

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

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: TE

Date of Birth: xx/xx/xx

Dates of Hearing:
August 12, 2008, September 15, 2008
CLOSED HEARING
ODR #8943/07-08 KE

Parties to the Hearing:

Mr. and Ms.

Pottsville Area School District
1501 West Laurel Boulevard
Pottsville, PA 17901-1498

Representative:

Phillip A. Drumheiser, Esquire
P.O. Box 890
Carlisle, PA 17013

Jeffrey F. Champagne, Esquire
McNees, Wallace & Nurick LLP
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

Date Record Closed:

September 29, 2008

Date of Decision:

October 6, 2008

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a teen aged resident of the Pottsville Area School District (District), and Student is not currently identified as a child with a disability for special education purposes. (1NT 10, 2NT 12-13.)¹ The Student is currently not enrolled in the District, but until June 2008 had been enrolled in an alternative educational program provided by the [redacted] Intermediate Unit, known as [redacted]. (2NT 20-23; S-13, 14.) The Student was at that time assigned to the sixth grade level, which is below the appropriate grade for Student's age. (P-2, S-11 p. 10, 12.) Student has a history of being diagnosed with attention deficit hyperactivity disorder. (P-7 p. 1.)

Mr. and Ms. (Parents) requested an evaluation in November 2007, (P-1), and the District completed the evaluation by January 18, 2008, (P-7). The Parents next requested an independent educational evaluation and conveyed this request on or about January 24, 2008. (P-10.) By letter dated January 27, 2008, the Parents requested due process, asserting that the District failed to identify the Student as a child with a disability from kindergarten year until the date of filing for due process, that the District's evaluation of January 2008 was inappropriate, and that the program and placement that the District offered to the Student was inadequate. (P-13.) They sought an order for an Independent Educational Evaluation, a decision that the Student is eligible for special education, and compensatory education. (2NT 4-6; P-13.)

The parties agreed and the hearing officer directed that the matter be bifurcated and that the hearing officer first decide the Parents' request for an independent educational evaluation. (1NT 25-26.) In a decision dated May 24, 2008, (HO-1), the hearing officer ordered an independent educational evaluation at public expense, (2NT 6-7), and this decision was affirmed by the Appeals Panel. In re Educational Assignment of E.B., Spec. Educ. Op. 1895 (July 17, 2008). The findings and conclusions of law set forth in the

¹ This matter was bifurcated, and two ODR case numbers were assigned. See Notes of Testimony, August 12, 2008 at page 4-8. The entire record of the proceedings under the first number is incorporated and made a part of the record of the proceedings under the second number. Ibid. As a result, there are two sets of transcripts and each set has its own separate pagination. Each set is comprised of two hearing sessions, numbered consecutively. The notes of testimony for the matter decided in number 8498/07-08 KE will be cited as "1NT" and the notes for the matter decided here in number 8943/07-08 KE will be cited as "2 NT."

May 24, 2008 decision are incorporated herein in their entirety, (HO-1), and they will not be repeated in this decision.

During the reconvened hearing (between August 12, 2008 and September 15, 2008), the District requested a ruling on the scope of the hearing as affected by the IDEA limitations period and any applicable limitations of section 504 causes of action. (HO-2.) In an email message, the hearing officer ruled that the relevant period of the matter would begin two years prior to the filing of the Complaint, or January 27, 2006. (2NT 6-12, 242-245; HO-3.)

The hearing was reconvened on August 12, 2008, and September 15, 2008, to decide the remaining issues. On the last day of the hearings, the District moved for admission of three documents to which the Parents objected on grounds of a lack of five day notice as required by law. Exercising his discretion, the hearing officer held the record open so that the Parents could request an opportunity to cross examine after reviewing the documents for five days. (2NT 329-335.) On September 21, 2008, Parents moved for admission of a two page report by their expert, responding to the District's documents. The record closed upon receipt of the District's response, on September 29, 2005, objecting to admission of the proffered report. The hearing officer declined to admit the proffered report, and limited the scope of admission of S-20 through S-22 to setting forth the basis of the District expert's testimony. (HO- 4.)

ISSUES

1. Is the Student eligible for special education and related services as a child with a disability under either IDEA or section 504 of the Vocational Rehabilitation Act of 1973?
2. Did the District fail to perform its Child Find obligation under IDEA or section 504 of the Vocational Rehabilitation Act of 1973 by failing to identify the Student as eligible for special education and related services during the relevant time period, from January 27, 2006 to August 12, 2008?
3. Did the District implement discipline without obtaining a manifestation determination in violation of the IDEA?

4. Should the hearing officer award compensatory education for all or any part of the relevant period?
5. Should the hearing officer order any changes in the District's policies or procedures regarding screening and evaluation for Child Find purposes?

