

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: JR
ODR #9527/08-09 KE

Date of Birth:
xx/xx/xxxx

Dates of Hearing:
January 29, 2009
March 9, 2009
March 25, 2009
May 11, 2009
December 1, 2009
December 3, 2009

CLOSED HEARING

Parties to the Hearing:

Representative:

Tanya Alvarado, Esquire
McAndrews Law Offices
30 Cassatt Avenue
Berwyn, PA 19312

Upper Merion School District
435 Crossfield Road
King of Prussia, Pennsylvania 19406

Mark Fitzgerald, Esquire
Fox Rothschild
Suite 200 PO Box 3001 Ten
Blue Bell, Pennsylvania 19422

Date Record Closed:
Date of Decision:
Hearing Officers:¹

February 1 2010
February 13, 2010
Deborah G. DeLauro, Esquire
Linda M. Valentini, Psy.D., CHO

¹ Hearing Officer DeLauro presided over all hearing sessions, decided the first issue listed below [IEE], and drafted the portion of the decision addressing that issue. Hearing Officer Valentini collaborated with HO DeLauro on finalizing the first issue and on deciding and writing the second issue [denial of FAPE]. This decision is submitted on behalf of both hearing officers.

Background

The Student² is a teen aged student residing in the District [District]. Student is currently considered to be in 12th grade and is attending an alternative educational program as of February 5, 2009.

Student attended parochial school prior to enrolling in the District for 9th grade in the fall of 2006. In 9th grade Student began exhibiting some truancy behaviors, but was able to maintain a sufficient academic average so as to be promoted to the 10th grade for the 2007-2008 school year. However, in 10th grade Student's truancy pattern increased and Student's grades deteriorated. By January 2008 the District and the Parents met to develop a Truancy Elimination Plan. The District referred Student to truancy court and also recommended that Student be placed in the alternative program that Student now attends. Believing that Student's truancy was related to academic struggles, the Parents did not approve the alternative education placement and made a written request for a comprehensive psychoeducational evaluation to determine whether the truancy was related to an educational handicap, including possible difficulties in reading and/or paying attention in class. Following the completion of its evaluation in October 2008 the District found that Student was not eligible for special education. The Parents disagreed with the ER and filed for this due process hearing seeking an Independent Educational Evaluation (hereinafter "IEE") at public expense in order to "comprehensively identify and address [Student's] complete educational needs" which they believed the District had failed to do. The Parents also sought compensatory education from the 2006-2007 school year through the 2008-2009 school year for the District's alleged violation of its Child Find obligations, failure to conduct a comprehensive educational evaluation and subsequent denial of a free appropriate public education.

The due process hearing was bifurcated in order to first determine the appropriateness of the District's ER with the understanding that if the ER was found to be appropriate, the rest of Parents' complaint was moot. If, however, the ER was found to be insufficient, the District would be ordered to fund an IEE and the due process hearing would be continued until the completion of the IEE in the light of which the second issue would be addressed.

For the reasons outlined below, the presiding hearing officer found the ER inappropriate and issued her ruling ordering an IEE on July 8, 2009 indicating that her full reasoning would be put forth in the final decision. For the reasons outlined below, both hearing officers found that Student is not eligible for special education under the IDEA, but is a protected handicapped student and as such is entitled to a 504 Service Plan, and that Student is entitled to compensatory education for a portion of the time requested in the complaint.

² The name, age, gender and current school of the Student is not used in the body of this decision in order to preserve the Student's privacy.

Issues

1. Was the evaluation conducted by the District appropriate?
2. Did the District fail in its child find responsibilities and therefore deny Student a free appropriate public education, and if so is Student entitled to compensatory education, in what kind and in what amount?

Findings of Fact

Background:

1. Student is a teen-aged student, a resident of the District.
[S-1]
2. Student attended parochial schools from kindergarten through 8th grade. Student's overall grade average for the 8th grade was 80%. [S-2]
3. In September 2006, Student enrolled as a 9th grader in the District. Student was assigned to all regular education classes. Student had never been evaluated for special education services. [S-1]
4. Upon entering 9th grade, Student began exhibiting some truancy behaviors, and was absent without an excuse a total of 9 days during the 2006-2007 school year.
[S-13]
5. During the 2007-2008 school year, when Student was in 10th grade, Student accumulated 10 unexcused full day absences, 19 unexcused morning absences and 3 unexcused afternoon absences. [NT 42; S-8]
6. Student earned the following final grades for the 2007-2008 school year: Biology D; Construction Management D; English F; Geometry C; Western Civ. D. [S-8]
7. On January 4, 2008 and on February 4, 2008, the District, meeting with the Parents, developed a Truancy Elimination Plan (hereinafter "TEP") wherein it was noted that Student "starts skipping school when Student is falling behind or [Student] needs help". It was also noted that Student was taking Concerta. Student was referred to the District Court on February 11, 2008 for truancy. On 4-15-08 Student was referred to the District's school counselor subsequent to another TEP meeting. On 6/24/08 it was noted under the section "Follow-Up Next Steps," that Student would be "evaluated for [a] Reading Disability." [NT 142; S-7]
8. On June 13, 2008, for the 2008-2009 school year the District made a referral to an Alternative Placement, which would provide Student with a small class setting,

structured environment, and individualized attention/supervision. The Parents did not accept this placement at the time; however, this is the placement the Student currently attends. [NT 119-120; S-8]

District's Evaluation:

