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

Child's Name: C.S.

Date of Birth: [Redacted]

Dates of Hearing:

February 27, 2012
March 6, 2012
March 7, 2012
March 19, 2012
April 4, 2012

CLOSED HEARING

ODR Case # 2786-1112AS

Parties to the Hearing:	Representative:
Moon Area School District 8353 University Boulevard Moon Township, PA 15108	John Rushford, Esquire Dodaro, Matta & Cambest, P.C. 1001 Ardmore Boulevard Suite 100 Pittsburgh, PA 15221
Parents	Edward Feinstein, Esquire 429 Forbes Avenue Allegheny Building/17th Floor Pittsburgh, PA 15219
Date Record Closed:	April 26, 2012
Date of Decision:	May 15, 2012
Hearing Officer:	Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (hereinafter "student") is a [late teen-aged] student residing in the Moon Area School District ("District") who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA") and Pennsylvania special education regulations ("Chapter 14").[1] Specifically, the student has been identified as a student as having an other health impairment.

Parents allege that numerous procedural and substantive errors and omissions over the course of the 2010-2011 school year denied the student a free appropriate public education ("FAPE") and specifically led to a series of events where the student was ultimately enrolled, by the parties' mutual agreement, in a private placement for the 2011-2012 school year. Parents claim that the private placement, however, has been inappropriate. As a result of those denials of FAPE, parents claim a remedy of compensatory education. Additionally, parents make claims that the student was denied FAPE under the provisions of Section 504 of the Rehabilitation Act of 1973 ("Section 504"),[2] as well as claims that the

[1] It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.164.

[2] It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.10 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for the protection of "protected handicapped students".

student suffered discrimination, prohibited by Section 504, as a result of the student's disability status.

The District counters that the student was provided with FAPE in the 2010-2011 school year and has been provided with FAPE in the 2011-2012 school year. The District also argues that it met its obligations under Section 504.

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

ISSUES

Was the student provided with FAPE during the 2010-2011 school year?

Was the student provided with FAPE during the 2011-2012 school year?

If the answer to either, or both, of the foregoing questions is "yes", is compensatory education owed to the student?

What, if any, remedy is owed to the student for alleged violations under Section 504?

FINDINGS OF FACT

1. In the summer of 2010, the student relocated to the District from another state. (School District Exhibit ["S"]-13).

2. Parents testified that the student received services under a Section 504 plan in the other school district but did not qualify under IDEIA. Nothing in the record indicates, however, that the student had any programming in the other school district. (S-12, S-13; Notes of Testimony ["NT"] at 418-421, 583-588).

3. The student had been previously diagnosed with attention deficit hyperactivity disorder ("ADHD"), obsessive-compulsive disorder

("OCD"), and oppositional defiant disorder ("ODD"). Additionally, the student had been identified as having social skills deficits. (Parents' Exhibit ["P"]-4; NT at 245-248).

4. In late August 2010, at a meeting with the student's school counselor at the District, parents shared this information with the District. Upon enrolling at the District, however, the District did not receive information regarding the student's programming for disabilities from the other school district. (S-12, S-13; NT at 418-421, 583-588).

5. At these late August meetings, parents requested an evaluation of the student. The principal of the school indicated that the student would need to wait to be evaluated, although on August 25, 2010, the District issued to parents a procedural safeguards letter, outlining the parents' rights under IDEIA. Included on this letter, the school counselor had written the names and phone numbers of local mental health providers for the parents to investigate. (P-35; NT at 249-253).

6. On September 21, 2010, the District provided parents with an evaluation request form, returned to the District on September 27, 2010. On October 1, 2010, the District provided parents with a consent form, seeking permission to evaluate ("PTE") the student based on the parents' September 21st request. On October 8, 2010, the parents returned the PTE, granting permission to evaluate the student. (S-9, S-10).

7. On October 5, 2010, contemporaneously with the exchange of evaluation paperwork, the student was involved in a disciplinary incident. Another student had reported that the student had threatened other students and [redacted]. The student was reprimanded for the remarks. (P-1, P-2; S-4).

8. As a result of the October 5th incident, the student was referred to a District student assistance program. As a result of this program, the student liaised with a retired District teacher. (P-1, P-2; S-15, S-16; NT at 260-263, 592-594).

9. On October 28, 2010, as part of the student assistance program, the student met with a mental health clinician from an outside agency with whom the District contracts for services. As a result of the student's interview with the clinician, the clinician voiced concerns to the District administration about the student's mental health status. Nothing in the record indicates that the student

made any threat or acted in any violent way on October 28th. (P-32; NT at 263-265, 423-435, 600-603).