FINDINGS OF FACT

1. After success in grades one through four, the Student failed multiple subjects in fifth grade during the 2005-2006 school year, and was retained. Student exhibited disruptive behavior at school and at home. Student failed to do class assignments and homework. Student was absent frequently. (NT 98-100; S-18 p. 1-3, P-7 p. 1, 5, P-19, P-24.)
2. In the 2006-2007 school year, the Student's behavior and grades were unsatisfactory in two subjects. Student exhibited disruptive behavior, had excessive absences and failed to do the required school work. Nevertheless, the Student was promoted to sixth grade. (NT 101-104; S-18 p. 2, P-7 p. 5, 19.)
3. In November 2007, the Parent conveyed a letter to the District in which she revealed that the Student had been diagnosed with ADHD and was being evaluated for medication treatment. (P-1.)
4. In the 2007-2008 school year, the Student failed all Student's courses, exhibited serious disruptive behavior at school, failed to do school work, and was found to have engaged in two thefts outside the home, for which Student was placed on probation by the juvenile court. Student then violated probation by acting out in school and was committed to a residential facility in Pennsylvania for evaluation. (1NT 59-60, 2NT 108-109; S-18 p. 1-2, P-5, P-19 p. 2-3, P-24 p. 2, S-9 p. 2, S-11.)
5. The Student's performance on the 2006 and 2007 administrations of the PSSA was inconsistent. Student scored Basic and Below

Basic in different years in both reading and mathematics. (1NT 88-91; S-9.)

6. The Student has a history of being diagnosed in 2006 with Attention Deficit Disorder. At least since November 2007, Student has been medicated for this disorder with a stimulant medication. (2NT 213-215; S-9 p. 1, S-11 p. 2, 7, 8, 11, 12, 14, P-3, P-9, P-7, P-24 p. 1.)
7. Due to this disorder, the Student has a propensity to engage in dysfunctional behavior in the absence of external control, especially in times of increased academic demands. (P-11 p. 2, P-24 p. 13-14.)
8. The Student was experiencing cognitive difficulties including problems with attention during the Fall of 2007, when Student's behavior was dysfunctional and Student was failing in school. (P-7 p. 2-5.)
9. The Student's teachers were unable to distinguish the causes of the Student's behaviors, or Student's instructional level in the curriculum, because of the interference of Student's bad behaviors. (P-7.)
10. The Student displays average intelligence on standardized testing with the Stanford-Binet Intelligence Scales, Fifth Edition. (S-6, 9, P-24 p. 3.)
11. In standardized achievement testing with the Woodcock-Johnson Tests of Achievement-III, the Student's achievement is average in reading, written language, written expression, mathematics calculation and mathematics. Student's achievement is commensurate with Student's cognitive ability. (S-9.)
12. Standardized tests show that the Student has difficulties in organizing information. (2NT; P-24 p. 4-5.)
13. Standardized tests show that the Student has difficulties with short term memory that affect Student's ability to retain successive bits of learned information. (2NT 163-165; P-24 p. 4.)

14. Standardized achievement tests show that the Student performs at an average level overall in reading; however, Student has difficulties in reading comprehension based on deficits in short term memory. (P-24 p. 9-10, S-9 p. 4, S-17 p. 2-7.)
15. Standardized achievement tests show that the Student performs at an average level overall in writing; however, Student exhibited greater difficulty in writing complex passages. (P-24 p. 10, S-9 p. 4, S-17 p. 2-7.)
16. Standardized achievement tests show that the Student performs at an average level overall in mathematics, with more difficulty performing more complex tasks. (P-24 p. 10-9 p. 4, S-17 p. 2-7.)
17. Standardized tests show that the Student has difficulties in inhibiting behavior. (2NT 76-77, 85-87, 106, 108, 125; P-24.)
18. In an independent educational evaluation ordered in the previous due process proceeding, the Student was diagnosed with a cognitive disorder, not otherwise specified, in the nature of an executive functioning disorder. This deficit in functioning is similar to ADHD in that it affects the student's ability to know when to inhibit behavior, by preventing the student from being aware of or alert to the need to inhibit behavior. It involves the same area of the brain as ADHD. (2NT 109-115, 136; P-24 p. 5-8.)
19. The Student has little insight into the dynamics of Student's dysfunctional behavior, and what insight Student displays is superficial. (2NT 174-176.)
20. The Student's prognosis is guarded, and Student is unlikely to be able to control Student's behavior in a regular education setting without significant intervention and support. (NT 191-197, 222-223.)
21. The District's Evaluation Report dated January 18, 2008 recommends consideration of teaching self monitoring skills, and organizers for notebook and classroom. (S-9 p. 7.)

