PENNSYLVANIA

Special Education Hearing Officer

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This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

DECISION

D. R.
Date of Birth: xx/xx/xx
ODR File No.: 6513/05-06 AS

Dates of Hearing:
June 5, 2006

Closed Hearing

Parties to the Hearing:	Representatives:
Parent	Mark W. Voigt, Esquire Plymouth Meeting Executive Campus, Suite 400 600 West Germantown Pike Plymouth Meeting, PA 19462
North Penn School District 401 East Hancock Street Lansdale, PA 19446	Gina K. DePietro, Esquire Sweet Stevens Tucker & Katz LLP 331 Butler Avenue, P.O. Box 5069 New Britain, PA 18901
Date Transcript Received:	June 8, 2006
Record Closed:	June 8, 2006
Date of Decision:	June 16, 2006
Hearing Officer:	Rosemary E. Mullaly

I. Background and Procedural History

A. Background

The Student is a resident of the North Penn School District (the "District") who, was diagnosed with asthma in August 2004. He began the 2005-2006 school year as a seventh grade student at the Middle School. On November 11, 2005, the Student was diagnosed as suffering from severe asthma and allergy due to exposure to the cockroach aeroallergen. His asthma and allergies became so severe that on November 23, 2005, his physician placed him on homebound instruction. He remained on homebound at all times prior to the hearing in this matter. During the seven month excusal from school attendance, he received five hours a week of academic tutoring.

Proceeding under both the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), the parent asserts that the District failed to timely conduct a multidisciplinary team evaluation to determine if the Student was "a child with a disability" under the IDEA or an "otherwise qualified handicapped student" under Section 504; it failed to provide notice of procedural right to the Student's parents; it failed to provide the Student with appropriate specially designed instruction; and it failed to offer a free appropriate public education in the least restrictive environment. The parents seeks placement of the Student for the 2006-2007 school year in one of the other two District middle schools and 697.5 hours of compensatory education and prevailing party attorneys fees and costs.

The District acknowledges that the Student has a disability – specifically asthma and allergies, but asserts that it did not place the Student on homebound - it was doing exactly what his physician prescribed and his parent requested in the nature of an accommodation for his disability. Moreover, the Student does not qualify as a child with a disability under the IDEA because he does not meet the second criteria for eligibility for the classification of "other health impaired" student because he does not require specially designed instruction and related services.

B. Procedural History

The Office for Dispute Resolution received the parent's hearing request in this matter on April 24, 2006. The single session hearing took place on June 5, 2006.

II. Findings of Fact

1. The Student resides at [redacted].

Summer 2004

2. In the summer of 2004, the student required an emergency room visit due to inability to breathe; at that time he was diagnosed with asthma. Prior to August 2004, he was seen by a physician for allergies and was taking Claritin and he did not have any difficulty with asthma or allergies in school and did not require an inhaler at school, although the Student would miss school because of migraines. (N.T. 28, 29, 59-60, 134; P-4).

2004-2005 School Year – Sixth Grade

4. During the 2004-2005 school year, the Student attended Elementary School. At School he would use an inhaler daily after lunch and gym. He missed school days during sixth grade due to allergy/asthma related problems. (N.T. 30-31).

5. In September 2004, the Student required an emergency room visit because he couldn't breathe. He was discharged to home with oral Prednisone and inhaled steroids to compliment his rescue inhaler. (N.T. 31-32, 101; P-3, at 49).

6. In December 2004, the Student was seen by a pulmonary specialist who diagnosed the Student with asthma and rhinitis. (N.T. 32, 103-; P-8, at 82).

7. In January 2005, Student received a prescription for a nebulizer. If he was experiencing asthma symptoms he would use it every four hours or three times a day. If it was a school day, he would take it before school, after school, and before he went to bed. (N.T. 33; P-6).

8. During the 2004-2005 school year, the Student was taking Proventil or Albuteral and Azmacort. He went to the nurse, got his inhaler treatments and then went back to class. During sixth grade, he had problems with gym, and occasionally missed time from school (N.T. 34, 35; P-8 at 82).