9. On June 5, 2008 Parents, through their attorney, provided the District with a written request for an expedited evaluation that they asked be conducted prior to the start of the 2008-2009 school year. [NT 118, 121-122; S-13]
10. Attached to the June 5th letter was a letter from a psychiatrist noting that Student "ha[d] an attention deficit hyperactivity disorder and [was] being treated with stimulant medication for this". [S-13]
11. The District did not mail the Parents a Permission to Evaluate (PTE) form until June 26, 2008. The PTE indicated that the Parents requested the evaluation in order to investigate if Student's truancy was related to an educational handicap, including possible difficulties with reading and paying attention in class. Parents signed the PTE on July 2, 2008 shortly after receiving it. [NT 36,40-42; S-15]
12. The Parents completed a "Parents' Input Form" on July 21, 2008. Parents indicated that their current concerns were Student's failing English, truancy and cutting class. Parents described their concerns, more specifically, to be in the areas of learning, social-emotional, behavioral, attention/focusing and motivational. Parents stated that they had been addressing these concerns through private counseling and parent consequences. Parents also indicated that they would like the school to address these concerns by testing for a possible learning disability. [NT 44-50, 150; S-18]
13. The Parents indicated on the Developmental History Questionnaire that Student took Concerta for ADHD. Parents further indicated that from April 2006 Student had received private counseling from a social worker. [NT 48-50; S-18]
14. On August 4, 2008, the social worker wrote a letter stating that he had given Student a Connor's rating scale in October 2007, the results of which indicated that Student was likely to break rules, have problems with persons in authority, and be more easily annoyed and angered than most individuals Student's own age. The social worker stated further that to a lesser, yet significant degree, Student's scores indicated the presence of some academic difficulties, problems organizing work and completing assignments. Finally, Student's measures for attention deficit characteristics were moderately high and Student could therefore be considered "at risk" for ADD. [NT 106, 122-123, 139-141, 150-152; S-6]
15. In his letter, the social worker also noted a long-term pattern of being resistive to completing school assignments and preparing for tests. The social worker stated further that since Student was a good test taker, Student rationalized Student did not have to study because Student could always pull off a passing grade. In the

- social worker's opinion, Student had never really entertained the reality that someday Student would be confronted with consequences of Student's behavior. Consequently, according to the social worker, Student believes that Student can pretty much get away with anything. [NT 138; S-16]
16. The social worker's letter also lists the behaviors which he felt indicated diagnostically that Student was developing a character disordered³ pattern of behavior: persistent failure to comply with rules or expectations in the home, school, or community; school adjustment characterized by repeated truancy; repeated conflict or confrontations with authority figures at home, school, or in the community; failure to consider the consequences of actions; numerous attempts to deceive others through lying, conning, or manipulating; consistent failure to accept responsibility for misbehavior accompanied by a pattern of blaming others; little to no remorse for past misbehavior; lack of sensitivity to the thoughts, feelings and needs of others. [NT 138; S-16]
 17. On August 12, 2008, Parents provided the social worker's letter to the District. [S-1]
 18. The school psychologist testified that he did not see the letter before he conducted Student's evaluation in October 2008. [NT 106-107,109, 121-122, 138]
 19. The District psychologist testified⁴ that he had attended a meeting regarding Student with the social worker in June when the social worker stated among other things that Student had been diagnosed as having ADHD. The District psychologist acknowledged that he knew the social worker to be "a clinical social worker in private practice that has had involvement with several of our students". [NT 106-107, 122]
 20. Regarding what school records he reviewed, the District psychologist testified that since he knew that truancy was a major issue prompting the evaluation, one of the first things he reviewed was the school attendance records from the previous academic year and for the current academic year, up to that point. [NT 42; S-7, S-18]
 21. Attendance records indicate that from the beginning of the 2008-2009 school year through the date of the ER, October 29, 2008, Student had 3 unexcused absences; 3 excused absences and one unexcused tardy. Upon closer review, the District psychologist noted that at the beginning of the school year, Student's attendance

³ This is nomenclature that is no longer used clinically. [NT 1290-1291]

⁴ Q. When did you become aware that [Student] had been diagnosed with ADHD?

A. That came to my attention at the Pupil Services Meeting, I believe in June when our [school] social worker had returned from a truancy hearing for [Student], at which time [the private social worker] stated that [Student] had been diagnosed. And that information was related to the Pupil Services Department or the team of psychologists at that meeting from [the school social worker]. That was my awareness. [NT 122]

- was actually pretty good; it was after the evaluation report that attendance deteriorated. [NT 81-86; S-29]
22. The District psychologist also testified that Student and Student's [opposite gender romantic] friend were both absent from school on the following dates: 9/17/08; 9/24/08; 9/26/08; 10/7/08; 10/14/08; 10/24/08. [NT 82-86, 219; S-29]
 23. The District psychologist testified that on the days Student was in school, Student's grades and academic performance were satisfactory; that on the days Student was absent, grades were poor. The District psychologist averred further that Student's four academic teachers were unanimous in their agreement that Student did fine work when present. [NT 42-43, 51-55; S-19]
 24. According to the teachers, Student was functioning as an average student in most classes, except in math where Student was above average. [NT.52-53; S-19]
 25. Student's grade averages between September and October 29, 2008 were as follows: Algebra II 82.47%; American Culture 70.06%; Chemistry 71.73%; English 77.57%. [NT 78, 242; S-24]
 26. Student's academic teachers all indicated that Student did not have any problems with behavior; that Student was polite and respectful; Student was for the most part completing assignments, paying attention when in class and seemed organized. Student's chemistry teacher did note that Student didn't interact much with the other students in the class, and that Student rarely spoke to anyone, including Student's lab partner. [NT 54-55, 77-78; S-19]
 27. The District psychologist testified that the teachers' observations were not consistent with the symptoms of ADHD. The District psychologist stated that the teachers' input was so clear and consistent that it made him form his opinion that Student did not behave like a student with ADHD in the classroom (e.g. Student was not off-task, not daydreaming or needing redirection, Student was not hyperactive or impulsive). [NT 53, 145-148; S-19]
 28. The District psychologist did not conduct any classroom observations. He did review Student's school records. [NT 162-163]
 29. The District psychologist initially administered the following: Wechsler Intelligence Scale for Children- Fourth Edition (WISC-IV); Woodcock-Johnson III Tests of Achievement – Normative Update (WJ III NU), BASC-2 Parent Rating Scales and the BRIEF Self-Report. The District issued an ER dated October 29, 2008 upon which the District based its finding that Student was ineligible for special education. [S-19]

30. On the WISC-IV Student achieved the following standardized test scores [S-19]:

<u>Index Standard Scores</u>		<u>Subtest Scaled Scores (Average = 10)</u>
Verbal Comprehension	98	Similarities-11; Vocabulary-9; Comprehension-9
Perceptual Reasoning	98	Block Design-13; Picture Concepts-11; Matrix Reasoning-8
Working Memory	104	Digit Span-10; Letter/Number Sequencing-10
Processing Speed	88	Coding-7; Symbol Search-9
Full Scale IQ	98	

