

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

DUE PROCESS HEARING

Name of Child: AK
ODR #9048/08-09 KE

Date of Birth:
Xx/xx/xx

Dates of Hearing:
October 27, 2008
November 4, 2008
November 26, 2008
January 12, 2009
January 13, 2009

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

Saucon Valley School District
2095 Polk Valley Road
Hellertown, Pennsylvania 18055

Date Record Closed:

Representative:
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January 30, 2009

Date of Decision:

February 11, 2009

Hearing Officer:

Linda M. Valentini, Psy.D.

Background

Student is a preadolescent student, a resident of the Saucon Valley School District (hereinafter District), who is currently served under a 504 Service Agreement. Mr. and Mrs. (hereinafter Parents) filed for this hearing to challenge the District's finding Student ineligible for special education and thereby denying Student a free appropriate public education (hereinafter FAPE) for the 2006-2007 and 2007-2008 school years and for the 2008-2009 school year up to the point when the District offers Student an appropriate IEP. The Parents also maintain that even if the District's finding of ineligibility for special education is correct, the 504 Service Agreement of June 2008 was inappropriate. The Parents are seeking compensatory education for the alleged denial(s) of FAPE. The District maintains that Student is not eligible for special education, that the June 2008 504 Service Agreement is appropriate, and that no compensatory education is due.

Issues

1. Did the Saucon Valley School District fail to identify Student as a child who is eligible for special education services under the IDEA?
2. If the Saucon Valley School District failed to identify Student as an eligible student, is Student entitled to compensatory education services, in what kind and in what amount?
3. If the Saucon Valley School District's finding of ineligibility was correct, did the District fail to offer Student an appropriate 504 Service Plan in June 2008?
4. If the 504 Service Plan of June 2008 offered to Student by the Saucon Valley School District was inappropriate, is Student entitled to compensatory education services, in what kind and in what amount?

Findings of Fact

1. Student is currently a preadolescent sixth grade student attending the Saucon Valley School District's [redacted] School. Student enrolled in the District in the beginning of the 2005-2006 school year, for third grade, after attending a private Catholic school for first and second grades. (NT 37-38).

Third Grade 2005-2006

2. Upon Student's entry into the District, Student's reading scores indicated that Student was reading at an early second grade level. Results of Iowa Tests of Basic Skills of 2004 and 2005 from [redacted] parochial school indicated that while at [parochial school] Student was at or above grade level in all academic areas in first grade, but made no progress in reading in second grade, and less than one year's progress in math and language in second grade. (NT 752; S-24)

3. Throughout third grade Student received Title I Core reading instruction with the Soday Reading program. (NT 111, 748)
4. Student's decoding and fluency skills increased and Student moved up in grade level materials, progressed in Student's words per minute score, and in accuracy consistently scored above the standard. (NT 751-757; S-3)
5. Student progressed from level 15 to level 24 in the Soday Reading program during third grade, and Student's pre and post-test scores on Soday indicated significant progress. (NT 756-57, 759-760).
6. On the third grade PSSA, Student scored Basic in Reading, missing the criterion for Proficient by two points. Student's math score was Advanced. (S-2, S- 37)

Fourth Grade 2006-2007

7. Because of Student's test scores, Student did not qualify for the Title I Core reading program at the beginning of fourth grade and was placed in the "on level" reading group. (NT 761, 825)
8. The District implemented a new reading program, the Scott Foresman, in 2006-2007. Student along with many of the other students in the District, had difficulty meeting the District's 80% comprehension standard on that program, which emphasized higher level thinking skills, but Student did meet the Scott Foresman publisher's comprehension standard of 60%. (NT 448-449, 764, 829-830, 832)
9. On January 24, 2007 a Speech/Language screening was conducted by a District speech/language pathologist. On the Test for Auditory Comprehension of Language-3, Student's percentile rankings were as follows: Vocabulary 63rd %tile, Grammatical Morphemes 75th %tile, Elaborated Phrases Sentences 63rd %tile. Student's Language Quotient was 109 at the 73rd %tile. The Average Range for Language Quotient scores is between 90 and 110, placing Student's functioning at the uppermost end of the average range. (NT 693-694; S-7)
10. On January 22, 2007 the District's Reading Coordinator for students in grades kindergarten through eighth, conducted an Individual Reading Evaluation which yielded the finding that Student's instructional reading level was 3rd to 4th grade with Word Recognition in Context at 90-97% and an Average Comprehension Score of 75-89%. Student's accuracy (97.5%) and fluency (91 WPM) levels were appropriate for 4th grade. Student did have more difficulty with inferential items on a nonfiction passage than with literal items on the passage at the 4th grade level. (S-6)
11. Pursuant to a January 26, 2007 Child Find team meeting, Student was again entered into the Title I Core in-class reading program based on Student's

