DECISION

COVER SHEET

DUE PROCESS SPECIAL EDUCATION HEARING

FILE NUMBER:	2967/11-12KE
RESPONDENT/SCHOOL DISTRICT (LEA):	Warrior Run School District
SCHOOL DISTRICT COUNSEL:	Sharon Montanye, Esquire
STUDENT:	A.P.
PARENT:	Parent
COUNSEL FOR STUDENT/PARENT	Phillip Drumheiser, Esquire
INITIATING PARTY:	Parent/Student
DATE OF DUE PROCESS COMPLAINT:	March 20, 2012
DATE OF HEARING:	May 23 and 24, 2012
PLACE OF HEARING:	School District Offices
OPEN vs. CLOSED HEARING:	Closed
STUDENT PRESENT:	No
RECORD:	Verbatim-Court Reporter
DECISION TYPE:	Electronic
DUE DATE FOR DECISION:	July 23, 2012
HEARING OFFICER:	James Gerl, Certified Hearing Official

DECISION

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PRELIMINARY MATTERS

Prior to the hearing, Respondent challenged the sufficiency of the Complaint. In an Order dated April 2, 2012, said motion was denied. Said Order is incorporated herein by reference.

Also prior to the hearing, Respondent filed a motion to compel participation by the student in the resolution meeting. In response thereto, Petitioner filed a motion for default judgment with regard to the timeliness of the resolution meeting. Both motions were denied in an Order dated April 12, 2012, which is incorporated by reference herein.

Each party herein filed one motion to extend the hearing officer's decision deadline. Both motions were unopposed. Both motions were granted. As a result of the second motion to extend decision deadline, the deadline for the hearing officer's decision is July 23, 2012.

A prehearing conference by telephone conference call was convened for this matter on April 4, 2012. As a result of said conference, a prehearing conference order was entered herein. Said Order is incorporated herein by reference.

On May 7, 2012, counsel for the parties filed a joint prehearing memorandum. Such memorandum contained numerous stipulations of fact, and it defined the issues presented for purposes of this due process hearing. Said memorandum also contained information concerning exhibits and witnesses.

Subsequent to the hearing, both parties filed written briefs and proposed findings of fact. All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

Personally identifiable information, including the names of parties and similar information is provided on the cover sheet hereto which should be removed prior to

distribution of this decision to the public. FERPA, 20 U.S.C. § 1232(g) and IDEA § 617(c).

ISSUES PRESENTED

The issues presented in this due process hearing, as identified by the parties in the prehearing conference and confirmed in their joint prehearing memorandum, are as follows:

1. Is the student eligible for special education services as a child with a disability under the Individuals with Disabilities Education Act?

2. Is the student eligible for services pursuant to Section 504 of the Rehabilitation Act?

3. If the student is eligible under IDEA, should [the student] receive compensatory education from Respondent?

4. If the student is eligible under Section 504, should [the student] receive compensatory education from Respondent?

FINDINGS OF FACT

Based upon the parties' stipulations of fact as contained in their joint prehearing memorandum, the hearing officer makes the following findings of fact:

1. The student is a student in Respondent's school district and [the student's] date of birth is [redacted] (Stip-1). (References to stipulations of fact in the parties' joint prehearing memorandum are hereby referenced as "Stip-1," etc.).

2. The student had a grade point average of 89 in grade 5, a GPA of 84.16 in 6th grade, a GPA of 85.7 in 7th grade, a GPA of 79.7 in 9th grade, and a GPA of 79.7 in 10th grade. (Stip-2)

3. On January 29, 2009, while in 8th grade, the student was suspended for three days for behaving in an unreasonable manner for [redacted]. (Stip-3)

4. On February 12, 2010, when in 9th grade, the student had a[n] accident [redacted]. (Stip-4)

5. The student returned to school following [the] February 12, 2010 injury on February 22, 2010. (Stip-5)

6. The student's mother provided the school district with the Discharge Instruction Summary from the student's hospitalization dated February 13, 2010 which prohibited gym class and sports or other activities [redacted]. A

recommendation for follow-up in two weeks with the trauma clinic and a pediatric neuropsychological evaluation was included in the discharge summary. (Stip-6)

7. On March 3, 2010, a neuropsychology fellow at the hospital where the student was hospitalized wrote a letter that the student was cleared to return to school. (Stip-7)

8. On October 26, 2010, while in 10th grade, the student was [injured twice]. (Stip-8)

9. The student had an appointment with a doctor on October 29, 2010. The doctor gave [the student] a certificate to return to school on November 1, 2010, which included a note not to participate in contact sports. (Stip-9)

10. Another doctor wrote a letter on November 5, 2010 which recommended accommodations for school. (Stip-10)

11. On November 15, 2010, the same doctor as in paragraph 9 wrote a letter recommending homebound instruction for the student until further evaluation by neurology. (Stip-11)

12. On November 18, 2010, a pediatric neurologist at the hospital where the student had previously been hospitalized wrote a letter recommending for the student to have half days at school, combined with homebound instruction. (Stip-12)

13. On December 2, 2010, a representative from the intermediate unit gave a presentation to teachers and staff at Respondent concerning brain injury. (Stip-13)

14. On December 17, 2010, the student hit another student [redacted]. (Stip-14)

15. On December 20, 2010, the parent sent a written request to the school requesting that the student be evaluated. (Stip-15) (NOTE: There is a typographical error in Stipulation No. 15 on the parties' joint prehearing memorandum concerning the date. See P-26.)

