

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. 2629-1112 KE

Child's Name: J.C.

Date of Birth: [redacted]

Dates of Hearing: 1/30/12; 6/22/12

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney
Heather Hulse, Esquire

School District
Wallenpaupack Area

School District Attorney
Lucas Repka, Esquire

Date Record Closed:

July 23, 2012

Date of Decision:

August 15, 2012

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

This case presents two primary substantive issues: Whether Student, currently a [late teen-aged] resident of the District enrolled in the District high school, should have been identified as IDEA eligible as early as the spring of 2009 and whether, regardless of the District's refusal to identify Student as IDEA eligible, it provided sufficient, appropriate services under §504 of the Rehabilitation Act of 1973 to meet Student's educational needs arising from an impairment that substantially limits a major life activity.

At a brief hearing session on January 30, 2012, Parent took the testimony of three District staff members and produced a number of documents in support of her child find claim. The District cross-examined two of the witnesses but declined to introduce its own documents, call additional witnesses or conduct direct examinations of the District staff called by Parent, contending that there was insufficient evidence of an IDEA child find violation and requesting the opportunity to submit a motion to dismiss that aspect of Parent's claims. The District's request was granted, since the availability of some witnesses and the schedules of the parties and counsel would have delayed completion of the record without the motion.

After the District's motion was denied, a second hearing session was held in June 2012, followed by written closing arguments. Based upon the testimony and documents, neither party prevails entirely in this matter, but Student is entitled to limited compensatory education from April 2011 through the end of the 2010/2011 school year and for the 2011/2012 school year.¹ The School District will also be required to assure that Student receives appropriate supportive services during the 2012/2013 school year, depending upon Student's behaviors and academic performance during the 2011/2012 school year and the beginning of the upcoming school year.

¹ Parent agreed to pursue compensatory education for only 2 years prior to the December 8, 2011 filing of the due process complaint. Consequently, claims relating to the 2008/2009 school year is no longer at issue in this case.

ISSUES

1. Did the School District conduct appropriate evaluations of Student, followed by complete and accurate evaluation reports, and correctly conclude that Student is not eligible for special education services under the IDEA statute?
2. Should the Student have been identified as IDEA eligible in any one or combination of the categories of emotional disturbance, other health impairment or specific learning disability?
3. Did the School District provide Student with Service Agreements under §504 of the Rehabilitation Act of 1973 in accordance with federal and state regulatory standards that met Student's educational needs at least as adequately as the needs of non-disabled Students?
4. If the School District failed to appropriately identify Student as IDEA eligible and/or failed to provide adequate services under §504, is Student entitled to an award of compensatory education and if, so, in what period, in what amount and in what form?

FINDINGS OF FACT

1. [Name redacted] (Student), a [late teen-aged] child born [redacted] is a resident of the Wallenpaupack Area School District. (Stipulation, N.T. p. 11)
2. Student is currently identified as a protected handicapped student under §504 of the Rehabilitation Act of 1973 (Stipulation, N.T. p. 12)
3. Student received early intervention services due to developmental delays, as well as counseling services during kindergarten. (P-13, pp. 1, 2)
4. During the elementary school years, Student had been identified as IDEA eligible in the category of speech/language impairment for which Student received services for several years. Student was no longer receiving services by the beginning of middle school. (S-13 p. 2, P-15 p. 1)
5. Student exhibited significant behavioral issues at school throughout the elementary and middle school years. (P-13 pp. 2, 3)
6. While enrolled in the District middle school during the second half of the 2008/2009 school year, Student committed an infraction of the disciplinary code that resulted in a 10 day suspension from school and a behavior contract to avoid expulsion. (N.T. p. 190, 191; P-5 p. 1, P-8, P-13 p. 3)