31. On the WJ III NU Form C Student scored as follows [S-19]:

<u>Cluster Subtest</u>	<u>Standard Score</u>	<u>Percentile Rank</u>	<u>Category</u>	<u>Gr Equiv.</u>
Reading:	100	50th	Average	11.2
Letter-Word Identification	98	45th	Average	9.6
Passage Comprehension	110	74th	High Average	17.2
Math:				
Calculation	114	83 rd	High Average	>18.00
Applied Problems	121	92 nd	Superior	16.8
Writing:	101	53 rd	Average	12.0
Spelling	98	44 th	Average	9.3
Writing Samples	110	74 th	High Average	14.4

32. On the BASC-2⁵ Parent Ratings Student's results based on items endorsed by the mother resulted in Clinically Significant scores on the Conduct Problems [rule-breaking behavior] and Activities of Daily Living [difficulty performing simple daily tasks in a safe and efficient manner] scales. [S-19]

33. The Parents' BASC-2 ratings yielded At Risk⁶ scores on Functional Communication, Social Skills, Hyperactivity, Leadership, Aggression, Withdrawal and Attention Problems. [S-19]

34. The District psychologist testified that although two of the Parents' scores fell into the "Clinically Significant" range, they were not included in the Evaluation Report because the answers counted toward the scales were "Sometimes" instead of "Always" or "Never." NT 73-76; S-19]

35. The District psychologist also testified, "I'm not minimizing at all, the impact of [Student's] conduct disorder and conduct problems that the parents have experienced and seem to be heightening as each week goes by, but it's not related

⁵ The BASC is a comprehensive set of rating scales including the Teacher Rating Scales, Parent Rating Scales, Self-Report of Personality, Student Observation System and Structured Developmental History. The BASC-2 uses a multidimensional approach for conducting a comprehensive assessment. The BASC-2 applies a triangulation method for gathering information. By analyzing the behavior from three different perspectives – Self, Teacher and Parent you get a more complete and balanced picture. [NT 109, 205-210; P-7]

⁶ Signify potential problems that need to be monitored.

- to, in my view, an educational handicap. It's more of a conduct problem and a character disorder, as [the private social worker] points out, but it doesn't need, I don't think, a special education IEP intervention. It needs a different kind of intervention. That's not to minimize the seriousness of it. [NT 247-248]
36. When asked whether he could point to anything in the Evaluation Report or any assessment to come to a conclusion that this is a social maladjustment disorder, the District psychologist responded: “[Student’s] truancy” [NT 248]
 37. On the BRIEF [Self-Report]⁷ Student’s self-ratings resulted in Clinically Significant findings on Working Memory, Task Completion, Organization of Materials, Planning/Organization, Shifting and Self-Monitoring.⁸ [S-19]
 38. Student’s scores on the BRIEF Self Report fell into the “Clinically Significant” range in executive functioning in almost every area. [S-19]
 39. The District psychologist. stated that he was surprised that Student endorsed items contributing to executive functioning problems and behavior/emotional problems. The District psychologist. did not include any explanation of Student’s scores from the BRIEF Self-Report in the evaluation report. [NT 75; S-19]
 40. As part of the BASC-2, the District psychologist did not give the Teacher Rating Scale or the Self-Report; only the Parents’ Rating Scales format was completed. The District psychologist testified that he did not give the Teacher Rating Scales because the information that he had from teachers was so consistent among them, nothing of any clinical significance would be addressed by the BASC-2. [NT 109, 210-211; S-19]
 41. When asked whether the BRIEF Teacher Rating Scales would provide information relating to a student’s oppositional behaviors, the District psychologist responded that if Student exhibited oppositional behaviors in school, he was sure teachers’ rating would reflect this, but from the teachers’ [interview] input, there was no clear cut oppositionality. The District psychologist stated further that “if they didn’t report it in their anecdotal reporting on an on-going basis to me, the principal, to the counselor, it doesn’t seem likely that it would be reported or rated on a rating form”. [NT 246-247]

⁷ The BRIEF is a standardized measure that captures views of an adult’s **executive** functions or self-regulation in his or her everyday environment. Two formats are used -- a **self-report** and an **informant report**. The **Self-Report** Form is designed to be completed by adults 18 to 90 years of age, including adults with a wide variety of developmental, systemic, neurological, and psychiatric disorders, such as attention disorders, learning disabilities, etc. The **Informant Report** is administered to an adult informant who is familiar with the rated individual’s everyday functioning. It can be used alone when the rated individual is unable to complete the **Self-Report** Form or has limited awareness of his or her own difficulties, or with the **Self-Report** Form to gain multiple’s perspectives on the individual’s functioning. When administered in conjunction with the **Self-Report** Form, the BRIEF **Informant Report** provides a more clinically comprehensive picture of the individual being rated. [P-10]

⁸ In the ER Inhibiting and Emotional Control are listed both under the Clinically Significant Category and the Borderline or Average category, likely a transcription error.

42. On December 5, 2008 the Parents filed for a due process hearing, with the appropriateness of the District's evaluation being one of the issues. Based upon the ER, the School District concluded that Student was not IDEA eligible and issued a NOREP recommending that Student be placed in regular education classes in an alternative educational placement. Since the Parents disagreed, Student remained in regular education classes at the public school for several more months.⁹

On July 8, 2008 following four hearing sessions Hearing Officer DeLauro ruled that the District's evaluation was not appropriate and ordered an Independent Educational Evaluation at District expense. The IEE was delayed due to the independent evaluator's availability, and the IEE Report was not issued until October 9, 2009.