16. Respondent issued a Permission to Evaluate form on December 21, 2010. The parent signed said form on December 27, 2010 and returned it to the school on January 5, 2011. (Stip-16) (There appears to be a typo in one of the dates in the stipulation contained in prehearing memorandum. See the inconsistencies in the dates contained in the stipulation and see R-14.)

17. On or about December 17, 2010 to December 22, 2010, the student was hospitalized in a psychiatric ward at a hospital. (Stip-17)

18. The student began receiving homebound instruction on or about December 28, 2010. (Stip-18)

19. On or about January 3, 2011, the student received a neuropsychological evaluation to determine if [the student] had any neurocognitive weaknesses relative to the return to play and return to school decision making. (Stip-19)

20. Said neurological evaluation referenced a report that a CT scan was completed [redacted] in October of 2010 and that the results of the CT scan were normal. (Stip-20)

21. On or about January 15, 2011 to January 20, 2011, the student was hospitalized at a psychiatric hospital. (Stip-21)

22. Respondent completed a Report of Psychoeducational Evaluation dated February 24, 2011. (Stip-22)

23. Respondent completed an Evaluation Report dated February 25, 2011. (Stip-23)

24. Respondent's February 25, 2011 evaluation did not find the student eligible for services in special education. (Stip-24)

25. The February 25, 2011 evaluation also did not find that the student qualified for a § 504 service agreement. (Stip-25)

26. The school district approved an independent educational evaluation to be completed by a school psychologist selected by the parent. (Stip-26)

27. On February 24, 2011, the student applied for a working permit to obtain a job as a lifeguard [redacted]. (Stip-27)

28. On June 20, 2011, a neurological assessment was completed at Children's Development Center by a clinical neuropsychologist. (Stip-28)

29. On July 1, 2011, a psychologist wrote to Respondent recommending that the student be permitted to participate in summer recreational activities. (Stip-29)

30. In October 2011, there was an incident where another student was receiving threatening text messages from the student's account. [Redacted]. (Stip-30)

31. Respondent sent the parent a Request to Evaluate form on November 29, 2011. The parent signed and returned the permission form on January 3, 2012. (Stip-31)

32. Respondent completed a second evaluation of the student on February 28, 2012. (Stip-32)

33. On January 6, 2012, Respondent received the independent educational evaluation report from Petitioner's expert school psychologist which included Woodcock-Johnson age normed and grade normed sheets. (Stip-33)

34. Respondent's February 28, 2012 evaluation did not support the finding of the independent educational evaluation of a specific learning disability in written expression or math, nor that the student qualified for special education services or a 504 plan under health impairment or emotional disturbance. (Stip-35) (Note, Stipulation No. 34 duplicates Stipulation No. 32 in the prehearing memorandum.)

35. Petitioner filed the instant due process complaint on March 20, 2012. (Stip-36)

36. Petitioner amended their complaint to limit claims for compensatory education to two years prior to March 20, 2012. (Stip-37)

Based upon the evidence in the record, the hearing officer makes the following findings of fact:

37. The student's parent provided a written doctor's note to the Respondent on June 1, 2010 providing full clearance for the student to return to sports competition after [the February 2010] accident. (R-29) (References to exhibits shall hereafter be referred to as "P-1," etc. for the Petitioner's exhibits; "R-1," etc. for the respondent's exhibits and "HO-1," etc. for the hearing officer exhibits; references to testimony at the hearing is hereafter designated as "T".)

38. The student's mother provided Respondent with a doctor's note permitting the student's return to full sports competition on February 16, 2011 following the [October 2010] accident[s]. (R-16)

39. The student had a grade point average of 85.7 while [the student] was in 8th grade at Respondent. (R-1)

40. In 11th grade, the student attained a grade point average of 78.1. (R-4)

41. The student is an average student. [The student] makes passing grades in [the student's] courses, and [the student] makes educational progress in [the student's] classes. [The student] does about as well in [the student's] classes as the

other students do. (R-2, R-3, R-4; T of the student's 9th grade world culture teacher, who is the same person as [the student's] 11th grade American history honors teacher; T of the student's English teacher; T of the student's Spanish teacher; T of the student's anatomy teacher; T of the student's physics teacher)

42. There was no significant change in the student's grades before and after [the student's] two [redacted] injuries. There was also no substantial change in the student's attitude, attendance and behaviors from the period before the two [redacted] injuries to the period after said injuries. (R-2, R-3, R-4; T of Respondent's school psychologist; T of the student's 9th grade world culture teacher, who is the same person as [the student's] 11th grade American history honors teacher)

43. The student made passing grades while [the student] attended the cyber school. The cyber school was administered by a vendor that contracted with Respondent. The vendor had different grading policies than those employed by the Respondent. The cyber school's grading policy assigned different weights to midterm and final exams than the school district's policy assigned. When converted using the appropriate grading policies of the Respondent, the student received passing grades while attending the cyber school. (T of Respondent's director of curriculum and instruction; R-3)