- September and November 2006 4Sight scores¹ and a review of Student's grades and in-class comprehension tests. (NT 114, 116, 450-451, 840-842, 839).
12. In addition, Student continued to receive the Scott Foresman curriculum, using the strategic intervention level book which was designed for students who are at lower fluency and comprehension levels. (NT 839-840)
 13. In January 2007 Student also began reading tutoring at the Lear facility funded through a Classroom Plus Grant. Originally two hours a week, later reduced to one hour a week, Student received the Wilson Reading Program and the Lindamood-Bell Visualizing and Verbalizing Program. (NT 304-306, 351-353, 355-356, 376)
 14. Pursuant to the Child Find team meeting, on January 26, 2007 the District issued a Permission to Evaluate. The Parents refused to sign it because it indicated that the evaluation was being done at the request of the Child Study Team instead of at the request of the Parents. The District issued a second Permission to Evaluate on February 20, 2007, which Parents signed, and the District then conducted its initial multidisciplinary evaluation. (S-8, S-10)
 15. As part of the multidisciplinary evaluation the speech/language pathologist administered the Clinical Evaluation of Language Fundamentals-4 (CELF-4). Student achieved Standard Scores as follows: Core Language 120 (Above Average), Receptive Language 105 (Average), Expressive Language 122 (Above Average), Language Content 110 (Average), Language Memory 125 (Above Average). (S-11, S-12, P-14)
 16. The speech/language pathologist also administered the Test of Auditory Processing Skills-3 (TAPS-3). Student's scores were as follows: Auditory Number Memory Forward 63rd %tile, Auditory Number Memory Reversed 50th %tile, Auditory Word Memory 50th %tile, Auditory Sentence Memory 91st %tile, Auditory Comprehension 95th %tile, Auditory Reasoning 50th %tile. (S-11, S-12, P-14)
 17. A District psychology intern, under the supervision of a District psychologist, administered the Wechsler Intelligence Scale for Children Fourth Edition (WISC-

¹ Although this decision will not go into the 4-Sight scores the reader should note, if examining the exhibits, that interpretation is somewhat tricky. The 4-Sight for each grade assesses the student during the year on material equivalent to that tested on the PSSA given toward the end of that year. Over the course of a school year the average student is expected to score Below Basic in the beginning of the year (because the material would not yet have been taught) then move through the repeated administrations to Basic and then to Proficient. On the PSSA then the student would be expected to score at the level Student/she scored on the last 4-Sight. On the 4-Sight, even if a student ends the year at Proficient, the first administration in the next grade would be expected to be Below Basic again and build on up. (See P-6 and Direct Examination by School Principal)

- IV). Scores were as follows²: Full Scale IQ 104 (Average), Verbal Comprehension 99 (Average), Perceptual Reasoning 106 (Average), Working Memory 94 (Average), Processing Speed 112 (High Average). (S-11, S-12, P-14)
18. Student was also administered the Wechsler Individual Achievement Test Second Edition (WIAT-II). Student's Standard Scores were as follows: Word Reading 97 (Average), Reading Comprehension 99 (Average), Pseudoword Decoding 98 (Average), Numerical Operations 98 (Average), Math Reasoning 106 (Average), Spelling 92 (Average), Written Expression 106 (Average). (S-11, S-12, P-14)
 19. Based on the multidisciplinary evaluation results the evaluation team concluded that Student was not an eligible student under either the classification of specific learning disability or speech/language impairment. (NT 454; S-11, S-12, P-14)
 20. The Parents declined to sign the Notice of Recommended Educational Placement (NOREP) when it was proffered on May 8, 2007 for the stated reason that they needed more information. (S-13)
 21. In a January 31, 2007 report, which the Parents did not share with the District at the time, Dr. P stated that Student displayed "indicators of" Central Auditory Processing Disorder (CAPD). Student subsequently issued an undated Addendum to Student's report specifically diagnosing Student with CAPD. (NT 123-124, 455; S-9)
 22. On May 29, 2007 the Parents provided the original report and the Addendum to the District asking that the CAPD diagnosis be added to the Evaluation Report. (S-13)
 23. Based upon the diagnosis of CAPD, the Parents, the Director of Special Education and the Principal met during the summer and created a 504 Plan dated July 31, 2007. The 504 Plan to be implemented in fifth grade provided accommodations for Student's CAPD. (NT 326; 657-660; S-17)
 24. The Parents approved the July 31, 2007 504 Service Plan on August 20, 2007. The Plan called for preferential seating, highlighting key words and phrases, have Student repeat directions to staff or peers and sub-vocalize to himself, encourage Student to face the speaker, small group with academic Core support, directions given clearly and slowly using frequent pauses and enunciated word endings, redirect and refocus off-task behavior with verbal or non-verbal cues or prompts, quiet area for test-taking, teacher to initial assignment book, quarterly team meeting. (S-17)

² Relevant Ranges are: 70-79 Borderline; 80-89 Low Average; 90-109 Average, 110-119 High Average. However, there is a confidence band around each individual score of about +/- 5, such that for example a child scoring a 92 could be expected to score anywhere between 87 and 97 on repeated test administrations.

25. On the fourth grade PSSA Student scored Proficient on the Reading section and Advanced on the Math section. (NT 304; S-5)

Fifth Grade 2007-2008

26. Student was served under the July 31, 2007 504 Plan during 5th grade. Student's fifth grade language arts teacher noted that Student responded well to the accommodations contained in the 504 Plan, including re-direction prompts, repeating directions, the Core program, use of a quiet area in the classroom, extra time for tests, and use of an assignment book, needing only single prompts/redirections. (NT 661, 870-872)
27. On December 29, 2007 the District re-issued the May 2007 NOREP as it had never been approved. The Parents disapproved it, requesting mediation and noting, "Please refer to Dr. P's audiological report. The auditory processing disorder is manifested in difficulty with linguistic-based learning, most notably reading comprehension". (S-13)
28. Pursuant to Parents' request, on January 7, 2008 the District psychologist who had supervised the first evaluator administered norm based reading tests to Student. On the Kaufman Test of Educational Achievement Second Edition (KTEA-II) Student's standard scores were as follows: Letter and Word Recognition 95 (Average, 37th %ile), Reading Comprehension 99 (Average, 47th% ile). (S-22)
29. The District psychologist also administered a subtest of the Woodcock-Johnson Tests of Educational Achievement Third Edition (WJ III). Student's standard score in Reading Fluency was 92 (Average, 29th % ile). (S-22)
30. The District psychologist also administered the Gray Silent Reading Test (GRST) on which Student received a standard score of 82 (Low Average, 12th % ile). A breakdown of the components of this score expressed in percentiles is as follows: Rate 25% ile, Accuracy 16th % ile, Fluency (which is a composite of Rate and Accuracy) 16th % ile, Comprehension 75th % ile. Student obtained a better score on a more difficult passage than Student had on the two preceding less difficult passages. (S-22)
31. Student's reading teacher administered the 5th Grade Second Quarter reading assessment to Student. Student scored 100 words per minute (standard for District is 90 WPM), 97% accuracy (standard for District is 90%) and 72% comprehension (standard for District is 80%). Of note, these results were a complete reversal of Student's performance on the GSRT (as both tests' comprehension sections are based on silent reading that particular component is fairly comparable, illustrating Student's tendency to score inconsistently on standardized tests). (S-22)