7. According to the District's Psychological Evaluation Report, incorporated into a Reevaluation Report (RR) issued in March 2009, Parent had requested an evaluation due to concerns about Student's academic performance. The District's March 2009 report included no reference to prior services or behavioral issues because the school psychologist believed it unnecessary. (N.T. p. 195; P-5 p. 1, P-6)
8. The District School Psychologist administered the WISC-IV (Wechsler Intelligence Scale for Children-Fourth Edition) to assess Student's cognitive ability. Student's index scores were all in the average range, with higher percentile rankings on the Verbal Comprehension Index (VCI/70th %ile) and Working Memory Index (WMI/68th % ile) and relatively lower rankings on the Perceptual Reasoning Index (PRI/55th %ile) and Processing Speed Index (PSI/58th %ile) (P-5 pp. 2, 3) Student's full scale IQ score (FSIQ) was 108, in the average range (70th %ile) (P-5 p. 3)
9. Student's scores on a standardized achievement test (WIAT-II-Wechsler Individual Achievement Test-Second Edition) also generally fell into the average range, except for Listening Comprehension, which was in the high average range (87th %ile). Student's %ile rankings on the other subtests were Word Reading—42nd, Reading Comprehension—34th, Numerical Operations—39th, Math Reasoning—61st, Written Expression—77th, and Spelling—32nd. (P-5 p. 4, S-42 p. 9)
10. The school psychologist assessed Student's behavioral functioning by means of the Behavior Assessment System for Children-Second Edition (BASC-2) rating scales completed by three of Student's then current teachers (math, English and Spanish), as well as by Parent and Student. (P-3 pp. 1, 21, 45, 70, 85)
11. None of Parent's and Student's ratings were in the elevated range, suggesting that they perceived no atypical behavioral issues. (N.T. pp. 212, 213; P-3 pp. 70—99)
12. The Spanish teacher's ratings placed Student's behavior in the "clinically significant" range with respect to the externalizing problems composite, hyperactivity, aggression, conduct problems; the school problems composite, attention problems; the behavioral symptoms index, atypicality; the adaptive skills composite, adaptability and social skills. Ratings were in the "at risk" range with respect to the internalizing problems composite, depression, learning problems, leadership, study skills and functional communication skills. In addition, the content scores (anger, bullying, developmental social disorders, emotional self-control, executive functioning, negative emotionality, resiliency) were in the "clinically significant" or "at risk" range, indicating a possible need for follow-up. (P-3 pp. 25, 26, 29)
13. The BASC-2 internal validity scale, however, indicated that the teacher's ratings should be viewed with extreme caution due to overly negative responses to some items. (P-3 pp. 22, 24)

14. The math teacher's ratings placed Student in the "at risk" range with respect to school problems, attention problems, learning problems and study skills, but otherwise indicated no atypical behaviors. (P-3 pp. 48, 49)
15. The English teacher's ratings placed Student's behaviors in the "clinically significant" range for attention problems and in the "at risk" range with respect to the externalizing problems composite, hyperactivity, aggression, conduct problems, school problems, study skills and functional communication. On the content scales, where elevated scores suggest further investigation, Student was in the "at risk" range with respect to bullying and executive functioning. (P-3 pp. 5, 6, 8)
16. The school psychologist erroneously reported that four of Student's teachers completed rating scales and did not include any scoring tables summarizing the BASC-2 results in the psychological report or RR. The school psychologist distilled the results to a brief narrative report, stating that the teachers' ratings were inconsistent, with two teachers indicating higher than average ratings with respect to attention, aggression and less regulated conduct and three teachers indicating that Student was inattentive in their classes. (N.T. pp. 197, 199, 200; P-5 pp. 4, 5)
17. To assess Student's attention and focus, the school psychologist administered the Connors Continuous Performance Test (CPT), which yielded inconclusive results. (P-5 pp. 5, 6)
18. The school psychologist also asked the English teacher, the math teacher and Parent to rate Student's executive functioning by completing the BRIEF (Behavior Inventory of Executive Functions) scales, but entirely omitted the results from his report. (N.T. pp.52, 53; P-9)
19. Parent's ratings on the BRIEF indicated no areas of concern with respect to Student's functioning. (P-9 pp. 7—17)
20. The teachers' ratings indicated concerns in several areas. Specifically, both teachers' ratings were elevated with respect to the Global Executive Composite (GEC) and Metacognition Index (MI), as well as with respect to Student's ability to inhibit impulsive responses, monitor his/her own behavior, plan and organize problem-solving approaches, organize his/her environment and materials, initiate problem solving and sustain working memory. (P-9 pp. 20, 21, 24—29, 33, 34, 37, 39—42)
21. As rated by one of the teachers, Student's profile was similar to that of children diagnosed with ADHD, Combined Type. As rated by the other teacher, Student's profile was similar to that of children diagnosed with ADHD, but without a clear indication of the sub-type. (P-9 pp. 31, 44)
22. The school psychologist concluded that Student had average intelligence and academic achievement and presented with mild behavioral regulation and conduct issues, but exhibited no significant indications of specific learning disability, attention disorder or