44. The student was frequently absent from class. During the 2009-2010 school year, [the student] was absent a total of 27.5 days. During the 2010-2011

school year when [the student] was in 10th grade, the student was absent a total of 54.5 days. During the 2011-2012 school year when the student was in 11th grade, [the student] was absent a total of 26.5 days. The student's mother received notices from Respondent that the student's absences were excessive. The excessive number of absences affected the student's academic performance. Taking the absences into account, the student made substantial academic progress in [the student's] classes when [the student] was present. (R-2, R-3, R-4; T of the student's mother; T of all of the student's teachers who testified)

45. Respondent makes substantial efforts to identify students with disabilities. Approximately every four to six weeks, a meeting is held with guidance counselors, teachers and administrators concerning any behavioral or academic concerns that might indicate that a student has a disability. At the beginning of each school year, Respondent conducts a child find training and a confidentiality training. (T of Respondent's special education director)

46. Upon being discharged after [the student's] hospitalization from December 17, 2010 to December 22, 2010, the hospital issued a Discharge Instruction Summary. On the first page of the summary, under Brief Summary of Inpatient Care, the discharge instruction directed to the student states as follows, "You acted out before you came into the hospital. You were admitted to the inpatient psychiatric unit in order to see if there was a medical or psychiatric cause for the behavior. There is

not. Therefore you were discharged." Under Special Instructions, the discharge instruction summary states as follows, "In order to get the respectful and fair treatment that you want, treat your teachers and parents with respect and consideration. A bad attitude will generate a negative response. The sooner that you learn this, the easier your life will be. Obey the law or you will go to jail." The discharge summary from the same hospitalization states that a neurology consult indicated no additional medical problems. Although the student had sustained a[n injury] earlier, the discharge summary concludes that [the student] has no acute symptoms related to the [injury]. The report notes that it is too early to give the student a serious psychiatric diagnostic label. The report notes that [the student's] providers at the hospital concluded that [the student] is responsible for [the student's] own behavior and that [the student] should be accountable for [the student's] choices. The report recommends that the student be held accountable for [the student's] behavior in the same manner as other students, and that it is important for the student not to blame others but to take responsibility for [the student's] own behavior. (R-11)

47. On January 3, 2011, the student was evaluated by a neuropsychologist. Said report finds the student's academic abilities generally within the average range. Said report finds that the student's memory is within normal limits for [the student's] age. The evaluation found that the student presented no evidence of major depressive episode, bipolar disorder or psychoses. The evaluator concluded that the student

showed little evidence of irritability except when [the student] was around [the student's] mother. The report of the evaluator concludes that the student's general intellectual abilities are within the average range and that [the student's] academic skills are within normal limits, and that [the student] possesses age appropriate executive functioning, and that [the student] has verbal memory and visual memory both within normal limits. The evaluator states that the evaluation did not reveal any significant neuropsychological weaknesses and that overall data from extensive evaluation does not suggest any neuropsychiatric illness or neurological disorder to account for [the student's] behavior and that a history of two [injuries] during 2010 is noted but cannot be definitively associated with recent behavioral episodes at school. The evaluator concludes that he did not have sufficient data to make a premorbid diagnosis. He also notes that the premorbid diagnosis of [redacted] syndrome is not the same as the actual diagnosis made, and that sometimes such diagnoses are entered in the process of generating the billing. It was the recommendation of the evaluator and the student's treatment team at the psychiatric hospital that the student should be accountable for [the student's] behavior, like other students are. The evaluator notes that because the student had a physical altercation in 8th grade that it is difficult to attribute the recent physical altercation against the peer to the [redacted] injury and that further because the student is an adolescent and has multiple cumulative stressors, those are possible factors for the behavior. The evaluator does not express

an opinion concerning eligibility for special education because that is the responsibility of the eligibility team, which includes the student's parents. (P-37)

48. On February 24, 2011, the student applied for a permit to work as a lifeguard at [redacted]. (R-29)

49. Pursuant to the parent's request, the student was evaluated by Respondent on February 25, 2011. The parent submitted three and one-half pages of typewritten input pertaining to her request that the student be evaluated. The evaluation was conducted by Respondent's school psychologist. The evaluator considered the previous very thorough neuropsychological evaluation of the student conducted on January 3, 2011. In addition, Respondent's counselor conducted observations of the student during the 2009-2010 school year and the 2010-2011 school year, and [the student's] teachers conducted observations. In addition, Respondent's school psychologist administered a Kauffman cognitive assessment and the BASC, an assessment tool to measure social, emotional and behavioral needs. At the beginning of the evaluation process, Respondent's school psychologist reviewed the parent's input letter. At first, the school psychologist believed that it was an open and shut case and that the student would qualify for, at the very least, a 504 plan. Upon further review, however, Respondent's school psychologist found a number of inconsistencies and inaccuracies in the parent's letter. The parent had reported that the student's brother had been diagnosed with autism, but the Respondent had an