32. The parties went to mediation, and pursuant to the mediation agreement, the District issued another Permission to Evaluate for non-district employee(s) to conduct a psycho-educational evaluation, and the Parents consented. (S-23)
33. On February 19, 2008 an educational audiology evaluation was performed by a Colonial Intermediate Unit 20 educational audiologist. (S-25) Using a combination of objective testing, teacher report, self-report and classroom environment assessment the audiologist made some classroom recommendations: preferential seating, closed hallway doors during instruction, avoid giving instructions/assignments during transition times, give assignments and multi-step directions in written form, use close-captioned media or give a printed outline or summary before the media is shown, check for comprehension as well as memory of directions. (S-25)
34. On March 13, 2008 an IU 20 psychologist issued an evaluation report. For purposes of the evaluation, the IU psychologist reviewed records including the following: Audiological Evaluation (January 2007) Sacred Heart Hospital Allentown; Neurological Evaluation (June 2007) St. Christopher's Hospital for Children Philadelphia; Audiology Consultation (February 2008) IU 20; Reading Screening Evaluation (January 2007) District; Speech/language Screening Evaluation (January 2007) District; Multidisciplinary Evaluation (May 2007) District; Selected reading subtests of KTEA-II and WJ III (January 2008) District; School Records including classroom-based assessments (CBA), 4-Sight probes, response to instruction probes (RTI), report cards, and PSSA scores; Iowa Tests of Basic Skills 2004 and 2005 from [parochial school]. (S-24)
35. The IU psychologist directly gathered information from the following sources: Parent Input Form; Teacher Input Forms; Behavior Rating Inventory of Executive Function (BRIEF) completed by the Parent and Student's two teachers; Behavioral Assessment System for Children Second Edition (BASC-2) completed by the two teachers; Classroom-based Observation including rating with the Behavioral Observation of Students in Schools (BOSS); Woodcock Johnson III Tests of Cognitive Abilities; Woodcock Johnson III Tests of Achievement. (S-24)
36. On the Woodcock Johnson III Tests of Cognitive Abilities, Student received standard scores as follows: General Intellectual Ability 95 (Average), Verbal Ability 111 (High Average), Thinking Ability 89 (Low Average), Cognitive Efficiency 103 (Average), Phonemic Awareness III 96 (Average), Working Memory 96 (Average), Oral Language 100 (Average). (S-24)
37. A subtest analysis of the Woodcock Johnson III Tests of Cognitive Abilities indicated that Student did better when a task involved limited or no auditory demands, and suggested that the lower scores were attributable to Student's CAPD. (S-24)

38. On the Woodcock Johnson III Tests of Achievement, four score clusters were examined. Student received standard scores on the Reading Cluster as follows: Letter-Word Identification 90 (Average), Reading Fluency 103 (Average) Passage Comprehension 92 (Average), **Broad Reading 95 (Average)**³, Word Attack 100 (Average), Reading Vocabulary 98 (Average), Sound Awareness 100 (Average), **Basic Reading Skills 95 (Average), Reading Comprehension 94 (Average).** (S-24)
39. Student received standard scores on the Woodcock’s Mathematics Cluster as follows: Calculation 104 (Average), Math Fluency 108 (Average), Applied Problems 111 (High Average), **Broad Math 109 (Average).** (S-24)
40. Student received standard scores on the Woodcock’s Written Language Cluster as follows: Spelling 105 (Average), Writing Fluency 96 (Average), Writing Samples 106 (Average), **Broad Written Language 102 (Average).** (S-24)
41. Student received standard scores on the Woodcock’s Oral Language Cluster as follows: Story Recall 93 (Average), Understanding Directions 103 (Average), **Oral Language 100 (Average), Oral Comprehension 106 (Average), Listening Comprehension 106 (Average).** (S-24)
42. The IU psychologist reported that behavioral rating scales completed by the Parent and by the teachers revealed an elevated score on Somatization on the BASC 2, and elevated scores on the BRIEF in the areas of Inhibit, Emotional Control, Working Memory, Plan/Organize, Monitor, **Behavioral Regulation Index, Metacognition Index, and Global Executive Composite**⁴. Characteristics of CAPD and ADHD overlap somewhat, such that the BRIEF results could partially support either condition. (S-24)
43. On the BOSS, a formal observation protocol during which Student’s behaviors in class were compared to the behaviors of Student’s classmates and assigned ratings, Student active engagement (raising Student’s hand, answering questions) was significantly less than Student’s classmates’, but Student’s passive engagement (looking at the speaker, following along on Student’s worksheet, following along at the board) was much higher than Student’s classmates’. NT 598-599; S-24)
44. Following a thorough assessment as described above, the IU psychologist found that Student was not eligible for special education services. Specifically she used the “discrepancy (between ability and achievement) model” as well as examining “response to intervention/instruction (RTI)” data, and while noting that Student has struggled with reading comprehension, concluded that Student was making

³ **Bold type** indicates that the score is the result of a prescribed combination of various subtests (unbolded) scores. (S-24)

⁴ See above.

