

**PENNSYLVANIA**  
**SPECIAL EDUCATION HEARING OFFICER**

*This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.*

DECISION  
DUE PROCESS HEARING

Name of Child: Z.S.  
ODR #5794/05-06 AS

Date of Birth: xx/xx/xx

Dates of Hearing:  
January 10, 2006 (9:00 am – 4:00 pm):  
February 24, 2006 (9:00 am - 4:30 pm)  
March 7, 2006 (9:00 am – 4:00 pm)  
May 1, 2006 (9:00 am – 5:45 pm)  
May 2, 2006 (9:00 am – 5:00 pm)

CLOSED HEARING

Parties to the Hearing:

Parent(s)

Representative:

Tanya Alvarado, Esquire  
McAndrews Law Firm  
30 Cassatt Avenue  
Berwyn, Pennsylvania 19312

West Chester Area School District  
Spellman Administration Building  
829 Paoli Pike  
West Chester, Pennsylvania 19380

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P.O. Box 5069  
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Last Transcript Received:

May 8, 2006

Record Closed

May 30, 2006<sup>1</sup>

Date of Decision:

June 9, 2006

Hearing Officer:

Linda M. Valentini, Psy.D.

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<sup>1</sup> Counsel given extra time to complete written closing arguments because of illness.

## Background

Student is a xx-year-old 11<sup>th</sup> grade student who resides in the West Chester Area School District (hereinafter District) and who has been attending the [Redacted] Charter School since the beginning of the 2005-2006 school year. Prior to enrolling in the charter school, Student attended schools in the District; the most recent being [Redacted] High School for 9<sup>th</sup> and 10<sup>th</sup> grades.

On August 22, 2005 Mr. and Mrs. (hereinafter Parents) requested this hearing to address concerns under the IDEA and Section 504 and under PA Chapters 14 [and] 15 as articulated in the Issues section below.

Prior to the convening of the hearing the Parents submitted a letter requesting the hearing officer to order an independent educational evaluation (IEE) (J-1). The hearing officer denied this request (J-2). By letter the Parents articulated their position regarding assignments of the burdens of proof (J-3). The District provided a letter and a brief regarding limiting the claims (J-4). The hearing officer provided a letter regarding the burden of proof (J-5). The Parents provided a letter and a brief regarding limitations on the claims (J-6). The hearing officer ruled on limiting the claims (J-7).

This hearing officer assigned the burden of proof to the Parents on all issues, and limited the claims under the IDEA/Chapter 14 and Section 504/Chapter 15 to two years following the IDEIA (IDEA 2004), from the date of the hearing request.

## Issues<sup>2</sup>

1. [Redacted.]
2. [Redacted.]
3. Were the evaluations of Student performed by the School District between August 23, 2003 and August 23, 2005 for IDEA/Chapter 14 and/or 504/Chapter 15 appropriate?
4. If the evaluations of Student performed by the School District between August 23, 2003 and August 23, 2005 for IDEA/Chapter 14 and/or 504/Chapter 15 were not appropriate, is she entitled to an independent educational evaluation?
5. Was Student an eligible student under the IDEA/Chapter 14 and/or a protected handicapped student under Section 504/Chapter 15 between August 23, 2003 and August 23, 2005 (2003-2004 and 2004-2005 school years) and to what extent, if any, did the District violate its Child Find obligation?

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<sup>2</sup> These issues are the issues presented on the record and in the written closing arguments but are articulated here in an expanded form in order to lend more clarity to the decision.

6. Was Student properly identified as a protected handicapped student and if so was the 504 Service Plan offered to her appropriate?
7. If Student was an eligible student and was not offered an IEP, and/or if Student's 504 Service Plan was not timely and/or not appropriate, is she entitled to compensatory education and in what amount?
8. Is the School District obligated to reimburse Student's Parents for psychotherapy services they procured for her to substitute for appropriate guidance services that the School District did not provide<sup>3</sup>?

### Findings of Fact

#### Background

1. Student is a [late teen-aged] resident of the School District who attended High School in the District during the 2003-2004 (9<sup>th</sup> grade) and the 2004-2005 (10<sup>th</sup> grade) school years.
2. Student is currently enrolled in the [Redacted] Charter School (2005-2006 – 11<sup>th</sup> grade), having been withdrawn from the District at the end of 10<sup>th</sup> grade. (NT 1268)
3. In 3<sup>rd</sup> grade Student was diagnosed with Attention Deficit Hyperactivity Disorder primarily inattentive type pursuant to a recommendation from the school that the Parents have her evaluated by a physician. She began medication to address ADHD that year and continues to take medication to address the condition. (NT 1204, 1206, 1307; P-30)

#### [Redacted.]

[Findings 4-19 redacted.]

#### Were the evaluations of Student performed by the School District between August 23, 2003 and August 23, 2005 for IDEA/Chapter 14 and/or 504/Chapter 15 appropriate?

20. The District provides training to its regular education teachers and support staff regarding identification and education issues arising from the IDEA and Section 504. (NT 46-50, 126, 151-153, 826-827, 926-927, 993-995, 1040-1041, 1091, 1169-1172)
21. The grades for the first marking period of 10<sup>th</sup> grade came out the week before Thanksgiving. Student's numerical grades were: Geometry 60, Chemistry 57, Western World Honors 71, English 10 Seminar 75 and French 3 77. These

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<sup>3</sup> The hearing officer specifically declined to consider whether some failure on the District's part created the condition for which Student required psychotherapy. (NT 35)

- triggered the school counselor's concern and she put Student on the list for the Child Study Team. (NT 326; P-6)
22. Early in December of 10<sup>th</sup> grade the Parents emailed the counselor asking to talk with all Student's teachers. The counselor advised the Parents to get Student's progress reports on line and email the teachers individually. (NT 1242)
  23. By letter dated January 8, 2005 the Parents requested that "a comprehensive psycho-educational evaluation be completed to determine what the problems are and whether or not she qualifies for special education services". (P-23)
  24. In the January 8, 2005 letter the Parents also noted, "In addition to this request for an evaluation and while we are waiting for the results of the evaluation we are requesting that a 504 Service Agreement meeting be held in an effort to put some supports and accommodations in place that will help Student..." (P-23)
  25. The Parents also noted, "we hereby give our consent for the evaluation to take place. We understand that under the law, the evaluation must be completed and a written report issued to us within 60 school days of this consent. If you would like us to sign a Permission to Evaluate Form, please forward a completed form to us immediately."  
(P-23)
  26. The District received the letter by certified mail on January 10, 2005. (P-23)
  27. In response, on January 10, 2005 the District issued a Permission to Evaluate form for a Section 504 evaluation. The form notes, "this is not a special education evaluation". (NT 1245-1247, 1463-1466; P-20)
  28. Additionally, by letter dated January 11, 2005 the District issued a NOREP stating that the District proposed to initiate a 504 evaluation, that the District also proposed to "gather more information through the Child Study Team to determine if pre-referral is warranted". Further, "the District is proposing the 504 evaluation because of Student's ADD to determine if it significantly impacts access to her education." Further, Additional information must be gathered to determine what action is most appropriate for Student educationally". (P-22)
  29. The Parents responded to the Permission to Evaluate on January 20, 2005 by signing and giving their consent for a Section 504 evaluation, but added, "In addition we request a comprehensive psycho-educational evaluation to determine eligibility for special education under IDEA". (P-20)
  30. The Parents sent a cover letter with the Permission to Evaluate form noting that although they requested a psycho-educational evaluation, the District had sent a permission form for a Section 504 determination. They noted, "please be informed that in addition to ADD Student may have some learning disabilities

