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**PENNSYLVANIA**

***SPECIAL EDUCATION HEARING OFFICER***

DECISION

DUE PROCESS HEARING

Name of Child: A.P.  
ODR #6330/05-06 AS

Date of Birth: xx/xx/xx

CLOSED HEARING

Parties to the Hearing:

Parent

Mr. John Baker  
Oxford Area School District  
119 South Fifth Street  
Oxford, PA 19363-1770

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Mr. David Thallheimer, Esquire  
1831 Chestnut Street  
Suite 300  
Philadelphia, PA 19103

Mr. Mark Fitzgerald  
Sweet Stevens Tucker and Katz  
331 Butler Avenue, P.O. Box 5069  
New Britain, Pennsylvania 18901

May 5, 2006

May 20, 2006

Marcie Romberger, Esquire

## BACKGROUND

Student enrolled in the Oxford Area School District in April, 2004 as a 7<sup>th</sup> grade student. During Student's 8<sup>th</sup> grade year, he was exhibiting difficulties during structured and unstructured settings during and after the school day which led to many disciplinary actions. The issue before me is whether Student was identified in a timely fashion as a child with a disability both under Section 504 of the Rehabilitation Act and the Individuals with Disabilities Education Act.

## FINDINGS OF FACT

1. Student attended 5<sup>th</sup> grade in [another state]. Student's 5<sup>th</sup> grade report card showed Student needing improvement in math and reading. S-1. A comment on the report card stated that Student was "dealing much better at controlling himself when he is angry." S-1.
2. The District in [that other state] began the process of offering an IEP to Student, but Student moved to [a second state] before the process was completed. NT 29.
3. The District in [the different state] did not provide Student with an IEP or a Section 504 service agreement in 6<sup>th</sup> grade, instead taking a "wait and see" approach. NT 29-30, 329. Student functioned well in [the second state] although his grades ranged from a "D" to "As" and standardized tests showed Student functioning at a "progress warning" level for math and reading and "unsatisfactory progress" in writing. S-1; NT 326.
4. Student enrolled in the School District (hereinafter "District") in April, 2004 as a 7<sup>th</sup> grade student. Stipulation 1, NT 24. On the enrollment papers completed by Student's family, there is inconsistent information. S-1. On one, it states that Student did not have previous special education services; on another, it states that Student had a previous IEP in another District. S-1. The District did not follow up with Student's family to discuss the inconsistencies. NT 30-31.
5. Student was receiving mental health services when he entered the District including seeing a psychiatrist and taking medications for Attention Deficit Hyperactivity Disorder (hereinafter "ADHD") and other issues. NT 39-40.
6. Approximately one month after Student entered the District, he was suspended for 3 days for fighting. S-43, P-2. The District notified the police. P-2.
7. Prior to that incident, Student was on probation for fighting a student after exiting the school bus. NT 36-37. Student's family did not notify the District about the

bus incident or that Student was on probation until the fall of the 2004-2005 school year. NT 37-38.

8. On September 27, 2004, Student received a one day in-school suspension for making an offensive gesture in class. P-2.
9. Approximately October 14, 2004, an incident occurred in Student's math class where Student's math teacher gave him an instruction which Student did not follow. The teacher sent Student out of the class. In response, Student slammed the door and [made a threat]. NT 49-50, 690-691, 699. The student assist team's crisis unit and the guidance counselor responsible for addressing mental health concerns of the student body were brought in. NT 50, 688-689, 698. Student's family was notified. NT 73, 334-335. The family did not receive any written documentation on what specifically occurred. NT 72. Student's family was told that they needed to have Student evaluated. NT 74.
10. Student's teachers were asked to monitor Student in their classes for behaviors which may need to be addressed through the crisis unit. NT 660, 661.
11. The student assist team also provided referral forms to Student's teachers to indicate significant behaviors they were observing. S-6; NT 514, 661-662. The teachers noted that Student was having academic and behavioral difficulties, including a drop in grades, failure to complete assignments, difficulty with peers, issues with anger, hyperactiveness, changes in behavior, and behaviors that are self abusive, risk taking, and attention getting. S-6. Student, however, was not placed in the student assist program. NT 545. Nor were Student's parents shown these documents or told of the results. NT 358.
12. Student was being bullied by some members of [a sports] team which was brought to the attention of the Assistant Principal. NT 44-45. Student would come home with bruises on his body which Student attributed to bullying rather than practice. NT 168. The Assistant Principal told Student's family that she would speak to the coach because other parents were also complaining. NT 45. It does not appear anything occurred as a result of this information. NT 47-48.
13. On October 21, 2004, a week after the Assistant Principal was notified of the bullying, Student received a 5 day suspension for threatening the boys who were bullying him. NT 44-46; P-2. Student was not permitted to return to school until Student obtained a psychiatric evaluation. P-2; NT 48, 49.
14. Student obtained the evaluation from his private psychiatrist. S-19. The evaluation was faxed directly to the District. NT 53. During the evaluation, Student said that he threatened the boys to stop the boys from threatening him. S-19.
15. This behavior is a characteristic of Student's inability to get out of a situation appropriately. NT 46-47. Student's psychiatrist stated: "[Student] seems to try and

tolerate being harassed by people for a while: however, he seems to suddenly react impulsively without much thinking or planning.” S-19.