- progress in reading skills within the current regular education program being provided to Student. (NT 610, 615-617, 642-643; S-24)
45. The IU psychologist recommended that Student continue Student's current (regular) educational program, that Student's reading comprehension be monitored closely using standard probes, that Student continue to receive the accommodations available through Student's Service Plan issued because of Student's CAPD and that the plan be expanded to include a self-monitoring program for attention to speaker and/or other targeted observable behaviors to foster independence in managing Student's CAPD, and that Student join a social skills group. The IU psychologist also endorsed the recommendations offered by the IU audiologist. (NT 610, 615-617, 642-643; S-24)
 46. On April 4, 2008 the District issued a NOREP, calling for Student to remain in regular education with a 504 Plan. As the Parents did not respond, the NOREP was reissued. Parents rejected the NOREP on April 18, 2008, and requested a due process hearing. (NT 320-321; S-26, S-27)
 47. On April 17, 2008 the Woodcock Reading Mastery Test was administered by the owner of the tutoring business where Student was receiving reading tutoring. Student's standard scores were as follows: Visual-Auditory Learning 60, Letter Identification 109, Word Identification 96, Word Attack 88, Word Comprehension 103, Passage Comprehension 96, Readiness Cluster 92, **Basic Skills Cluster 93, Reading Comprehension Cluster 99, Total Reading Cluster 95.** (P-7)
 48. Student was not well on the day Student took the major portion of the 5th grade PSSA Reading assessment which specifically addressed comprehension. Student's teacher attributed Student's Below Basic score to Student's illness, especially in light of Student's having scored Proficient in Reading on the previous year's PSSAs and in light of Student's 4-Sight scores during 5th grade. Student scored Proficient in Math and Proficient in Writing. As noted earlier, Student performs inconsistently on standardized testing, and Student tends to perform as expected on the 4-Sight progress monitoring probes throughout the year but not do as well on the actual PSSA tests. (NT 877-878; S-37)
 49. Student's 5th grade report card grade in Reading was a C "inconsistently meets standards", and A's and B's in all other subjects, including writing. (S-29)
 50. On June 12, 2008 the District convened a two-hour meeting to create a Section 504 Service Agreement for Student's 6th grade year when Student would transition from elementary to middle school. Participants in the meeting included the attorneys representing each party, the Parents, the 5th grade learning support counselor, the 5th grade teachers, the elementary school principal, the middle school guidance counselor, the 6th grade teachers, the middle school principal, the

- IU audiologist who had evaluated Student and the IU psychologist who had evaluated Student. (NT 671-672; S-32)
51. Additions to the previously approved 504 Service Plan were: reduce noise sources in the classroom, close hallway doors during instruction, avoid giving instructions or assignments during transitions, multi-step directions should be given in written form, use of closed caption material or provide written outline or summary of material before presentation of media, give the opportunity to read tests and writing pieces aloud prior to their being graded, one-to-one social training with the school counselor and small group social skills training with the school counselor a total of four times per month, permission to seek out a school counselor if a situation arises during non-structured times. (NT 673-674; S-32)
 52. The Parents did not approve the 504 Service Plan and requested a due process hearing. The District's former supervisor of special education was surprised that the Parents took this position because they seemed to be in agreement at the meeting, both parties' counsel were present and the Plan addressed Student's CAPD and social issues. (NT 674)
 53. The proposed 504 Plan contains the recommendations the private psychologist later testified were most important for Student's school achievement, and the private psychologist also testified that she did not see anything in the proposed 504 Plan that was inconsistent with her recommendations. The proposed 504 Plan incorporates the recommendations in the IU audiologist's report. (NT 227-231, 248, 673-674; S-32, S-33)

Private Evaluation – Psychological

54. In June 2008 Student was evaluated by a private psychologist specializing in neurodevelopmental evaluations and consultation. The District received a copy of the Report of a Psychological Evaluation in mid-August 2008. (S-33)
55. In addition to interviewing the Parents and observing Student in her office, the private psychologist reviewed the previous multidisciplinary evaluations including previous audiological evaluations, and the July 31, 2007 504 Service Plan. It does not appear that she reviewed Student's educational records from the District. (S-33)
56. For purposes of her evaluation the private psychologist utilized the ADHD-IV behavior rating scale completed by the Parents; the Behavior Assessment System for Children Second Edition (BASC 2) completed by the Parents and two of Student's teachers, with the BASC 2 Self-Report form being completed by Student; the Integrated Visual and Auditory Continuous Performance Test (IVA+Plus), selected subtests of the NEPSY; selected subtests of the Delis-Kaplan Executive Functioning Scale (D-KEFS); the California Verbal Learning Test – Children's Version (CVLT-C); the Rey-Osterreith Complex Figure Test (RCFT). (S-33)