- emotional handicap, and, therefore, did not meet the criteria for IDEA eligibility. (P-5 p. 6)
23. The school psychologist believed, however, that Student would benefit from study skills training, school counseling and motivational activities. (P-5 p. 6)
 24. At Parent's request, the District provided an independent educational evaluation (IEE) several months later, in the fall of 2009. Using different measures of cognitive potential and academic achievement,² the independent evaluator's assessments placed Student's full scale IQ score at 114 (high average range/82nd % ile) and overall academic achievement within the average range with the following percentile rankings: Broad Reading—75th, Broad Math— 53rd, Broad Written Language—37th, Total Achievement—58th. (P-13 pp. 5, 6, 8, 9)
 25. The independent evaluator reviewed the BASC-2 results reported by the District school psychologist, and consulted with the Spanish teacher and English teacher. She noted in some detail the "clinically significant" ratings by the Spanish teacher, as well as the English teacher's "clinically significant" rating in the area of attention problems and "at risk" ratings in the areas of conduct problems, hyperactivity and limited study skills. She did not discuss the BASC-2 ratings of the math teacher, Parent and Student. (P-13 pp. 13, 14; P-15 p. 3)
 26. The independent evaluator had Student complete the Achenbach System of Empirically Based Assessment and listed several "sometimes true" responses that she concluded demonstrated that Student could identify behaviors that had caused problems over the years. The independent evaluator did not provide a description of the assessment and its purpose or any further discussion of the results in terms of whether Student's responses indicated a disability. (P-13 p. 11)
 27. Based primarily on the BASC-2 ratings of two of the three teachers who had rated Student in connection with the District's March 2009 evaluation and Student' history, particularly counseling services provided by the District in kindergarten, the independent evaluator concluded that Student was IDEA eligible in the category of Emotional Disturbance (ED) and recommended that special education services be provided in an emotional support setting. (P-13 p. 14)
 28. The evaluator also recommended daily group counseling and weekly individual counseling; daily progress monitoring for behavior; strategies for changing Student's behavior such as role playing and a positive reinforcement schedule; parent training and counseling; reading instruction from a certified Wilson Reading System teacher or teacher trained in Orton-Gillingham methodology for daily phonics instruction; an occupational therapy evaluation; specially designed instruction to address weaknesses in visual-spatial tasks; chunking of homework and classroom assignments; daily homework checks and multi-sensory instruction. (P-13 pp. 14, 15)

² Stanford-Binet Intelligence Scales, Fifth Edition (SB-5) and the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III).

29. After receiving the IEE report, the District conducted a reevaluation of Student in the spring of 2010 by a different school psychologist, who administered the reading subtests of the WIAT-III standardized achievement test but no other standardized assessments of cognitive potential and academic achievement. (N.T. pp. 227, 228; P-15 p. 6)
30. Student's scores again generally fell into the average range, with higher percentile rankings in some areas than had been derived from the WIAT-II administered in the prior year. Reading Comprehension was measured at the 70th % ile and Word Reading at the 53rd % ile. Student showed a weakness in Pseudoword Decoding (23rd % ile) and Oral Reading Fluency (25th % ile). Total Reading and Basic Reading were both at the 34th % ile, with Reading Comprehension and Fluency at the 45th % ile, all three composite scores within the average range (N.T. pp. 227, 228; P-15 p. 6)
31. Four of Student's then current teachers were asked to complete the BASC-2 rating scale. None of the teachers' scores fell into the "clinically significant" range. The ratings of two of the four teachers placed Student in the "at risk range" for both hyperactivity and atypicality. One teacher's ratings placed Student in the "at risk" range for conduct problems and another teacher's ratings were in the "at risk" range for attention problems. The teacher with the highest number of elevated scores on the clinical scales also rated Student in the "at risk" range in three of the Content Scales, bullying, developmental social disorders and executive functioning. Otherwise there were no elevated scores. (P-15 pp. 6, 7)
32. In reporting the teacher ratings on the BRIEF, the school psychologist noted that one of the teachers' ratings indicated no elevated scores, but in summarizing the results, she stated that each displayed elevated scores in some areas. The scores reported by the school psychologist and her analysis indicated that problems with planning and organizing problem-solving approaches were identified by three of the teachers and the ratings of two teachers identified a profile consistent with ADHD. (P-15 p. 8)
33. Based on the teacher ratings on the Connors-Third Edition rating scales, the school psychologist concluded that despite elevated ratings by three of the teachers on some scales, a diagnosis of ADHD that met DSM-IV criteria was unlikely to highly unlikely (N.T. pp. 232, 233; P-15 pp. 8—10)
34. Student's self-ratings on the BASC-2, the BRIEF and the Connors rating scales were in the average range in every category. (P-15 pp. 7—10)
35. The school psychologist assessed the likelihood of Student having an emotional disturbance with the Scales for Assessing Emotional Disturbance-Second Edition (SAED-2) based on teacher ratings and structured observations of Student in classroom settings by the school psychologist. The results were not indicative of emotional disturbance. (N.T. pp. 234—236; P-15 pp. 10, 11)

