply while Student is receiving homebound instruction due to the expulsion still in force. (FF 5, 7) During the entire period, however, Student's counselor, who was charged with the responsibility for managing the annual Service Agreements did not ever review its provisions with Student, did not provide explanation or instruction concerning the "self-monitoring" provision of the Agreements, assure that Student received consistent help with organization, or assure that Student's teachers were implementing the Agreement. (FF 8, 9 10) According to Student's uncontradicted testimony, teachers generally did not implement the Agreements, at least not with respect to preferential seating, checking for understanding, signals to attend, breaking down assignments, decreasing the length of assignments, repeating instructions. (FF 11) At most, Student may have received extended time, reduced homework assignments, was permitted short breaks and was given non-verbal signals to attend to new and important concepts from one teacher in one class in one school year. (FF 11; J-23 p. 2 ) Although Student also received some assistance with organization, leaving it to the discretion of a Student who has ADHD to voluntarily seek out the counselor for assistance was virtually a set up for the complete failure of that accommodation in the absence of training, or at least frequent prompting in the beginning and fading over time to encourage personal responsibility. If Student had been mentally and

physically organized enough to consistently take advantage of that accommodation, it likely would not have been necessary. In light of the District's almost complete failure to implement the minimal accommodations and supports included in the repetitive Service Agreements, it is superfluous to attempt to determine whether more detailed or different accommodations might have better met Student's needs. The best possible plan to address the effects of Student's ADHD would have been entirely ineffective without the District's commitment to assure its implementation, and that was clearly lacking, by the District's own admission. (FF 8, 9, 10)

The effects of the District's failure to implement Student's Service Agreements cannot be determined with certainty, especially prior to Student's "melt-down" during the early part of the 2010/2011 school year. Nevertheless, the District certainly took the position that the accommodations in the Service Agreements met Student's needs, and presumably would have provided significant benefits to Student had the District bothered to implement them. Although the brief increase in Student's disciplinary referrals in the winter of 2010 may not have had a substantive effect arising from the lack of an evaluation, those issues should at least have prompted the District to determine at that time whether the Service Agreement was being implemented and was effective or needed to be adjusted. Moreover, although Student stayed out of trouble for the rest of the 2009/2010 school year, the testimony of the counselor established that Parent was concerned about Student's behaviors and lack of motivation during the 2009/2010 school year, spoke to the counselor about those issues frequently and that Student was often discussed at the teacher team meetings. (N.T. pp. 167, 169, 170) The evidence that the District made no changes to Student's Service Agreements to address increased needs, and made no attempt to assure implementation of the Service Agreements was uncontradicted and actually came into the record primarily through the testimony of District witnesses. Student will be

awarded compensatory education for the District's failure to effectively address the needs arising from Student's ADHD disability from the winter of 2010 through the date of Student's expulsion in 2011.

### Expulsion Procedures

Under the IDEA statute, a change in an eligible student's placement for disciplinary reasons cannot be implemented by a school district before providing procedures to assure that a student is not punished for disability-related conduct. *Centennial School District v. Phil L.*, 559 F.Supp.2d 634 (E.D. Pa. 2008). The regulations applicable to IDEA eligible, or potentially eligible students are found at 34 C.F.R. § § 300.530—536. In *Centennial School District* the court determined that pursuant to 34 C.F.R. § 104.36, the due process protections available to IDEA eligible students also apply to students protected by §504, and that although compliance with the IDEA provisions is sufficient to fulfill the procedural safeguards requirement found in §104.36, it is not necessary. School districts are, however, obligated to provide due process protections "similar" to the IDEA requirements.

There is no dispute in this case that with respect to disciplinary process leading to the expulsion, Student was treated exactly as any regular education student would have been. Several District witnesses, including the superintendent of schools, testified that they are unaware of any written policies or procedures that are applied to protected handicapped students. (FF 21) Although the superintendent further testified that he does take disability into account in making a determination whether a student who has committed a serious infraction should be referred to the school Board for a consequence as serious as expulsion, *i.e.*, a change of placement, the process he described is informal at best, entirely subjective and made without reference to any standard at worst. (FF 21) Although in some instances, it may be difficult to

determine whether the disciplinary process employed by a school district is sufficiently similar to the IDEA procedures to comply with the §504 procedural safeguards, this case does not present such circumstances.