Child Find and FAPE:

43. After the Parents filed for a due process hearing in December 2008 the District asked and the Parents granted permission for the utilization of additional instrument[s] to assess emotional/behavioral functioning. The District psychologist then used only one more instrument, the Behavior Assessment System for Children, 2nd edition (BASC – 2) Teacher Rating Scales. The District issued an Addendum to the ER on January 21, 2009, again finding Student ineligible for special education. [S-22]
44. On the BASC-2 Teacher Ratings Student's results based on items endorsed both by the math teacher [math is a strength for Student] and the science teacher were clinically significant¹⁰ in the area of Withdrawal [generally alone, difficulty making friends, unwilling to join group activities]. Student's ratings based on items endorsed by the social studies teacher were clinically significant in the area of Social Skills [difficulty complimenting others and making suggestions for improvement in a tactful and socially acceptable manner]. The guidance counselor's item endorsements yielded a clinically significant score on Conduct Problems [rule-breaking behavior such as cheating, deception and/or stealing]. [S-22]
45. Three teachers' responses yielded At Risk findings in the area of Adaptive Skills. [S-22]
46. During school year 2006-2007, as of spring 2007, Student began skipping classes¹¹ and continued this behavior to the end of the year. The District

⁹ During the hearing it was established that Hearing Officer DeLauro would consider the ER as it stood on October 29, 2008 and would not consider the Addendum or the after-acquired knowledge in her deliberations regarding the issue of the ER's appropriateness and the request for an IEE. The results of the Teachers' Reports on the BASC-2 are presented in the Findings of Fact regarding the second issue, below.

¹⁰ A high level of maladaptive behavior requiring treatment.

¹¹ This of course may have started earlier, but came to the awareness of the District in Spring.

- documented this behavior on Student Behavior Referral forms as of April 2007 and assigned Student to In-School Suspension. [S-4]
47. The first quarter¹² grades for the 2007-2008 school year were as follows: Biology F, English F, Western Civilization F, Geometry D, Construction Management A. [S-7]
 48. The second quarter¹³ grades for the 2007-2008 school year were as follows: Biology C, English C, Western Civilization C, Geometry B, Construction Management B, a significant improvement over the first quarter grades except for a slight dip in Construction Management. [S-7]
 49. The school counselor testified that when Student came to school and stayed in school, Student did fine in school, but as soon as Student started skipping classes, and then leaving school without permission, the grades declined. [NT 301-302]
 50. Although the guidance counselor was reluctant to acknowledge this, according to school records Student's decline or increase in grades did not correspond to Student's absences from school or from class, i.e. Student's grades were poorer during the first marking period when the absences/cutting was less and improved during the second marking period when the absence/cutting had increased. [NT 346-355; S-4, S-24, S-31]
 51. The guidance counselor had spoken to Student about Student's failing grades in December 2007 when Student had not yet been excessively absent from school. [NT 362; S-4, S-24, S-31]
 52. On January 4, 2008 the District held a Truancy Elimination Meeting. [S-6]
 53. Truancy and cutting classes continued through the next month. At the February 4, 2008 follow-up TEM the Parents informed the District that Student had ADHD and was taking Concerta to treat it. [S-4, S-6, S-7]
 54. On February 11, 2008 Student was referred to Truancy Court. On February 12, 2008 the mother told the assistant principal that "[Student] keeps telling me [Student] doesn't care. I am at my wits' end and don't know how to help [Student]". [S-6]
 55. The District did not propose evaluating Student for special education eligibility or a 504 Service Plan. The guidance counselor stated that she knew that Student did not require some form of special education and/or 504 services because ordinarily referrals for special education and services came from teachers when a student was having academic difficulty and that inappropriate behaviors were resulting; but with Student, it was the behavior of skipping classes, which then started the

¹² Ending November 13th. [S-6]

¹³ Ending around the end of January.

- decline of grades. [NT 300]
56. The school counselor acknowledged that students may start acting out in class as a way of distracting attention from their learning problems, but since Student was not acting out in class, [was just skipping class], there was no indication that grades were declining because Student needed special education.¹⁴ [NT 301-303]
 57. The school counselor testified, however, that Student was referred to the Student Assistance Team (hereinafter “SAT”) because of a “change in behavior and change of friends, and changing grades”. She explained further that the SAT was different than the Child Study Team (hereinafter “CST”) in that it was more for drug, alcohol and mental health reasons and/or for students who were “clearly at risk for any of those concerns”. [NT 314-316]
 58. The school counselor acknowledged that Student was also referred to the CST, and that the District psychologist was in attendance, however, she did not recall when the CST first met regarding Student or whether she voiced her belief that Student did not have a disability. [NT 344-345]
 59. The school counselor acknowledged that children who have mental health needs or emotional needs could qualify for special education, and that they did not necessarily need to have a learning disability. [NT 327-328]
 60. The school counselor also acknowledged that when the District is evaluating a student’s abilities in terms of focus and attention span, learning disabilities or any other factor(s) that might be contributing to their difficulties, the District is required to form conclusions to the student’s needs as a result of administering valid and normed assessments. [NT 343-344]
 61. Truancy and cutting continued throughout the 2007-2008 school year. In this school year, there were 44 recorded notations of incidents of cutting class, leaving school or assigned area without permission, misuse of hall pass and/or failing to report for detention. [S-31]
 62. In June 2008 the District recommended that Student be transferred to an alternative program. The Parents did not approve this recommendation, and instead on June 5, 2008 made a written request through their counsel that Student receive an expedited multidisciplinary evaluation. [S-1]
 63. Enclosed with the written request for an evaluation was a note from Student’s

¹⁴ In support of her opinion, The school counselor stated that in her 20 some years in education, she has found that there are very distinct patterns of behavior: some students who were exhibiting learning problems, she would refer for a special education evaluation; others had social magnets or other compelling reasons that were pulling them out of school. According to The school counselor, Student was in the latter category. [NT 309-310]