10. The principal demanded that the student be removed from the school that day and barred the student from returning until parents provided psychiatric documentation that it was safe for the student to return to school. (NT at 263-268, 270-272, 423-426, 600-603).

11. The student was marked with "excused absence" on October 29th and November 1st. At great effort and expense, the parents obtained a letter, as requested, from a Pennsylvania-licensed psychiatrist, and the student was re-admitted to the school on November 2, 2010. (P-3, P-4, P-33; S-5; NT at 263-268, 270-274, 424-426).

12. Even though the District's evaluation process was underway at that point, the District school psychologist was not notified in detail of the events of October 28th. (NT at 555, 561-563).

13. On December 7, 2010, the District issued its initial evaluation report ("ER"). There was no meeting of the multi-disciplinary team. Instead, the school psychologist presented the evaluation team participation signature page to the student's mother at home. The student's mother signed the participation page and returned it by mail to the school counselor. The signature page was then circulated at the District for signatures of the school psychologist, regular education teacher, school counselor, and assistant principal. (P-5; S-11; NT at 430-432).

14. The December 2010 ER indicated that the student had behavioral concerns, made reference to the October 28th incident, indicated that the student's OCD would sometimes lead to anger or peer conflict at the previous school, and was observed as being very disengaged and showing no interest in a regular education class. (P-5 at page 7).

15. The December 2010 ER contained Behavior Assessment System for Children (2nd edition) ("BASC") scores. On the parents' BASC results, the student showed scores of significant concern across the externalizing, internalizing, and adaptive skills composites. On the student's BASC self-report, the student showed scores of significant concern across the emotional symptoms index, the internalizing and inattention/hyperactivity composites, and in personal adjustment. The student showed an at-risk score in the school problems composite. The school psychologist did not seek

BASC results from teachers or any school-based personnel. (P-5 at pages 7-8).

16. The student was identified as a student with health impairments as a result of ADHD and OCD. (P-5 at page 9).

17. The December 2010 ER recommended: "Social and behavioral considerations seem to be of most impact and would likely require behavioral support and monitoring. Further data collection in the form of a (functional behavior assessment) would be beneficial in defining behavioral goals and appropriate strategies." (P-5 at page 9).

18. On January 11, 2011, the student's individualized education plan ("IEP") team met to draft the student's IEP. (P-6).

19. In the January 2011 IEP, the IEP indicates that the student exhibits behaviors that impede the student's learning or that of others, thereby requiring a positive behavior support plan ("PBSP") based on a functional behavior assessment ("FBA") of the student's behavior. (P-6 at page 5).

20. The District never conducted a FBA or developed a PBSP. (P-6; NT at 544-546).

21. The January 2011 IEP contains three goals: a goal in algebraic concepts in mathematics[3], self-monitoring skills to allow the student to seek support when needed, and self-advocacy skills to notify school personnel the student requires assistance. None of the goals have baselines and, as written, the goals are unmeasurable. (P-6 at pages 14-16).

22. The January 2011 IEP also provides for mental health services once weekly for 30 minutes. This mental health counseling was provided by the outside agency which was also providing mental health services under the student assistance program. (P-6 at page 19).

23. On March 8, 2011, the student was reprimanded for [redacted]. (S-4).

[3] The student did not qualify as a student with a mathematics disability. The student was enrolled in a math class, however, which was particularly challenging for the student. As a result of struggles in mathematics, a goal and program modifications were developed by the IEP team. (P-5, P-6).

24. On May 10, 2011, an incident occurred that had far-reaching impact on the student, the student's family, and the District.

25. As part of the student weekly therapy, the student kept a notebook. The notebook contains [redacted]. On May 10th, students informed school administrators of the notebook's content, and the student was summoned to a meeting with school administrators. (P-14; NT at 119-129, 288-290).

26. The student was questioned over a span of hours by school administrators and community police. [Redacted]. (P-36; S-20; NT at 646-647)

27. During questioning in a school conference room, where administrators left the student alone with the notebook, the student attempted to destroy the [contents]. (S-20; NT at 125, 617, 767-768).

28. Some scraps were retrieved from a waste basket in the conference room, and District witnesses testified uniformly that the [content] did not come into the possession of the District but was, instead, taken by community police. (S-20; NT at 646-647, 766-774).

29. Upon detailed examination of the therapeutic notebook kept by the student, [redacted]. Still, even in this context, the contents of the notebook are explicitly threatening and violent. (P-14).