9. During the 2004-2005 school year he began with the usage of an Albuterol rescue inhaler; then his frequent incidents of asthma exacerbations necessitated the use of Prednisone; then he began to use a daily inhaled steroid – Azmacort and Advair and Flovent. He stopped taking Azmacort during the summer of 2005 and at some point during in September 2005, the Student stopped using his Advair inhaler. A change in medication and discontinuation of a suppressive asthma therapy could indicate a flare-up of symptoms. (N.T. 134, 135, 136, 139, 140).

10. During the 2004-2005 school year the Student's asthma was not well controlled. (N.T. 104, 106, 107, 108; P-6 at 78; P-10, at 102, 104, 106, 105, 107, 108).

Summer 2005

11. Over the summer of 2005, the Student did not manifest significant problems with his asthma. He was taking Azmacort every day, and he had no emergency room visits during that time. (N.T. 35-36).

2005-2006 School Year- Seventh Grade

12. At the beginning of the 2005-2006 school year, the Student started attending Middle School, and his asthma symptoms changed; specifically he would become more congested as the week progressed so that by on Thursday and Friday, he normally couldn't go to school. (N.T. 36-37, 38-39).

13. In September, 2005 the Student's allergies remained at the same level of "not well controlled" as was noted during the 2004-2005 school year – in that he was seeing the physician every two to three months for asthma flare-ups. The Student's physician indicated that he should carry his Albuterol inhaler with him. (N.T. 109-110; P-10, at 97).

14. On September 26, 2005, the Student was seen by his physician for breathing troubles and he was put on Prednisone. On November 2, 2005, the Student was admitted overnight to the hospital from the emergency room due to asthma related distress. At or around the time of this admission to the hospital, his family was pulling up carpet. He was seen by his physician on November 7, and 10, 2005 and the frequency of his symptoms and visit reflected a worsening of his asthma and allergies. (N.T. 39-40, 41-42, 111-112, 113-114; P-2 at 5, P-10 at 95).

15. Due to excessive absences, the Student was the subject of a Child Study Team on October, 2005. His absences were related to his asthma. (N.T. 155, 165).

16. On November 11, 2005, the Student was evaluated by an asthma specialist, and he tested positive only for the cockroach aeroallergen. At that time he was prescribed inhaled Albuteral and Flovent and nebulized Proventil. When the parent provided a copy of this report to the District, no action was taken by the District in response to this information. On or about November 14, 2006, the Parent contacted the District, stated that the Student could not attend Middle school, and requested homebound request be sent to his allergist November 15 and then his family physician on November 18 for a homebound recommendation (N.T. 42, 43-44, 65, 115, 157-158, P-1, at 1).

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17. The Student's physician requested homebound for the first time on November 23, 2005 based upon environmentally induced asthma. He was not aware of any other alternative educational placements for the Student nor did the District suggest any. The first recommendation of the Student's physician for homebound was only for two weeks to allow his asthma to cool down. After five weeks of homebound instruction his physician thought it was not unreasonable to attempt him in the traditional school setting. On January 6, 2006, the Student had an unsuccessful trial return to Middle School. He immediately started having problems breathing and remained at school about 45 minutes. His parent took him directly to his physician who placed him on homebound for three additional months. When that three months was over, he was placed on homebound for the rest of the 2005-2006 school year. The total duration of his homebound instruction lasted from November 23, 2005 until the end of the 2005-2006 school year. (N.T. 117-121, 122, 123, 124, 125, 142, 143, 144; P-10. at 86, 92; N.T. 51-52, 53, 67, 68; S-2, at 4; P-10, at 86).

18. While the Student was on homebound, his asthma improved. (N.T. 50-51; 53, 55,125; P-10, at 84-85).

19. The Student's asthma adversely affects the Student's educational placement and performance. His asthma is unstable and interferes with his ability to participate in schooling on a consistent basis as well as interferes with his ability to concentrate on a day-to-day basis if his asthma is unstable. (N.T. 128).