- that are impacting her ability to progress. Therefore we request that the school district perform a comprehensive psycho-educational evaluation to determine her eligibility for special education services under IDEA. Please consider our signatures on the Permission to Evaluate under 504 form our permission to evaluate eligibility under IDEA as well.” (P-20)
31. The Parents responded to the NOREP by checking their approval of the recommendation, noting, “We are approving participating in Child Study Team. However, we request that our approval on the Permission to Evaluate Form for Section 504 and IDEA signed and dated 1/20/05 will begin the 60 day time period in which the school district will evaluate Student”. (P-22)
  32. On January 20, 2005 the Parents sent the District a letter from Student’s physician attesting to her having been treated for attention deficit disorder since July 1997. (P-21)
  33. On January 28, 2005 Student’s therapist sent a letter to the school counselor noting dysthymia as a concern in addition to ADD, and raising the concern that Student may have an undiagnosed learning disability. (P-19)
  34. The District initiated testing on February 3, 2005. On February 9, 2005 the District sent the Parents a list of the tests to be administered. (S-8, P-17)
  35. The school psychologist used the Wechsler Abbreviated Scale of Intelligence (WASI), a screening instrument as Student had previously had four previous cognitive tests (June 1997 Slosson IQ 133; November 1997 WISC-III IQ 122; December 1999 Slosson IQ 130; February 2000 WISC-III IQ 127). On the WASI Student received a Verbal IQ of 133, a Performance IQ of 111 and a Full Scale IQ of 125. (P-14)
  36. [Redacted].
  37. The school psychologist administered the Wechsler Individual Achievement Test Second Edition (WIAT-II). Student’s standard scores were: Word Reading 112, Reading Comprehension 115, Numerical Operations 122, Math Reasoning 115, Spelling 105, Written Expression 131, Mathematics Composite 121, Written Language Composite 121. (P-14)
  38. Other than Spelling at the 63<sup>rd</sup> percentile, all Student’s WIAT-II scores ranged from 79<sup>th</sup> percentile to 98<sup>th</sup> percentile. (P-13)
  39. The Parents completed a Behavior Assessment System for Children (BASC) and their endorsements factored into clinically significant scores on the Aggression and Attention Problems scales, and at-risk scores on the Hyperactivity, Anxiety, Depression, Somatization, Atypicality and Withdrawal scales. (P-14)

40. Student's 10<sup>th</sup> grade English Seminar teacher provided BASC responses and his endorsements placed Student in the average range of scores throughout the clinical and the adaptive profiles. (P-14)
41. On the BASC self-report Student's endorsements produced a clinically significant score in the area of somatization, and at-risk scores in the areas of Anxiety and Sense of Inadequacy. Student reported in her individual interview with the school psychologist that she experienced anxiety and had been diagnosed with dysthymia. (P-13, P-14)
42. Five of Student's teachers rated her on the Connors Rating Scale. On the Cognitive Problems/Inattention scale three teachers rated her in the clinically significant category. On the ADHD Index, one teacher rated Student in the clinically significant range. The Inattentive Scale produced higher ratings than the other scales, with two teachers rating her markedly atypical, and two rating her in the clinically significant range. (P-13)
43. On February 28, 2005 the District forwarded a copy of testing results. (P-14)
44. A 504 Evaluation Report was prepared and issued on March 1, 2005. Additional information was obtained from Student's therapist and added to the report on March 30, 2005. (P-13)
45. The 504 Evaluation resulted in the conclusion that Student had a mental or physical impairment and that her impairment substantially limited a major life activity.
46. On April 8, 2005 pursuant to the Parents' request of March 29, 2005 the District issued another Permission to Evaluate. Specific assessments to be done were a Speech/Language Evaluation, the QRI -3, certain subtests of the DTLA-4 to address processing and a record review including data collected on Student's response to the Section 504 Accommodation Plan. (P-9, P-10)
47. On various dates in April 2005 Student was given a reading evaluation by the evaluator whom the Parents requested. The evaluator found that Student's QRI-3 results, combined with her 8<sup>th</sup> grade PSSA test and her October 2004 Terra Nova Test, confirmed that Student had the ability to read at the proficient to advanced levels on high school reading assignments. (P-9, P-10)
48. On May 12, 2005 the school psychologist administered subtests of the Detroit Test of Learning and Aptitude – Fourth Edition (DTLA-4). Student performed at the mid to high average level on all subtests (Standard Scores 9 through 14) with the exception of one score at the lower end of the average range which likely was negatively impacted by Student's level of interest and motivation as the task uses prompts for story telling that are "fairly juvenile". (P-5)

49. The school psychologist also administered the Behavior Rating Inventory of Executive Functioning (BRIEF) to the Parents and four teachers. The ratings reflected that Student has difficulty<sup>4</sup> with initiation of tasks (wanting to succeed at a task but not being able to get started, needing excessive prompts to begin a task or activity), planning and organization (anticipate future events and set goals and steps toward goals, develop appropriate steps ahead of time to carry out a task), organization of materials (orderliness of work space) and working memory (attention span, persistence of effort over time). (P-5)
50. At the Parents' request Student was given a speech/language evaluation, as the Parents were concerned about her receptive language skills. (NT 832, 834, 839, 882)
51. On the Test of Language Competence – Expanded Edition (TLC-E) Student's scores indicated competency as well as skills above expectations for a student her age. This is a stand-alone test of language competence and not correlated with IQ scores; comparisons are made to same-age peers. (NT 845-846, 850, 890; P-5)
52. On the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) Student was competent on subtests chosen for their ability to assess listening skills: semantic relationships and understanding spoken paragraphs. The CELF assesses a student's language in reference to same-age peers. (NT 854, 86, 892-893; P-5)
53. On the Test of Auditory Perceptual Skills: Upper Level (TAPS-UL) Student received an Auditory Quotient (standard score) of 103. Her skills were within expectations for a student her age, at the average to above average levels, although she evidenced weakness in repeating digits forwards, listening to and repeating directions, and recalling unrelated words. (P-5)
54. Educational needs arising from the speech/language assessment were opportunities to paraphrase or summarize new information heard and verbal feedback for accuracy, cuing that new information is being presented, continuation of effective strategies she has developed to aid memory and opportunities to request repetitions of oral information as needed. (NT 873-874; P-5)
55. In order for a student to qualify as having a disability in the area of speech/language, there needs to be functioning significantly below age-expectations. (NT 884)
56. Student's speech/language test results found her to be competent with language, having good receptive and expressive language skills, and some above average