36. Based upon the assessment results, the school psychologist concluded that Student did not meet the criteria for any IDEA eligibility category and that a §504 evaluation was not necessary. (N.T. pp. 236—238; P-15 p. 11)
37. Subsequently, the District offered Student a §504 Service Agreement in an attempt to resolve the ongoing dispute with Parent over Student’s eligibility and need for services. Despite her conclusion that Student has no disability or need for services, the school psychologist who completed the May 2010 RR agreed to develop a §504 Accommodation Plan because attention weaknesses and organizational issues had been identified through the evaluation, the independent evaluator had identified spelling weaknesses, and the school psychologist thought there was no harm in trying a §504 plan to see whether it would benefit Student. (N.T. pp. 118, 239—241; P-16 pp.1, 3)
38. Despite the eligibility criteria printed on the form that the District uses for §504 Accommodation Plans, *i.e.*, the requirement that there must be a disability (“a physical or mental impairment/history of having a physical or mental impairment”) that “**substantially** limits one or more major life activities,” (Emphasis in original), and an explanation concerning how Student meets those criteria stating that the District’s most recent evaluation determined that Student has weaknesses that “sporadically impact...academic progress,” not a disability, and needs supports for academic progress, District staff indicated on the eligibility statement that Student’s documented impairment is “attentional weaknesses that sporadically impact [Student’s] ability to maintain attention to task and complete assignments.” (P-16 pp. 3, 5)
39. The §504 Accommodation Plan offered to Parent and Student in August 2010 for the 2010/2011 school year provided that Student’s teachers would: a) monitor Student’s attentiveness to tasks and repeat directions in a manner that would not bring attention to Student; b) permit Student to turn in an assignment 1 day late, 2x/quarter/class in order to assist with misplaced or incomplete assignments due to disorganization of materials or time management; c) inform Parent (via e-mail) of long-range assignments/projects, provide a rubric for the assignment explaining it and the due dates when available. (P-16 p. 6)
40. The Accommodation Plan also provided that Student would be responsible for a) informing teachers if Student missed part of a lecture or class direction; b) informing teachers of the need to turn in an assignment late and explaining the difficulty; c) utilizing PowerSchool to monitor grades and homework. (P-16 p. 6)
41. The §504 Plan also placed certain responsibilities on Parent: a) assist Student with organization of assignments at home; b) utilize PowerSchool to assist Student in monitoring grades, homework assignments and completing assignments; 3) assist Student with planning long range assignments. (P-16 p. 3)
42. The original Accommodation Plan was reviewed in February 2011 and revised to provide that a) teachers would directly inform Parent of any concerns about Student since [Parent] does not have access to a computer to check PowerSchool; 2) Student would be

allowed an extra set of books; c) Student would be given the opportunity to correct spelling errors, and spelling errors would not be counted against Student. The provisions of the August 2010 Plan were also included. (P-16 p. 3, P-21 pp. 2, 3)

43. Due to an increase in Student's leaving classes and wandering the halls, the Plan was revised in April 2011 to add an escort to accompany Student when s/he left a class after it began. Otherwise, the Plan repeated the February provisions. (P-21 pp. 2, 3, P-26 pp. 2, 3)
44. The escort provision was removed from the Plan in October 2011, leaving it identical to the February 2011 Accommodation Plan. No other changes were made to the §504 Accommodation Plan for the 2011/2012 school year. (N.T. pp. ; P-21 pp. 2, 3, P-27 pp. 2, 3)
45. During the 2009/2010 school year, Student passed all classes and ended the year with a 2.69 grade point average. During that school year, five disciplinary incidents were noted, including 1 fight resulting in 3 days of in-school suspension and one other peer conflict. (P-15 p. 1, P-29 pp. 6, 7, P-30)
46. During the 2010/2011 school year, Student also passed all classes, but with somewhat lower grades, ending the year with a 2.26 grade point average. During that school year, several academic concerns were noted with respect to Student's Biology class, centering on a conflict with the teacher and missed assignments. Student also had difficulties with English class and generally with remembering to complete and turn in assignments and failure to sign up for tutoring services. Altogether, there were 9 notations of academic concerns through the first quarter, but none after early December 2010. (P-29 pp. 4, 5, 6)
47. Student had 28 notations of disciplinary actions, concerns or referrals during the 2010/2011 school year, including a number of instances of leaving classes before they ended, arriving late to school or late to classes, resulting in several detentions and two days of in-school suspension. Student's cutting or coming late to classes persisted throughout the school year. (P-29 pp. 1—5)
48. During the first quarter of the 2011/2012 school year, between mid September and mid-November 2011, Student had 6 disciplinary notations, including reference to 5 instances of cutting, leaving or arriving late to classes and a fight with another Student, resulting in 3 days of in-school suspension in September 2011. Student's first quarter report card reflected grades in Student's four classes in the proficient (80, 87, 72) to advanced range (91). (P-28, P-29 p. 1)

DISCUSSION AND CONCLUSIONS OF LAW

This case presents an initial issue concerning the sufficiency/appropriateness of the District's two educational evaluations, conducted approximately 1 year apart in 2009 and 2010, as well as the accuracy of the District's conclusion that Student is not IDEA eligible, both in terms of the District's interpretation of its own assessment data and whether it gave sufficient consideration to the IEE conducted approximately mid-way between the two District evaluations.

In light of the record ultimately compiled in this case, it also presents a somewhat unusual issue concerning the factual accuracy and legal appropriateness of the District's determination of Student's stipulated §504 status, as well as whether §504 Accommodation Plans met Student's needs arising from a disability, as that term is defined in either the IDEA statute/regulations or §504 and the federal and state regulations implementing §504.