At the least, a school district's disciplinary process for §504 protected students should include some assurance that the student's §504 status and a description of the disability and its effects is included in the executive summary of the incident for which a student is to be disciplined. The executive summary also includes relevant information concerning grades and discipline history, is prepared by the administrators in the building where the infraction occurred and is transmitted to the superintendent as part of his review and determination whether the student should be referred to the school board for further action. That did not occur in this case, and no one with firsthand knowledge of Student was consulted as part of the superintendent's review process. (FF 19, 20)

In addition, at a minimum, the parents of a protected handicapped student should be notified of their right to raise issues concerning the student's disability at the school board hearing, or some other formal meeting, as a reason not to impose discipline that results in a change of placement. A single administrator empowered to review the incident, the reason(s) why a student has a §504 Service Agreement, and to then conclude that information concerning the student's disability is not relevant to the school board's consideration because the incident "could not possibly" be a manifestation of a disability, as occurred in this case, clearly provided Parent and Student neither notice nor an opportunity to be heard, and therefore, does not meet the most minimal due process standards.

There was no dispute that a serious violation of both school policy and the law led to Student's expulsion from school—and there was no effort by Parent or Student to excuse

Student's behavior or challenge the appropriateness of the significant discipline imposed as the consequence of it. (FF 18, 22) Parent testified that she is satisfied with Student's academic progress in homebound instruction and credited Student's ability to pass the 2010/2011 school year to it. (FF 24) The family's acceptance of responsibility, as well as acting quickly to procure individual counseling for Student and engaging in family therapy (FF 34) stands in stark contrast to the District's efforts to blame Student and Parent for all the difficulties Student experienced during the 2010/2011 school year and maintain the position that its actions were entirely proper.<sup>6</sup>

Although Student clearly did not receive the due process protections that should have been provided before the discipline was imposed, Parent did not request relief in the form of a hearing before the school board to present disability-related information. Moreover, the expulsion has been in effect for nearly a full school year, and as Parent acknowledged, Student has made academic progress with the 1:1 homebound instruction. Consequently, although the District's due process violation in connection with the discipline certainly had a substantive effect on Student's education, the remedy will be prospective, in the form of definite reinstatement to school for the 2012/2013 school year.

### Remedies

The District's violations of the IIDEA child find/evaluation requirement from the beginning of the 2010/2011 school year, its failure to properly implement Student's Service Agreements and further investigate Student's needs when there were clear signs that Student's behaviors were becoming a problem, and especially after Student's grades declined precipitously at the beginning of the 2010/2011 school year, and the District's failure to provide appropriate

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<sup>6</sup> Student's and Parent's acceptance of their contributions to Student's legal and disciplinary difficulties, and their efforts to overcome those issues assured that the efforts of District witnesses to wedge as much negative information as possible about the family into their testimony reflected far more poorly on the District than on the family.



due process protections in connection with the expulsion clearly demand significant relief. In *Ferren C. v. School District of Philadelphia*, 612 F.3d 712 (3<sup>rd</sup> Cir. 2010) the Court of Appeals confirmed the broad discretion of the courts, and by extension, special education due process hearing officers, to fashion appropriate relief for denials of a FAPE under IDEA. There is no reason that the same principles should not apply where a protected handicapped Student was denied a FAPE, and especially in the circumstances presented by this case, where the child find violation might have resulted in a finding of IDEA eligibility and triggered the explicit protections of the IDEA discipline procedures.

Parent will be awarded relief in the form of reimbursement for the independent evaluation she procured. The evaluation was thorough, saves the District the expense of a full psycho-educational evaluation and provides a good basis for appropriate services as Student transitions back to school during the next school year, since additional assessments at this point might be premature, and, therefore, may be delayed until Student has been back in school for at least 30 days.

Student will be awarded full days of compensatory education for the 3<sup>rd</sup> and 4<sup>th</sup> quarters of the 2009/2010 school year and for the 2010/2011 school year until Student was removed from school by the expulsion. In addition, Student will be awarded 10 hours of compensatory education from the date of Student's exclusion from school until 1:1 homebound instruction began and sufficient hours to equal 10 hour/week from that time until Student returns to school. Since the District has recently increased the hours of homebound instruction, it is reasonable to infer that 10 hours is the amount of time Student should have been receiving from the beginning.