20. Since cockroaches were the Student's only documented allergy and with the frequency of the flare-ups while he was in the school setting, his physician concluded that the allergen was present in the school and therefore it would be reasonable for him to require an alternate placement in order to receive an appropriate education (N.T. 130-131).

21. Before the Student went on homebound on November 23, 2005 and January 9, 2006, the District did not have any discussions with the parent about the Student's placement; the District did not conduct any evaluation or testing of the Student; the District did not offer to instruct the Student

in another school building; the District did not offer to instruct the student in any location other than homebound; the District did not provide the parent with any notice of procedural rights. The first time the District requested permission to evaluate was on May 5, 2006. (N.T. 46-47, 52-53, 57, 164, 165; P-12 at 114).

22. Before it honors a prescription for homebound instruction, the District does not do any evaluation of whether these is a lesser restrictive environment than homebound. (N.T. 221)

23. The Student's homebound instruction was provided by Lansdale Testing and Tutoring starting sometime around November 30, 2005; he received one hour a week of tutoring in English, American History, Algebra I, Science and Reading. While he was on homebound the Student did not receive art instruction or foreign language instruction. He received his homebound instruction both at home and at the Lansdale Testing and Tutoring center. (N.T. 47-48, 55-56; P-14 at 117, 118).

24. No one from the District had any contact with anyone regarding the students' education program or medical condition after he was placed on homebound. The District did not contact the parent to see how the Student was doing during homebound. The District never had direct contact with the Student's physician. (N.T. 50, 159, S-2).

25. No evidence of record supports that fact that the School Board of Directors did not excuse the Student from attending school nor did it obtain final approval of the Department of Public Instruction. (N.T. 161).

26. Cockroaches are the Student's only documented allergy. The Student's physician concluded that his educational setting caused frequent asthma flare-ups. The only accommodation the Student requires to address his asthma/allergy is a place that does not have allergens that prevent him from attending school on a regular basis. Assuming that there is no decline in his asthma status, it would be reasonable to assume that the Student would do well in an alternative school setting. (N.T. 130, 132, 148, 150, 188; P-1, at 1).

27. In May, 2006, the District performed a multidisciplinary team evaluation of the Student finding that he did not meet the second prong of IDEA eligibility – that he required special education and related services. In addition to completing academic testing, the District sought input from the parent, from the Student's records, from the limited information available from six weeks of working with attendance during seventh grade from his Middle school teachers (because the evaluator wanted to see what was needed in an regular educational setting); and his 2005-2006 grades from Middle school. She reported that information from the nurse was very limited since she only saw him twice. The Student's attendance records noted chronic absenteeism but not any on-going concerns or significant diagnoses. As the result of the evaluation, the District recommended that a 504 Service Agreement for the Student's asthma be developed. (N.T. 198-201, 203-05, 207, 208, 209, 210, 212, 213; S-7)

III. Issues Presented

A. Whether the District timely conducted an evaluation and offered a free appropriate public education to the Student as a "child with a disability" under the IDEA and/or "an otherwise qualified handicapped student" under Section 504?

B. If the District did not meet its obligations to the Student, is he entitled to compensatory education, and if so, what is an appropriate award?

IV. Discussion and Conclusions of Law

Burden of Persuasion

The United States Supreme Court explained the concept of burden of proof in *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citation omitted) stating

> The function of a [burden] of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

In administrative and judicial proceedings under the both the IDEA and Section 504,[1] the party bearing the burden of persuasion must prove its case by the "preponderance of the evidence." *See* 20 U.S.C. § 1415(i)(2)(C)(iii). The term "preponderance of evidence" is defined as "evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it." *Black's Law Dictionary* (Fifth Edition), at 1064. The burden of persuasion in "an administrative hearing challenging and IEP is properly placed upon the party seeking relief." *Schaffer v. Weast*, 546 U.S __, __, 126 S.Ct. 528, 537 (2005). While it does not specifically so find, the holding in *Schaffer* is highly persuasive that this burden would apply to claims under Section 504 as well.[2]

A. Whether the District timely conducted an evaluation and offered a free appropriate public education to the Student as a "child with a disability" under the IDEA and/or "an otherwise qualified handicapped student" under Section 504?