22. In January 2007, the Student was enrolled in [redacted], a therapeutic program with an educational component. [Therapeutic Program] classes are small, and the Student was taught by a special education teacher. (2NT 167, 223; S-11.)
23. While at [Therapeutic Program], the Student's behavior was under control, Student was attentive in classes, and Student succeeded academically. (S-11.)
24. Therapeutic Program recommended against special education, but did recommend immediate transfer to a special school, [redacted], which the Student attended in May and June, as well as ongoing individual and family counseling. (S-11 p. 9, 10, 15.)
25. In April 2007, the Student was enrolled in the "day treatment program" of [redacted], an alternative education program operated by the [redacted] Intermediate Unit. The Student attended classes in this program for about eighteen days. (2NT 20-23, 49; S-13, 14.)
26. The social studies and health teacher for Day Treatment Program was a therapist for five years and then obtained his teaching certificate. He had no significant experience with teaching in a public school setting. He rarely refers students for special education. He was unaware of the Student's background upon the Student's admission to his classroom. (2NT 37-39, 46.)
27. Day Treatment Program provides small classrooms with ten students in each. In the health class, work materials and supplies are not taken home, so it is unnecessary for students to learn to bring necessary materials to class. Homework is not assigned as a rule, and students study for tests in class. Textbooks have short chapters, and are not chosen by the teacher. (2NT 39-44, 51.)
28. The Student finds the work at Day Treatment Program to be easy compared to the work assigned by the District. The program provides some accommodation for the Student's needs with regard to attention. In this setting, underlying problems with the Student's functioning are not as great an impediment to the Student

as they are in the District's regular education classes for fifth or sixth grade. (2NT 96-99.)

29. In the health class of Day Treatment Program, the Student did not exhibit any behaviors suggesting the need for special education, and Student was successful academically. (2NT 24-25, 31-36; S-14.)

DISCUSSION AND CONCLUSIONS OF LAW

DISRUPTIVE AND DYSFUNCTIONAL BEHAVIOR

This hearing officer has found previously that the District conducted an inappropriate evaluation because it did not address the cause of the Student's behavior. (HO-1.) The hearing officer found that the Student did exhibit behavior that interfered with learning, as evidenced by a glaring constellation of undisputed facts. (HO-1, FF 25-26.) The Student's grades plummeted in fifth grade after satisfactory performance in the first through fourth grades. (HO-1, FF 1-7.) Student's teachers reported numerous instances of disruptive and inappropriate behavior, which escalated throughout two years of fifth grade and one half of sixth grade, from the beginning of school in 2005 to the date on which the Student was committed to a residential treatment program. (HO-1, FF 4-7, 20-23.) The Student's teachers, returning their behavior inventory responses as part of the District's evaluation in January 2008, reported behavior that reached the clinically significant level in externalizing, total problems, achievement and adaptive functioning. (HO-1, FF 20-23.)

The Student had exhibited an escalation of negative behavior for at least two and one half years, including excessive talking and disruptive classroom behavior, defiance of authority, irritating and arguing with peers, throwing objects at peers, and substantial absences, lateness and truancy. (HO-1, FF 1-7.) At one point Student was disciplined for disrupting the class by singing. (P-20 p. 11.) On another occasion, the Student had Student's face marked with a pink magic marker. (P-20 p. 12.) The Student was suspended for being disruptive and defiant, and the teacher indicated that the Student's behavior was slowing the progress of the class. (P-20 p. 16.)

Teachers reported that the Student did not work well in groups and had to be seated separately in some of Student's classes. (HO-1, FF 6.) They reported substantial, repeated disruptive behavior, failure to work in class and failure to complete homework assignments. (HO-1, FF 6.) The Student accumulated a substantial record of absences and lateness, including truancy. (HO-1, FF 13.)

The teachers had reported these behavioral difficulties on separate disciplinary notices sent contemporaneously to the Parents in September through December, 2007. (P-20.) The teachers also reported these behaviors on the Student's report cards on a quarterly basis. (P-19 p. 2-3.) In response to the District's Psychologist's inquiries, all of the teachers who responded stated in writing that the Student's instructional level in the curriculum could not be determined because of the interference of Student's bad behaviors. (FF 9.)

Eventually, based upon allegations of theft (not in the school or home), the Student was taken out of regular education because of escalating dysfunctional behaviors, and placed by the court in a private residential treatment center, [redacted]. (FF 4, 22.) The ultimate trigger for this was inappropriate behavior in school, which the court found to be a violation of probation. Ibid.