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<sup>4</sup> This hearing officer established that "difficulty" would be based on the parents and at least two teachers being in agreement.

language skills. The isolated deficit in short term memory, if it in fact exists<sup>5</sup>, can be addressed in the ordinary course of classroom instruction. Student does not have a disability in the area of speech/language. She does not require specially-designed instruction in the areas assessed by the speech/language pathologist. (NT 891, 900-901, 907, 920)

57. In endorsing Student's application to People to People International, her charter school teacher added "highly" to recommend and noted, that students admitted to the charter school had to show "a high degree of self-motivation and discipline". Further, "from day 1 Student has been a Shining Star ...thorough in her preparations...Her discipline and motivation to succeed and her enthusiasm for learning are very impressive". (emphasis in the original) Student's mother does not disagree with the recommendation. (NT 1296; P-4)

Was Student an eligible student under the IDEA/Chapter 14 and/or a protected handicapped student under Section 504/Chapter 15 between August 23, 2003 and August 23, 2005 (2003-2004 and 2004-2005 school years) and to what extent, if any, did the District violate its Child Find obligation?

58. A review of Student's numerical grades for 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> grades, and the first two marking periods of 10<sup>th</sup> grade reveals a significant downward trend.<sup>6</sup> (P-7; P-13)

Grade Level	6 <sup>th</sup>	7 <sup>th</sup>	8 <sup>th</sup>	9 <sup>th</sup>	10 <sup>th</sup> 1	10 <sup>th</sup> 2
English	87	84	86	81	75	78
History	86	84	85	79	71	77
Math	85	78	97	90	60	75
Science	86	82	85	80	56	72

59. In 8<sup>th</sup> grade Student was repeating the math course; it was her second year of pre-algebra. The previous year in 7<sup>th</sup> grade she received a D in the fourth marking period and a C average for the year. In 7<sup>th</sup> grade she was not completing assignments and performing poorly on tests and quizzes. (NT 1213-1215)
60. In 9<sup>th</sup> grade Student's grades<sup>7</sup> were as follows for the four marking periods and the final average: Algebra 1 Academic A, B, A, B, B; African-Asian Seminar D, E, C, C, C; English 9 Seminar B, C, B, C, C; French 2 B, C, C, D, C; Biology Honors B, C, B, D, C. (P-24)

<sup>5</sup> There was a difference between the speech/language pathologist's results and the psychologist's results in this area. (NT 919-920)

<sup>6</sup> There was some discrepancy between the numbers reported for the first marking period of 10<sup>th</sup> grade on the evaluation and those produced during the hearing. The numbers used for the hearing are presented.

<sup>7</sup> A= 100-93; B= 92-85; C= 84-77; D= 76-70; E= 69-55; F= 54 and below.



61. Student's pattern has been to drop in the second marking period and go back up in the third marking period. (NT 1218)
62. The Parents signed a waiver for Student to take the African-Asian Seminar even though the teachers had not recommended her for it. (NT 1215-1216)
63. The Parents signed a waiver for Student to take the English Seminar even though she had not been recommended for it by her teachers. (NT 1215-1216)
64. In January 2004 Student's mother testified in a hearing regarding Student's brother that Student did not have any learning differences. (NT 1305-1306)
65. The African-Asian Seminar teacher invited Student on several occasions to come talk with him but she did not. She sometimes appeared to be making an effort in class; however she was occasionally talkative with her friends but no more than the other students. (NT 1093-1096)
66. The African-Asian Seminar teacher observed that Student took notes, her notebook seemed complete, she sat the second seat back from the front so her note-taking was easily observable. (NT 1097, 1112)
67. Tests and quizzes were the main vehicles for grading students in the African-Asian Seminar. Student was erratic. When she came in and said she had studied for the test or quiz she tended to do well and when she came in and was quiet she did not do well. She sometimes said she was too busy and didn't get a chance to study. (NT 1101-1103, 1109)
68. During the second marking period the African-Asian teacher asked the guidance counselor to talk with Student to see if there was something interfering with her doing her studying. (NT 1110)
69. There was a meeting with the Parents in the second marking period and Student seemed to be doing better in the third and the fourth marking period. There were no special accommodations in place. (NT 1111-1113, 1117, 1120)
70. At the meeting with the African-Asian Seminar teacher the Parents did not mention that Student had been diagnosed with ADHD or ADD. (NT 1127)
71. The African-Asian Seminar teacher felt that Student should not have been placed in the Seminar class, but would have been better suited for an Honors class as her writing was a little bit below the other students in the class. He recommended her for an Honors class rather than a Seminar class for the following year's social studies course. (NT 1118, 1121)
72. The 9<sup>th</sup> grade French teacher noted that Student occasionally performed poorly on tests and quizzes during the first two marking periods and also had some missing

- homework, but then began a pattern of missing homework assignments towards the fourth marking periods. (NT 1142, 1145)
73. In French Student averaged between four and seven incomplete homework assignments of a total of twenty assignments each marking period. The teacher noticed that when there was more than one assignment missed in a certain week that the achievement would be much lower in the subsequent quiz. (NT 1152, 1154, 1157)
  74. The 9<sup>th</sup> grade French teacher provided a progress report in the fourth marking period indicating that Student could improve her performance by addressing daily study habits, incomplete assignments and quiz grades. (NT 1150)
  75. The 9<sup>th</sup> grade French teacher offered extra help to Student but Student did not avail herself of the opportunity. The French teacher's opinion as to why Student did not come for help was that she was comfortable with her grades until the fourth marking period. (NT 1158, 1160)
  76. Student took Honors biology in 9<sup>th</sup> grade. (P-24)
  77. In 9<sup>th</sup> grade biology there were occasions in the fourth marking period when Student did not turn in her homework. Homework contributed between forty and fifty percent of the grade for a marking period. (NT 1186-1188)
  78. The biology teacher recalled that Student was quiet, polite and cooperative. She grasped the concepts and fit into the class. Other than the fourth period she was "right in the middle of the pack". (NT 1193-1194)
  79. In 9<sup>th</sup> grade Student would claim that she did her homework in study hall and the Parents never really "got a handle on" what all her assignments for all her classes were. The Parents were not aware that Student was not completing and handing in assignments. (NT 1225-1226)
  80. In 10<sup>th</sup> grade the Parents became more vigilant regarding Student's academic progress. (NT 1226)
  81. For 10<sup>th</sup> grade English Student was enrolled in a seminar class, the highest level of class, being by its nature more rigorous, more intellectually demanding, and requiring higher order thinking and analytic skills. (NT 126-127)
  82. During the first marking period in 10<sup>th</sup> grade (September to mid-November) in English Student received letter grades of A through F on homework, quizzes and an exam. She received an F on two assignments because she was absent and did not make up the work, and received an F on another occasion for turning in her Syllabus Acknowledgement late. She received E's and an F on the three quizzes and a C on her exam. Her other homework and classwork was at the A-B level.