evaluation ruling out autism. The parent reported that the student had been on the honor roll, but the student's grades revealed that [the student] had not been on the honor roll since at least the 5th grade. Among the observations of the student considered in the report were observations by the student's geometry teacher, [the student's] history teacher, [the student's] English teacher, the school counselor and [the student's] homebound teacher. The evaluator reviewed all of the existing and newly created dated concerning the student. The evaluator concluded that the student did not meet the definitions of specific learning disability, or other health impaired or emotional disturbance under IDEA. The evaluator also concluded that the student's conditions did not substantially limit [the student's] learning as a major life activity and that there was no evidence to support the argument that the student's [redacted] injuries affected [the student's] ability to learn and that [the student] has continued to make good academic progress. The evaluator recommended family counseling and individual therapy for the student to address [the student's] depression and anger management issues and that the student's educational progress continue to be monitored. (R-14; T of Respondent's school psychologist)

50. The student's eligibility team met on February 25, 2011. Present at the eligibility team meeting were the student, the student's mother, the student's father, Respondent's superintendent, Respondent's school psychologist, Respondent's high school principal, and Respondent's special education director. The committee

determined that the student was not eligible for special education or for a 504 plan. The student and [the student's] parents disagreed with the conclusion. Respondent issued a Notice of Recommended Educational Placement, refusing to change the student's identification to eligible, on March 4, 2011. (R-14; T of Respondent's school psychologist)

51. In the spring of 2011, the Petitioner and Respondent entered into a settlement agreement. In the settlement agreement, the Respondent agreed to fund an independent educational evaluation by a school psychologist selected by the parent and to pay the copay for counseling to be provided to the student by a psychologist. The parent agreed to have the student complete the 2010-2011 school year in a cyber school program. The district agreed not to pursue disciplinary action against the student for the disciplinary infractions that occurred during the 2010-2011 school year. The parents agreed that the student would not return to regular school attendance or participate in extracurricular activities or athletics until [the student] received a safety clearance from the psychologist who was providing the counseling referred to above. The parents agreed that the student would not participate or attend any school functions until at least June 9, 2011. Although the student's mother did not sign the settlement agreement, the parents and the school district agreed to and abided by the terms of the settlement agreement. (R-19; T of student's mother)

52. On June 9, 2011, the report of a second neuropsychological assessment of the student was completed. The report of the evaluator states that no previous neuropsychological evaluations were reported. The student's parent did not share the previous neuropsychological evaluation with the evaluator. The report states that the student's mother reported that the student was making amazing progress in cyber school and that [the student] was achieving high levels of achievement. The evaluator concluded that the student was within the normal range of neurocognitive development. The evaluator determined that there was no evidence of attention deficit disorder, learning disability, developmental language delay or other cognitive processing disorder. The evaluator reported that despite reports, [the student's] overall performance appears to be well within the average range with no evidence or residual features or symptoms of a closed [redacted] injury or a structural central nervous system affects. The report notes that the student suffered a [redacted] injury in February of 2010 but was performing near normally academically by September of 2010. The report notes a slower recovery from the second [injury]. The evaluator made a diagnosis of [redacted] syndrome and adjustment reaction with mixed disturbance of emotions and conduct. The evaluator made no recommendations with regard to ability in light of test findings showing no evidence of deficits across measures of verbal, perceptual motor, lower level executive, higher level reasoning and learning/memory. The evaluator also made no academic skill recommendations

in light of neuropsychological test findings showing no risk factors in the student for reading, spelling or math disabilities. The report did recommend that the student receive cognitive behavioral therapy and that [the student] use feedback. The report also mentions the option of medication to "turn down the volume" of the stress levels. (P-60; T of student's mother)

53. On January 6, 2012, the report of the independent educational evaluation of the student prepared by the school psychologist chosen by the student's mother pursuant to the settlement agreement was issued. The evaluation was conducted on July 25 and 26, 2011 and September 15, 2011. The testing conducted by the evaluator found problems with the student's memory and executive functioning. Many of the conclusions made by the evaluator appear to be made primarily based upon information supplied by the student's mother. The evaluator did not observe the student in the classroom and the evaluator did not solicit any input from the student's teachers or other school officials. The report notes that the conclusions made by the evaluator are inconsistent with two previous neuropsychological evaluations. The evaluator concluded that the student met the IDEA eligibility categories of specific learning disability, other health impaired, and emotional disturbance. The evaluator makes numerous recommendations concerning academics, behavior and social functioning. (P-67; T of Petitioner's school psychologist)

54. Respondent's school psychologist completed a second evaluation of the student on February 28, 2012. The evaluator considered the independent educational evaluation of Petitioner's school psychologist in detail. In addition, the evaluator does a detailed analysis of the second neuropsychological evaluation of the student. In addition, observations of the student by the student's English teacher, [the student's] algebra teacher, [the student's] Physics teacher, [the student's] history teacher, [the student's] Spanish teacher, [the student's] art teacher and [the student's] school counselor were considered. The evaluator also administered the Behavior Assessment System for Children, or BASC, to the student. In addition, the evaluator administered the Scales for Assessing Emotional Disturbance, or SAED, to the student. The evaluator also met with the student's mother to obtain additional information. In addition, the evaluator interviewed the student. The evaluator reviewed the student's grades from 5th grade through 10th grade and [the student's] first three reporting periods from 11th grade. The evaluator determined that there was no significant change in the student's academic performance since [the student] returned to school in the fall of 2011. The Respondent's evaluator prepared a chart comparing the findings of the two neuropsychological evaluations, the independent educational evaluation provided by Petitioner and the other information available to Respondent. The evaluator points out that in a number of instances, Petitioner's independent educational evaluation evaluator made statements that ignored, misrepresented or