There can be no doubt that the Student's behaviors in school severely interfered with Student's learning by essentially making Student unavailable to general education. At the same time these behaviors forced Student's removal from a normal, less restrictive educational environment to a highly restrictive educational setting in the residential treatment center. There is no doubt on this record that the Student's behaviors have prevented meaningful progress academically and socially. The record clearly establishes that the Student's dysfunctional behaviors reveal Student's need for support and teaching in the areas of self-monitoring and behavioral self-control. (FF 1-4, 17-23, 27-28.)

EVIDENCE OF LACK OF EFFORT AS A CAUSE OF THE STUDENT'S DYSFUNCTIONAL BEHAVIOR

The hearing officer decided that the District's evaluation was flawed because it failed to address the cause of the Student's behavior. (HO-1.) The District inappropriately discounted the severity of the Student's

disruptive behavior. Ibid. It did not perform a functional behavior analysis. Ibid. Yet the District concluded that the Student's academic decline was caused by failure to do school work, not by any disability. (HO-1 p. 14.) The evaluation report concludes that the Student's poor academic performance is related to problematic behaviors (including disruptive and uncooperative classroom behaviors, among other things); yet, it seems to assert that teachers reported no problems with hyperactivity or impulsivity. (P-7 p. 7.) The hearing officer found this conclusion to be unreliable. (HO-1 p.14.)

The District asserts that the Student's academic difficulties are caused solely by the Student's attendance problems and failure to complete work. (FF 10-16.) This begs the question. Even if the Student's academic decline were due solely to failure to complete class work and home work, this would not explain why Student failed to do the work when Student reached fifth grade. Moreover, Student's failure to complete work, Student's absences and Student's disruptive behavior themselves interfered with Student's education in the areas of social and adaptive skills; the record clearly shows clinically significant deficits in these areas. (FF 8, 17, 19, 20.) The Student was retained for one year because of these behaviors, and ultimately, these behaviors caused Student to be excluded from general education and placed in a restrictive residential setting. (FF 1-4.) Thus, the hearing officer found that it was inappropriate to attribute the school failures to the behavior without addressing the causes of the behavior. (HO-1.)

WHAT THE RECORD SHOWS AS EVIDENCE OF THE CAUSES FOR THE STUDENT'S DYSFUNCTIONAL BEHAVIOR

The question presented is whether this Student's educational need for support and teaching in the areas of self-monitoring and behavioral self-control is "by reason of" a disability defined in the IDEA. 34 C.F. R. §300.8(a). If so, the Student is a child with a disability as defined by law (if the needed services rise to the level of special education and related services). As this hearing officer found, the District's evaluation in January 2008 failed to address this issue. (HO-1.)

This hearing officer ordered completion of an IEE. (HO-1.) The Parents' expert completed an IEE. (2NT 54.) The Parents forwarded the IEE to the District, but received no response in the short time before the first hearing was scheduled to occur. (2NT 13.) Neither the District nor the

Parents' expert obtained a functional behavior analysis. Under the circumstances,² this may have been impractical; nevertheless, the record remains devoid of the insight that such an assessment might have contributed. No team meeting was convened to consider the IEE, although this may have been in part due to the hearing's August start date. The District offered no new data or interpretation at the hearings. Rather, it relied upon a critique of the IEE and a reiteration of the District's original findings that the Student does not suffer from a disability as defined in the IDEA.

Although this is a close case, the hearing officer finds on the record as a whole, and based upon a preponderance of the credible evidence, that the Student's diagnosed disability of ADHD was causally related to Student's dysfunctional behavior and therefore Student's failure to make meaningful academic progress during the times relevant to this matter. This is based upon four principal findings, which are supported by the weight of the evidence. First, the Student was diagnosed with symptoms of ADHD during the time in question, and continues to be diagnosed. Second, ADHD created and continues to create in the Student a propensity to act impulsively and to lack control of Student's behavior, as well as to be distracted from required tasks. Third, there is evidence that the Student was experiencing significant difficulties with attention during the Fall of 2007. Fourth, circumstances further reinforce the inference that the cause of the Student's failure to control Student's behavior was ADHD; these circumstances include the sudden change in behavior in fifth grade, the beneficial effect of structure on the Student's behavior, and the correlation of behavior change with medication change.

SERIOUS EMOTIONAL DISTURBANCE AND SPECIFIC LEARNING DISABILITY

In determining whether or not the Student is a disabled child entitled to special education pursuant to the IDEA, the first question to answer is whether or not the Student has been evaluated as having one of the disabilities listed in the IDEA. 34 C.F.R. §300.8(a). In this matter, the only

² There is no mention of such an assessment in the record, despite this hearing officer's pointed references in the previous decision. (HO-1.) Of course, by then, the Student was no longer enrolled in the District's schools, but was in a residential setting. Also, there would have been little time to seek such an assessment, given the schedule set by the hearing officer, with the consent of the parties. The first hearing after receipt of the IEE was on August 15, 2008.

disabilities under consideration were “serious emotional disturbance”, “specific learning disability,” and “other health impairment.” Ibid.