- The teacher sent a progress report home to the Parents via Student on November 2<sup>nd</sup>. (NT 60-73; P-7)
83. During the first marking period of the 2004-2005 school year Student did not have a Section 504 Service Plan. (NT 58)
  84. During the second marking period (mid-November to third week in January) in English Student received letter grades of A through F on homework and quizzes. She received a D, and F and an A on the three quizzes and a good number of A's and B's on other items. During the second marking period Student raised her English grade from a D to a C. During the second marking period of the 2004-2005 school year Student did not have a Section 504 Service Plan. (NT 76, 84-88, P-7)
  85. In January 2006 the English teacher was asked to rate certain aspects of Student's behavior and performance for the Child Study Team. He rated her as being "Fair" in preparation, participation, directions and organization, as "Good" in comprehension, behavior and attention span, and as "Very Good" on response to redirection. He also noted a problem with absenteeism. (NT 95-103; P-18)
  86. During the third marking period (end of January to mid-April) Student received letter grades of A through F on homework and assignments. However, her three exam grades were two C's (80%) and an A (95%). During the third marking period Student raised her English grade from a C to a B. During the third marking period of the 2004-2005 school year Student did not have a Section 504 Service Plan. (P-7)
  87. During the fourth marking period (mid-April to Mid-June) Student received four A's, a D and two F's. The D (70%) was on a paper, but the two F's were for assignments she did not hand in. Her grade dropped to an E at the end of the fourth marking period. Student received her Section 504 Service Plan during the fourth marking period. (P-7)
  88. The 10<sup>th</sup> grade English teacher identified Student's performance in his class as being due to consistency, motivation and initiative issues. (NT 122, 140-143)
  89. Student's Chemistry class was an Honors course, which is a college prep course, more rigorous than an academic class but not as rigorous as a seminar class. (NT 240-241)
  90. During the first marking period in Chemistry Student received letter grades ranging from A to F for homework, labs and tests/quizzes. Five of the seven F's were for work not handed in. Student's chemistry grade for the first marking period was an E. (NT 171-194; P-7)

91. During the second marking period in Chemistry Student received letter grades from A to F. Two of the three F's were for work not handed in. Student raised her grade to a D during the second marking period. (NT 194-202; P-7)
92. In January 2006 the Chemistry teacher was asked to rate certain aspects of Student's behavior and performance for the Child Study Team. She rated her as being "Poor" in preparation, directions and organization, as "Fair" in participation and comprehension, as "Good" in behavior and attention span, and as "Very Good" on response to redirection. (NT 211-216, 222; P-18)
93. During the third marking period in Chemistry Student received letter grades from A to F. Three of the four F's were for work not handed in or tests/quizzes. Student's Chemistry grade remained a D for the third making period. (NT 203-207; P-7)
94. During the fourth marking period in Chemistry Student received letter grades from A to F. Four of the five F's were for work not handed in or tests/quizzes. Student's Chemistry grade dropped to a D for the third making period. (NT 228-234; P-7)
95. Overall there was no pattern to the nature of the tasks on which Student received A's and B's and those for which she received lower grades. (NT 242)
96. During the fourth marking period, when Student's Section 504 Service Plan was in effect the Chemistry teacher on her own time started helping Student individually after school from 2:30 to 3:30 or 3:45. The teacher believed after the sessions that Student had understood the material and that the session had been successful, and would give Student additional problems to do at home that night. Student never had the problems completed, saying that she had been too busy to do them. (NT 232-233, 260)
97. The Chemistry teacher did not observe any memory issues in Student, and did not observe any processing issues in her. (NT 234-235)
98. The Chemistry teacher perceived that Student did well when she enjoyed an assignment. The teacher believed that Student had an issue with motivation and organization. (NT 239-240)
99. Student's 10<sup>th</sup> grade math class (geometry) was an Honors level class. Student did not meet the admission criteria to an Honors level math class, but enrollment could have been gained through parental over-ride of the school's recommendation or the 9<sup>th</sup> grade teacher's over-ride of the admission criteria. (NT 933, 963)

100. During the first marking period in math Student received letter grades of A through F. She received F's for homework, quizzes and tests. Her grade for the first marking period in math was E. (NT 939-944; P-7)
101. The math teacher arranged a meeting with the Parents after the first marking period. He specifically addressed the subject of homework completion and organization skills.
102. During the second marking period in math Student received letter grades of A through F. She received F's for homework, quizzes and tests. For the second marking period she raised her grade to a D. (NT 949-950; P-7)
103. In January 2006 the math teacher was asked to rate certain aspects of Student's behavior and performance for the Child Study Team. He rated her as being "Poor" in participation, as "Fair" in preparation and comprehension, as "Good" in directions, response to redirection and attention span and as "Very Good on behavior. (NT 952-955; P-18)
104. During the third marking period in math Student received letter grades of A through F. She received F's for homework, quizzes and a quarterly rough draft. For the third marking period she maintained a D. (NT 950-951; P-7)
105. During the fourth marking period in math Student received letter grades of A through F. She received one F for homework, quizzes and a quarterly rough draft. For the fourth marking period she raised her grade to a C. (P-7)
106. The math teacher attributed Student's progress in math to improved effort on homework which in turn improved quiz and test scores, and coming in for extra help on a few occasions. (NT 966)
107. Student's 10<sup>th</sup> grade social studies course (Western World) was an Honors course. (P-7)
108. In social studies during the first marking period Student achieved letter grades of A through F. She received the Fs in homework, bonus work, tests and quizzes. Her grade for the marking period was D. (NT 1001-1009; P-7)
109. In social studies during the second marking period Student achieved letter grades of A through F. She received Fs on bonus, homework, quizzes and a project. During this marking period she raised her grade to a C. (P-7)
110. In the second marking period, a little before the Child study Team conducted its work, the social studies teacher approached the guidance counselor as he perceived Student to be smart and expected better performance. He saw missing homework assignments, which he believed, affected her performance on tests and quizzes, and was seeking solutions. (NT 1010-1013)