16. According to Student’s psychiatrist, Student “has difficulty controlling his impulses in stressful situations. He seems to lack good decision making skills under stress. He tries to ignore the stress, but after a while he seems to get overwhelmed and he reacts impulsively.” S-19.
17. The psychiatrist recommended that Student learn coping skills and see a school counselor or a principal frequently and regularly in order for District personnel to evaluate Student’s stress levels. S-19.
18. This suggestion was discussed between Student’s family and District personnel at a meeting to return Student to school after his suspension on approximately October 29, 2004, but it did not appear to be implemented. NT 53-54. Also at that meeting, Student’s family provided the District with documents regarding Student’s issues at his former schools as well as prior evaluations and requested a § 504 Service Agreement. P-1, S-19; NT 55-56, 59, 695-696.
19. One of the documents provided to the District was a 2002 neurological evaluation of Student. S-12. This evaluation identifies Student as having uncontrollable anger, explosive outbursts, and episodes of self injury ([redacted]). S-12. Student’s family also provided letters from Student’s 5<sup>th</sup> grade teacher and guidance counselor which identified triggers, behaviors, and methods which have been successful in working with Student. S-12, 19. Their observations of Student’s behaviors –self-injurious and threatening [behaviors] -- were consistent with Student’s behavior in the District. NT 62-63; S-12, 19.
20. If the family forgot to give any documents to the District in October, 2004, the family provided them to the District in November, 2004. NT 59.
21. It was Student’s family’s understanding that a Section 504 service plan would be implemented for Student as per their request and the recommendation of Student’s private psychologist. S-2. NT 56, 63-64.
22. The District did not offer to evaluate Student after either October, 2004 events. NT 50, 74.
23. Student failed or received “Ds” in almost every core subject his first marking period in the District which ended on November 4, 2004. S-12. Comments were: uncompleted homework, lacks organized notebook, and poor performance on tests. S-12.
24. On November 10, 2004, Student was again disciplined for something he said to another student while there was a substitute. NT 78.

25. On November 15, 2004, Student's father sent an email to the Principal concerned that a Section 504 evaluation was not going to be forthcoming in the near future. S-5. On November 16, 2004, a response was written by the guidance counselor. S-5. She stated that she could complete a referral for a 504 Service Agreement based upon the information provided by Student's family. S-5. She also stated that although a normal request for a 504 Service Agreement would take a "full testing timeline," because Student was new to the District, they did not have to go through the evaluation process. S-5. However, she encouraged Student's family to obtain a psychiatric evaluation of Student. S-5.
26. On November 16, 2004, Student's father responded that he scheduled a date for Student to be evaluated by his private psychiatrist. S-5. He also stated that it was his understanding from the Assistant Principal that Student did not have to wait to obtain a 504 Service Agreement. S-5. He also gave consent for the team to talk to Student's private psychologist and psychiatrist. S-5.
27. Student's father understood that he did not need to provide permission to the District in November, 2004 for a Section 504 evaluation to be conducted. NT 126.
28. On November 16, 2004, a referral for Section 504 assistance was completed by the guidance counselor and sent to the Special Education Department. NT 458, 459, 502; S-2. The document specifically states that no referral for special education is necessary as there is no evidence to indicate the presence of a disability. S-2. The reason for the referral was concerns with organization and behavior, and because of Student's ADHD. S-2.
29. At the time of the referral, the guidance counselor was aware of Student's problems in his other schools, his medication, and his participation in counseling. NT 507. Also at approximately this time, the Director of Special Education became familiar with Student. NT 567.
30. Once a referral is sent to the special education office, the special education office sends a Permission to Evaluate to the family usually within 24 hours. NT 479, 572. If a request is made for a Section 504 service agreement, a referral is also made for a special education evaluation. NT 508. In the District, the timelines for determining whether to provide a Student with a Section 504 service agreement is the same as for a special education evaluation – 60 school days. NT 509-510.
31. Also at this time, the Instructional Support Team (hereinafter "IST") became involved because Student was referred for a Section 504 service agreement and because teachers indicated that Student had some needs. NT 454-455, 457, 467.
32. Instructional Support can become involved when a student has behaviors that interfere with the educational process of the student. NT 466. Behaviors could include such issues as attendance, emotional, homework, or any other issue interfering with classroom performance. NT 466. IST addresses a child's needs in

structured and unstructured settings in the school building. NT 514-515. It does not address issues during extracurricular activities, terroristic threats, threatening or self-injurious behaviors. NT 515, 544, 547.