For the reasons explained below, I conclude 1) That District was correct in declining to identify Student as IDEA eligible in the categories of specific learning disability and/or emotional disturbance at any time; 2) That Student's issues with respect to attention, focus and organization rise to the level of a disability, which the District correctly acknowledged by providing a §504 Accommodation Plan for the 2010/2011 school year, although it obviously did not intend to identify Student's difficulties as a disability; 3) That the evidence supports the District's conclusion that Student did not require either specially designed instruction or an Accommodation Plan during the remainder of the 2008/2009 and 2009/2010 school year, since Student was able to make appropriate educational progress during those years; 4) That the §504 Plan was adequate to meet Student's needs during the 2010/2011 school year until April 2011, when Student began avoiding classes by arriving late and/or leaving early; 5) That the addition of an escort was an inadequate response; 6) That the District should have conducted a functional

behavioral assessment at that time to determine why that behavior arose and how to extinguish it; 7) That the District should have added services to assist Student in eliminating the tardiness and leaving class behavior, based upon the results of the FBA; 8) That the [District] should have added periodic counseling services as recommended in the District's March 2009 evaluation report when Student began avoiding classes in the winter of 2011; 9) That the District should have provided Student with specific organizational strategies and check-ins with a specific staff member, through counseling or instruction, to more directly assist Student with strategies to improve attention, focus and organization in the school setting.

Legal Standards Applicable to Evaluations/Reevaluations
Procedural Appropriateness of the District's Evaluations

The IDEA statute and regulations require an initial evaluation, provided in conformity with statutory/regulatory guidelines, as the necessary first step in both determining whether a student is eligible for services and in providing special education services. *See* 20 U.S.C. §1414; 34 C.F.R. §300.8(a). The primary purpose of the initial evaluation is, of course, to determine whether the child meets any of the criteria for identification as a “child with a disability” as that term is defined in 20 U.S.C. §1401 and 34 C.F.R. §300.8, but an appropriate evaluation also provides a basis for the contents of an eligible child's IEP, including a determination of the extent to which the child can make appropriate progress “in the general education curriculum.” 34 C.F.R. §§300.8, 300.304(b)(1)(i), (ii).

If a child is determined to be eligible, the IDEA statute and regulations provide for periodic re-evaluations, which “may occur not more than once a year unless the parent and public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that an evaluation is unnecessary.” 20 U.S.C. §1414(a)(2)(B)(i), (ii); 34 C.F.R. §300.303(b). School districts, however, also have the obligation to “ensure that a

reevaluation of each child with a disability is conducted” at any time “the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child’s parent or teacher requests a reevaluation.” 20 U.S.C. §1414(a)(2)(A)(i), (ii); 34 C.F.R. 300.303(a). It is also reasonable to expect a school district to reevaluate a student not determined to be eligible after an initial evaluation if changed circumstances warrant it.

Moreover, in accordance with 34 U.S.C. §300.502(c)(1), school districts are required to consider parent-initiated, private evaluations whether publicly funded or obtained at parents’ expense.

The general standards for an appropriate evaluation or re-evaluation are found at 34 C.F.R. §§300.304—300.306, which require a school district to: 1) “use a variety of assessment tools;” 2) “gather relevant functional, developmental and academic information about the child, including information from the parent;” 3) “Use technically sound instruments” to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be “sufficiently comprehensive to identify all of the child’s special education and related service needs” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7).

Every reevaluation (and initial evaluations if appropriate) must also include: 1) a review of existing evaluation data, including a) local, state and current classroom-based assessments; b) classroom-based observations by teachers and related service providers; 2) a determination of additional data, if any, necessary to determine a) whether the child has an IDEA-defined disability (in the case of an initial evaluation); b) the child's educational needs, present levels of academic achievement and related developmental needs; c) whether the child needs/continues to need specially-designed instruction and related services. 20 U.S.C. §1414(c); 34 C.F.R. 300.305(a)(1), (2). It is the district's responsibility to administer all assessments and other measures needed to compile the required evaluation data. 34 C.F.R. 300.305(c).

Once the assessments are completed, a group of qualified school district professionals and the child's parents determine whether he/she is a "child with a disability" and his/her educational needs. 34 C.F.R. §300.306(a). In making such determinations, the district is required to: 1) "Draw upon information from a variety of sources," including those required to be part of the assessments, assure that all such information is "documented and carefully considered." 34 C.F.R. §300.306 (c)(1). The District must also provide a copy of the evaluation report and documentation of the eligibility determination to the Parents at no cost. 34 C.F.R. §300.306(a)(2). If it is determined that the child meets the criteria for IDEA eligibility *i.e.*, is a child with a disability and is in need of specially designed instruction, an IEP must be developed. 34 C.F.R. §§300.306(c)(2).

The District in this case met the IDEA procedural requirements for an appropriate evaluation/reevaluation with respect to both its 2009 and 2010 evaluations in terms of assessing Student in all areas of suspected disability and using a variety of assessment tools and methods. Although the District's analysis of its results in connection with both evaluations, as well as its

2009 report, were suspect in some respects as discussed in connection with the potential disability categories, the record does not support a conclusion that Student suffered any substantive educational deprivation from the District's interpretation of its evaluation data.