111. In January 2006 the Social Studies teacher was asked to rate certain aspects of Student's behavior and performance for the Child Study Team. He rated her as being "Fair" in preparation, as "Good" in behavior and attention span, directions and organization, and as "Very Good" on participation, comprehension and response to redirection. (NT 1014-1019; P-18)
112. In social studies during the third marking period Student received letter grades of A through F. Her Fs were in homework and bonus. She received a D for the third marking period. (P-7)
113. In social studies during the fourth marking period Student received letter grades of A through F. Her Fs were in homework, tests, quizzes and bonus. She received a D for the marking period. (P-7)
114. The social studies teacher perceived Student to be respectful, intuitive and bright. There was a difference in her participation when she was interested in a topic. (NT 1024, 1029)
115. When Student didn't do her homework she just told the social studies teacher she didn't do it rather than making up excuses. In general she did not hand in missing assignments after being reminded. (NT 1026, 1030-1031)
116. Student's social studies notebook was neat, thorough, full and complete and well-organized. She was able to take notes from a lecture and from overheads. (NT 1027, 1036)
117. In French 3 for the first marking period Student's letter grades ranged from A to E. She received an E on a quiz and a test. Her grade for the marking period was C. (NT 1055-1057; P-7)
118. For the second marking period in French Student's letter grades ranged from A to F. She received E's and an F on quizzes and tests. Her grade for the marking period dropped to a D. (NT 1057-1072; P-7)
119. Starting at the second marking period, the French teacher recommended many times to Student that she come for extra help but she only came two or three times. French was a last period class so it would just have been a matter of Student staying after school. Student would say she didn't have the time to stay or that she didn't need the help. (NT 1049-1052, 1068, 1079)
120. In French for the third marking period Student received letter grades from B to F. Her F's were in a test, quizzes and homework. She received a D for the marking period. (P-7)

121. For the fourth marking period in French Student's letter grades ranged from A to F, with F's being in quizzes and a test. She received a D for the marking period. (P-7)
122. The French teacher suggested that Student learn her vocabulary in an active mode. The teacher modeled this in class, but does not know whether Student followed these instructions at home, but feels that she did not. The teacher modeled making flash cards in class. (NT 1049-1050, 1067, 1078)
123. Student did her French homework whether it was assigned orally or in writing or on worksheets. However she didn't ask questions and didn't volunteer. The French teacher saw no evidence that Student had needs in the areas of organization. (NT 1066, 1068, 1081, 1085)
124. Student was friendly in French class, seemed happy, had friends, talked and interacted with students around her and found a partner with whom to work without difficulty. (NT 1086)

*Was Student properly identified as a protected handicapped student and if so was the 504 Service Plan offered to her appropriate?*

125. On March 11, 2005 an Accommodation Plan draft was developed. (P-3; P-12)
126. On April 5, 2005 the District notified the Parents that given the psychologist's illness and the subsequent cancellation of a scheduled meeting to review the Accommodation Plan the draft version would be implemented. (S-13, P-3)
127. The Plan provided preferential seating, repetition of instructions, multi-instructions given slowly, visuals whenever possible, chunking for projects and assignments, allow Student to vocalize back instructions, check Student's homework started in class, three study skills sessions, extended time on tests in chemistry and geometry, permission to leave the classroom and go to counseling office, pass for two monthly visits to counselor, parents and Student to set up a home study space. (P-14)
128. There was nothing in Student's Section 504 Service Plan that the French teacher was not already doing or that would require a change on the teacher's part. Student seated herself close to the teacher, the teacher repeated instructions, used visuals, chunked assignments with deadlines, started homework in class, offered extended time for tests if needed. (NT 1072-1074)
129. The social studies teacher implemented the Section 504 Service Plan. Student was offered preferential seating and permitted to leave the class to see the

- counselor, although the teacher did not recall if she ever exercised that right. The rest of the accommodations were things he routinely offered to the whole class – repetitive instructions, slow instructions, chunking for long term assignments, use of visual aids, vocalizing back instructions and clarification, and assisting with starting homework in class. (NT 1020-1022)
130. During the fourth marking period the math teacher implemented the Section 504 Service Plan, although he was already implementing most of the strategies by that point. Student was already allowed extra time for math tests, which she used on only one or two occasions (all the students were allowed to ask for extra time), and already had preferential seating; the teacher habitually repeated instructions and used visual illustrations. Student never asked to leave to see the counselor. (NT 968-970, 983-984-985)
131. With regard to Student’s Section 504 Service Plan, the Chemistry teacher used some of the accommodations for the entire class on a routine basis. She gave preferential seating to Student; spoke to her privately to be sure she understood the procedure she would be doing for labs. Although the Chemistry teacher allowed Student extended test taking time, Student specifically declined the extra time and in fact turned her test in before the period ended. Student never left the Chemistry classroom to go to counseling. (NT 223-226)
132. With regard to Student’s Section 504 Service Plan, the 10<sup>th</sup> grade English teacher routinely offered the accommodations on the plan to his entire class. When the accommodation required Student to accept or decline a specific accommodation, e.g. preferential seating, extended time for tests, a pass to see the counselor, she declined or did not utilize the accommodation. (NT 131-135)
133. Student’s teachers were asked to report on her response to the 504 Service Plan. Their responses were included in the final draft of the ER transmitted to the Parents on September 15, 2005. (P-5)
134. The teachers reported that Student “sometimes” to “never” needed extended time for tests and when she did take time it was “sometimes effective” to “never effective”. (P-5)
135. All the teachers save one reported that Student “never” asked for class notes. When she asked the one teacher they were provided. (P-5)
136. Teachers reported that Student either accepted preferential seating or did not. When it was given/accepted it was “effective”. (P-5)
137. Teachers noted that cueing to stay on task was sometimes provided and when used was “sometimes effective” to “very effective”. (P-5)



138. Assignments were given in writing “never” to “always”. This was “sometimes” to “often” effective. (P-5)
139. The Parents and the District revised the 504 Service Plan on October 27, 2005 after Student has already left the District. (P-3)

*Is the School District obligated to reimburse Student’s Parents for psychotherapy services they procured for her to substitute for appropriate guidance services that the School District did not provide<sup>8</sup>?*