The Parents’ expert issued a preliminary report in the form of a letter to Parents with suggestions about the District’s evaluation. (P-11.) In this letter, the expert suggested consideration of a Serious Emotional Disturbance, particularly suggesting the consideration of a clinical diagnosis of Oppositional Defiant Disorder. Ibid. However, the District has not considered such a diagnosis, and neither did the expert when he performed his IEE. On the contrary, both the expert (based upon his full evaluation) and the District’s school psychologist testified that the Student is not appropriately classified as Seriously Emotionally Disturbed. (2NT 131-132, 247.) Thus the Student has not been evaluated as having a “serious emotional disturbance.”

The District did consider “specific learning disability.” (HO-1 p. 16-18.) It found that there was no objective evidence of such a disability. (HO-1 FF 29-31.) The hearing officer found that this determination was appropriate. (HO-1 p. 16-18.) Thus the Student has not been evaluated as having a “specific learning disability.”

ATTENTION DEFICIT HYPERACTIVITY DISORDER - DIAGNOSIS

The Student carries a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) by history. Neither the District’s school psychologist, nor the Parents’ expert in the IEE report, personally diagnosed the Student as suffering from ADHD; rather, the Parent conveyed to the District a letter from a physician stating that the Student is so diagnosed. Moreover, the record demonstrates that the Student has been treated with medication for ADHD during the past three years. (FF 6.)

The Parents produced a letter requesting an educational evaluation dated November 2007, which indicated that the Student had experienced side effects of medication for that disorder and that the medication had been discontinued. (P-1.) According to the letter, the Student was to be placed on a different medication later that month.

While it did not reach an independent conclusion as to the diagnosis, the District did not ever question the diagnosis; it accepted the diagnosis for

purposes of the evaluation. (1NT 78 - 79.) It went even further: by letter dated January 23, 2008, the District stated:

We believe that [the Student] is eligible [for identification as a protected handicapped child] because of Student's identified disorder of Attention Deficit Hyperactivity Disorder.

(P-4.) The letter went on to indicate that the District would evaluate the Student to determine eligibility, and indicated that it would review behavior "strategies" from the Student's home program. (P-4.) Thus, the District, shortly after its evaluation meeting that resulted in the evaluation report dated January 18, 2008, acknowledged that the Student had an "identified disorder" of ADHD, (2NT P-4) and linked this diagnosis to the Student's behavior. (HO-1, FF 12.)

The District's School Psychologist testified in summary form that the District had in fact made no determination of section 504 eligibility at the time of the letter. (1NT 407-408; P-4, 8.) However, the witness did not deny acknowledging the Student's ADHD as a disorder.

ATTENTION DEFICIT HYPERACTIVITY DISORDER - PROPENSITY

The Parents' expert found in his report that the Student's behavioral problems and academic failures are due in part to ADHD. (P-11 p. 2.) He noted that both the Student and the Mother rated Student's difficulties with attention as clinically significant. Ibid. He noted a history of impulsive behaviors that are "consistent with" ADHD. Ibid.

The expert asserted that the Student's ADHD produces "primary symptoms" of "inattention, impulsivity and hyperactivity" and that these symptoms "result in problematic behaviors in school." (P-24 p. 13.) The expert described a process in which the Student's negative behaviors would increase due to difficult relationships with teachers, they in turn would tend not to reinforce pro-social behaviors, and the Student would receive greater reinforcement of negative behaviors through Student's friends. (P-24 p. 13-14.) In preface to this posited chain of causality, the expert noted that it is "virtually impossible" to determine which of a complex collection of factors is the primary cause of any behavior. (P-24 p. 13.)

The Parents' expert (through neuropsychological testing) also detected deficits in what he classified as the Student's "executive functions." (FF 18.) He testified that these deficits often cause the kind of behavioral dysfunction that the Student exhibited in this matter. Ibid. He noted that this construct is often viewed as being synonymous with ADHD. Ibid.

The expert's opinions in this regard were based upon his experience and knowledge of ADHD, which the hearing officer finds to be formidable. Although his description of the process by which such behaviors escalate were not firmly grounded in concrete evidence of how the Student's ADHD was affecting Student's behavior in general education, it is sufficient to establish that there is a propensity in the Student to engage in dysfunctional behavior in the absence of external control, especially in times of increased academic demands. (FF 7.)