In addition to reimbursement, the District will be ordered to permit Student to return to school no later than the first day of the 2012/2013 school year, and before Student returns to

school, to convene a team to determine whether the independent evaluation provides a sufficient basis for considering and making a determination of Student's IDEA eligibility, or whether additional assessments need to be conducted, including classroom observations and a functional behavioral assessment (FBA). The District will be permitted to delay further assessments such as a classroom observation or FBA until Student has been back in a school setting for at least 30 school days. The District will also be ordered to assure that sufficient supports and services are available to Student in a fully implemented Service Agreement from the first day Student returns to school, and ordered to provide additional counseling services and support for organization and development of executive function skills immediately as part of Student's transition back to a public school setting.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the Abington Heights School District is hereby **ORDERED** to take the following actions:

1. Reimburse [Student's] Parent(s) for all costs associated with the neuro-psychological evaluation and report produced in September 2011.
2. Provide Student with compensatory education as follows:
  - a. Full days for every day school was in session from the beginning of the third quarter of the 2009/2010 school year until the last day of school and from the first day of the 2010/2011 school year until the day before the first date Student was excluded from school due to expulsion;
  - b. 10 hours of compensatory education/week for every week school was in session from the date Student was excluded from school until the first week in which homebound services began, and the number of additional hours needed from that date until the first week Student returns to a school setting on a full-time basis to equal 10 hours/week for every week school was in session during the 2010/2011 and 2011/2012 school year.
  - c. Compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current and future IEPs and/or will otherwise assist him/her

in overcoming the effects of Student's disabilities.

d. The compensatory education shall be in addition to, and shall not be used to supplant, educational services and/or products/devices that should appropriately be provided by the School District through Student's §504 Service Agreement and/or IEP to assure meaningful educational progress.

e. Selection of compensatory education services, products or devices shall be at Parent's sole discretion.

f. Parent may use part of the compensatory education award to pay for the services of a knowledgeable, independent educational consultant to help her choose appropriate compensatory education services/products/devices, provided, however, that any such consultant may derive no financial benefit from the services s/he recommends or from the providers of such services;

g. Compensatory services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parent. The hours of compensatory education, or fund for compensatory education services/products/devices, should the District choose to create such fund, may be used at any time from the present to Student's 21<sup>st</sup> birthday.

3. The District shall permit Student to return to the appropriate public school building and grade level in the District no later than the first day of the 2012/2013 school year.

4. From the first day Student returns to the public school setting, and continuing for at least 30 school days thereafter, until a meeting is held with appropriate school staff and Parent, unless the parties otherwise agree, the District shall provide Student with a §504 Service Agreement that includes, but is not limited to all of the following provisions: a) a structured study hall where Student will receive consistent, 1:1 help with organization, productivity, study skills and developing executive functions; b) a homework helper to monitor completion of assignments and teach Student executive and organizational skills; c) individual tutoring to improve math skills.

5. The District shall prepare for Student's return to school by providing the following transition services: a) at least 1 one hour session weekly with a school-based counselor to discuss Student's return to school and develop strategies to ease Student's transition back to school and avoid the problems that led to the expulsion; b) at least one hour weekly of explicit instruction in organizational strategies and development of executive functions.

6. Within 30 days of the date of this order, convene a meeting of a team comprising the same members required for an IDEA multi-disciplinary team to review and discuss the results of the September 2011 independent neuro-psychological evaluation and decide whether there is sufficient information to determine whether Student is eligible for special education services under IDEA or should continue with a § 504 Service Agreement based upon that evaluation. If the team determines that additional assessments need to be conducted, including classroom observations and a functional behavioral assessment (FBA), and if any such evaluative measures

be deemed necessary by the team, the District may delay further assessments such as a classroom observation or FBA until Student has been back in a school setting for at least 30 school days.

7. The District shall assure that sufficient supports and services are available to Student in a fully implemented Service Agreement from the first day Student returns to school until such time as either a new Service Agreement or an IEP is developed and implemented.

8. The District shall assure that Student is fully knowledgeable concerning the provisions of the Service Agreement or IEP and instructed in any aspects of such plan Student does not understand.

9. The District shall develop and explain to Student, Parent and all of Student's teachers and other staff working with Student each school year a plan to monitor compliance with the provisions of Student's Service Agreement or IEP and shall provide written assurance of implementation to Parent at least monthly during the time school is in session each school year.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

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Anne L. Carroll, Esq.  
HEARING OFFICER

March 31, 2012