The IDEA regulations require that "[a]ll children with disabilities, regardless of the severity of their disabilities, and who are in need of special education and related services are identified, located, and evaluated." 34 C.F.R. § 300.128(a)(1) and note 1. See 20 U.S.C. §§ 1412(2)(C), 1414(a)(1)(A); 34 C.F.R. §§ 300.220 and note, 300.300 note 3; 22 Pa. Code Section 104.121. Section 504 has a similar requirement. *See* 34 C.F.R. § 104.32(a). Under *both* the IDEA *and* Section 504, 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," and the failure to do so can result in liability for both the offending school district and individual teachers and administrators. *W.B. v. Matula*, 67 F.3d at 500-01; *see also Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d

[1] 34 C.F.R. § 104.36 provides that "[c]ompliance with the procedural safeguards of Section 615 of the Handicapped Act is one means of meeting the procedural safeguards provided under Section 504.

[2] The *Schaffer v. Weast* court notes that the default rule – that the party seeking relief bears the burden of persuasion regarding the essential aspects of their claims – has been applied to statutes whose language closely tracks Section 504, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. S § 2000e-2 et seq., *see St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993); and the Americans with Disabilities Act, *see Cleveland v. Policy Management Systems Corp*., 526 U.S. 795, 806 (1999). *Schaffer*, at 537. It further notes that "[d]ecisions that place the entire burden of persuasion on the opposing party at the outset of a proceedings are extremely rare. Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Id.*

at 253 (Section 504 "imposes a 'child find' duty, or the duty to identify a disabled child 'within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability").

At no point during the 2005-2006 school year prior to its May 2006 evaluation did the District evaluate the Student to ascertain eligibility for services under the IDEA or Section 504. Sometime after the Student in the instant matter was excused from school on November 23, 2005 due to environmentally induced asthma and for the remainder of the 2005-2006 school year, he received homebound instruction. A description of the legal authority for school excusal and homebound instruction is essential to the current analysis of whether the District discharged its child find obligations to the Student.

1. Homebound Instruction

Section 1329 of the Pennsylvania School Code provides for the excusal of students from compulsory attendance requirements, 24 P.S. § 13-1329, *as amended*, Public School Code of 1949. Therein, it provides that:

> The board of school directors of any school district may, upon certification by any licensed practitioner of the healing arts or upon any other satisfactory being furnished to it, showing that any child or children are prevented from attending school, or from application to study, on account of any mental, physical, or other urgent reasons, excuse such child or children from attending school as required by the provisions of this act, but the term urgent reasons" shall be strictly construed and shall not permit of irregular attendance. In every such case, such action by the board of school directors shall not be final until the approval of the Department of Public Instruction has been obtained. Every principal or teacher in any public, private or other school may, for reasons enumerated above, excuse any child during temporary periods.

Id. The regulation of the State Board of Education flesh out the procedures for the implementation of this section of the School Code. Specifically, Title 22 of the Pennsylvania Code, Section 11.5 provides, in the event of a temporary excusal from school due to illness or other urgent reasons:

> (a) A principal or teacher may, upon receipt of satisfactory evidence of mental, physical or other urgent reasons, excuse a student for nonattendance during a temporary period, but the term ''urgent reasons'' shall be strictly construed and does not permit irregular attendance. A school district shall adopt rules and procedures governing temporary excusals that may be granted by principals and teachers under this section. Temporary excusals may not exceed 3 months.
>
> (b) A school district, area vocational technical school, charter or independent school may provide students temporarily excused under this section with homebound instruction for a period not to exceed 3 months. A school district, area vocational technical school, charter or independent school may request approval from the Department to extend the provision of homebound instruction, which shall be reevaluated every 3 months. When a student receives homebound instruction, the student may be counted for attendance purposes as if in school. A school district shall be reimbursed for homebound instruction provided to a student under section 2510.1 of the Public School Code of 1949 (24 P. S. § 25-2510.1).