ATTENTION DEFICIT HYPERACTIVITY DISORDER – DIRECT EVIDENCE

There is evidence that the Student was experiencing cognitive difficulties including problems with attention at the time Student's behavior was escalating out of control. (FF 8.) Parent and Student both reported significant or borderline significant scores in attention, (as well as rule breaking and aggressive behavioral problems). (P-7 p. 5.) In addition, two teachers noted problems that may be attributable to the Student's cognitive functioning. The social studies teacher reported that the Student had difficulty retaining and recalling material covered in the classroom. (P-7 p. 2.) The English teacher reported that the Student does not follow instructions. (P-7 p. 2.) This evidence shows that the propensity toward inattention and impulsivity, established by the Parents' expert in his report, was observed the Student's behavior in the Fall of 2007.

ATTENTION DEFICIT HYPERACTIVITY DISORDER – CORRELATION WITH CHANGES IN ACADEMIC DEMAND, STRUCTURE AND MEDICATION ADMINISTRATION

There is a known correlation between ADHD and declining performance in higher grades that place more demands upon the student for higher level skills and self-organization. (1NT 258-259.) The Student did well in lower grades and then suddenly failed in fifth grade. (FF 1-4.) This

bolsters the inference that the Student's ADHD and other learning differences were causally related to the Student's failures in school. Ibid.

The hearing officer also finds persuasive the fact that the Student has responded so well to structure in Student's academic setting. (FF 22-28.) While in general education, the Student was essentially out of control behaviorally, but when subjected to a highly structured setting with small class size, Student seems to have brought Student's behavior under control and to have succeeded academically as well. (S-11.) The [residential treatment] placement is characterized by small class size and individual attention; its teachers are special education teachers by training. (FF 22.) Thus, this placement has attributes of a special education setting. (2NT 167-168.) It has succeeded in helping the Student to control Student's behavior and to begin again to learn. Taken with all the other evidence, this reinforces the inference that ADHD caused the Student's behavioral melt down.

The record preponderantly demonstrates that the Student has an educational need for a smaller class setting, teaching that addresses individual needs for self monitoring and self organization, and extra services such as counseling, in order to help the Student learn. (FF 22-23, 27-28.) All evaluations in this case support that conclusion. Even the District's Evaluation Report dated January 18, 2008 recommends consideration of teaching self monitoring skills, and organizers for notebook and classroom. (S-9 p. 7.)

The [residential treatment] evaluation report dated April 8, 2008 noted a staff recommendation that the Student be identified as Emotionally Disturbed and educated in an Emotional Support classroom full time. (S-11 p. 12.) Ultimately, [residential treatment program] did not recommend special education as such, but did recommend immediate transfer to a special school, [Day Treatment Program], which the Student attended in May and June, as well as ongoing individual and family counseling. (FF 24.) The [Day Treatment Program] setting continues the small class size and individualized programming that [residential treatment program] provided successfully to the Student; the [residential treatment] evaluators concluded that the Student needed such specialized programming as a step down from [residential treatment program's] educational program. (FF 24, 27.)

The Parents' expert, based upon his IEE, recommended special education and related services. (NT 116; P-24 p. 26-34, P-26.) His numerous recommendations included measures aimed at addressing needs in attention, self organization, behavior self-control and academics. Ibid.

The hearing officer finds it significant that medication had been prescribed for the Student and that Student allegedly had not been taking it during the months (the first half of the 2007-2008 school year) when Student's behavior was most out of control and severe. (P-1, P-20, P-21.) The Student's response to changes in medication treatment during the relevant period again reinforces in this hearing officer the finding that the Student's dysfunctional behavior was due to Student's ADHD.

This evidence must be weighed against the data collected by the District's School Psychologist and reported in her Evaluation Report. (S-9.) The psychologist obtained behavior inventories from three classroom teachers, the Student and the Parent. (Id at 4.) None of the teachers reported clinically significant or even borderline problems with attention. (Id. at 5.) Two of three reported borderline significant rule breaking behavior and one reported borderline significant aggressive behavior.

However, this data is subject to question because two of the teachers indicated that it was hard to "distinguish" the Student's "academic difficulties." (P-7 p. 2.) The hearing officer interprets this to mean that the teachers found it hard to distinguish among the possible causes of Student's difficulties because of Student's behavior and lack of effort during the first half of the 2007-2008 school year, when Student was being evaluated. Thus, the hearing officer accords less weight to the fact that the teachers did not see overt evidence of attention problems. They themselves admitted that the student's absences and lack of work effort clouded their ability to distinguish the sources of Student's academic struggles. (FF 9.)

EXECUTIVE FUNCTIONS

The Parents sought to prove that the Student should be identified with a disorder of executive functioning. At the outset, their expert, who is trained and knowledgeable in certain neuropsychological testing instruments, confronted two problems with this assertion. First, the standard diagnostic manual of psychiatry, which is also the standard manual utilized in psychology, does not recognize disturbance of executive functioning as a

disorder. Second, the IDEA does not expressly incorporate disturbance of executive functioning as a recognized disability.