30. Eventually, the student's parents were called to the school, and, at the request of community police, the student was removed by parents to a local hospital for a mental health evaluation. The hospital indicated that the student was not a threat. Under threat of arrest, however, community police insisted that the student be transported by ambulance from the hospital to a residential mental health facility. (NT at 292-295, 297-299.)[4]

[4] While the student was at the hospital, before being transferred to the residential mental health facility, community police searched the family's home. Evidently, written materials were removed. At the outset of the hearing, those writings (S-1) were purported to be the notebook materials taken by the District at the May 10th incident. District witnesses clarified, however, that the notebook at the center of the May 10th incident is at P-14. How the materials at S-1 came into the possession of the District, or how the District came to understand that S-1 represented the notebook at the center of the May 10th incident, is unclear. Therefore, while S-1 is an exhibit of record, it was not reviewed by this hearing officer as testimony clearly established that the writings at S-1

31. In the early morning hours of May 11, 2011, the student was admitted to the residential mental health treatment facility. The student remained there until May 16, 2011. Two psychiatrists at the mental health facility opined in a letter indicating that the student did not exhibit risk factors for violent youth. Under threat of the student's arrest by community police upon discharge from the facility, the parents acquiesced to the request of community police and the student was removed by community police in handcuffs for transportation to a juvenile justice facility. (P-16; NT at 299-301, 304, 440-444).

32. On May 19, 2011, the District held a manifestation determination hearing. Parents did not attend because a juvenile court hearing was held on the same date as the manifestation determination hearing. When parents called in to participate in the manifestation determination hearing by telephone, parents were informed that the manifestation determination hearing had already concluded without their participation. (P-11, P-12, P-13; NT at 307).

33. The manifestation determination hearing resulted in a finding that the May 10th incident was not a manifestation of the student's disability. The District intended to pursue expulsion proceedings. (P-13; NT at 307-308).

34. The student was held at the juvenile justice facility for 35 days, approximately May 16th to June 20th. (NT at 304).

35. The student was released from the juvenile justice facility to a second residential mental health facility for 28 days, approximately June 21st to July 19th. (P-23; NT at 304-305).

36. On or about July 19, 2011, the student was released by the juvenile justice system to home detention with multiple daily check-in phone calls and weekly in-person visits. (NT at 305-306).

37. On August 19, 2011, parents prepared a letter indicating that the student had recently obtained a diagnosis of autism-spectrum disorder and mood disorder and, therefore, parents requested a re-evaluation of the student. (P-24; NT at 189-190, 307-309).

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were not generated in school or reviewed by District administrators as part of the May 10th incident. (See NT at 114-129).

38. On August 22, 2011, the District held an expulsion proceeding. On the same day, parents emailed the request for re-evaluation to the District superintendent and director of special education, and faxed a copy of the letter to counsel for the District. The student's juvenile justice liaison also faxed a copy of the letter to counsel for the District. In the parents' opening statement at the expulsion hearing, parent reiterated a request for a re-evaluation. Based on this request, the expulsion hearing was postponed to September 12, 2012.(P-24; NT at 189-191).

39. On September 7, 2011, the parents obtained a letter from the student's treating psychiatrist that the student had been diagnosed with autism spectrum disorder and mood-disorder/not otherwise specified. (P-24).

40. Also on September 7, 2011, the parents and the District entered into an agreement in settlement of a complaint at 2242-1112AS regarding claims that the manifestation determination process in May 2011 was flawed. The settlement included provisions, *inter alia*, that the parties agreed to a private placement outside the District, that the District would not pursue expulsion proceedings, and that the student was barred from attending the District/from being on school grounds/attending school functions in the future. (S-2).[5]

41. On September 23, 2011, the student's IEP team met to draft the student's IEP for the private placement. (S-17).

42. The September 2011 IEP contained four goals: one for career/vocational exploration, one for socialization, one for appropriate communication, and one for classroom attention. (P-17 at pages 19-22).

43. The September 2011 IEP addresses the student's counseling and behavior support needs. (P-17).

44. On January 18, 2012, the student was punched by another student at the private placement. Thereafter, the student declined to attend the private placement. (S-7 at page 4, S-19).

[5] This complaint, at 2786-1112AS, is a companion complaint to the complaint settled at 2242-1112AS wherein parents are pursuing the issues outlined above, namely claims of denial of FAPE, claims not addressed in the parties' settlement of September 2011.