33. The role of IST is to collect data on a child once a teacher has made a referral because of a concern the teacher has for the child. NT 455. The IST teacher would interview teachers, parents, and the student. NT 455. The IST teacher would also do assessments and classroom observations of the student. NT 455. After the data is collected, a team would meet to develop strategies to implement in the classroom. NT 456. At the end of 30 days, the team would reconvene to discuss whether those strategies were effective. NT 457.
34. On November 17 and 18, 2004, Student was observed in the classroom setting by the Instructional Support Teacher. S-3. The teacher noticed Student off-task, having difficulty with peer interaction, calling out in class, and not complying with teacher requests. NT 460; S-3. These behaviors observations were consistent with Student's history of ADHD. NT 93-94; S-3, 4. The Instructional Support teacher testified that Student appeared to be easily redirected, however, that does not appear to be consistent with her observation summaries. NT 460-461; S-3
35. No observations of Student were conducted in unstructured situations even though it was in those situations where Student had most of his issues. S-3.
36. The Instructional Support teacher interviewed Student. NT 462; S-4. She determined from her interview that Student did not like school or working with other students, that he thought other students did not like him, and that he had difficulty dealing with his emotions. NT 462. Student stated that he feels like hurting someone when he gets mad and that he wishes he could die or disappear because he does not like himself. S-4.
37. Teacher interviews showed Student having some difficulty with off task behavior and homework completion, but not a lot of behavior problems, although Student's math teacher told the Instructional Support teacher that Student's grades were very poor whenever he had a "melt down." NT 465.
38. Student's father thought the observations and interviews were conducted in connection with the Section 504 referral. NT 94.
39. On November 18, 2004, Student's mother wrote an email requesting that Student's lack of impulse control, his inability to control his emotions, and his inability to handle transitions should be addressed in a plan. S-5.
40. On November 18, 2004, a parent-teacher conference was scheduled. NT 341-342, 712. Instead, a team meeting was held to discuss supports for Student. NT 342-343; S-7. Student's family raised homework assignments as a concern and discussed triggers – what upsets Student which escalates negative behavior. NT

467-468. Student's family requested that Student have someone to go to when he was upset. NT 468.

41. On November 23, 2004, the first formal IST Action Plan for Student was developed. NT 101; S-8. The action plan does not address supports for Student in unstructured settings nor does it provide counseling to address Student's issues with anger, peer interactions, or feelings toward himself. S-4, 8.
42. One of the goals in the Action Plan was Student "will recognize triggers and appropriately react to stressful situations." S-8. At that time, the teachers could not identify any antecedents although Student's family told the teachers of many -- pencil snapping, withdrawing, laying head down. NT 373. The teachers were implementing communication with Student that would escalate Student's behaviors. NT 89, 102-103, 119-120, 151, 373, 519; S-5.
43. An intervention in the Action Plan was for Student to obtain teacher signatures in his agenda book. S-8. Although a good intervention for Student, it would only be implemented if Student brought the book to the teachers. NT 105-106, 648; S-8, 17.
44. Another intervention was for Student to clean out his locker once per week. S-8. However, this only occurred on one occasion. NT 108, 161; S-9.
45. There is also a notation in the Action Plan that a "MDE referral will be made to address academic as well as social/emotional concerns." S-8. However, Student was not provided with a Permission to Evaluate until almost a month later. S-8; NT 109.
46. There was no counseling offered in the Action Plan although suggested by both District personnel and Student's psychologist. S-8, 19. There was also nothing in the Action Plan that would teach Student how to deescalate. S-8. In addition, there are no positive reinforcements or reward systems in the Action Plan although Student's family requested it. NT 520, 522; S-8.
47. The IST logs are difficult to decipher to determine whether the Action Plan was being implemented and if so, how often. S-9.
48. On November 23, 2004, Student's father wrote to the Instructional Support teacher requesting procedural safeguards and information regarding the functional behavioral assessment. S-5, 10. He also asked if he needed to sign the "consent" form the guidance counselor provided and to what they were actually consenting. S-5, 10.
49. On November 30, 2004, Student's father wrote an email to the District again discussing antecedents and techniques teachers could use to keep Student engaged. S- 5, 10. He wrote the email because the teachers were telling Student's father than

they could not identify antecedents. NT 89. Student's father also stated that he would be willing to work with the District on a rewards system related to target behaviors. S-5, 10. The District did implement a positive reward system for Student. NT 91. Student's father believed a reward program was not instituted because no Section 504 plan was developed. NT 91-92.