- psychiatrist noting the ADHD diagnosis; the District had been previously aware of the diagnosis from the Parents as of February 4, 2008. [S-1, S-13]
64. The psychiatrist is a board-certified child and adolescent psychiatrist who specializes in ADHD in children. [NT 1288]
 65. The District did not issue a Permission to Evaluate until June 26, 2008; the PTE was mailed. The Parents received the form a few days later and signed it on July 2, 2008. [S-14, S-19]
 66. The District produced its ER on October 29, 2008. [S-19]
 67. On July 8, 2008 following four hearing sessions the presiding hearing officer ruled that the District's evaluation was not appropriate and ordered an Independent Educational Evaluation at District expense. The IEE was delayed due to the independent evaluator's schedule, and the IEE Report was not issued until October 9, 2009. [S-A¹⁵]
 68. The independent evaluator obtained intelligence and achievement scores that were broadly comparable to those obtained by the District psychologist. [S-A]
 69. On the Wechsler Adult Intelligence Scale – Fourth Edition [WAIS-IV] Student achieved the following standard test scores [S-A]: Verbal Comprehension 98, Perceptual Reasoning 96, Working Memory 95, Processing Speed 102, Full Scale IQ 97. Processing Speed increased by 14 points from the previous testing raising the category from Low Average to Average, while Working Memory decreased by 9 points but remained in the Average range.¹⁶ [S-A]
 70. On the Wechsler Individual Achievement Test – Second Edition [WIAT-II] all Student's standard scores, based on age, were in the Average range or above as follows: Word Reading 91, Reading Comprehension 100, Pseudoword Decoding 110, Numerical Operations 118, Math Reasoning 120, Spelling 104, Written Expression 92. [S-A]
 71. The independent evaluator concluded in her report that Student has a mild learning disability, but testified that Student certainly doesn't display significant learning disabilities at this point. [NT 1256-1257; S-A]
 72. The independent evaluator opined that Student did not present a lot of observable behaviors in the school setting because Student does not interact much and doesn't present very much. [NT 1232, 1349-1350, 1418]
 73. The independent evaluator administered the Brown ADD Scales, an adolescent

¹⁵ For the second portion of this bifurcated hearing the manner of exhibit marking changed from numbers to letters

¹⁶ The two instruments [WISC-IV and WAIS IV] are essentially similar.

- and adult inventory of behaviors related to Attention Deficit Disorder.¹⁷ Student's score based on self-rating and mother's rating [the instrument does not have teacher scales] indicated that ADD is "highly probable". [NT 1236-1237, 1363; S-A]
74. Although the independent evaluator declined to draw the conclusion that everything [inappropriate] Student does is caused by ADHD, there is a high degree of co-morbidity with the kinds of behaviors Student exhibits and ADD. [NT 1240]
75. Student self-reported the use of substances to ameliorate depression and pain. At the time of the independent evaluation Student reported [redacted behavior]. [NT 1250, 1292, 1294]
76. Student's responses on the Rorschach, a scored projective instrument the independent evaluator used because the person being evaluated cannot dissimulate, supported dysthymia which is a mild prevailing depressive state.¹⁸ [NT 1252, 1427; S-A]
77. Although Student is in a romantic relationship, Student otherwise does not build or maintain satisfactory interpersonal relationships with peers and teachers. [NT 1368-1369, 1383, 1430]
78. Emotional factors are impacting on Student's life as exemplified by withdrawal, depression [dysthymia], self-destructively using [Redacted] to cope, inability to attend school regularly, and inability to attend a regular education high school. [NT 1374-1375, 1378-1380, 1429]
79. The independent evaluator is of the opinion that Student's primary disability could either be ADD or Emotional Disturbance as Student presents with significant emotional symptomatology that has been evident for the past year and a half to two years. [NT 1256-1257]

Current Placement:

80. As of February 5, 2009 Student began attending the alternative school placement. [Communication from counsel 2-12-10¹⁹]

¹⁷ HO Valentini who is a child and adolescent psychologist takes judicial notice that the DSM-IV does not list ADD as a separate diagnosis, but rather as the "predominantly inattentive type" of Attention Deficit Hyperactivity Disorder. This classification method is under consideration for revision in the DSM-V to be published in May 2013.

¹⁸ Although this well-researched instrument would not be used alone in a clinical or a school setting to diagnose or classify an individual, in the hands of a skilled psychologist with much background administering, scoring and interpreting it the Rorschach can provide supportive data that is useful because responses are virtually impossible to fake. [NT 1251-1252]

¹⁹ HO Valentini emailed counsel and asked for this discrete piece of information that the record had not made clear. Counsel supplied the date on 2-12-10.

81. The program is described as a comprehensive, alternative education program designed to provide students with the academic, counseling and behavioral support necessary to overcome obstacles and achieve success. Certified teachers and trained clinicians work together with each student and family to address academic, emotional and behavioral needs. The primary goal of the program is to provide students with the support needed to achieve their goals and transition successfully to high school classes or post-secondary institutions. [P-8]
82. The independent evaluator, a former long-time district psychologist, visited the program and found it to be “quite a nice program and noted that she had no objections to this program. She testified that the program is appropriate. [NT 1262, 1395-1396]
83. The independent evaluator does not believe Student needs specially designed instruction per se. Student does need supports through related services to access the curriculum. [NT 1432]
84. The independent evaluator declined to recommend either an IEP or a 504 Plan, but believes that Student does require supports that either could confer. [NT 1434]
85. The independent evaluator recommends, among other things, that within the current alternative school program Student receive extra time for assignments with a specified time schedule, a level of mathematics instruction to match Student’s advanced skills in this area, a significant counseling component both individual and group to improve social skills and become more interactive and a behavior plan to get Student to school. [NT 1265, 1434-1435; S-A]
86. The independent evaluator also believes that Student needs therapy outside the school setting as well and has recommended this to the Parents. [NT 1433]
87. The independent evaluator recommends that Student be part of the planning process so that external motivators regarding school attendance and participation are successful. [NT 1267]

Discussion and Conclusions of Law

Legal Basis:

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion, as one element of the burden of proof, 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. 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]. However, application of the burden of persuasion analysis does not enter into play unless the evidence is in equipoise, that is, equally balanced so that by definition the party seeking relief has not presented a preponderance of the evidence. Although the District was assigned the burden of proof on the first issue and the Parents were assigned the burden of proof on the second issue, the evidence in neither issue was in equipoise and therefore a burden of proof analysis is not necessary.

Credibility: 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.²⁰ 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]. It is the responsibility of a hearing officer to make credibility determinations in assessing the weight to be accorded the evidence. E.N. v. M. School District, 928 A.2 453, 461 [Pa. Commw. 2007]. The credibility determinations were made by Hearing Officer DeLauro since she heard and observed the witnesses directly. Hearing Officer Valentini found no areas of disagreement regarding credibility and wholly adopts Hearing Officer DeLauro's determinations.