57. On the ADHD-IV, which uses the DSM-IV⁵ list of criteria to assess whether an individual has ADHD, the Parent's responses did not meet the diagnostic criteria for any subtype of ADHD (or ODD⁶). One teacher's responses did not meet the diagnostic criteria for any subtype of ADHD (or ODD). The other teacher's responses were borderline for meeting the diagnostic criteria for ADHD, inattentive type⁷. Diagnostic criteria in the DSM-IV are precise, and full criteria must be met in order to assign the diagnosis. (NT 619; S-33, HO-1)
58. On the BASC 2 the Parent's responses yielded results in the average range for all composite scales and subscales, including subscales for hyperactivity, ability to attend, ability to interact with peers, aggression, conduct problems, depression, anxiety and somatization. (S-33)
59. On the BASC 2 both teachers' ratings resulted in findings that corresponded to the Parent's results with the exception of both teachers' endorsements of items resulting in an At-Risk (similar to a "borderline" finding, as opposed to being clinically significant) score on the depression subscale which contributed to an At-Risk finding on the Withdrawn scale. (S-33)
60. On the BASC 2 Student's self-reported endorsements of items resulted in findings that Student is typical as compared to boys Student's age, and that from Student's point of view overall Student is not stressed by interpersonal relationships with peers or social situations in general. However, Student did report that Student perceives peers making fun of Student, and experiences feelings of loneliness and being left out of things. (S-33)
61. Based substantially on the results of the approximately 20-minute, computerized, IVA test, the private psychologist concluded that Student was "extremely impaired" in auditory attention and in visual attention as well as in mental stamina. The IVA required Student to click the mouse once whenever Student heard or saw the number one and to refrain from clicking the mouse when Student saw or heard the number two. The use of the IVA as a diagnostic tool for ADHD is questioned by the professional community at this time. (NT 557-558; S-33)
62. On the NEPSY subtests Student presented as above average on a test of Attention and Executive Functions, variable on subtests of Language, high average to above average in Memory and Learning with a borderline subtest score on immediate recall and recall following interference, above average in Visuospatial functioning, and variable in Social Cognition. (S-33)

⁵ Diagnostic and Statistical Manual of the American Psychiatric Association Fourth Edition (DSM-IV).

⁶ Oppositional Defiant Disorder.

⁷ Sometimes imprecisely called Attention Deficit Disorder (ADD).

63. On the Delis-Kaplan Student demonstrated quick and accurate visual scanning, good mechanical reasoning, average rapid-naming but well below average accuracy on verbal naming. (S-33)
64. On the California Verbal Learning Test Student had “slight difficulty” with learning verbal information. Student had difficulty sustaining attention while learning material auditorially, but could recall learned verbal information at an average level on short and delayed recall trials. Student “did not display an unusually high degree of vulnerability to proactive interference”. Overall findings suggested that Student is able to adequately encode and retrieve verbal information, but performance could be enhanced with greater attention to task and employing active learning strategies. (S-33)
65. Rey-Osterreith results were average for visual construction, visual-motor processing speed, immediate and delayed visual recall and delayed visual recognition. (S-33)
66. On the basis of the IVA, with some selected support from the NEPSY, and looking at individual items from the behavior rating scales rather than using the standard practice of looking at composites or indexes, the private psychologist concluded that Student has a “severe attention deficit disorder (ADHD inattentive type)”. Her formal diagnoses were: “Attention Deficit Hyperactivity Disorder, Inattentive Type; Developmental Reading Disorder, by history⁸, Cognitive Disorder Not Otherwise Specified (Auditory Processing Disorder) by history; R/O⁹ Learning Disorder NOS (Nonverbal Learning Disorder). (NT 558-559; S-33)
67. The private psychologist wrote that her recommendations “should be incorporated into an IEP identifying Student as a child in need of specially designed instruction on the basis of Student’s Specific Learning Disability (Reading) and Other Health Impairment (ADHD)”. (S-33)
68. The District considered the report of the private psychologist at the beginning of the 6th grade school year at a meeting attended by the Parents, counsel for both parties, all Student’s current teachers, and the school principal. (NT 555)
69. The District continued to accept the previous diagnosis of CAPD, but questioned the ADHD diagnosis and disagreed with the classification of a specific learning disability. The District did not find Student eligible for special education services because there was no basis for the private psychologist’s recommendation that

⁸ When a clinician uses the “by history” notation it means that the area was not tested and/or not found directly during the evaluation, but that the record (written or conveyed orally) contains an indication of the diagnosis previously having been assigned.

⁹ R/O (“rule-out”) means that the diagnosis needs to be further explored in order to eliminate it (rule it out) or confirm it.

Student needed specially designed instruction and the 504 Service Plan was in effect to address accommodations Student might require. (NT 555-556, 648-650)

70. Based upon her previous participation in researching ADHD as part of her graduate work, the IU psychologist has concerns about the private psychologist's diagnosis of ADHD for Student and as a school psychologist disputes the private psychologist's conclusion that Student has a specific learning disability and requires specially designed instruction. (NT 618-624)

Private Evaluation – Speech/Language

71. In July 2008 Student was evaluated by a private speech/language pathologist. (S-35)
72. The speech/language evaluator utilized an informal self-made behavioral checklist completed by the Parent to glean information about Student's functioning. She also interviewed the Parent, and reviewed the January 2007 audiological report as well as the private psychological evaluation report. Additionally, she utilized the Clinical Evaluation of Language Fundamentals Fourth Edition (CELF 4); the Test of Problem Solving-3: Elementary (TOPS-3); the Test of Written Language Third Edition (TOWL-3); and the Comprehensive Test of Phonological Processing (CTOPP). It does not appear that she reviewed educational records from the District or sought to speak with anyone from the District. (S-35)
73. On the CELF 4, Student's standard scores were as follows: Core Language Score 104 (Average), Receptive Language Index 105 (Average), Expressive Language Index 99 (Average), Language Content Index 90 (Average), Language Memory Index 108 (Average). A comparison of scores suggests that while all were in the average range semantic skills are a relative weakness and language skills depending on memory are a relative strength. (S-35)
74. On the TOWL-3 Student scored on subtests as follows: Vocabulary 63rd% ile (Average) ; Spelling 50th% ile (Average); Style 16th% ile (Below Average) ; Logical Sentences 16th% tile (Below Average); Sentence Combining 25th% ile (Average). (S-35)
75. On the final portion of the TOWL-3 Student did not fully comply with the demands of the test. Given a 15 minute period to complete a piece of writing, Student stopped after 7 minutes and did not continue despite prompting, resulting in a passage that had too few words to score. Given a second prompt, Student wrote for only 5 minutes despite prompting. However, this piece had enough words to score. The resultant scores reflecting Contextual Conventions, Contextual Language, and Story Construction were Student's lowest, at the 9th, the 5th and the 2nd percentiles respectively representing Below Average, Poor and Very Poor categories. (S-35)