50. In addition to the above, there was a request by Student's family for each of Student's teachers to sign his assignment book and to provide Student extra time to get from one class to another so that he can get his assignment book signed. S-5, 10.
51. At this time, Student's father thought the evaluation process had commenced though no Section 504 plan or IEP had yet been developed. NT 124, 352.
52. After Student's father's email, the guidance counselor told Student's family it would be in their best interest to have an updated psychiatric evaluation conducted. S-10. The District did not offer to fund the evaluation. S-10.
53. On November 30, 2004, the Instructional Support teacher provided a copy of the Action Plan to Student's family. S-5, 10. She also submitted a referral for a special education evaluation to the special education department. S-5, 10, 12. The reason for the referral was Student was demonstrating episodes of explosive anger. S-12. The referral was not signed as received by the special education office until December 16, 2004. S-12.
54. The Instructional Support teacher told Student's family that they do not need to sign the Permission to Evaluate provided to them by the guidance counselor, but that they do need to sign a Permission to Evaluate in order for the special education evaluation to commence. S-5, 10.
55. On December 2, 2004, the Instructional Support teacher again told Student's family that they do not need to sign the Permission form already provided to them by the guidance counselor, but that a permission form will come from the special education office which they will need to sign. S-11.
56. On December 2, 2004, Student received a detention for throwing staples at another child. P-5.
57. On December 9, 2004, Student received a Saturday school for being disruptive to another student. P-2. Student made a comment to a student who was getting in trouble that his mother is going to be ashamed of what he did. NT 129-130.
58. The first time Student received procedural safeguards was December 20, 2004 when he received the Permission to Evaluate, dated December 17, 2004. NT 126, 347; S-13.



59. The Permission to Evaluate was provided to Student's family one month from the date the Section 504 referral was delivered to the special education office. NT 458, 459, 479. The Permission to Evaluate provided to Student did not list the specific types of tests that would be conducted. NT 127, 129; S-13.
60. There was initial confusion by Student's family as to whether they needed to sign the Permission to Evaluate in order for an evaluation to commence. NT 349, 354; S-11.
61. Student's father would not sign the Permission to Evaluate without knowing what tests were going to be conducted on Student. NT 127-128, 354. Student's father was also concerned that the school psychologist would not have all the relevant background information regarding Student. NT 127-128, 149-150, 354. He wanted to meet with school personnel before signing the Permission to Evaluate to confirm that all the information that he provided to the District would be seen by the school psychologist. NT 149-150, 349-350.
62. On January 12, 2005, Student received an out of school suspension for 10 days for assault. P-2. A student was pushing Student's seat on the bus and Student [acted aggressively]. NT 132-133. The police were notified of the incident. P-2.
63. While Student was suspended, Student's family obtained Student's school work. NT 135-136. They were not able to obtain the work in a consistent fashion and Student would fall behind. NT 136. Student was also falling behind on tests and making up tests was an issue in some classes. NT 136, 137, 139.
64. When Student was in class, he was doing well. NT 525; P-4. However Student's grades were poor due to falling behind and missing instructional time because of suspensions. NT 260-262, 524-526; S-19, 21, P-4. Returning from suspensions was also a difficult transition for Student who would have to get back into the routine of a structured setting. NT 55-156, 198; S-19.
65. During the month of January, 2005, Student's family was still confused as to the process for special education and whether they needed to sign the Permission to Evaluate form. NT 143-144, 147-148; S-5. The Director of Special Education and the Instructional Support teacher informed Student's family that without a signed consent form, the District could not proceed with the evaluation. NT 574; S-5.
66. On January 23, 2005, another email was sent by Student's family discussing Student's triggers. S-5, 16. Also on that date, the IST teacher thanked Student's family for informing the District of Student's triggers and wrote that Student was having behavioral difficulty in settings other than the classroom. S-16; NT 152.
67. On February 2, 2005, there was an incident in class in which Student became agitated and started [acting aggressively toward] another student. S-29. The family was not apprised. S-17; NT 157. District personnel discussed putting Student into

a program for kids deemed at-risk. NT 656, 672-673; S-17. Although this program is also deemed regular education, it is more structured than the regular education program. NT 160, 657. The students in this program do not change classes so they are not in the hallways as much. NT 657. For some unknown reason, this was not pursued for Student. NT 657.

68. District personnel also did not discuss with Student's family any accommodations that could be implemented in unstructured settings to address Student's behavioral needs. NT 160. The District did not offer school-based counseling; rather, the District provided Student with a list of private counselors. NT 160.
69. In February, 2005, Student was still concerned about getting to class in a timely fashion after getting his assignment book signed. S-17; NT 161. Student's family continued to ask for permission for Student to come late to class in those situations. S-17. Extra time was allowed in the February, 2005 revised Action Plan. S-18; NT 188.
70. On February 10, 2005, Student received another out of school suspension for 5 days for fighting during an unstructured setting. NT 162-163; P-2. The District did not share with Student's family what occurred on that occasion, but the family learned from Student [about the incident]. NT 164; P-7, 8.
71. On February 11, 2005, District personnel and Student's family met to review the Action Plan developed on November 19, 2004. NT 483; S-18. The meeting lasted approximately 20 minutes. NT 186.
72. Changes to the Action Plan related to when there was a substitute teacher and provided additional time for Student to have his agenda book signed. S-17, 18. However, the teachers were still not reminding Student. NT 188-189.
73. Student's father wanted Student to maintain a homework folder. NT 190. This was included in the revised Action Plan, but subsequently not enforced because Student did not like to do that. S-18; NT 190-191, 247. Student's family also requested that Student be monitored during the day because of his medicine change. NT 191-192. This was included in the revised Action Plan. S-18.
74. The revised Action Plan does not provide Student with group counseling as per the request of Student's private psychologist. NT 193; P-10. In fact, Student was not eligible for group counseling at the District unless he had an IEP. NT 491.
75. Neither the original Action Plan nor the revised Action Plan addressed behaviors in unstructured settings. S-18; NT 486;
76. Also on February 11, 2005, Student's father and District personnel reviewed the information that was to be sent to the school psychologist. NT 186, 356, 483. Student's father believed there were documents missing from the referral packet

which he provided the District in October, 2004. NT 196, 338-340, 349-350, 526-527; S-19. After the review, Student's father signed the Permission to Evaluate granting permission for the District to evaluate Student. S-13.