Hearing Officer DeLauro found the District's psychologist, in general, not to be a credible witness. A few key examples of this witness' lack of credibility relate to: 1) His initial failure to utilize a range of testing instruments to assess possible emotional disturbance and other health impairment, limiting his assessment to interviews with the teachers, cognitive testing, achievement testing, a rating scale completed by the Parents and a Self-Report rating scale [FF 29]; 2) his initial failure to use any standardized objective instrument to acquire teachers' input, relying only on his conversations with the teachers²¹[FF 40, 41]; 3) when utilizing an additional instrument, a Teachers' rating scale, after the Parents challenged the appropriateness of the ER, his discounting the significance of the confluence of the Parents' scores and the teachers' scores [FF 34]²²;

²⁰ 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].

²¹ Regarding why he did not use the BRIEF's Teacher Rating Scales, The District psychologist stated, "if they didn't report it in their anecdotal reporting on an ongoing basis to me, the principal, to the counselor, it doesn't seem likely that it would be reported or rated on a rating form". [NT 246-247]

²² The District psychologist testified that although the Parents' scores fell into the Clinically Significant range, they were not included in the Evaluation Report because the answers counted toward the scales were "Sometimes" instead of "Always" or "Never." [NT 73-76]

4) his using only the Self-Report²³ on the BRIEF and not having the teachers and the Parents fill out the corresponding form [FF 29]²⁴.

The mother's testimony on the other hand, was found to be highly credible both because it was supported by the documentary evidence and because her explanation and recollection of conversations and events leading up to her child's evaluation were logical and believable. Furthermore, the mother was quite candid about seeking outside counseling [FF 10, 12, 13] in order to address her child's increasingly oppositional behavior. She was straight-forward when she didn't remember something and appeared earnest and honest when she shared difficult information about her child [FF 14, 15, 16, 17, 54].

To the contrary, the school counselor was less forthcoming and her testimony was not given sufficient weight to counter evidence on the record. For example, although the school counselor acknowledged that she knew that Student had attention problems and that the evaluation should have looked at attention, she also stated that the only reason Student was having difficulty academically was due to missing class. [NT 300-303, FF 49] She used an end result to negate a possible causal factor when she testified that she knew Student did not require some form of special education and/or 504 services because ordinarily referrals for special education and services came from teachers when a student was having academic difficulty and that inappropriate behaviors were resulting, but with Student, it was the behavior of skipping classes, which then started the decline of grades. [NT 300] Another example of factors leading to conferring negligible weight to her testimony is that although she attended the TEP meetings, she testified that she did not have any recollection about what was meant by the notation on the TEP that "[Student] starts skipping school when falling behind [in class]." [NT 371-372; S-31] The guidance counselor continued to assert her strong opinion that Student was ineligible for 504 status even though Student was referred to both the SAT and the CST. [314-316, 344-345] Finally, the guidance counselor was evasive and reluctant to answer when shown that according to school records, Student's decline or increase in grades did not correspond to Student's absences from school or from class and that she had in fact spoken to Student about Student's failing grades in December 2007 when Student had not yet been excessively absent from school or cutting classes. [NT 346-354, 363; S-4, S-24, S-31; FF 50]

The assistant principal's testimony was also given little weight. She testified that Student had no issue with academics, which was incorrect, but also admitted that Student was

²³ The District psychologist. stated that he was surprised that Student endorsed items contributing to executive functioning problems and behavior/emotional problems, and he did not include any explanation of Student's scores from the BRIEF Self-Report in the Addendum to the ER. [NT 75]

²⁴ The District psychologist testified that he did not give the Teacher Rating Scales because the information that he had from teachers was so consistent among them, nothing of any clinical significance would be addressed by the BASC-2. [NT 109, 210-211]

getting poor grades even in classes which Student was not cutting. Although the Parent told her that Student had ADHD at the 1/4/08 TEP meeting, she implied that this was not relevant since there was no doctor's note on file. She testified that she thought that Student no longer took Concerta, but even if Student did, it was a problem in the past. She didn't inform the family that they could make a request for a special education evaluation because she didn't think Student needed it. At the June 24, 2008 TEP meeting, she claimed that she did not see Parent's letter dated June 5, 2008 requesting evaluation for a "reading disability" but then backtracked and stated that she knew the Parents had asked for an evaluation, but she didn't know in what specific area. She was very evasive when asked directly about ADHD and the tendency to self-medicate, even though she had stated that she knew that some students self medicated because of home issues, mental diagnosis, personal issues and to relieve stress (notably she did not include school issues)

The District English teacher's testimony contributed little to the evidence. She had had minimal training in special education. At times she seemed somewhat rehearsed and overly confident on direct examination, although on cross-examination she lost some of her assurance and became rather defensive. She stated that because Student had no cognitive disabilities she saw no reason to refer Student for special education. Nevertheless, she admitted that she was aware that Student had failed English before, but failed to acknowledge that perhaps Student was doing well because Student was receiving the same curriculum and materials that Student had received the previous year. She lost further credibility further by later admitting that Student had difficulty with vocabulary quizzes, was frequently sleepy in class and sometimes did not hand in work on time.

The District social studies teacher's testimony was given some weight, even though she opined that Student did not need special education but then admitted that she had never referred a student for special education before. She at first stated that Student did well in her class, but then testified that Student missed assignments and did not take advantage of the opportunity to make up work or to get extra credit.

The District chemistry teacher did not add much to the evidence, although she testified that she was concerned about Student's lack of interaction with other students.

The private social worker who had been seeing Student privately until Student refused to continue treatment was not deemed to be a credible witness, and if anything his testimony, if credible would have in part supported the District's position that Student was socially maladjusted. This witness was not familiar with the regulations under the IDEA. He made sweeping generalizations and did not provide objective scientific support for his conclusions, basing his opinions on his experience rather than tests or inventories. The hearing officer was left to wonder why, given his participation in the TEP meetings, this witness did not share his beliefs about Student's having ADHD and emotional issues earlier in the process.