(c) A school district shall adopt policies that describe the instructional services that are available to students who have been excused under this section. The policies must include statements that define the responsibilities of both the district and the student with regard to these instructional services.

22 Pa. Code § 11.5. The preponderance of evidence supports the conclusion that the Student was excused from school from November until June without compliance with the statutory and regulatory mandates that apply to homebound instruction that was more than "temporary."

The Public School Code has contained a version of the Section 1329 "excusal from attending school" since 1939 – long before anyone envisioned that with special education and accommodations individuals with mental and physical disabilities could and should attend school – and long before the child find mandates contained in the IDEA and Section 504 compelled districts to evaluate students to determine if they do have mental or physical disabilities and if so, to determine what individualized services are necessary to offer them appropriate educational programs. On November 23, 2006 when the District excused the Student from school attendance and permitted the parent to access homebound instruction, the District acknowledged that due to the "urgent reason" of environmentally induced asthma the Student was "prevented from attending school, or from application to study. Coupled with the October 24, 2006 referral to the Child Study Team due to excessive absences, the District knew or should have know that the Student may be a child with a disability or an otherwise qualified handicapped student and should have referred the student for evaluation.

2. Was the Student eligible for services under the IDEA as a "child with a disability"?

The IDEA defines the term "child with a disability" as a child

(1) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments,(including blindness), serious emotional disturbance (referred to in this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; AND

(2) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1402(3) (A). The IDEA implementing regulations provide that "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 environments that

(i) 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 feder, and sickle cell anemia; and

(ii) (ii) adversely affects a child's educational performance.

34 C.F.R. § 300.7(c)(9). Since the District does not dispute that the Student's asthma clearly fits within the first prong of IDEA eligibility as an "other health impaired" student, it should have evaluated the Student as soon as his school attendance was the topic of a Child Study Team investigation and he required an excusal from attending school.

A suspicion of a disability is not dispositive, however, of whether the Student is eligible under the IDEA or whether he or she is entitled to compensatory education according for IDEA violations. As noted in the definition of "child with a disability" the IDEA has a two-prong analysis for purposes of eligibility, in that it requires the student, who, by reason of the disability, needs special education and related services. The IDEA defines "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education. 20 U.S.C. § 1402(29) (A)-(B). According to the IDEA, "related services" are "transportation, and such developmental, corrective, and other supportive services [omitted non-exhaustive list of types of related services which did not include change in location of intervention] as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1402 (26)(A). The IDEA implementing regulations defines "specially-designed instruction" as "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology or delivery of instruction (i) to address the unique needs of the child that result from the child's disability; and (ii) 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." 34 C.F.R. § 300.26(b)(3). Nothing about the lone request for a change in location of intervention fits within this definition.

In support of their contention that the Student's need for a change the location of intervention from Middle School to some other middle school within the District constitutes special education and related services under the IDEA, the Parents offer *Punxsutawney Area Sch. Dist. v. Kanouff,* 663 A.2d 831*(Pa. Cmwlth 1995).* Nowhere in the case (which is found at Exhibit P-20) does the Commonwealth Court hold that a change in location, by itself, constitutes specially designed instruction or related services. The facts of this case are clearly distinguishable from the instant matter in that, unlike the Student in the instant matter, the *Punxsutawney* case involved two students who had already been evaluated and provided with IEPs; one student had a gifted IEP the other an IEP for specific learning disability. The court therein found that the failure to consider whether the parents' requested change in location of intervention was an appropriate change in educational placement in the least restrictive environment lead to the award provided by the court. See *Punxsutawney,* P-20 at 162 and 163 – not that the change in location itself was sufficient to meet the second prong of the IDEA eligibility criteria.

The record supports the conclusion that the student did not meet the second prong of this definition. In that the only thing he required was a change in the location of his educational program to a place that does not have an allergen that prevents him from attending school on a regular basis, this does not rise to the level of special education and related services. Therefore, the Student was eligible for services under the IDEA. The District's May 5, 2006 evaluation also so concluded.