The Parents' expert addressed the first problem by demonstrating that executive functioning itself as a construct is recognized in the Diagnostic and Statistical Manual of Mental Disorders IV – Text Revision (DSM IV-TR.) It is recognized in the course of discussing “mild neurocognitive disorder”, one of two examples given for Cognitive Disorder Not Otherwise Specified (294.9). (S-19.) The discussion references “research criteria” for the mild neurocognitive disorder, and these criteria include “disturbances in ... executive functioning”, which includes “planning, reasoning ... organizing, sequencing, abstracting” *Id.* at 762, 764.

Thus, Parents' expert demonstrated that the paradigm he was describing, an entity called “executive functioning”, is referenced and therefore presumably supported as an entity, by the text of DSM IV-TR. He made no claim that there is a “disorder” recognized in the diagnostic manual. Nevertheless, he thus grounded in generally accepted nomenclature his own opinion as to this entity's manifestation in the Student. He also indicated that some in the field believe that this construct is identical to or overlaps with the recognized disorder of ADHD. (NT 115, 136.)

The Parents' expert sought to deal with the second problem by fitting the disturbance he had detected through testing to the language of the IDEA and its implementing regulations. He seized upon the word “alertness” in the definition of Other Health Impairment. 34 C.F.R. §300.8(c)(9)(i). However, he later admitted that he was most uncomfortable relying upon this word, and he actually contradicted himself on whether or not the Student really experiences a deficit in “alertness” as he was trying to assert, with regard to executive functions. (NT 112-115, 132, 190.) Moreover, there is persuasive precedent in the Appeals Panel that a deficit in Executive Functioning is not a disability under the IDEA. In re Educational Assignment of C.M., Spec. Educ. Op. 1765 (August 25, 2006).

ELIGIBILITY

The hearing officer does not find that the Student's behavior and academic failures were due directly to a deficit in executive functioning, except insofar as such deficit created the problems with attention that are encompassed in the Student's diagnosed ADHD. However, the hearing

officer finds that the Student has been evaluated with an Other Health Impairment within the meaning of the IDEA, 34 C.F.R. §300.8(c)(9)(i), based upon Student's accepted diagnosis of ADHD. The Student's dysfunctional behavior and consequent failure to advance academically are causally related to this disability. Therefore, the Student needs special education and related services "by reason of" the Student's Other Health Impairment. 34 C.F.R. §300.8(a)(1).

SECTION 504

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on account of disability. It prohibits federally funded programs from "exclud[ing] from participation in [or] den[ying] the benefits of" such programs "solely by reason of ... disability." 29 U.S.C. §794(a). Disability is defined to include a "mental impairment which substantially limits one or more ... major life activities" 29 U.S.C. §705(20)(b). Major life activities include learning. 34 C.F.R. §104.3(j)(2)(ii); 34 C.F.R. §104.33(a). 22 Pa. Code Chapter 15. Under Pennsylvania regulations, school districts are required to provide protected handicapped children with the aids, services and accommodations that are designed to meet the needs of such children. 22 Pa. Code §15.1(b). These aids, services and accommodations must be provided in such as way as to afford the child equal opportunity to obtain the benefits of the school program "to the maximum extent appropriate to the student's abilities." 22 Pa. Code §15.3.

In this case, the Parents have shown by a preponderance of evidence that the Student suffers from a mental impairment due to ADHD and weakness in executive functions, (FF 18), by reason of which Student needs aids, services and accommodations in order to participate in the general educational setting in the District's schools.

CHILD FIND

Under both section 504 and the IDEA, the District has an obligation to identify all children within its jurisdiction who are disabled and in need of special education and related services. The Parents assert that the student was such a child, but was not properly identified as such for the two year period ruled relevant in the present proceedings.

The hearing officer has found that the District's evaluation in January 2008 was inadequate, and that the Student is indeed disabled as defined in the IDEA. In addition, the District has failed to identify the Student during the two years prior to the filing of the complaint in this matter. However, Child Find is not a "strict liability" obligation. See A.P. v. Woodstock Board of Education, Dkt. No. 3:07CV833(MRK) at 5-7 (D. Conn. 8/19/08). If a district has exercised good faith to conduct an appropriate evaluation within a reasonable time of when it knew or should have known of a child's disability or alleged disability, it will not be held to have violated its child find obligation.