77. In an email dated February 25, 2005, Student's IST teacher reminded Student's family that in November, 2004, she suggested that the family obtain a new psychiatric evaluation. S-20. At no time from November, 2004 until April 29, 2005 did the District request to conduct a psychiatric evaluation. NT 209-210.
78. Student had been exhibiting less negative behaviors in the classroom from November, 2004 to February, 2005 according to reports provided by Student's teachers. NT 490. However, Student continued to exhibit difficulties in unstructured settings and his grades were still declining. S-16, P-4.
79. On March 4, 2005, another revised Action Plan was developed, but it is unclear if there was a meeting which occurred to revise the Plan. Stipulation NT 715; NT 219-220, 222, 223. This Action Plan still does not discuss unstructured settings. S-23.
80. The second revision to the Action Plan discussed what would occur if Student was disruptive in class: an adult will ask Student to leave the classroom and go to a designated area to cool down; if Student resists, he would receive a conduct referral and be written up for insubordination. S-23. The purpose for this plan was to document how often Student was unsuccessful according to the Instructional Support teacher. NT 554.
81. Student's father did not believe this would deescalate Student because bringing the disciplinarian to the class to tell Student to leave the class would escalate Student's behaviors. NT 226-227.
82. On March 9, 2005, a Behavior Consultant from the Intermediate Unit observed Student only in the lunch room for less than an hour. NT 540; S-24. This observation was in response to the District's request on or about November 18, 2004 for the Intermediate Unit to conduct a functional behavioral assessment of Student. NT 489, 536, 537-538. The District did not request that anyone else perform the functional behavioral assessment because it did not know what other resources were available. NT 539. The assessment was delayed for a few reasons including Student's suspensions. S-19.
83. The purpose of the functional behavioral assessment was to identify triggers. NT 489; S-5.
84. Although she observed on March 9, a report was not compiled until April 19, 2005. NT 541-542; S-5, 39. A suggestion of the Consultants was for the Action Plan to be changed to concentrate on unstructured settings. S-24. She also recommended

setting up a contract with Student. S-24. Student's father suggested that in October, 2004, but the District did not follow up on his suggestion. NT 232, 543-544. The District also did not follow up on this suggestion from the Behavior Consultant. S-24.

85. One of the concerns raised in the Behavior Consultant's report was that Student has explosive anger. S-24. This was known by the District. S-17.
86. On March 17, 2005, Student again received a Saturday School for [acting aggressively]. P-2. Student was rushing to the cafeteria to sit in a certain seat in which he felt comfortable when the [aggression] occurred. NT 201.
87. On March 28, 2005, the Instructional Support teacher informed Student's family that Student was involved in several incidents with substitute teachers and in the cafeteria. S-5.
88. On April 18, 2005, an incident occurred at school from which Student was ultimately suspended. It first began with Student and the Principal having a few discussions regarding Student carrying his medication. NT 401-402. Then, Student put his name on a list for computer time above other names already on the list. NT 402, 650-651; S-29, 39. When the teacher told him he would need to wait till the end of the list, he [redacted]. NT 404-405, 408, 577, 652, 674. [Redacted.] Student's family was called to pick him up and was told that he would be suspended. NT 403, 408.
89. Most of these behaviors [redacted] were consistent with prior behaviors Student exhibited during the school year. NT 621, 652, 664, 665, 670. [Redacted.]
90. Student's family did not receive any written notices of disciplinary action as to what occurred, the duration of his suspension, or when he could return to school. NT 266, 269, 275, 390, 409, 415-416; S-39. On April 18, 2005, Student's family was told that Student would not be able to return to the school and that an alternative placement would have to be located. NT 409-410.
91. During the suspension, the Director of Special Education became aware that Student was suspended that year for more than 15 days. NT 582. As a result of Student being a "thought-to-be eligible" student, the Director informed District personnel that Student needed to return to school. NT 582-583.
92. Because of truancy concerns, the District determined that Student should return to school on May 2, 2005. S-28; NT 587-588. However, the District may have requested Student to return on April 27, 2005. S-25. Student's family did not want to place him back into school without accommodations in place. S-25. Student's family requested a meeting to discuss Student's return. S-25.