misinterpreted the neuropsychological evaluations and also made a number of statements that had no factual basis. The evaluator concluded that based upon all of the findings in the data for the student, the student did not have a specific learning disability or an emotional disturbance or qualify as other health impaired. The evaluator notes that there appears to be a strong disconnect in factual communication about school between the student and [the student's] mother. (R-23; T of Respondent's school psychologist)

55. The student's eligibility team met on February 28, 2012. Participating on the eligibility team were the student's mother, Respondent's school psychologist, a second school psychologist for Respondent and Respondent's special education director. The team did not find the student eligible for special education or for a 504 plan. On March 20, 2012, the Respondent issued a Notice of Recommended Educational Placement refusing to change the identification of the student and noting that the student was not found eligible for services. (R-23)

56. Respondent's special education director, who participated in both eligibility meetings concerning the student, and Respondent's principal, who participated in at least one of the eligibility meetings concerning the student, did not offer an opinion concerning the student's eligibility at the eligibility meetings. They did not offer an opinion at the eligibility meetings because they were not school psychologists and they thought, therefore, that they could not offer an opinion

concerning eligibility at the eligibility committee meeting. (T or Respondent's Special Education Director; T of Respondent's Principal).

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. Under IDEA, school districts must ensure that children with disabilities or children who are reasonably suspected of having disabilities are identified, located and evaluated and that a practical method is developed and implemented to determine which children with disabilities are currently receiving special education and related services. IDEA § 612(a)(3); 34 C.F.R. § 300.111; 22 Pa. Code §§ 14.121 through 14.125; Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); PP by Michael P & Rita P v. Westchester Area School District, 585 F.3d 727, 53 IDELR 109 (3d Cir. 2009).

2. Under IDEA, a child with a disability is defined as "a child:

   (i) With a mental impairment, hearing impairments, including deafness, speech or language impairments, visual impairments (including blindness), social emotional disturbances (referred to in

> this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities; and (ii) who by reason thereof needs special education and related services." IDEA § 602(3).

3. In addition, to be eligible under IDEA, the student must meet the definition of one of the enumerated disabilities, which includes a requirement that the disability adversely affects a child's educational performance. 34 C.F.R. § 300.8; 22 Pa. Code § 14.101.

4. When a school district evaluates a student to determine whether [he or she] has a disability, the student must be evaluated in all areas of suspected disability. The school district must consider a variety of assessments, including observations; the evaluation must be sufficiently comprehensive, and the evaluation must include consideration of parental input. IDEA § 614; 34 C.F.R. §§ 300.301 through 300.305.

5. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of her or his disability be excluded from participation and/or be denied the benefits of or be subjected to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 C.F.R. § 104.33; 22 Pa. Code §15.1. In order to prove a violation of Section 504, parents must show that "one that the student is disabled, two that the student was otherwise qualified to participate in school activities, three that respondent receive federal financial assistance, and four that the student was excluded from participation and/or denied the benefits of education as a result of discrimination by Respondent."

Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); 29 U.S.C. § 794; 34 C.F.R. 104.33(b)(1); 22 Pa. Code §15.3. In order to be eligible, a student's disability must substantially impair a major life activity; such as learning. See 22 Pa. Code §15.2; Macfarlan v. Ivy Hills SNF, LLC 675 F.3d 266, 112 LRP 16588(3d Cir 2012).

6. A professional evaluator may not simply prescribe special education, the eligibility team must consider all relevant factors. Marshall Joint School District No. 2 v. CD by Brian and Traci D., 616 F.3d 632, 54 IDELR 307 (7th Cir. 2010); District of Columbia Public Schools, 111 L.R.P. 76506 (SEA DC 2011).

7. Under IDEA, eligibility is determined by a team of qualified professionals and the parent of the child. In interpreting evaluation data for the purpose of determining if the child is a child with a disability, the public agency must draw upon information from a variety of sources, including aptitude and achievement tests, parent input and teacher recommendations, as well as information about the child's physical condition, social or cultural background and adaptive behavior and must ensure that information obtained from all those sources is documented and carefully considered. 34 C.F.R. § 300.306; 22 Pa. Code §14.123.

8. Under IDEA, a procedural violation is actionable only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights or causes a deprivation of educational benefits. IDEA §

615(f)(3)(E)(ii); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 19, 2012). However, IDEA also provides that nothing in the subparagraph prohibiting procedural violations to be actionable without harm should be construed to preclude a hearing officer from ordering a local education agency to comply with the procedural requirements of IDEA. IDEA § 615(f)(3)(E)(iii).

9. In the instant case, Respondent has complied with its child find duty as it pertains to the student.

10. In the instant case, Respondent appropriately determined that the student is not eligible for special education under IDEA.