140. Student’s brother, age xx, has complex disabilities and has been identified as an eligible student since January 2000 and the Parents have been in three or four IEP cycles for him. (NT 1198-1199, 1202, 1277)
141. From approximately January 2004 until March 2006 the family was involved in a due process hearing, an appeal and a federal court appeal regarding Student’s brother, covering Student’s 2003-2004 and 2004-2005 school years as well as the present school year. (NT 1200-1201)
142. Student’s mother terminated her employment in January 2004. (NT 1276)
143. During the second marking period of 9<sup>th</sup> grade Student seemed to be “not just a little bit out of control” at home; her behaviors at home “were a little bit more over the boundary than they had been in the past”. (NT 1220)
144. Although Student had always been fairly resistant to authority at home and was argumentative, she seemed to have an escalation in these behaviors, yelling and resistance was “over the top” and her level of organization at home seemed to be “worse than the terrible level it was in the past”. (NT 1220, 1223-1224)
145. Student was spending a considerable amount of time on line and IM’ing in both 9<sup>th</sup> and 10<sup>th</sup> grades. The Parents caught her up in the middle of the night (on line) a couple of times, she was tired and “something was changing”. (NT 1221, 1225-1226, 1309-1310, 1333-1335)
146. Student had always been a very headstrong child and during the middle of 9<sup>th</sup> grade her behavior started to become “a little more risky”. At home she was loud and argumentative and partially due to her brother’s sensitivity this created quite a bit of dysfunction in the household. (NT 1222)
147. Student’s emotions were not regulated; she was moody, going from one extreme to another. (NT 1222)

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<sup>8</sup> The hearing officer specifically declined to consider whether some failure on the District’s part created the condition for which Student required psychotherapy. (NT 35)

148. In 10<sup>th</sup> grade Student became much more aggressive both verbally and physically. When the Parents tried to address her grades she became belligerent and oppositional and became physical with her mother twice in the winter. (NT 1234-1235)
149. Student began seeing a therapist in December 2004 because according to Student her brother expressed concern when she and her mother were fighting. (NT 1232; P-13)
150. The Parents may or may not have told the Child Study Team that Student had become aggressive and angry. (NT 1235-1236)
151. In March 2005 (toward the end of 10<sup>th</sup> grade) Student was diagnosed with dysthymia. She was placed on an antidepressant medication. On her evaluation she told the school counselor that she had been depressed since 6<sup>th</sup> grade. (1232, 1241; P-14)

#### Discussion and Conclusions of Law

##### Legal Parameters

Special education programming and placement issues are currently governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). The events in the instant matter, other than the date of the filing of the hearing, occurred during a time period prior to the implementation date of the IDEIA. Therefore, cites are to the previous statute, IDEA 1997. There are no substantive differences between the IDEIA and the IDEA in the relevant provisions governing this matter other than the limitation on the time for filing articulated in the IDEIA.

The Parents brought this hearing under Section 504 of the Rehabilitation Act of 1973 as well as under the IDEA. All claims arise out of the same facts alleged under the IDEA claims, and they are subject to the same statute of limitations as applied to the IDEA claims. (See M.D. V. Southington Bd. Of Educ., 119 F. Supp. 2d 115-116 (D. Conn., 2000), reversed in Part, affirmed in part, M.D. v. Southington Bd. Of Educ., 334 F.3d 217, 222 (2d Cir. 2003); In Re the Educational Assignment of A.H., PA Sp. Ed.Op. No. 1724)

[Paragraph redacted.]

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party

seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. *See* 20 U.S.C. § 1415(i)(2)(C)(iii). This hearing officer reasoned that insofar as the procedures conducting hearings about 504 issues [redacted] in Pennsylvania fall substantively under the same administrative regulations as conducting hearings under the IDEA/IDEIA, the Parents would bear the burden of proof on all issues.

With this legal basis in mind, an examination of the issues follows.

[Issue Discussion Redacted.]

[Issue Discussion Redacted.]

Were the evaluations of Student performed by the School District between August 23, 2003 and August 23, 2005 for IDEA/Chapter 14 and/or 504/Chapter 15 appropriate?

The Individuals with Disabilities Education Act (IDEA), at 20 U.S.C. §1414[b][2] instructs that in conducting an evaluation, the local educational agency shall use a variety of assessment tools and strategies to gather relevant information, including information provided by the parent, that may assist in determining whether the child is a child with a disability. Case law for Section 504 of the Rehabilitation Act closely tracks IDEA case law and it follows that an evaluation under Section 504 must meet the same standards.

20 U.S.C. §1414[b][3][C] requires that the child be assessed in all areas of suspected disability. IDEA's implementing regulations at 34 C.F.R. §300.532 [g][h] provide that the public agency shall ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, social and emotional status, and that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs whether or not commonly linked to the disability category in which the child has been classified.

In conducting the evaluation the local educational agency shall:

Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including

Whether the child is a child with a disability; and  
The content of the child's individualized education program

Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Further, IDEA 2004 at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that

Assessments and other evaluation materials used to assess a child

- Are selected and administered so as not to be discriminatory on a racial or cultural basis;
- Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;
- Are used for purposes for which the assessments or measures are valid and reliable;
- Are administered by trained and knowledgeable personnel; and
- Are administered in accordance with any instructions provided by the producer of such assessments;

The child is assessed in all areas of suspected disability;

Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Once a child has been evaluated it is the responsibility of the multidisciplinary team to decide whether the child is eligible for special education services. IDEA 2004 provides, at Section 614(b)(4) that

Upon completion of the administration of assessments and other evaluation measures,

- The determination of whether the child is a child with a disability as defined in section 602(3) and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5).

In regard to evaluations for Section 504 only, Pennsylvania regulations protecting handicapped students at 22 PA Code §15.6(d) provide that within 25 days of receipt of parents' written request for an evaluation and provision of services the district shall evaluate the information submitted by the parents and send a written response to the parents' request. Districts may also, as provided in 22 PA Code §15.6(f) request additional information of the parents or ask for permission to evaluate the student.

Student's grades in 9<sup>th</sup> grade were not markedly different from her grades in previous years, and given an expected adjustment period for freshman year in high school and given that Student was taking coursework above the level recommended by teachers, her grades would not have triggered a child find response in the District. Additionally Student was living in a family that had begun to engage in due process about a seriously impaired younger brother, Student was reacting emotionally within the family, and Student was discovering/enjoying the opportunity to socialize online at all hours of the evening and night with her friends. Perhaps because the Parents were distracted by their son's issues, or perhaps because their parenting style with Student had been more relaxed given that she was bright and headstrong, the Parents did not exercise the constant consistent vigilance about homework and bedtime that all teenagers require, no matter how bright they are and how responsible they may seem to appear. This hearing officer finds that the District did not fail in its child find obligation to Student as regards the IDEA or Section 504 during the 2003-2004 school year.

By the end of the first marking period to the beginning of the second marking period in 10<sup>th</sup> grade, both the District (guidance counselor) and the Parents became concerned. The guidance counselor put Student on the list for the Child Study Team and the Parents requested a meeting with the teachers and then requested an evaluation. This is precisely the point where a prudent district would have become concerned. Student had progressed to sophomore year and her first marking period in 10<sup>th</sup> grade did not evidence better grades than during freshman year. It is only a matter of conjecture whether the District would have evaluated Student had the Parents not requested an evaluation. In any event, the Parents requested and the District conducted an evaluation. As will be discussed below, the evaluation was mis-labeled and the District's response to the Parents' request was not appropriate, but it is this hearing officer's finding that the evaluation itself was timely and it was appropriate and it did come to the correct conclusion.