93. On April 28, 2005, a referral for a psychiatric evaluation was completed and submitted to the special education department. S-26. On April 29, 2005, a Permission to Evaluate was completed. S-40. It was not returned until May 19, 2005 because Student's family wanted to discuss it with their attorney. S-40.
94. On May 3, 2005, a meeting was held. At the meeting, the Director of Special Education indicated that Student could return to school. NT 283. The Director believed things would be better for Student now that he was involved. NT 283. The Director, however, had been involved since November, 2004. NT 283, 386; S-12, 19. No additional accommodations or changes to the Action Plan were discussed at this meeting if Student returned to school. S-28; NT 285, 382.
95. Approximately May 3, 2005, the District discussed two programs with Student's family: Choices, an emotional support program which provides counseling, and REACH, a partial hospitalization program. NT 286, 594; P-11, 12.
96. Discussions regarding placement occurred before the Evaluation Report was completed and a §504 service agreement or IEP was offered. NT 287-289, 595.
97. Although the Director of Special Education recommended that Student return to the District, Student's teachers expressed concern about Student returning. S-26. The teachers did not believe that Student could return to the same regular education program. NT 667. They felt that Student needed more help and assistance than they could provide and were hoping that by voicing their concerns, Student would get the help he needed. NT 671, 672. These concerns were not shared with Student's family. NT 291-292.
98. The Director testified that if no modifications to Student's program were developed, it would not have been appropriate for Student to return to school after his April suspension. NT 617. No documentation exists to show any modifications to Student's program would have been implemented upon Student's return. NT 618.
99. After the incident in April, Student was placed on homebound instruction. NT 592. The District did not send a teacher to Student's home. NT 301. Rather, Student's family transported Student to the school to get tutored after school -- the only time offered to Student. NT 301-303, 627. The District did not offer to transport Student to school for the tutoring. NT 302.
100. On May 5, 2005, an Evaluation Report was issued by the District. S-29. It determined Student was eligible under IDEA as a student with an emotional disturbance and an other health impairment, specifically ADHD. S-29. Student's family agreed with the recommendations and wished those recommendations were addressed in the Action Plans. NT 397-398.

101. On May 27, 2005, prior to an IEP being offered, the District discussed Student attending a therapeutic summer program at a partial hospitalization program with Student's family. S-33, 34; NT 305-306. At that time, no psychologist had recommended a therapeutic placement. NT 306.
102. Student indicated to his family that he did not want to continue at the District for the 2005-2006 school year. NT 316-317.
103. On June 1, 2005, an IEP was offered. S-34. A Section 504 service agreement was never created for Student. NT 502-503.
104. Student's language arts teacher did not have a lot of difficulty with Student in her class during most of the school year. NT 640. Although he had some behaviors, he was very correctable. NT 640, 649. Other teachers were seeing concerns during the school year, however. NT 644.
105. Transitions can be a problem for Student. NT 326. He has a school routine which is affected by being late because of getting his assignment book signed or losing his cafeteria seat. NT 331-332, 421.
106. One of the ways Student disengages is by drawing or writing. NT 296. It is his way of removing himself from the situation. NT 296.
107. Student's assignment book was not consistently completed at any time during the school year. NT 422.
108. No data was collected on the success of the Action Plans. NT 523, 524.
109. Student received 21 days of out of school suspensions during the school year. NT 422, 597. At no time was a manifestation determination hearing held. NT 385, 599. It was the Director of Special Education's understanding that a manifestation determination did not have to occur until a child had been identified. NT 599-600.
110. The Director of Special Education believes that a child is a "thought to be eligible" student once a referral to the special education department is made. NT 606. In Student's case, the referral was made November 16, 2004. NT 458, 459, 502; S-2. It is at that point, the Director believes that Student would have been afforded IDEA's procedural protections regarding discipline. NT 606-607, 612.

## ISSUES

Did the District fail to identify Student as a child with a disability under the Individuals with Disabilities Education Act or under Section 504 of the Rehabilitation Act as early as October, 2004?

If the District did fail in its Child Find mandate, is Student entitled to compensatory education?

## DISCUSSION AND CONCLUSION OF LAW

### Burden of Proof

Following Schaffer v. Weast, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (Nov. 14, 2005), and L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006), the burden of proof is now borne by the party bringing the challenge. As Student has filed for a due process, he has the burden of proof.

### Section 504 of the Rehabilitation Act

The substantive requirements of the Rehabilitation Act in the education context are equivalent to the requirements set forth in the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999) (citing W.B. v. Matula, 67 F.3d 484, 492-93 (3d Cir. 1995)). The regulations implementing the Rehabilitation Act provide that districts "shall provide a free appropriate public education to each qualified handicapped person who is in the district's jurisdiction." 34 C.F.R. § 104.33(a); see also W.B., 67 F.3d at 493.