The independent evaluator was deemed to be very credible and her testimony was given considerable weight although not all her conclusions were adopted. She holds a doctorate in education and child development, has been a certified school psychologist over 30 years, and is licensed for the independent practice of psychology in Pennsylvania. She has worked as a school district psychologist and spent 27 years in a suburban school district not far from the District. This witness was credible for many reasons, not the least being her demeanor. She listened carefully to questions, did not become defensive and answered honestly after reflection on what was being asked of her. She conveyed clear independence in her judgment of the current placement and in her recommendations.

Evaluation

IDEA 2004 provides, at Section 614(b)(2) that in conducting the evaluation the local educational agency shall:

*Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent that may assist in determining--
Whether the child is a child with a disability; and
The content of the child's individualized education program...*

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

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

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

Assessments and other evaluation materials used to assess a child under this section—

Are selected and administered so as not to be discriminatory on a racial or cultural basis;-

Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;

Are used for purposes for which the assessments or measures are valid and reliable;

Are administered by trained and knowledgeable personnel; and

Are administered in accordance with any instructions provided by the producer of such assessments;

The child is assessed in all areas of suspected disability;

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

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

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

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

In the instant matter, the district had the burden of proving that its evaluation was appropriate. IDEA 2004 at Section 615(b)(6) provides for the opportunity for any party to present a complaint - with respect to any matter relating to the identification, evaluation, or educational placement of the child, and for that complaint to be resolved at a due process hearing. An appropriate remedy for a district's failure to provide an appropriate evaluation for a student is the awarding of an independent educational evaluation at the district's expense. This right is explained in the implementing regulations of IDEA 2004:

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency... If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file a due process complaint notice to request a hearing to show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).

Child Find and FAPE:

The IDEA's implementing regulations at §300.8 provide:

(a) General. (1) Child with a disability means a child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as emotional disturbance), an orthopedic impairment, autism,

traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities

The issue of Student's IDEA eligibility with respect to the whether Student is a "child with a disability" centers however both on whether Student meets the objective criteria for one or more of the disability categories as defined in the IDEA statute and regulations, as well as the additional requirement that

"by reason thereof," Student "needs special education and related services." 20 U.S.C. §1401(3), (30); 34 C.F.R. §300.7(a)(1), (c)(10), 22 Pa. Code §§14.101, 102(a)(2)(ii). See e.g. In Re: The Educational Assignment of Vincent D., Special Education Opinion No. 1413 (Sep. 23, 2003)²⁵; In Re: The Educational Assignment of Michael M., Special Education Opinion No. 1019 (June, 2000)²⁶.

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 a child may have a disability. *Ridgewood Board of Education v. M.E.*, 172 F.3d 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 Schools 221 F.Supp.2d 222, *226 - 227 (D.Mass. 2002).

Compensatory Education: Compensatory education is a remedy designed to provide a student with the services he or she should have received pursuant to a free appropriate public education [FAPE] or a Gifted Education. When a student has been denied the due process rights or an appropriate educational program that he/she should have received, compensatory education is an in-kind remedy. Lester H. v. Gilhool, 916 F. 2d 865 [3d Cir. 1990], cert. denied 499 U.S. 923, 111 S.Ct. 317 [1991]

Commonwealth Court has rejected a one-to-one system of awarding compensatory education, holding that, where an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him or her to the position that he or she would have occupied but for the school district's failure to provide an appropriate education. This may require awarding the student more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education, because [s]he has progressed appropriately despite having been denied a FAPE. B.C. v. Penn Manor Sch. Dist., 906 A.2d 642 [Pa. Commw. 2006].

Discussion:

Evaluation

²⁵ Although Pennsylvania has eliminated the Appeals Panels, the law upon which this Special Education Opinion is based has not changed, and the Opinion is instructive while not binding.

²⁶ *Supra*

The Parents, at their “wit’s end” [FF 54], requested that the District investigate whether there was any correlation between Student’s recalcitrant truancy and Student’s difficulties with reading and paying attention [FF 62]. There was also a question raised about whether Student’s escalating truancy and deteriorating academic performance were related to social or emotional problems.

The presiding hearing officer listened to testimony over four sessions and reviewed documentary evidence. Several issues rose to a level of considerable concern that contributed to the finding that the District’s evaluation as put forth in the October 29, 2008 was inappropriate. First, the District failed to consider all areas of suspected exceptionality. [FF 29] Even though the District made a referral for the SAT [FF 57], it did not then consider Emotional Disturbance [ED] as a possible handicapping condition. Additionally, even though the District knew Student had been diagnosed with ADHD [FF 53, 63, 64] Student was not considered for eligibility under Other Health Impaired [OHI]. Additionally, the District appears not to have considered the possibility that Student could have 504 status [FF 55]. Second, the District did not inform itself by seeking information that was available from professionals who had dealt with the Student for several years. The District knew that Student was receiving private counseling but did not ask for permission to discuss issues and concerns with the social worker/counselor, and knew Student took medication for ADHD but did seek consent to speak to the prescribing psychiatrist. Third, the District psychologist, after failing to observe Student himself, only had the BASC-2 completed by the Parents and did not utilize the Teachers’ Form or the Self-Report Form, and likewise only administered the BRIEF to Student without having the teachers and parents complete it as well [FF 27, 29]. Fourth, despite the fact that virtually all scores on the Self-Report form of the BRIEF were clinically significant, the District psychologist did not give weight to this factor [FF 39]. Fifth, the District seems to have based the finding of non-exceptionality on the teachers’ and particularly the guidance counselor’s, belief that Student’s academic problems directly correlated to Student’s truancy and seemed to dismiss other possibilities out-of-hand [FF 49, 50, 56]. Given that teachers are not trained to diagnose or rule out ADHD the District should have been more cautious and used a well-normed instrument such as the Connors Teacher Rating Scale to develop hard data. Finally, the District psychologist’s testimony suggested bias against the Student as revealed in his testimony, “I wanted to get a sense of [Student’s] experience of [Student’s] so-called attention deficit disorder, so I ha[d] [Student] complete the BRIEF”. [NT 73-76]

In consideration of all the testimony and documentary evidence before her the presiding hearing officer determined that the District’s evaluation had been inappropriate under the act and ordered an independent educational evaluation at public expense. This determination is here affirmed and it will be so ordered.