The District conducted what it termed a "504 Evaluation" in response to the Parents' clear, at least thrice-repeated (January 8, January 11 and January 20, 2005), request for "a comprehensive psycho-educational evaluation ... to determine what the problems are and whether or not (Student) qualifies for special education services". (P-23) In their January 8, 2005 letter the Parents also noted, "In addition to this request for an evaluation and while we are waiting for the results of the evaluation we are requesting that a 504 Service Agreement meeting be held in an effort to put some supports and accommodations in place that will help Student..." The Parents further articulated their understanding that the evaluation must be completed and a written report issued within 60 school days and added extra protection to their timeline by stating their explicit consent to the evaluation, adding that if a signed Permission to Evaluate form, was needed one should be forwarded to them immediately." (P-23)

The District's response was to make its own determination regarding whether or not it should/would conduct an evaluation and what kind of an evaluation (IDEA or 504) it would conduct. This hearing officer can find no justification whatsoever for the District's response, which the District claims was given an imprimatur by its counsel (not necessarily the attorney who handled this hearing). Frankly this hearing officer finds the

District's response inappropriate and patronizing, which is surprising and puzzling in that she has also, in this matter and in other cases, found the District's supervisory personnel to be highly professional, gracious and responsive. This hearing officer can only conclude that the school psychologist assigned to the case handled the matter clumsily and did not seek thorough guidance. What is ironic is that the school psychologist then went on to conduct, in a notably brief time period, an evaluation that was perfectly acceptable under either the IDEA or Section 504. Although the report was reincarnated several times, as the Parents requested additional testing, and although the final report was disjointed and poorly integrated, this hearing officer finds the report fulfills the criteria set forth by the IDEA and is appropriate.<sup>9</sup>

The District is strongly urged for the future to respond to the requests made by parents for an evaluation of their children by doing a "multidisciplinary evaluation" that would determine either IDEA or Section 504 eligibility, consulting with the parent and obtaining informed written consent to initiate a C-SAP or IST process, or filing for a due process hearing. The District should also keep in mind that a student is to be assessed in all areas of suspected exceptionality. Clearly the Parents in this matter suspected a learning disability as did Student's therapist; it is unclear why the District did not also suspect as much and it makes absolutely no sense that it simply decided to focus on Student as a possible protected handicapped student under 504 instead of a possible eligible student under IDEA. An appropriate comprehensive evaluation would address cognitive, academic, behavioral, and neurological (attentional, executive functioning) issues and result in findings applicable to the IDEA, Section 504, or neither.

Nevertheless, having examined the evidence this hearing officer finds that the evaluation conducted by the District (although mislabeled), and completed by March 1<sup>st</sup>, was appropriate and reached the correct conclusion as to Student's ineligibility for special education under the IDEA and as to Student's status as a protected handicapped student under Section 504. Furthermore, the expanded evaluation completed in September 2005 was likewise appropriate and reinforced the District's original conclusions.

If the evaluations of Student performed by the School District between August 23, 2003 and August 23, 2005 for IDEA/Chapter 14 and/or 504/Chapter 15 were not appropriate, is she entitled to an independent educational evaluation?

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must either

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<sup>9</sup> Although the Parents pointed out that the WASI and the WIAT-II were not specifically normed together to assess discrepancy between achievement and ability, this hearing officer finds that using the WASI did not harm Student, given that there were several cognitive tests on record that were all consistent with one another and the WASI. In fact, studies comparing the WISC-IV and the WISC-III show that although there is a good correlation, students generally receive lower scores on the WISC-IV than on the WISC-III given the updated norms (a phenomenon that is usually seen when tests are revised) and hence Student likely would not have come out quite as strong cognitively.

initiate a hearing and at that hearing show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).

As the evaluation conducted by the District through the spring of 2005 was appropriate, Student is not entitled to an independent evaluation at public expense.

Was Student an eligible student under the IDEA/Chapter 14 and/or a protected handicapped student under Section 504/Chapter 15 between August 23, 2003 and August 23, 2005 (2003-2004 and 2004-2005 school years) and to what extent, if any, did the District violate its Child Find obligation?

Chapter 14 – Individuals with Disabilities Education Act (IDEA)/PA Chapter 14

IDEA's so-called "Child Find" provision requires that states ensure that:

"...All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of **special education**<sup>10</sup> and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving special education and related services." 20 U.S.C. § 1412(a)(3).

**Special education** is defined as **specialty designed instruction**...to meet the unique needs of a child with a disability. **Specialty designed instruction** means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

The implementing regulations of the Individuals with Disabilities Education Act (IDEA) which are found at 34 C.F.R. §300.7 provide the following definitions:

**Other Health Impairment** means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, such as asthma, attention deficit disorder, **or attention deficit hyperactivity disorder**, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and adversely affects a child's educational performance.

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<sup>10</sup> Emphasis added in all cases where boldface type is used.

**Child with a Disability** means a child evaluated in accordance with §§300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, **and who, by reason thereof, needs special education and related services.**

Therefore, for a child to be identified as a child with a disability, there must be **both a disability and a need for special education** and related services. Although Student is a student with **attention deficit hyperactivity disorder** the record does not support a need in Student's case for specially designed instruction as defined in the IDEA.

#### Section 504 of the Rehabilitation Act/A Chapter 15

The relevant provision of Section 504 of the Rehabilitation Act states that:

No otherwise qualified **individual with a disability** in the United States...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...29 U.S.C. §794(a).

An individual with a disability is defined as any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. § 706(8)(B)(i)-(iii); 34 C.F.R. § 104.3(j)(1). Major life activities include functions such as learning, walking, seeing, hearing, speaking, breathing, and caring for one's self.

Section 504/Chapter 15 **does not require that a student be in need of specially designed instruction** in order to be eligible for protection. Any student with an identified physical or mental disability which substantially limits a major life activity, e.g. learning, is entitled to protection under Section 504/Chapter 15.

Pennsylvania Chapter 15 regulations, found at 22 Pa. Code § 15.1 et seq., set out the procedures for implementation of Section 504 in Pennsylvania. Chapter 15 uses the nomenclature "**protected handicapped student**" instead of individual with a disability:

A school district shall provide each **protected handicapped student** enrolled in the district, without cost to the student or family, **those related aids, services or accommodations which are needed to afford that student equal opportunity to participate in and obtain the benefits of the school program** and extracurricular activities without discrimination and **to the maximum extent appropriate to the student's abilities.**



The District appropriately evaluated Student, and the results of the evaluation taken together with the testimony and evidence presented have led this hearing officer to the conclusion that Student is not a student with a Learning Disability. Furthermore this hearing officer concludes that she is a student with an Other Health Impairment (ADHD predominantly inattentive type). Although she has been recently diagnosed with dysthymia, this hearing officer notes that this condition does not reach the standard for depression, one of the qualifiers for emotional disturbance under the IDEA, and further that a classification of emotional disturbance would be incorrect and would do a disservice to this student whose described behavior towards teachers and peers in the school setting was not indicative of emotional disturbance.