3. Was the Student eligible for services under Section 504 as an "otherwise qualified student with a disability"?

Section 504 of the Rehabilitation Act of 1973, *as amended,* 29 U.S.C. § 794, provides:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, 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 of under any program or activity conducted by any Executive agency or by the United States Postal Services.

Id. The implementing regulations for Section 504, provide, in the educational context,

> a recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

34 C.F.R. § 104.33(a). The regulations defines appropriate education as

> 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 and (ii) are based upon adherence to procedures [requirements related to least restrictive environment, evaluations and placement and safeguards].

Id. at §104.33(b). Regarding location of intervention, a recipient

> shall educate or provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

Id at §104.34(a). Title 22 of the Pennsylvania Code, Chapter 15, the state implementing regulations for Section 504 in the public school context, provides

> Section 504 and its accompanying regulations protect otherwise qualified handicapped students who have physical, mental or health impairments from discrimination because of those impairments. The law and its regulations require public educational agencies to ensure that these students have equal opportunity to participate in the school program and extracurricular activities to the maximum extent appropriate to the ability of the protected handicapped student in question. School districts are required to provide these students with the aids, services and accommodations that are designed to meet the educational needs of protected handicapped students as adequately as the needs of nonhandicapped students are met. These aids, services and accommodations may include, but are not limited to, special transportation, modified equipment, adjustments in the student's roster or the administration of needed medication. For purposes of the chapter, students protected by Section 504 are defined and identified as protected handicapped students.

22 Pa. Code §15.1(b). Chapter 15 defined "protected handicapped student as

> A student who meets the following conditions:
>
> (i) Is of an age at which public education is offered in that school district.
>
> (ii) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program.

(iii) Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under § 15.10 (relating to discrimination claims).

22 Pa. Code §15.2. The regulations describe a district's child-find obligations, specifically,

> (a) A school district shall send a written notice to the student's parents if a school district believes that a student meets one or more of the following conditions:
>
> (1) Should be identified as a protected handicapped student….

22 Pa. Code §15.5(a)(1). It further provides that "[i]f the school district needs additional information before it can make a specific recommendation concerning the related aids, services or accommodations needed by the student, the district may ask the parents to provide additional medical records which the parents may have and to grant the district permission to evaluate the student." 22 Pa. Code §15.5(c) and "[t]he school district initiated request to evaluate a student shall specifically identify the procedures and types of tests which it proposes to use to evaluate the student and inform the parents that they have the right to give or withhold their written consent to these evaluations." 22 Pa. Code §15.5(d).

Based upon the forgoing obligations, the record supports the conclusion that the Student is an otherwise qualified handicapped person in that his asthma and allergies prevented him from accessing his educational program

4. Did the District offer the student a free appropriate public education in the least restrictive environment.

The record supports a conclusion that the tutoring services offered by the District did not comply with the appropriateness requirements. A plan for five hours a week of education in just his five major subjects that the Student received as a handicapped person - as compared with twenty-seven and a half hours a week which were provided to nonhandicapped students - was not designed to meet the individual educational needs of the Student as adequately as the needs of nonhandicapped persons are met. Moreover, the least restrictive environment mandate should have resulted in a regular education environment and not in a segregated setting. Even though this homebound instruction was what was prescribed by the Student's physician and requested by his mother, the District did not comply with state statute regarding the permitted duration of homebound services. Moreover, it did not otherwise fulfill its child find obligation to evaluate the Student when it knew or should have known that the child was an otherwise qualified handicapped student even though the Student was the subject of discussion during a Child Study Team due to his excessive absenteeism associated with his asthma and he was excused from school attendance for an urgent medical reason. At no point did it provide any notice of rights to the parent.