It must be noted, however, that the District's failure to include important results, such as the underlying data for the 2009 BASC-2 ratings and its omission of any mention of the BRIEF assessment, much less a reasonable discussion of the results deprived Parent of the ability to participate fully in the decision-making process. *See* FF 16, 18. In this case, Parent's prompt request for an IEE, and the District's agreement to it establishes that the omission of the information from the February 2009 RR did not deter Parent from continuing to seek an evaluation, identification of Student as IDEA eligible and services she believed were necessary for Student. Moreover, Student suffered no substantive effect from the absence of accommodations and services during the 2009/2010 school year, in which there was no evidence of academic or significant behavior concerns. FF 45. The District is cautioned, however, to assure that its evaluation reports are thorough and complete in the future.

Denial of IDEA Eligibility in the Category of Specific Learning Disability

The first District school psychologist who evaluated Student in March 2009 and the independent evaluator, who tested Student several months later, used different standardized test instruments to assess intellectual ability and academic achievement, but the measures used by both evaluators are well-regarded instruments, commonly used by school psychologists for those purposes and the results reported by both evaluators were comparable. *See* FF 8, 9, 24. Whether Student's abilities and achievement are solidly in the average range, as determined by the District's school psychologist in the spring of 2009, or closer to the high average range as

measured by the independent evaluator, Student's achievement scores were generally commensurate with ability as measured by both evaluators. (FF 8, 9, 24)³

In reporting that Student's word attack and spelling subtest scores on the achievement assessment fell into the low average range, the independent evaluator noted that the scores confirmed Parent's report that Student had received limited, if any, instruction in phonics. P-13 pp. 8, 12. Student also obtained a low average score on the math fluency subtest, exhibiting difficulty with basic math facts. P-13 pp. 9, 12. Notwithstanding those below average subtest scores, however, Student's achievement in the reading, math, and written language clusters were all in the average range, and overall achievement was at the 58th percentile. (FF 24)

Given the results of Student's standardized assessments and the independent evaluator's comments suggesting that Student's low scores on the word attack and spelling subtests likely reflected a lack of appropriate instruction in phonics, it is not surprising that the independent evaluator did not suggest that Student has a specific learning disability. The results of the independent evaluation, therefore, support the District's decision not to identify Student as IDEA eligible in the category of specific learning disability. In the absence of evidence in the form of a psychological report and the interpretation/opinion of any school psychologist supporting a contrary conclusion, including the independent evaluator selected by Parent, there is no rational basis for determining that the District should have found Student IDEA eligible in the category of specific learning disability.

³ The comparability of the ability results reported by both the District school psychologist and the independent evaluator is well-illustrated by taking into account the 95% confidence intervals for both the WISC-IV and the Stanford Binet full scale IQ scores, which suggest that Student's score would likely fall between 102 and 114 on the WISC-IV and between 110 and 118 on the Stanford Binet if Student were re-tested on those measures. See P-13 p. 5; Sattler, J. Assessment of Children-Cognitive Foundations, 5th Edition (Jerome M. Sattler, Publisher, Inc. 2008) pp. 273, 573.

Denial of IDEA Eligibility in the Category of Emotional Disturbance

Parents point out, accurately, that the school psychologist who evaluated Student in 2009 omitted a full interpretation of the results of the BASC-2 rating scales completed by Parent, Student and three teachers designed to assess Student's behavior.⁴ During testimony at the hearing, the District school psychologist explained that he was confronted with varying results in that the rating scales completed by Student, Parent and one of the teachers indicated no areas of great concern, while the ratings of one teacher, in particular, identified several areas of significant concern. (N.T. pp. 196—198) The school psychologist concluded that the elevated scores could have reflected less tolerance for Student's attention-seeking behaviors by two of the teachers, and using his clinical judgment, he essentially discounted the rating scale that indicated significant problems and concluded that the elevated or at risk scores yielded by some raters did not indicate the presence of an emotional disturbance or other disability. (N.T. pp. 203, 204) The school psychologist's omission of both the underlying data and an explanation of his reason for concluding that the ratings of one teacher was an anomaly and not an indication of emotional disturbance did not further the collaborative spirit of the IDEA and deprived Parent of information that any reasonably concerned and involved parent would have considered relevant and important. Certainly, including scores and technical information without adequate explanation could be confusing and should be avoided. Full assessment results, accompanied by an adequate explanation and discussion with Parent, should, however, avoid that problem.

Moreover, the school psychologist included in the psychological report and RR such technical data as raw scores, scaled scores, critical values, base rates, intervals, predicted scores qualitative range and T-scores, and T-score percentile guidelines with respect to all other

⁴ In the RR (P-6 p. 2), the District school psychologist mistakenly noted that there were four teacher ratings, but only three of Student's teachers actually completed the rating scales. Parent was the fourth outside rater, and Student completed a self-rating. (N.T. p. 199)

measures administered with no explanation and no apparent fear of confusing Parent. *See* P-5 pp. 5—9, P-6 pp. 1—3, 6—16.