76. Reflecting Student's variable cooperation, Student's TOWL-3 composite scores were: Contrived Writing 25th ile, Spontaneous Writing 1st ile, and Overall Writing 10th ile. (S-35)
77. On the CTOPP Student's composite standard scores were as follows: Phonological Awareness 79, Phonological Memory 85, Rapid Naming 76. (S-35)
78. The private speech/language evaluator noted that Student was "easily distracted" by noises during the evaluation, sometimes seemed not to process or to forget instructions, had difficulty with topic maintenance, initiated extraneous conversational topics, and had difficulty with social cues, for example interrupting the examiner and following the examiner out of the room when Student had been asked to wait. (S-35)
79. The private speech/language evaluator recommended that Student receive speech/language therapy to address areas of identified weakness. (S-35)
80. There was a drastic decline in most of Student's CELF 4 scores over the 17-month period from February 2007 to July 2008. Although Student's Receptive Language Index remained stable at 105, all Student's other scores declined as follows: Core Language from 120 to 104 (declined 1 standard deviation), Expressive Language from 122 to 99 (declined 1½ standard deviations), Language Content from 110 to 90 (declined 1½ standard deviations, and Language Memory from 125 to 108 (declined 1 standard deviation).¹⁰ Even though the 2008 scores were lower than the 2007 scores, they were all still in the Average Range. (S-11, S-12, S-35, P-14)

Sixth Grade 2008-2009

81. At the request of the Parents, in September and October 2008 Student was given another speech/language evaluation which was conducted by the same District speech/language pathologist who had evaluated Student in 2007. The report was dated November 3, 2008. (NT 699; S-43)
82. The District's speech/language pathologist conducted an informal observation of Student in Student's Language Arts class. (NT 717)
83. The District's speech/language pathologist administered the Comprehensive Assessment of Spoken Language (CASL) to assess Student's receptive and expressive language skills, and understanding and use of pragmatic language. Subtest standard scores were as follows: Synonyms 99, Antonyms 100, Sentence Completion 107, Idiomatic Language 101, Syntax Construction 114, Paragraph

¹⁰ Although each of the scores from the July 2008 evaluation was in the average range, the hearing officer's concern is Student's decline from Student's *own* previous score levels which could present an issue for referral to a pediatric neurologist. The CASL results do not entirely mitigate this hearing officer's concerns in this regard.

- Comprehension 101, Grammatical Morphemes 108, Sentence Comprehension 99, Grammaticality Judgment 102, Non-literal language 100, Meaning from Context 114, Inference 107, Ambiguous Sentences 105, Pragmatic Judgment 119. All scores were Average, with one being Above Average, and the Average scores with two exceptions clustered in the upper half of the average range. (S-43)
84. On the CASL Student's standard scores were as follows: Core Composite 104 (61st % ile, Average); Lexical/Semantic 101 (53rd % ile, Average); Syntactic 109 (73rd % ile, Average); Supralinguistic 103 (58th % ile, Average). (S-43)
85. The District's speech/language pathologist also administered the Test of Pragmatic Language (TOPL) to assess the effectiveness and appropriateness of Student's social language skills. Student's quotient was 120, at the 91st%ile. (S-43)
86. The District's speech/language pathologist also administered the Phonological Awareness subtest of the CELF 4, which assesses knowledge of the sound structure of language and the ability to manipulate sound. Student's score was an 83 which exceeds the criterion score of equal to or greater than 67, indicating adequate processing at the level of phonology. (S-43)
87. The District's speech/language pathologist also administered the Test of Auditory Processing Skills-3 (TAPS-3) to assess Student's overall ability to perceive auditory signals. Student scored as follows: Number Memory Forward 25th%ile; Number Memory Reversed 37th%ile; Auditory Sentence Memory 98th%ile; Auditory Word Memory 37th%ile; Auditory Comprehension 84th%ile; Auditory Processing (thinking and reasoning) 75th%ile. (S-43)
88. The District's speech/language pathologist also administered the Language Processing Test-3 Elementary in order to assess Student's overall ability to attach meaning to auditory stimuli. Student's standard scores were as follows: Association 118 (Above Average), Categorization 106 (Average), Similarities 113 (Average), Differences 103 (Average), Multiple Meanings 118 (Above Average) Attributes >133 (Above Average), Total Score >136 (Above Average). (S-43)
89. The District's speech/language pathologist utilized the Descriptive Pragmatics Profile of the CELF 4 to assess Student's understanding and use of social skills within the classroom setting as rated on a checklist by Student's Language Arts, Math and Science/Social Studies teachers. The teachers' endorsements resulted in the following scores: rituals and conversational skills 163; asking for, giving and responding to information 148; using/interpreting nonverbal communication skills 143. These scores all exceed the criterion score of greater than or equal to 132 indicating adequate pragmatic language skills within the classroom. (S-43)
90. Another measure, The Phonological Awareness & Reading Profile (PARP) was administered to Student by the District's K-8 Reading Coordinator and interpreted