While Student is a student with an Other Health Impairment she does not require specially designed instruction and is therefore not eligible for special education. However, Student is a protected handicapped student and as such is entitled to protection under Section 504. Such protection is provided through a Section 504 Accommodation Plan (504 Service Plan). The District crafted a 504 Service Plan and put it into place in April 2005.

Was Student properly identified as a protected handicapped student and if so was the 504 Service Plan offered to her appropriate?

Student is a protected handicapped student whose disability requires that she have accommodations built into her educational program to assist her in benefiting from her educational instruction. Provision for such accommodations is made by the development and execution of a written 504 Service Agreement. If parents and the school district agree on the related aids, services or accommodations that will be provided, the parties must enter into a service agreement. 22 Pa. Code § 15.7(a)

A service agreement is a written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student. 22 Pa. Code § 15.2. Service agreements may also be called service plans, Section 504 plans, or accommodation plans. Service agreements must be written. The agreement must be signed by one or both the child's parents and a school representative. The agreement must specify the date the services shall begin and the date they will be discontinued. If the parents and the school cannot agree on what should be provided to the student, either party may use the procedural safeguard system set out at 22 Pa. Code § 15.8.

The District crafted a Service Plan and put it into place in April 2005. Although some of the strategies in the plan were strategies the teachers already were implementing, others were not. Overall, the effectiveness of the Service Plan is not determinable. It was in place for less than one marking period, it is unknown whether the Parents implemented any changes in Student's study space or her computer time allotment or her lights-out curfew, it is unclear to what extent Student herself bought into the Plan and what incentives her Parents provided for buying into the Plan, it is unclear whether application had already been made to the Charter School in which case Student would have known

she would be out of [high school] in a few months, and even if all conditions were favorable a dramatic upswing in grades during the fourth marking period would have been unlikely given that Student had not established a foundation of skills during the first three marking periods upon which to build. Furthermore, if there were flaws in the Plan the District was not given sufficient time to rectify the situation, as Student left [high school] at the end of June 2005. The District and the Parents refined the 504 Service Plan in October 2005 after Student had already left the District and therefore this Plan was not implemented and the District again did not have a reasonable opportunity to implement/adjust it.

If Student was an eligible student and was not offered an IEP, and/or if Student's 504 Service Plan was not timely and/or not appropriate, is she entitled to compensatory education and in what amount?

As aforementioned, under Section 504 a student is eligible if the student has a mental impairment which substantially affects a major life activity such as learning or working. 34 C.F.R. § 104.3. Students who are eligible under IDEA/Chapter 14 are automatically eligible under ADA/Chapter 15, but some students who may not be IDEA eligible may nevertheless be eligible for services under Section 504. The relief, for example, of tuition reimbursement and related costs is available under either IDEA or Section 504. See Ridgewood Board of Education v. N.E., 172 F.3d 238 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995); Palmyra v. Board of Education v. F.C., 2 F.Supp.2d 637 (D.C.N.J. 1998); Christen G. v. Lower Merion School District, 919 F.Supp. 793 (E.D. Pa. 1996).

The District's obligation to serve a student commences within a "reasonable time" after the District should have suspected the child to be disabled, the "reasonable time" being allowed to the District to conduct an evaluation, identify the student as disabled, and formulate an appropriate program for the child. See Puxatawney Area School District v. Kanouff and Dean; Ridgewood; W.B. v. Matula; Palmyra Board of Education v. F.C.; T.B. v. School District of Philadelphia.

Student is not eligible for special education under the IDEA/Chapter 14 and therefore she is not eligible for an IEP. Student is a protected handicapped student under Section 504/Chapter 15 and is entitled to a 504 Service Plan. The 504 Service Plan offered to Student was appropriate, therefore no compensatory education is warranted.

Is the School District obligated to reimburse Student's Parents for psychotherapy services they procured for her to substitute for appropriate guidance services that the School District did not provide<sup>11</sup>?

Student's younger brother has complex disabilities and from approximately January 2004 until March 2006 the family was involved in a due process hearing, an appeal and a

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<sup>11</sup> The hearing officer specifically declined to consider whether some failure on the District's part created the condition for which Student required psychotherapy. (NT 35)

federal court appeal regarding this child. Student's mother terminated her employment in January 2004. According to Student's mother, during the second marking period of 9<sup>th</sup> grade which commenced in mid-November 2004 Student seemed to be "not just a little bit out of control" at home and her behaviors at home "were a little bit more over the boundary than they had been in the past". Student's resistance to authority was present from an early age, but she seemed to escalate these behaviors in that yelling and resistance was "over the top". In addition Student was spending a considerable amount of time in the evening and late into the night on line and IM'ing, and had experienced an unfortunate outcome to a relationship she established with a boy online (NT 1310-1311). Although in 10<sup>th</sup> grade Student became much more aggressive both verbally and physically when the Parents tried to address her grades, there was no evidence presented that this was the only issue over which Student became aggressive or argumentative. The mother's testimony was that Student began seeing a therapist in December 2004 because according to Student her brother expressed concern when she and her mother were fighting. The Parents failed to prove that Student required psychotherapy as a supportive service to access the curriculum.

The Parents are not entitled to reimbursement for Student's psychotherapy.

## ORDER

It is hereby ORDERED that:

1. [Redacted.]
2. [Redacted.]
3. The evaluations of Student performed by the School District between August 23, 2003 and August 23, 2005 for IDEA/Chapter 14 and/or 504/Chapter 15 were appropriate.
4. As the evaluations of Student performed by the School District between August 23, 2003 and August 23, 2005 for IDEA/Chapter 14 and/or 504/Chapter 15 were appropriate, Student is not entitled to an independent educational evaluation.
5. Student was not an eligible student under the IDEA/Chapter 14 but she was a protected handicapped student under Section 504/Chapter 15 between August 23, 2003 and August 23, 2005 (2003-2004 and 2004-2005 school years). The District did not violate its Child Find obligation.
6. Student was properly identified as a protected handicapped student and the 504 Service Plan offered to her was appropriate.
7. Student's 504 Service Plan was timely and was appropriate, therefore she is not entitled to compensatory education.
8. The School District is not obligated to reimburse Student's Parents for psychotherapy services.

June 9, 2006

Date

*Linda M. Valentini, Psy.D.*

Linda M. Valentini, Psy.D.  
Hearing Officer