To establish a violation of § 504, Student must demonstrate that (1) he is disabled as defined by the Act;<sup>1</sup> (2) he is "otherwise qualified" to participate in school activities; (3) the school or the Board receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1380 (3d Cir. 1991); 34 C.F.R. § 104.4(a). In addition, to be liable, the District must have known or have been reasonably expected to know of Student's disability. Nathanson, 926 F.2d at 1381. However, plaintiffs "need not establish that there has been an intent to discriminate in order to prevail under § 504." Id. at 1384. See, Alexander v. Choate, 469 U.S. 287, 297, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985); Ridgewood, 172 F.3d at 253; Matula.

In this case, Student had been diagnosed with ADHD before entering the District. The District was aware of his diagnosis in October, 2004 if not earlier when Student's family provided the District with past evaluations and school records. NT 39-40. Also clear from the documents provided to the District as well as the District's first hand knowledge of Student's behaviors, Student's ADHD and emotional issues were substantially limiting Student's major life activities. S-6, 12. As a resident of the District, Student was "otherwise qualified" to participate in school activities at the District. The issue then, is whether Student was excluded from participation in, denied

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<sup>1</sup> A "Handicapped person" under Section 504 of the Rehabilitation Act is defined as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 34 C.F.R. §104.3(j).

the benefits of, or subject to discrimination at, the school. Student has argued that the District did not locate him and provide him an appropriate education in a timely fashion. Specifically, Student claims that he should have received a service agreement under § 504 in October, 2004 after the District became aware of his ADHD and his emotional issues in unstructured and structured settings.

An "appropriate" education "is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." 34 C.F.R. § 104.33(b)(1). There are no bright line rules to determine when a school district has provided an appropriate education as required by § 504. Eric H. v. Methacton Sch. Dist., 265 F. Supp. 2d 513 (E.D.PA 2003).

What is known is that §504 requires a recipient of federal funds to make "reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped" person. 34 C.F.R. §104.12 (a). Although the Third Circuit has not specifically addressed what is a "reasonable accommodation" in relation to the Rehabilitation Act's requirement of an "appropriate" education, Courts have concluded that a reasonable accommodation analysis comports with the Third Circuit's explanation that an "appropriate" education must "provide 'significant learning' and confer 'meaningful benefit,'" T.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182, 184 (3d Cir. 1988), but that it "need not maximize the potential of a disabled student." Ridgewood, 172 F.3d at 247; Molly L v. Lower Merion School District, 194 F. Supp. 2d 422 (E.D.PA 2002).

In this case, there is sufficient evidence in the record from which a reasonable factfinder could conclude that the District denied FAPE to Student under Section 504 at a time when it knew or should have reasonably expected to know of his disability. Student's family and the District discussed developing a Section 504 service agreement on October 29, 2004 when they met to discuss Student's suspension from school. S-2, 5; NT 56. At that time, Student's family provided the District with relevant medical and school records which clearly showed a need for Student to receive services and accommodations. Combined with the information that the District knew about Student's inability to appropriately be involved in school and school related functions, within a reasonable time from October 29, 2004, the District should have either evaluated Student or created a Section 504 plan without a new evaluation as the District stated that it would do. S-5. Rather, an evaluation was not conducted until May, 2005 and an IEP not developed until June, 2005. At no time did the District provide Student with a Section 504 service agreement.

The District did provide Student an IST Action Plan; however, this plan and its subsequent revisions do not encompass all of Student's known needs. S-8, 18, 23. IST does encompass structured and unstructured time during the school day, yet no Action Plan discusses procedures to address Student's difficulty with unstructured settings. S-8, 18, 23. Nor do the Action Plan address the counseling Student so desperately needs. S-8,



18, 23. What the Action Plans do discuss in relation to organization was appropriate on paper, but because it was not implemented on a consistent basis, it was not effective.

### Individuals With Disabilities Education Act

Under IDEA, "among the specific conditions a state must satisfy is the requirement that it demonstrate that 'all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated.'" W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995). IDEA's so-called "child-find" duty includes a requirement that children who are suspected of having a qualifying disability must be identified and evaluated "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." Id. at 501.

In this case, in October, 2004, the District was aware that Student was having emotional, academic, and organizational difficulties in school. S-6, P-2. The District was also aware at this time that Student had been diagnosed with ADHD and had violent outbursts. S-12, P-2. Yet, Student was not referred for testing to determine eligibility under IDEA until December 17, 2004. Had the District offered Student's family a Permission to Evaluate when the parties met in October or November, 2004, the possibility exists that Student's family would have signed it immediately because they would have been able to confirm with District personnel at the meeting: 1) the form needed to be signed, and 2) what documentation would be provided to the school psychologist.

In summary, there is evidence in the record from which a reasonable factfinder could conclude that a denial of FAPE occurred because an evaluation and IEP were not developed within a reasonable time after school officials were on notice that Student's ADHD and emotional behaviors were affecting his entire school day.

### Manifestation Determinations

The IDEA provides protections to children not yet eligible for special education and related services.