From January 27, 2006 until January 27, 2008, the Student was not identified as a disabled student, even though the evidence of record shows preponderantly that the Student suffered from a disability during that time. The Student was failing in the second half of the 2005-2006 school year, and was retained in fifth grade during the 2006-2007 school year. Thus, the Student did not make meaningful progress during the 2006-2007 school year, because Student fell a full year behind Student's peers. In addition, Student's behavior, caused by Student's disabilities, demonstrated a severe regression in social and adaptive functioning, which in itself was a failure to attain meaningful benefit of the social and adaptive learning available in a general educational setting. However, the District will not be ordered to provide compensatory education because the record does not show preponderantly that the District had notice that the Student was disabled until just prior to the filing of the complaint for due process in this matter.

Here, the District was faced with a behavior problem in a child who was not disabled as far as they knew. The record makes clear that the District's teachers could not distinguish the causes of the Student's plummeting grades because the Student was not completing work and was absent a lot, in addition to Student's disruptive behaviors in class. (FF 9.) Thus, despite the serious harm the Student was suffering as a result of Student's own behavior, the District cannot be held to know or be on notice that the Student's difficulties were due to disability during most of this time.³ Not until the Parent forwarded a letter indicating that the Student was diagnosed with ADHD was the District placed on notice that the Student was thought to be a disabled child. (P-1.) This did not occur until November 5, 2007. Within 60 school days, 22 Pa. Code §14.123, the

³ There was no evidence of a failure in the District's Child Find outreach policies or programs.

District produced an evaluation report, and within days after that, the Parent filed for due process. Thus, the District did not delay unreasonably in its evaluation of the Student, once it knew that the Student was thought to be disabled.

Here, the District did not conduct an appropriate evaluation as the hearing officer and Appeals Panel concluded. Thus, from January 18, 2008 until the date of the Complaint Notice, January 27, 2008, the District failed in its Child Find obligation. There was no evidence in the record as to whether or not the Student was in school during those ten days, whether there were school holidays during that time, and whether or not the Student's behaviors were interfering with Student's education during that time. Therefore, during this period, there is no evidence in the record that the Student was deprived of meaningful educational benefit. Consequently, and in the exercise of his equitable judgment, the hearing officer will not award compensatory education in this matter.

DISCIPLINARY ACTION WITHOUT MANIFESTATION HEARING

Aside from the evidence summarized above, the Parent offered no evidence regarding the process by which disciplinary actions were applied to the Student. The Student was not identified as disabled when the disciplinary actions disclosed in the record were undertaken. There was no evidence that the Student was suspected to be disabled at those times; indeed, the record shows that the District had no reason to suspect disability at that time, as discussed above. Therefore, there is insufficient evidence of a violation of IDEA with regard to discipline and the Parents' request for relief in this regard is denied.

PROSPECTIVE RELIEF REGARDING IDENTIFICATION AND EVALUATION PROCEDURES

The record and findings in this matter do not disclose any justification for relief regarding the District's policies for identification and evaluation of children with suspected disabilities. Therefore, this request by Parents is denied.

CONCLUSION

The Student has been evaluated as suffering from an Other Health Impairment in the form of ADHD, by reason of which Student suddenly engaged in escalating dysfunctional behaviors that made Student inaccessible to general education in the least restrictive setting, including academic, social and behavioral learning. The District will be ordered to convene an IEP team meeting to produce an educational placement and program including specially designed instruction and related services, and to consider in its deliberations the reports of [residential treatment program] and the IEE. Compensatory education is not awarded, and the Parents' request regarding disciplinary procedures is denied. In light of the hearing officer's findings and determination, the Parents' request for relief regarding the District's procedures for identification and evaluation of children with suspected disabilities is denied.

ORDER

1. The Student has been evaluated as suffering from an Other Health Impairment in the form of ADHD, by reason of which Student is in need of specially designed instruction and related services. Therefore, the District is ordered to convene an IEP team meeting within ten days of receipt of this decision, and to design and offer an educational placement and program for the Student pursuant to the requirements of the IDEA, including specially designed instruction and related services. In so doing, the IEP team will consider the reports of [residential treatment program] and the IEE.
2. The Student is a protected handicapped child within the meaning of Pennsylvania regulations implementing section 504 of the Vocational Rehabilitation Act of 1974, by reason of Student's diagnosis of ADHD and Student's deficits in executive functions. The District therefore is ordered to provide the Student with aids, services and accommodations that address Student's individual learning needs so as to provide Student with equal access to and opportunity to benefit from the educational services provided by the District to all students living within its jurisdiction.

3. The District did not fail to perform its Child Find obligation under IDEA or section 504 of the Vocational Rehabilitation Act of 1973 by failing to identify the Student as eligible for special education and related services during the time period from January 27, 2006 to January 18, 2008.
4. The Parents' request for an order regarding disciplinary procedures is dismissed.
5. The hearing officer will not award compensatory education for any part of the relevant period.
6. The hearing officer will not order any changes in the District's policies or procedures regarding screening and evaluation for Child Find purposes.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

October 6, 2008