- by the District's speech/language pathologist as part of her report. Student's scores, represented by the percentage of number of items correct out of number given, were as follows: Phonological Awareness 88% (44/50); Decoding 93% (100/108); Spelling 81% (60/74). Scores of 80 or higher are considered Average. Fluency was assessed through a task of rapid naming on which Student scored at 15 seconds, with the target being less than 20 seconds, and a task of paragraph reading on which Student read the paragraph in 35 seconds, with a target rate of less than 40 seconds. Student's reading rate indicated an expected words per minute rate above the target of 150 WPM. (S-43)
91. The District's speech/language pathologist concluded that based upon Student's average to above average skills in the areas of receptive/expressive language, auditory perceptual abilities, reasoning and thinking, language processing, articulation/prosodic (oral-motor) features and phonological awareness Student does not meet special education eligibility criteria as a student with a speech and language impairment. (NT 729; S-43)
 92. The District issued a NOREP on November 17, 2008 which the Parents did not approve because of being in the middle of this due process hearing. (S-45)
 93. In 6th grade Student has been served under the previously approved Section 504 Service Plan of July 31, 2007 because the Parents rejected the Plan developed on June 12, 2008. All teachers are aware of the Plan and are following it. (NT 918-919; S-17, S-43)
 94. A Qualitative Reading Inventory (QRI) was administered to Student in December 2008. On a 6th grade passage Student read 110 words per minute with 99% accuracy, 75% comprehension without look-backs and 88% comprehension with look-backs. The District's standard is 80%. (S-48)
 95. Student's Language Arts grades have been B for the first and second quarters of 6th grade, with an 85% rating on both quarters. As of 1-12-09, Student received 10 reading "assignments"¹¹ and earned a total of 764.5 points out of a possible 890 points (85.9%) and 4 writing assignments on which Student earned a total of 210 points out of a possible 250 points (84%). (S-49)
 96. On the two 4-Sight tests given to Student in September and in November 2008, 6th grade, Student scored Proficient in Reading. (S-37, S-44)

¹¹ Some of these were tests or quizzes.

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹² Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. Witness credibility where relevant is reflected in the discussion below.

Legal Basis

Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this case, on each issue, the evidence was not in equipoise.

Special Education

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004).

Child Find

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

¹² Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

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

“Child Find is a positive duty requiring a school district to begin the process of determining whether a student is exceptional at the point where learning or behaviors indicate that the child may have a disability. Ridgewood Board of Education v. M.E., 172 F.2d 238 (3rd Cir. 1999) A district is on notice of the *possibility* of a disability where a student is experiencing failing grades, or where it has notice that the student has been identified for ADHD. See S.W. v. Holbrook Public School 221 F. Supp. 2d 222, 2260227 (D. Mass 2002)” In re the Educational Assignment of R.R., A Student Residing in the Souderton School District, Appeals Panel Opinion No. 1859.

A ‘child with a disability’ means a child evaluated in accordance with §§300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, **and** who, by reason thereof, needs special education and related services. (emphasis added) 34 C.F.R. §300.7

FAPE

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

The FAPE requirement under Section 504, unlike under the IDEA, is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the "design" of a child's educational program." Mark H. v. Paul Lemahieu, 513 F.3d 922, 933. As defined by the regulations, a Section 504 FAPE requires education and services "designed to meet individual educational needs of handicapped persons as adequately as the needs of non handicapped persons are met." 34 C.F.R. §104.33(b)(1).

Compensatory Education

Compensatory education is an appropriate remedy where a school district has failed to provide a student with FAPE. M.C. v Central Regional School District, 81 F.3d 389 (3rd Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 488 U.S. 923 (1991). For many years the period of compensatory education has been calculated to be

equal to the period of deprivation, less a reasonable rectification period. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999) Since 2006, hearing officers can also focus on what it will take to bring the student to the point Student should have been if not for the deprivation of FAPE. B.C. v. Penn Manor, 906 A.2d 642 (Pa. Cmwlth. 2006)

Discussion and Conclusions of Law

This hearing officer has reviewed extensive test results from one-to-one evaluations provided by District and IU employees and provided by private evaluators. Evaluations included direct testing and observation, as well as review of behavior rating scale data collected from the Parents, from school personnel, and from Student himself. Data gleaned from progress monitoring, group standardized testing, and classroom assessments were also reviewed in their entirety. Such a detailed review was necessary to investigate the question of whether or not Student is a student who is eligible for special education services under the IDEIA under the category of specific learning disability, speech/language impairment, and/or other health impairment.

In order to be eligible for special education a student has to have a disability (or in Pennsylvania, meet criteria for giftedness) and by virtue thereof require specially designed instruction. Having relative difficulty in a particular subject, or performing inconsistently in one or more subjects does not necessarily mean that a student is disabled and requires specially designed instruction. Evaluations performed by District and IU personnel have consistently found Student ineligible for special education services. (FF 19, 45, 69)

Only the private psychologist found that Student was eligible for special education services. (FF 66, 67) Based upon the IVA, some variable functioning on the NEPSY and some individual item responses on the behavioral inventories completed by the Parent and Student's teachers, the private psychologist diagnosed Student with ADHD which is a disability, considered as an "other health impairment" under the IDEIA. The private psychologist further opined that Student had "severe" ADHD inattentive type and that Student therefore should receive specially designed instruction under an IEP. (FF 61, 66) As noted above, two criteria must be satisfied for eligibility for special education: 1) a disability recognized under the IDEIA and 2) the need for specially designed instruction to address that disability.