“(A) IN GENERAL.—A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this part if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

“(B) BASIS OF KNOWLEDGE.—A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

“(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

“(ii) the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B); or

“(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

20 U.S.C. §1415. The Special Education Director believes that a student is thought-to-be eligible for special education services once a referral is made to the special education department for an evaluation. NT 606-607, 612. Although that is true, a student can also be “thought-to-be” prior to a referral being made. 20 U.S.C. §1415 (B). In this case, it was clear that Student’s ADHD and possible emotional disturbance was affecting him in school beginning with the two incidents in October, 2004 which led to a crisis intervention and a suspension. Any disciplinary action after October, 2004 should have resulted in a manifestation determination.

“(i) IN GENERAL.—Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine—

“(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or

“(II) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.

“(ii) MANIFESTATION.—If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child’s disability.

“(F) DETERMINATION THAT BEHAVIOR WAS A MANIFESTATION.—If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child’s disability, the IEP Team shall—

“(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

“(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

“(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

20 U.S.C. § 1415 (E)(F). If the District had conducted even one manifestation determination, it would have determined that Student’s actions were a manifestation of his suspected disabilities and a functional behavioural assessment – clearly needed in this matter – would have been conducted and a behavioral intervention plan developed to assist Student at all times during school activities.

### Compensatory Education

As I have determined that Student has met his burden of proof, I now turn to the question of whether Student is entitled to compensatory education.

Compensatory education is a remedy for a denial of a free appropriate public education. Millersburg Area Sch. Dist. v. Lynda T., 707 A.2d 572, 578 (Pa. Commw.), app. denied, 555 Pa. 748, 725 A.2d 1223 (1998); Jackson, 155 Pa. Commw. 219, 624 A.2d 806. See also, Ridgewood Bd. of Educ., 172 F.3d 238; M.C. v. Central Reg. Sch. Dist., 81 F.3d 389 (3d Cir.), cert denied, 519 U.S. 866 (1996); Scott P., 62 F.3d 520; Lester H v. Gilhool, 916 F.2d 865 (3d Cir. 1990), cert. denied, 499 U.S. 923 (1991). It “require[s] school districts to belatedly pay expenses that they should have paid all along.” M.C. An award of compensatory education requires a “finding that a child has received an inappropriate education.” Id., 81 F.3d at 397. It is the denial of an appropriate education, not the mere denial of an appropriate IEP that creates the right to compensatory education. Ridgewood, 172 F.3d at 250.

Thus, the “right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education.” Id. As to the timeframe, “[t]he school district, however, may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem.” M.C. v. Central Reg’l. Sch. Dist., 81 F.3d 389, 397 (3d Cir.), cert. denied, 519 U.S. 866 (1996). Thus, M.C.’s corollary:

a school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.

As a result of the District failing to provide an appropriate program to Student either through a Section 504 Service Agreement or through an appropriate IST Action Plan, Student is entitled to compensatory education. The District was aware that Student was exhibiting issues related to his disability since the middle of October, 2004 when a crisis counselor had to be brought in for one episode to assist Student and for another episode; Student was suspended for terroristic threats. On October 29, 2004, Student's family provided the District with all necessary documentation related to Student's disability. At that time, the parties discussed developing a Section 504 plan for Student. Sufficient time was given by November 23, 2004, the date of the meeting to develop the IST Action Plan to either provide Student with an appropriate IST Action Plan or a Section 504 Service Agreement.

In addition to providing Student with an inappropriate IST Action Plan, and failing to provide a Section 504 Service Agreement to Student, the District failed to provide a Permission to Evaluate in a timely fashion, and failed to conduct manifestation determinations. For these reasons, Student is entitled to compensatory education since November 23, 2004.<sup>2</sup> Without an appropriate plan, Student was excluded from participation in activities – including academic instruction – during the school day and during extracurricular activities. Student is therefore entitled to a full day of compensatory education from November 23, 2004 to the end of the school year for all of the days he was in school or on disciplinary leave.<sup>3</sup>

Multiple Appeals Panels on numerous occasions have held that families should be authorized to choose and access appropriate services from any reasonable educational, habilitative, therapeutic, or recreational program provider when compensatory education is awarded. See Special Education Appeals Panel Decisions Nos. 1179, 1122, 1098, 1082, 1070, 1054, 1046, 1042, 1027, 1024, 999, 992, 989, 961, 946, 918, 830, 766, 723, 697. Therefore, Student and his family should determine how the compensatory hours will be used.

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<sup>2</sup> Although the bulk of the compensatory education award is a result of the failure of the District to provide a Section 504 plan since November, 2004, some of the award can also be attributable to the District's failure under IDEA to conduct manifestation determinations.

<sup>3</sup> Although an IEP was issued in June, 2005, it was not to take effect until August, 2005.

## ORDER

As a result of the District's failure to provide Student with an appropriate IST Action Plan, Section 504 Service Agreement, Permission to Evaluate in a timely fashion, and manifestation determinations, Student is entitled to compensatory education from November 23, 2004 to the end of the 2004-2005 school year. The amount of compensatory education should be calculated at a full day for every day Student was in school or was out of school for a disciplinary action.

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Marcie Romberger, Esquire