45. On January 31, 2012, the District sought permission to evaluate the student at the request of the parents, permission which the District received on February 13, 2012. (S-8).

46. In February 2012, the student's IEP team met to address issues related to the student's program at the private placement. The student returned to the private placement on a Tuesday-Thursday schedule. (S-7 at page 3; NT at 704-707).

47. Ultimately, before the juvenile justice tribunal, a consent decree was entered into. Under the terms of the consent decree, the student had a curfew; there were limitations on contact with students from the District; and a requirement for schooling and/or employment. There was no admission of guilt to any crime or adjudication of delinquency. The consent decree was in force until April 2, 2012. (NT at 306-307).

DISCUSSION AND CONCLUSIONS OF LAW

Provision of FAPE

To assure that an eligible child receives a FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). 'Meaningful benefit' means that a student's program affords the student the opportunity for "significant learning" (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

In this case, the District has failed to provide FAPE to the student.

Evaluations. District's evaluation processes have, almost uniformly, failed in the role those evaluations should play in the delivery

of special education. Parents testified credibly that, from the very outset of their communication with the District in late August 2010, they were interested in an evaluation process under the IDEIA. (FF 5). The parents were given procedural safeguards but, in effect, left to fend for themselves with contact phone numbers for community mental health services; the principal of the school explicitly turned down any notion that the District would seek parents' permission to evaluate the student, and that permission was not sought for nearly an entire month until late September 2010. (FF 5, 6).

The December 2010 ER is inappropriate. While the ER speaks to the importance of understanding and programming for the student's behavior, the ER fails to provide data in that regard. Especially lacking is any BASC rating, or other assessment, of the student's in-school behavior by teachers, especially in light of the extremely troubling ratings given on the parents' assessment and the student's self-report. (FF 15). In October 2010, with the evaluation process in full swing, the District evaluator had no sense of the details or magnitude of the incident which was rooted in a therapeutic assessment of need and consequent exclusion pending psychiatric evaluation. (FF14). Finally, it is this hearing officer's conclusion that, given this student's profile in the fall of 2010, the data the District was collecting (albeit incomplete), and the ultimate conclusions regarding the student's social and behavioral

needs, to forego a multi-disciplinary team meeting and simply circulate the ER's signature page is a prejudicial procedural error. (FF 13, 16, 17).

Likewise, in August 2011, after the profound consequences of the May 2011 incident and on the eve of an expulsion hearing, the parents' request for a re-evaluation was ignored. (FF 37, 38, 39). The evidence of parents and the juvenile court liaison is quite credible that, as of August 22, 2011, the District knew that the parents had requested a re-evaluation and that the student had, for three months, been in residential mental health facilities or a juvenile justice facility. Yet the District did not seek permission to evaluate the student until January 31, 2012. (FF 37, 38, 45).

Accordingly, an award of compensatory education will be ordered.

*IEP*s. The January 2011 IEP is inappropriate. Even given the flaws in the December 2010 ER, there is no doubt that the student's social and behavioral issues, and overall school affect, were the sole needs to be addressed. (FF 15, 16, 17). The January 2011 IEP recognizes this as a special consideration; yet no FBA was undertaken and no PBSP was drafted. (FF 17, 18, 19, 20). And the goals in the January 2011 IEP are wholly inappropriate. The goals are poorly drafted and unmeasurable, not surprising in the light of the ER and lack of an FBA/PBSP process. (FF 21).

The September 2011 IEP, however, being implemented in the private placement is appropriate. The necessary elements for the student's educational needs are addressed in that document. (FF 41, 42, 43). And even though the period after January 2012 at the private placement has been rocky, the record supports a finding that the student has received FAPE under the terms of the IEP. (42, 43, 44, 45, 46).

Accordingly, an award of compensatory education will be ordered for the denial of FAPE under the January 2011 IEP.

Compensatory Education

Where a school district has denied a student a FAPE under the terms of the IDEIA, compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEIA. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE. (Ridgewood; M.C.). The U.S Court of Appeals for the Third Circuit has held that a student who is denied FAPE "is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." (M.C. at 397).

Here, compensatory education will be awarded for (1) the District's handling of the parents' evaluation request in August 2010, (2) the inappropriateness of the December 2010 ER and lack of a multidisciplinary team meeting, (3) the inappropriateness of the January 2011 IEP, and (4) the District's handling of the parents' evaluation request in August 2011.