There are two significant problems with the conclusions of the evaluator, the first being the diagnosis of ADHD inattentive type itself. First, the 20-minute, computerized IVA, in addition to not being endorsed as a diagnostic tool for ADHD, provided findings that were in direct contradiction to well-established, personally administered, lengthy tests used by psychologists and speech-language pathologists to assess real life tasks. For example, results of tests of three episodes of speech/language testing done over an approximate 20-month period [CELF 4 administered in February 2007 and July 2008 (FF 15, 73), TAPS-3 administered in February 2007 (FF 16), CASL administered in September/October 2008 (FF 83, 84), TAPS-3 administered in September/October 2008

(FF 87), LPT-3 administered in September/October 2008 (FF 88)] showed average or above average scores on practical skills requiring auditory attention. Additionally, results of two rounds of psychological testing of cognitive skills (WISC-IV in February 2007, WJ III in March 2008) (FF 17, 36) found average functioning in areas requiring auditory and visual attention to task. Second, as regards the rating scales, it is noted that not one of these multi-item inventories (ADHD-IV behavior rating scale completed by the Parents, the Behavior Assessment System for Children Second Edition [BASC 2] completed by the Parents and two of Student's teachers, and the BASC 2 Self-Report form completed by Student) established the criteria for a clinically significant score needed to diagnose ADHD (FF 57, 58, 59, 60). Of great importance to this hearing officer is that the ADHD-IV, which was developed by a well-established researcher in the field (Barkley), and which is aligned to the criteria for the diagnosis of ADHD required by the DSM-IV, failed to support the diagnosis either by Parent report or by reports of two teachers (one of whose endorsements reached a "borderline" level) (FF 57). There is simply no support for the assignment of an ADHD diagnosis to Student. It is possible that features of Student's CAPD overlapped with some ADHD inattentive type characteristics and served to blur the picture for the private evaluator.

However, assuming for the sake of argument that one were to accept the private evaluator's diagnosis of ADHD, such that Student meets the first prong for eligibility, there is absolutely no support in her report for the opinion that Student requires specially designed instruction. She did not administer any academic achievement testing or intelligence testing on which to base her opinion. She did not review Student's entire educational file. (FF 55, 56) Furthermore, in every instance of academic achievement testing done with standardized, accepted, valid and reliable instruments (WIAT-II of February 2007, KTEA-II and WJ III of January 2008, WJ-III Tests of Achievement of March 2008, WRMT of April 2008) (FF 18, 28, 29, 38, 47), Student has overwhelmingly placed within the average range. Assessments in the classroom and report cards support the findings of formal psychological testing. It is also therefore of concern that the private evaluator diagnosed Student with a Developmental Reading Disorder, by history without conducting her own assessments that could substantiate the reason for her including that diagnosis into her report. The private psychologist's findings were not credible and her testimony, though graciously and earnestly presented was given relatively little weight. Some of her specific strategic recommendations, however, were appropriate and in fact are covered in the proposed 504 Plan. (FF 53)

The private speech and language evaluator found some weaknesses and recommended speech and language therapy to address them. (FF 79) Although her concerns based on her testing are acknowledged, she was not aware of Pennsylvania criteria for speech/language eligibility and further, her findings did not hold up upon retesting a few months later when Student performed at a considerably higher level on the CASL and other instruments covering a wide range of language skills. (FF 83, 84, 85, 86, 87, 88, 89, 90) Student has appropriately been found ineligible for speech/language services under an IEP.¹³

¹³ Of great concern to this hearing officer is that the private speech/language evaluator did not seem to have been given the results of the speech/language evaluation conducted in the District in 2007, in

As addressed earlier, Student received a diagnosis of CAPD from a legitimate health care professional. (FF 21) Although the professional did not appear at the hearing to be examined and cross examined, this hearing officer will accept that Student has CAPD as this is not in dispute between the parties. By virtue of this diagnosed disability, Student has been afforded a 504 Service Plan. Although the July 2007 Plan is adequate (FF 23, 24), the enhancements provided on the July 2008 Plan render it appropriate and seem to entirely suit Student's needs. This Plan should be implemented immediately.

Student's Parents should be commended for their unwavering advocacy on behalf of their child. Their closing argument states the position that a child with Student's intelligence, who has been given all the interventions applied by the district and in private tutoring, should not be consistently erratic in Student's reading performance. This hearing officer understands and acknowledges the Parents' concern and frustration in this regard. This hearing officer also knows that just because a child can display a skill on a test Student may not necessarily put that skill into action in real life, at all times. However, looking impartially at all the testing evidence gathered over the past several years it is clear that Student is making meaningful progress in all areas, including reading, in Student's regular education program, that Student is functioning within the average range overall, and that Student does not require specially designed instruction to assist Student in accessing the general curriculum. The 504 Service Plan developed by the entire school/parental team with participation of counsel in June 2008 appropriately addresses Student's CAPD and should be implemented. (FF 50, 51, 53)

particular the CELF 4 scores. As noted above Student's scores, although remaining in the average range, declined greatly as assessed on the same instrument over a 17-month period. Since the cause of that decline could be any number of things, one of which could have medical origins, by dicta this hearing officer recommends that Student be seen by a pediatric neurologist particularly since Student has also been reported to have frequent headaches.

Order

It is hereby ordered that:

1. The Saucon Valley School District did not fail to identify Student as a child who is eligible for special education services under the IDEA. Student is not an eligible student.
2. The Saucon Valley School District's finding of ineligibility was correct, and the District offered Student an appropriate 504 Service Plan in June 2008.
3. The 504 Service Plan of June 2008 should be implemented immediately.
4. Student is not entitled to compensatory education services.

February 11, 2009
Date

[Linda M. Valentini, Psy.D.](#)
Linda M. Valentini, Psy.D.
Hearing Officer