The parent requests an alternative middle school as an appropriate response to the Student's disability, and such a request is granted in light of the evidence of record. To determine whether this remedy was required in light of the student's disability, it was necessary to balance contradictory evidence relating to whether there were cockroach aeroallergens in Middle School and whether factors other than asthma induced by cockroach aeroallergens resulted in the Student's significant asthmatic

episodes during the 2005-2006 school year. This contradictory evidence did not impact the analysis of whether the student has a disability because the preponderance of the evidence supports the conclusion that the Student had environmental induced asthma which was impacted upon his ability to attend school. In excusing the Student from school and placing him on homebound instruction in the first place, the District had to determine that there was an urgent physical reason preventing his school attendance. In so doing, the District relied upon the Student's physician's recommendation regarding his environmentally induced asthma and never sought clarification of or the basis for this recommendation. Since cockroaches were the Student's only documented allergy and with the frequency of the flare-ups while he was attending school in the Middle school setting, his physician concluded that the allergen was present in the school and therefore it would be reasonable for him to require an alternate placement in order to receive an appropriate education Several factors raised by the District at hearing tended to cast doubt on this conclusion. Specifically, the District questioned the impact on the asthma from a change in medication and home environment; and the fact that if the Student is allergic to something in the school setting one would expect that he would be displaying symptoms of those allergies in the school setting and visiting the nurse more frequently than he did. The testimony of the physician -that he did not believe that an actual change in medication coincided with the significant increase in the asthma symptoms, and that no evidence suggests the home environment contained the only documented allergen – and the parent - that the Student's reaction was progressive and he stayed home from school when the more serious problems were manifesting themselves - resolves this issue in favor of the parent's proposed remedy of an alternative educational placement for the Student.

B. If the District did not meet its obligations to the Student, is he entitled to compensatory education, and if so, what is an appropriate award?

Districts who fail to discharge their child-find obligation can be liable for compensatory education services. Since 1999, the Third Circuit has recognized that a student's right to compensatory education may precede the time that a district actually identifies a child as eligible under the IDEA or Section 504. In *Ridgewood Bd. Of Educ. v. N.E.,* 172 F.3d 238 (3d Cir. 1999), the court clarified "[s]ince the IDEA's central goal is that disabled students receive an appropriate education, not merely an appropriate IEP, a disabled student's right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education." *Ridgewood Bd. Of Educ. v. N.E.,* 172 F.3d at 250 and 253; *see W.B. v. Matula*, 67 F.3d 484, 494. Determination of an award of compensatory education, however, must take into consideration "the time reasonably required for the school to rectify the problem … since a school district 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 Regional Sch. Dist.,* 81 F.3d 389, 397 (3d Cir. 1996). In summary, the holdings in *M.C.* and *Ridgewood* demonstrate that "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." *Ridgewood*, 172 F.3d at 250. 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." *M.C.* 81 F.3d at 397.

Recent decisions of the United States Court of Appeals for the Third Circuit in IDEA-Section 504 cases have very clearly established that "bad faith" or "gross misjudgment" on the part of school officials is not a necessary condition of establishing a cause of action. *See Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d at 253 (to maintain a Section 504 claim against public school defendants plaintiff "must demonstrate that defendants know or should be reasonably expected to know of his disability," but "need not prove that defendants' discrimination was intentional") and 253 n. 12 (Section 504 claims

expressly upheld despite finding by ALJ that District had not acted in "bad faith"); *W.B. v. Matula*, 67 F.3d at 492-93 (reiterating the "knew or should have known" standard for Section 504 liability and making clear that the elements for establishing liability under Section 504 are "identical or nearly identical" to those established under the IDEA) and 499-502 (benchmark for determining individual liability under *both* the IDEA and Section 504 is the "reasonable official"). The District's argument that it was simply doing what the parent requested and the Student's physician prescribed does not excuse them from liability for failure to discharge its own independent child find obligations.

Determination of an award of compensatory education, however, must take into consideration "the time reasonably required for the school to rectify the problem … since a school district 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 Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996). Exactly when a district knew or should have known that a student is receiving an inappropriate education is a fact specific analysis. Turning to the facts of the instant matter, what the School District knew about the Student on November 23, 2005 and at all times thereafter when he was excused from school on homebound instruction was sufficient to put them on notice that the Student should be evaluated.