The awards of compensatory education are as follows:

Equitably, an award will be made for 2 hours each school day between August 25, 2010 and September 21, 2010, the period where the District refused to coordinate with parents in beginning an evaluation process, or 32 hours.[6] Equitably, an equal amount of hours will be awarded for the ultimately inappropriate December 2010 ER issued by the District, or 32 hours. Equitably, an award will be made for 2 hours each school day between January 12, 2011 and May 9, 2011, or 160 hours. Equitably, an award will be made for 2 hours each school day from August 22, 2011 and January 31, 2012, or 200 hours.[7]

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of the

[6] The calculations where school days are used in the 2010-2011 school year are based on the school calendar at P-31. While testimony indicated that certain school days were lost in that school year to a teacher work stoppage, those days will not be excluded from the equitable calculation.

[7] A similar school calendar for the 2011-2012 school year is not an exhibit of record. Therefore, this equitable calculation is as follows: August to January is approximately half of the 180 day school year, or 90 days; because the end-date is January 31st, however, this 90-day figure has been brought up to 100 days to reflect the movement toward into the second half of the school year.

student's current or future IEPs. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education, either hourly or as the result of a lump sum settlement, must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

An award of compensatory education, as fashioned above, will be made part of the order.

Discrimination under Section 504

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) he is disabled or has a handicap as defined by Section 504; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at the

school; and (5) the school or the board of education knew or should be reasonably expected to know of her disability. Ridgewood; W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

In the instant case, there is no dispute that the student is disabled and is otherwise qualified to participate in school activities; the District knows and acknowledges that the student is disabled. While not made an explicit matter of proof in this case, it is a near certainty that federal funding flows to the District.

Thus, the legal determination to be made is whether the student "was excluded from participation in, denied the benefits of, or subject to discrimination at the school". There is no dispute that the student is disabled and is otherwise qualified to participate in school activities; the District knows and acknowledges that the student is disabled. While not made an explicit matter of proof in this case, it is a near certainty that federal funding flows to the District.

Thus, the legal determination to be made is whether the student "was excluded from participation in, denied the benefits of, or subject to discrimination at the school". Here, I find that the student was subject to discrimination as the result of the student's disabilities.

First, the actions of the building principal in the fall of 2010 are discriminatory. The principal initially interfered with the process of obtaining an evaluation. (FF 5). Thereafter, following the October 28, 2010 incident, the principal unilaterally barred the student from the

school building. (FF 9, 10, 11). The student was thought-to-be-eligible and was undergoing a District evaluation process. And the student was not suspended, or disciplined; the student was simply told not to return to school until unilateral conditions laid down by the principal were met. (FF 10, 11, 12). The student was excluded from school, denied the benefits of an appropriate education/educational processes, and was the subject of discrimination, all on the basis of the student's disabilities.

Second, even though the manifestation determination process was not at issue in this matter (FF 40), the District's convening of the hearing without the parents on May 19, 2011 was a deliberately indifferent act. (FF 32).

Third, the District's refusal, again, to engage in a re-evaluation process until late January 2012 after the parents' request of August 2011 was a deliberately indifferent act. (FF 37, 38, 39, 45).

Accordingly, there are multiple instances on this record where the District engaged in the exclusion of the student from school, denied the student the benefits of an appropriate education and subjected the student to discrimination, based on the student's disabilities. At critical junctures where the District had the obligation of appropriately handling of the student's educational program, the District engaged in deliberately indifferent behavior that led to the failure of those obligations under Section 504.

A Final Note. The record in this matter brings to a point two competing mandates in the educational environment: the need to maintain a safe school environment and the need to treat students with disabilities, even complicated disabilities, with fairness. This hearing officer has great sympathy for the position the District found itself in. To read the student's therapeutic notebook is to encounter shock [redacted]. (FF 25, 29). Yet the record taken as a whole indicates that, wherever the District had a choice in programming for the student, the District mostly failed in its obligations and well before health/safety became any part of the mosaic involving this student. (FF 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 21, 32, 37, 38, 39, 45). Even as one reads the therapeutic notebook, balanced against legitimate health and safety concerns must be a recognition that those writings are surfacing out of a disability.

CONCLUSION

The District denied the student FAPE in its handling of multiple evaluation processes. The District denied the student FAPE with the January 2011 IEP. The District subjected the student to discrimination in violation of Section 504.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is entitled to 424 hours of compensatory education, as outlined above.

Additionally, as set forth above, it is an explicit finding that the Moon Area School District subjected the student to discriminatory treatment as a result of the student's disability in violation of Section 504 of the Rehabilitation Act of 1973.

Any claim not specifically addressed in this decision and order is denied.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

May 15, 2012