Finally, although according considerably less weight to the ratings of the teacher whose scores were exceptionally high may have been justified due to the caution that her ratings generated by the scoring program, the school psychologist's speculation that gender differences among the raters could have made a difference in that male teachers may have been more tolerant of Student's classroom behaviors cannot be credited as a basis for his clinical judgment that one teacher's high ratings did not indicate emotional disturbance or another disability. *See* N.T. p. 204. Since all of the teachers who completed the rating scales for the evaluation he conducted were women, taking possible gender differences of raters into account as one of the considerations informing his clinical judgment could only have led to error in this case. Moreover, both of the other teachers rated some of Student's behaviors in either the "at risk" or "clinically significant" range, but those scores were not thoroughly discussed in either the evaluation report or the testimony at the hearing. (FF 14, 15)

On the other hand, however, as the District's school psychologist pointed out, the independent evaluator reported only the BASC-2 results of the teacher whose ratings placed Student in the "clinically significant" range on several clusters and the "at risk" range of several others and did not reference at all the results of the other teacher, Parent or Student whose BASC-2 ratings did not indicate pervasive, significant behavior problems. (FF 25; N.T. pp. 220, 221) She also related that one of those teachers reported observing "multiple" instances of Student bullying students who appeared to have special needs. (P-13 p. 11)

With respect to Student's self-reports, the independent evaluator did not refer to or discuss the BASC-2 results, but noted that Student's responses on the Achenbach's System of

Empirically Based Assessment indicated that Student “was able to identify precisely the behaviors that have gotten [Student] in trouble,” including, *e.g.*, trying to get attention, difficulty sitting still at times, breaking rules, arguing. (P-13 p. 11) Student also self-reported feeling sad, unhappy or depressed, being suspicious, being mean to others and having a hot temper. (P-13 p. 11) Based apparently on Student’s entire school history, including an “unusual” recommendation for counseling services during kindergarten, the two teachers’ BASC-2 ratings and the results of the Achenbach, the independent evaluator concluded that Student is IDEA eligible in the emotional disturbance (ED) category. (FF 27)

Notably, the evaluator did not discuss or even refer to the IDEA criteria for eligibility in the ED category. With respect to not reporting all scores and not fully discussing the basis for her eligibility conclusion, the independent evaluator’s report mirrored flaws in the District’s 2009 evaluation. The evaluator’s report of her classroom observation included a description of off task behaviors, lack of full engagement in classroom activities and difficulty with academic tasks that involved areas of Student’s relative cognitive weakness as disclosed by standardized tests, but no disruptive or aggressive behaviors. (P-13 p. 3)

Despite a more thorough discussion of the basis for her findings than found in the District’s 2009 RR, the independent evaluator’s report provides an insufficient basis for accepting her ED diagnosis and rejecting the District’s conclusion that Student is not IDEA eligible in the ED category. Both the District school psychologists selected certain assessment results as supportive of differing conclusions without a persuasive explanation of their respective exercises of clinical judgment. Moreover, District officials at least recognized that an adverse effect on educational performance is necessary in order to identify a student as IDEA eligible in the ED category. The independent evaluator made no attempt to relate Student’s inappropriate

behaviors and feelings identified in her evaluation to an adverse effect on education. There is no indication in the report that she reviewed Student's grades or other indications of academic progress—or lack of it—as part of her evaluation. There is, at least, no mention of Student's actual, school-based academic performance in the IEE report, although the reason for referral includes clarifying Student's educational performance levels. (P-13 p. 1) It appears that the independent evaluator may have concluded that Student exhibited “An inability to build or maintain satisfactory interpersonal relationships with peers and teachers,” “Inappropriate types of behavior or feelings under normal circumstances,” “A general, pervasive mood of unhappiness or depression” or some combination of those characteristics. *See* 34 C.F.R. §300 (B), (C), (D). It is, however, impossible to determine from the IEE report itself the precise basis for the independent evaluator's eligibility determination, making it impossible to accept the evaluator's conclusion. The independent evaluator apparently failed to consider Student's academic performance as part of educational performance, failed to explain why she disregarded or discounted the BASC-2 results from one of the teachers and Parent, as well as why she relied exclusively on the results of the Achenbach scale for Student's input and did not refer to Student's BASC-2 self ratings. Because of those lapses, the evaluator's ED eligibility conclusion is insufficient to support Parent's claim that Student should have been identified as IDEA eligible in the ED category.