11. The evaluations conducted by Respondent with respect to this student were appropriate.

12. Respondent appropriately concluded that the student is not eligible for a service plan under Section 504.

13. Respondent committed a procedural violation by failing to properly train its staff on the role of eligibility team members in making eligibility determinations.

DISCUSSION

Issue No. 1: Whether the student is eligible for special education services as prescribed by the Individuals With Disabilities Education Act?

The parents contend that the school district failed to fulfill its child find duty, failed to conduct appropriate evaluations and failed to identify the student as eligible under IDEA. The school district contends that the student is not eligible under IDEA, that it had no child find duty in this case, and that it appropriately evaluated the student and properly concluded that [the student] was not eligible for special education. Each of the three sub-issues under this issue, child find, eligibility and evaluation, shall be dealt with herein separately in this section.

IDEA imposes upon school districts a continuing child find obligation; that is they are required to identify and evaluate all students who are reasonably suspected of having a disability. IDEA § 612(a)(3); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 3/19/2012); PP by Michael P & Rita P v. Westchester Area School District, 585 F.3d 727, 53 IDELR 109 (3d Cir. 2009); 22 Pa. Code §§ 14-121 through 14-125.

In the instant case, it is undisputed that the school district had notice that the student had two separate [redacted] injuries. The first [occurred] on February 12,

2010. The second injury [occurred] on October 26, 2010. In each instance, however, the student's parent later provided Respondent with medical documentation completely clearing the student to return to school, including all sports activities.

Petitioner has not proven the existence of any red flags which might indicate that the student should be evaluated as a potential student with a disability. Accordingly, Petitioner has not proven a child find violation by the Respondent.

Petitioner's post-hearing brief contains less than one-half of one page concerning the child find allegations. It is apparent that Petitioner is not seriously pursuing this contention. Even assuming arguendo that Respondent had violated its child find obligation, however, there was no harm because as the ensuing discussion demonstrates, Petitioner has not demonstrated that the student was eligible for special education.

In order to be eligible for special education under IDEA a student must qualify as a child with a disability. IDEA defines a child with a disability as a child with one of the enumerated conditions, who by reason thereof needs special education or related services. IDEA § 602(3). In addition, the regulations require, by defining the various enumerated conditions, that the disability must adversely affect a child's educational performance before he is eligible for special education. 34 C.F.R. § 300.8; 22 Pa. Code § 14.101.

In the instant case, there has been no showing by Petitioner that the student's [redacted] injuries adversely affected [the student's] educational performance. In addition, there has been no showing by Petitioner that by reason of the student's [redacted] injuries, the student needed special education and related services.

It is undisputed that the student had two separate [redacted] injuries. The credible and persuasive evidence in the record, however, indicates that the student was an average student and that [the student] was making educational progress and that [the student] performed generally as well as other students both before and after suffering the [redacted] injuries. Similarly, the student's behavior and attendance was relatively similar before and after [the student's] injuries.

To the extent that the testimony of the student's mother and the other witnesses called by Petitioners conflicts with the testimony presented by the witnesses called by Respondent, the testimony of the student's mother and the student's other witnesses is less credible and persuasive than the testimony of Respondent's witnesses. This conclusion is based upon the demeanor of the witnesses, especially the evasive testimony provided by the mother during cross-examination, as well as the following factors: There were numerous inconsistencies in the testimony of the student's mother. She had told the school authorities that the student had been on the honor roll, but [the student] had not been on the honor roll since at least 5th grade. The

mother's testimony regarding the student throwing computers was contradicted by the testimony of [the mother's] son, the student's brother, who was called as a witness on behalf of Petitioner, and who credibly testified that such instances did not happen. Because of these and other problems with the testimony of the student's mother, her testimony is accorded little weight.

In addition, the testimony of and report by Petitioner's expert witness, who performed an independent educational evaluation upon the student, is also accorded little weight. The testimony of said expert was not credible or persuasive for a number of reasons. Petitioner's expert testified that it is urgent that something be done for the student, yet he waited, after performing an evaluation on the student in July, until the next January to issue the report of his independent evaluation. This inconsistency seriously undercuts his credibility. Moreover, the report of the independent evaluator is seriously flawed. As was correctly noted by respondent's school psychologist, Petitioner's expert witness made statements in his report that ignored, misrepresented or misinterpreted the neuropsychological evaluations and also made a number of statements that had no factual basis. In addition, said expert witness relied almost exclusively upon the mother's questionnaire and his testing of the student to develop his conclusions. He specifically did not solicit any information from the student's teachers or [the student's] school. In addition, the testimony of said expert is impaired by the fact that he apparently views the role of special

education as that of potential maximizing. In explaining his conclusions that the student was eligible for special education in his opinion, said expert noted that the student "has all kinds of potential." The purpose of special education, however, is to provide a basic floor of opportunity, not to maximize the potential of students with disabilities by requiring that they receive the best possible education. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (U.S. 1982); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 3, 2012).

Moreover, even if the testimony and report of Petitioner's expert witness were to be credited, it only establishes the first of the three prongs of IDEA eligibility, that the student has an enumerated disability. Neither his report not his testimony provides any basis for concluding that the student's disabilities either had an adverse effect upon [the student's] education or that by reason of [the student's] disabilities [the student] needed special education. It is apparent that said expert's recommendations are based upon his desire to maximize the student's potential rather than to show that [the student] requires special education.