What was the time reasonably required for the school district to rectify the problem? Because of the fact driven analysis, a few different options exist. Review of the timelines established for the District to evaluate and program for a Student under the IDEA could establishes a reasonable amount of time for the district to address the student's disability. For example, the District would have to complete a multidisciplinary team evaluation sixty days school days and thirty calendar days to develop an IEP and ten school days to implement the IEP. See 22 Pa. Code § 14.123(b); 34 C.F.R. § 300.343(b)(2), 22 Pa. Code § 14.131(a)(1). A calculation of this timeline would result in the date of April 19, 2006. Significantly, however, the District actually completed the evaluation of the Student seventeen calendar days after the permission gave permission to evaluate (see P-12 and S-7). This would result in a January 24, 2006 date. Using the three month statutory limit for temporary excusal from school would result in a date of February 23, 2006 date. Based upon the reasonableness standard, the time between November 23, 2005 and February 23, 2006 will constitute a reasonable mount of time to rectify the problem since the District was obligated at that time to return the Student to school because it did not seek the statutorily required approval from the "Department of Public Instruction" to extend the excusal, and it demonstrated that it was reasonable to complete the evaluation of this particular student in less than sixty school days..

The Student did receive five hours a week of tutoring, as compared with the twenty-seven and a half hours he would have received had he attended District schools. Therefore, he should receive four and a half hours a day of tutoring for each school day between Feburary 23, 2006 until the District offers the Student an appropriate educational placement. While one might argue that the fact that the District did what the parents wanted and what the Student's physician recommended, may factor into an equitable balancing of the competing claims associated with compensatory education, it disregards the District's affirmative child-find duty, and therefore should not limit the time frame for which compensatory education services are owed to the Student.

Regarding the parent's request for compensatory education until such time as the District offers an appropriate program to the student, for an IDEA remedy, the stay-put provisions of the Act seems to present a legal impediment to such an award. As more fully articulated in *In Re: the Educational Assignment of K.R., A Student of the Philadelphia City School District*, Spec. Educ. Op. No. 1506 (PDE 2004), at 8, "Stay put or pendency, in a two-tier jurisdiction attaches to the decision of the review level, or appeals panel, not the hearing officer's decision." *See also, In Re: the Educational*

Assignment of D.H., Spec. Educ. Op. No. 1672 (PDE 2005), 12; *In Re: the Educational Assignment of J.M. .*, Spec. Educ. Op. No. 1612 (PDE 2005), 5; *In Re: the Educational Assignment of K.R.*, Spec. Educ. Op. No. 1506 (PDE 2005), 8; *In re: the Education Assignment of D.B.*, Spec. Educ. Op. No. 1549 (PDE 2004). No such limitation attaches to the decision of the hearing officer since the basis of the remedy is Section 504 and the Chapter 15 regulations do not establish a two-tier administrative review process, and therefore the result of the IDEA holding does not obtain. Therefore the claim for compensatory education will apply to the period between March 6, 2006 and until the District implements an appropriate program for the student.[3]

V. ORDER

AND NOW, this 16th day of June 2006, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the School District must convene a Section 504 team meeting:

a. to modify develop a Service Agreement which provides for a change in location of intervention to one of the two other middle schools within the District and a plan for close monitoring of the Student's health while attending this alternative location; and

b. to develop and include within the Student's Service Agreement a plan for the provision of 4.5 hours instruction in the regular education seventh grade curriculum courses for each school day after February 23, 2006 until the date the District offers an appropriate program to the Student.

All other relief not contained in this order is specifically denied.

Dated: June 16, 2006

Rosemary E. Mullaly

Special Education Hearing Officer

[3] Chapter 15 does, however, provide if within 60 calendar days of the completion of the administrative due process proceedings, an appeal or original jurisdiction action is filed in a court of competent jurisdiction, the administrative order is stayed pending the completion of the judicial proceedings, unless the parents and school district agree otherwise. See 22 Pa. Code § 15.8(e).