Although grades are certainly the only indicator of appropriate educational performance, it is one factor that must be taken into account. Student passed all classes, generally earning grades primarily in the proficient range. There is, therefore, no objective evidence, based on academic performance, that Student displayed characteristics listed under ED category that

adversely affected educational performance as required for IDEA eligibility in that category. 34
C.F.R. §300.8(c)(4)(i)

Denial of IDEA Eligibility Due to Attention-Focus Issues/OHI

The independent evaluator reported Parent's concerns with Student's complete lack of organizational ability and memory for important tasks, such as returning permission slips and turning in homework assignments even when Student completed them. (P-13 pp. 3, 4)
Nevertheless, there was no discussion of Student's difficulties with attention and focus in the IEE report.

The first District evaluator reported the results of the Connors Continuous Performance Test (CPT) as inconclusive with respect to whether Student has an attention disorder (P-6 pp. 1, 2) and did not report the scores on the BRIEF at all, a significant lapse, considering that there were a number of scores indicating ADHD as elevated to significantly elevated. (P-9, pp. 37—44) The school psychologist did not discuss the results of the BRIEF at all, much less the effect, if any, the moderately to significantly elevated ratings may have had on interpreting the inconclusive results of the CPT. It is important to note that the CPT results did not rule out a diagnosis of ADHD, but just made the diagnosis "too close to call" on that basis alone. Had the school psychologist truly considered the results of the BASC-2 ratings from both of the other teachers, as well as the BRIEF ratings from the math and the English teacher, he may well have concluded that those results tipped the ADHD balance from inconclusive to likely.

Moreover, although the teachers who completed the rating scales in 2010 did not identify as many serious issues as the teachers from the prior year, having a full analysis of the problems identified by those teachers in the 2009 report might have prompted the District to revisit the

eligibility question when Student's classroom avoidance behaviors arose in the second half of the 2010/2011 school year. (FF 46, 47)

In the final analysis of the record, however, the question whether the District should have identified Student as IDEA eligible in the OHI category carries no real substantive weight, for two reasons. First, the 2009/2010 school year was an overall success for Student, both academically and behaviorally, without either accommodations or specially designed instruction. (FF 45) For that reason, Student is entitled to no award of compensatory education for the 2009/2010 school year.

Adequacy/Appropriateness of §504 Service Agreements

Had Student continued on the same path during the entire 2010/2011 school year, the District's position that Student was not IDEA eligible, and, indeed, had no disability at all and, therefore, no educational needs arising from a disability might have prevailed. Although Student had early academic issues during the school year, Student still did nearly as well academically, ending the 2010/2011 school year with a GPA just a bit lower than the prior year, but still solidly average, and by the PowerSchool notations, the academic concerns seem to have been resolved during the first half of the school year. (FF 46)

Beginning in February 2011, however, behaviors directed toward avoiding classes and demonstrating a declining willingness to follow school rules increased and appear to have continued through the beginning of the 2011/2012 school year. The District's response, through revision of Student's §504 Plan was inadequate. Simply adding an escort, and then removing that support after a few months did nothing to address the reasons that the behavior arose and persisted and provided no means for reducing the behaviors. At the time the District realized that extra support was needed, the District should have either re-visited the question of IDEA

eligibility or addressed the issue through a more detailed and effective §504 Plan. The District should have conducted a Functional Behavior Analysis as a first step and should have implemented the recommendation for counseling services included in the District's February 2009. Without taking some action of that type, it is possible that Student's problem behaviors continued and increased, although that cannot be known for certain since the evidence stopped at the end of the first quarter of the 2010/2011 school year.

The District's own evaluation data provides ample support for the conclusion that it should have provided a more detailed §504 Plan beginning in February 2011 to at least attempt to address Student's behaviors, and certainly to explore, through counseling or instruction, whether teaching Student strategies for organization and increasing focus and attention would have improved the situation.

The District, therefore, will be ordered to conduct an FBA and add services to Student's §504 Plan if Student's class cutting behaviors and tardiness were not resolved by the end of the 2011/2012 school year and/or if the behaviors recur or persist during the beginning of the 2012/2013 school year. Student will also be awarded one hour of compensatory education for counseling or other services directed toward behavior support or addressing Student's organization, focus and attention issues from the first week of February 2011 through the end of the 2010/2011 school year and for the 2011/2012 school year.

ORDER

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

1. Before the beginning of the 2012/2013 school year, convene a §504 team to address Student's [name redacted] needs for behavior support and/or

services to address organization, focus and attention needs. The team's consideration shall include, at a minimum, conducting an FBA unless the team determines, after reviewing the entire 2011/2012 school year that there are no current behavior issues that need to be addressed. The team shall also consider, at a minimum, services such as counseling and/or instruction in organizational strategies and strategies to address focus and attention in the classroom.

2. Provide Student [name redacted] with one hour of compensatory education for every full or partial week that school was in session from February 1, 2011 through the end of the 2010/2011 school year and from the first through the last week of the 2011/2012 school year. The compensatory education services shall be used to provide services, other than an FBA, describe in the first paragraph of this order.
3. Convene a §504 tem meeting no later than October 5, 2012 to consider the same services described in the first paragraph of this order and determine whether any changes or additions need to be made to any service put in place for the upcoming school year.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

August 15, 2012