A review of the credible and persuasive evidence in the record requires a conclusion that the student was a relatively average student both before and after [the

student's] injuries. There has been no showing that the student needs special education or that [the student's] disabilities adversely affect [the student's] education.

Respondent's school psychologist testified credibly that she analyzed the student's grades before and after both [redacted] injuries, and that the result was that the student's grades were substantially similar before and after the injuries. Particularly persuasive in this regard was the testimony of the teacher who had the student for ninth grade World Cultures and who had [the student] again in eleventh grade for honors American History. This teacher noticed no change in the student's academic performance even though he taught [the student] both before and after the [redacted] injuries. This testimony was corroborated by the testimony of four other teachers who noted that the student was an average student despite [the student's] frequent excused absences, and that [the student] didn't struggle any more than other students. That the student was an average student is also supported by the documentary evidence showing that the student received passing grades. There is no credible evidence in the record that supports a conclusion that the student needed special education or that [the student's] disabilities adversely affected [the student's] education.

The parent did point to grades the student received while the [the student] was attending the cyber school that were initially recorded as failing grades. The

Respondent provided the credible testimony of its director of curriculum and instruction, however, to explain that said grades were not consistent with the grading policies of Respondent. In order provide the option of the cyber school, the Respondent relies upon a vendor to provide the service. The vendor had a separate grading policy, but it was not consistent with the policies of Respondent. Accordingly, the parent was notified that the grades might be altered to properly reflect the school district's grading policies. In fact, the student's grades were changed prior to being issued as final grades to the student and [the student] did not receive failing grades in the courses [the student] took while attending the cyber school.

The Petitioner also contends that Respondent violated IDEA because no teacher participated in the eligibility determinations for the student. Unlike IEP teams, however, there is no requirement that a teacher be a member of an eligibility team. 34 C.F.R. § 300.306.

Petitioner does, however, raise one significant issue with regard to the eligibility determinations by Respondent. Specifically, Petitioner points to the testimony of Respondent's special education director and school principal to the effect that they could not offer an opinion at the eligibility committee meeting with regard to whether or not the student was eligible because they did not have a degree in school psychology or because they were not a school psychologist. This testimony betrays a

misunderstanding of the IDEA eligibility process. A determination of eligibility is made by a "group of qualified professionals and the parent." 34 C.F.R. § 300.306(a)(1); 22 Pa. Code §14.123. In interpreting evaluation data for the purposes of determining if the child is a child with a disability, the public agency must "draw upon information from a variety of sources…" 34 C.F.R. § 300.306. The testimony cited by Petitioner in [the] post-hearing documents reveals that said witnesses of Respondent misunderstand the eligibility process. The eligibility determination is not made by a school psychologist or any other single individual. Although the school psychologist can be an important member of the team, all members of an eligibility team are entitled to an opinion, and to have their input duly considered by other team members.

Respondent's misunderstanding of the proper role of eligibility team members is clearly a procedural violation of IDEA. Under IDEA, a procedural violation is actionable only if it results in a loss of educational opportunity for the student, seriously deprives the parents of their participation rights or causes a deprivation of educational benefits. IDEA § 615(f)(3)(E)(ii); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 3/19/2012). In the instance case, the eligibility team correctly determined that the student was not eligible for special education, so no harm has resulted from the misconception by some of the team members with regard to their roles. In other words, the student did not suffer a loss

of educational opportunity, the parent clearly fully participated in the eligibility team meetings, and the student did not receive a deprivation of educational benefits as a result of the procedural violation. Accordingly, the procedural violation has resulted in no harm to the student and no individual relief is appropriate. However, IDEA also provides that "nothing in… (the rule regarding procedural violations)… shall be construed to preclude a hearing officer from ordering a local education agency to comply with procedural requirements…" IDEA § 615(f)(3)(E)(iii). Accordingly, the order portion of this decision shall include an order requiring Respondent to properly train its personnel concerning the role of IDEA eligibility teams.

Finally, under this issue, Petitioner contends that Respondent violated IDEA by improperly conducting two evaluations of the student. Respondent completed an evaluation of the student on February 25, 2011. Respondent completed a second evaluation of the student on February 28, 2012.

Specifically, Petitioner argues that Respondent's evaluation process was flawed because Respondent did not properly consider parental input and because Respondent did not accept diagnoses made by private medical practitioners, and because the evaluations did not include observations of the student. These contentions are not supported by the evidence in the record. Respondent's school psychologist gave a detailed analysis of the input provided by the mother in writing in

the evaluation reports and during her testimony. Indeed, it was the initial hypothesis of the school psychologist that the student would likely be eligible for special education or least a 504 plan after reading the mother's detailed written input. After analyzing the medical records and other documents , as well as the student's grade and the reports of [the student's] teachers, however, the school psychologist rejected her initial hypothesis and recommended a finding that the student be found not eligible for special education and related services. The recommendation from the school psychologist was based upon her conclusion that the documentation and other information concerning the student revealed that [the student] was not adversely affected in [the student's] educational performance by [the student's injuries] and that [the student] did not need special education as a result of those concussions. Clearly, the input of the mother and the report of the independent educational evaluation performed by Petitioner's expert witness were duly considered by the evaluation committees in reaching their conclusions in both 2011 and 2012 that the student was not eligible. An eligibility committee is not required to agree with the input submitted by a parent, it is required only to duly consider it. The documentary evidence and the testimony of Respondent's school psychologist show that the input provided by the student's mother was duly considered.

Also Petitioner argues that the evaluations by respondent did not include observations of the student. The record evidence does not support this conclusion.

For the February 25, 2011 evaluation, Respondent's evaluation included observations by: the student's geometry teacher, [the student's] history teacher, [the student's] English teacher, the school counselor and [the student's] homebound teacher. For the February 28, 2012 evaluation, observations of the student by the student's English teacher, [the student's] algebra teacher, [the student's] physics teacher, [the student's] history teacher, [the student's] Spanish teacher, [the student's] art teacher and [the student's] school counselor were considered. There is no evidence in the record to support this allegation. Petitioner's argument is rejected.

The next argument raised by Petitioner concerning this issue is that Respondent rejected diagnoses provided by medical professionals. Under IDEA, however, a medical practitioner, or other expert, may not simply prescribe special education; rather, the eligibility team must consider all relevant factors. Marshall Joint School District No. 2 v. CD by Brian and Traci D., 616 F.3d 632, 54 IDELR 307 (7th Cir. 2010); District of Columbia Public Schools, 111 L.R.P. 76506 (SEA DC 2011). Petitioner seems to be arguing that any diagnosis entitles a student to special education. Having an enumerated disabling condition, however, is only one prong of the three prongs of IDEA eligibility analysis.

In the instant case, record evidence reveals that Respondent properly considered the evaluations conducted by all professionals, including the independent

educational evaluation conducted by Petitioner's expert witness. The credible and persuasive evidence in the record supports a conclusion that the professionals, with the exception of Petitioner's expert witness, who evaluated the student did not attribute any significant continuing effects to the two [injuries] suffered by the student. After considering all of the information available concerning the student, the eligibility team properly concluded that the student was not eligible for special education both in February 2011 and in February 2012. There is no basis to conclude from the credible and persuasive evidence in the record, that the [injuries] suffered by the student adversely affected [the student's] educational performance or resulted in a need for special education. Thus Petitioner has failed to show that the student meets the second and third prongs required for IDEA eligibility. Accordingly, it is concluded that the evaluations and eligibility determinations by Respondent that were challenged in this case were appropriate.

Issue No. 2: Whether the student has a disability and is eligible for special education services under Section 504 of the Rehabilitation Services Act?

The discussion contained with regard to Issue No. 1 above is incorporated by reference herein.

Petitioner's brief devotes less than one-half of a page in its post-hearing brief to its Section 504 argument. Petitioner apparently does not take this argument seriously.

To prove a violation of Section 504, a parent must prove "one that the student is disabled, two that the student was otherwise qualified to participate in school activities, three that respondent receive federal financial assistance, and four that the student was excluded from participation and/or denied the benefits of education as a result of discrimination by Respondent." Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 3/19/2012); 29 U.S.C. § 794; 34 C.F.R. 104.33(b)(1); 22 Pa. Code §15.3.

In order to be eligible, a student's disability must substantially impair a major life activity; here the major life activity would likely be learning. See 22 Pa. Code §15.2; Macfarlan v. Ivy Hills SNF, LLC 675 F.3d 266, 112 LRP 16588 (3d Cir 2012)

In the instant case, the student's disability did not impair [the student's] learning. In addition, there is no evidence that the student was denied the benefits of or excluded from participation in [the student's] education as a result of discrimination by the Respondent. (The extensive discussion with regard to the lack of effect of the student's disability upon [the student's] learning or upon [the student's] participation in [the student's] education in the discussion of the previous issue is incorporated by reference herein.) Accordingly, it is concluded that the student was not eligible under §504 and that Respondent did not violate §504.

Issues No. 3 and 4: Whether Petitioner is entitled to compensatory education if the student is eligible under IDEA or § 504?

Because Petitioner has proven no violation of IDEA or §504, it is not appropriate to award compensatory education or other relief to the Petitioner. Accordingly, no award of compensatory education is made in this decision. Respondent will, however, be ordered to correct the procedural violation proven by the parent herein.

ORDER

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. That Respondent shall within 180 days of the issuance of this decision, conduct trainings for its personnel who serve on IDEA eligibility committees concerning the proper role of IDEA eligibility committee members and their ability to express opinions as to the issues to be decided by the eligibility committee; and

2. That all other relief requested in the foregoing due process complaint is hereby denied.

ENTERED: July 23, 2012

James Gerl

James Gerl, Certified Hearing Official
Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing DECISION by emailing a true and correct copy thereof to the following:

Phillip Drumheiser, Esquire
[redacted]

and

Sharon W. Montanye, Esquire
[redacted]

On this 23rd day of July, 2012

James Gerl

James Gerl, Certified Hearing Official
Hearing Officer

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