Child Find and FAPE:

The Parents are asking that the hearing officers consider whether Student has a disability that qualifies Student for special education under the IDEA and/or the status of protected handicapped student under Section 504. Although all special education students [except

the solely gifted] are by definition handicapped, not all handicapped students require special education.

As noted above, in order for a Student to be eligible for special education under the IDEA the student must have 1) a disability and 2) by virtue of this disability require specially designed instruction. Three possible disabilities are offered for our consideration: specific learning disability in reading, other health impairment and/or emotional disturbance.

Although the independent evaluator drew the conclusion that Student has a mild learning disability in reading [NT 1244-1245], this opinion is not being adopted. There is no robust evidence in the record to support the current existence of a specific learning disability in reading. Student's IQ as assessed in two separate evaluations, one year apart, using two separate well-recognized instruments given by two qualified evaluators is in the Average Range, with standard scores of 98 and 97 [FF 30, 69]. There is no discrepancy between Student's ability and Student's achievement in reading and none of the reading scores are below average [FF 31, 70].²⁷ In fact, reading and writing standard scores were in the Average to High Average ranges on both assessments. Student performed considerably better in math than would have been predicted by the IQ alone on both assessments: Calculation 114 and Applied Problems 121 and Numerical Operations 118 and Math Reasoning 120, both sets of scores falling in the High Average to Superior ranges.

The hearing officers do adopt the conclusion of the independent evaluator and find that there is ample evidence to support that Student has a disabling condition, specifically ADHD predominantly inattentive type. The history of treatment for ADHD [FF 63], along with the independent evaluator's report and testimony regarding the presence of ADD [FF 73, 74], were persuasive. The information obtained by the District's psychologist via structured teacher reports [BASC-2] [FF 44, 45], structured Parents' reports [BASC-2] [FF 32, 33] and Student's self-report [BRIEF] [FF 37, 38] also supported this finding although the District was dismissive of its own results.

The hearing officers also have found sufficient, though somewhat less robust, evidence to indicate that Student qualifies as emotionally disturbed based on dysthymia [44, 57, 75, 76] and difficulty forming relationships with peers and adults [FF 72, 77], both long standing, marked, conditions. There is persuasive evidence in the record that Student's [Redacted] use serves a self-medicating function [FF 75] and is likely a result, rather than the cause, of mood and social difficulties.

We reach the conclusion therefore that Student has attention deficit disorder and emotional disturbance. However, as the independent evaluator candidly pointed out and we agree, the Student does not require specially designed instruction [FF 83]. The Student, even with very poor attendance, has been acquiring skills in reading, math and

²⁷ RTI is not currently being used in Pennsylvania as a method of diagnosing learning disabilities; the schools that are using RTI are using it only as a measure of school [building] improvement. [Communication from PDE, January 2010]

writing at least commensurate with Student's nondisabled peers [FF 31, 70]. The Student is not eligible for special education under the IDEA.

What the evidence does show is that Student's disabilities prevent Student from accessing educational opportunities in a typical public school setting [FF 4, 5, 6, 47, 53]. Student is a protected handicapped student and is entitled to a 504 Service Plan. Section 504 of the Rehabilitation Act of 1973 protects all qualified persons with a disability who have a physical or mental impairment which substantially limits one or more major life activities. The student is considered "qualified" because Student is of an age at which Student qualifies to attend school. The Section 504 regulations define a "physical or mental impairment" as any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: **neurological**, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or endocrine; or any **mental or psychological disorder** such as mental retardation, organic brain syndrome, **emotional or mental illness** and specific learning disabilities. [Emphasis added]

To fall within the protection of Section 504, a person's physical or mental impairment must have a substantial limitation (permanent or temporary) on one or more major life activities - functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working. 34 CFR § 104.3(j)(1) We conclude that Student's impairments have a substantial limiting impact upon Student's ability to learn the subject matter mandated by the State Curriculum because Student cannot attend or stay in a typical public school [FF 46, 54, 61].

There is no substantive distinction between Section 504's prohibition against discrimination on the basis of handicap and a School District's affirmative duty under the Individuals with Disabilities Education Improvement Act (IDEIA) to assure that eligible students with disabilities receive a free and appropriate public education (FAPE). Ridgewood Board of Education v N.E., 172 F.3d 238 (3rd Cir. 1999) Further, in Lower Merion School District v. Doe, 878 A.2d 925 (Pa.Cmnwlth. 2005) the Commonwealth Court analyzed the applicability of IDEA standards to Section 504 requirements and explicitly determined that requirements under the IDEA apply with equal force to Section 504. Therefore, a finding that a protected handicapped student was denied FAPE and is therefore entitled to compensatory education is within our authority.

At about February 2008, the District had reason to suspect that Student had a disability and could be eligible for services under the IDEA or under Section 504. The District had information about Student's having ADD and being prescribed Concerta [FF 53]. The guidance counselor had spoken to the Student about failing grades even before truancy and cutting classes became frequent [FF 51]. The January 2008 TEP meeting and plan produced no discernable effect as noted at the time of the February 2008 TEP meeting [FF 53]. In mid-February the District was making a referral to Truancy Court and the Parents were at their "wit's end" over Student's truancy [FF 54]. Yet, no one at the

District suggested an evaluation of this student, and no one at the District told the Parents that they could request an evaluation [FF 55]. We find that the District should have issued a Permission to Evaluate by mid-February, on or about February 15th, and that taking spring break into consideration and looking at school days²⁸, an ER should have been produced on or about May 15th. Had the ER been appropriate, Student would have been deemed to have a disability and to be entitled to a Section 504 Plan to carefully and thoroughly address supports and accommodations necessary for Student to access the curriculum.

The independent evaluator selected by the Parents had worked as a school district psychologist in a greater Philadelphia suburban district for 27 years. She is familiar with what constitutes an appropriate program and placement. She testified that the current alternative educational program in which she observed Student is an appropriate placement for Student [FF 82], albeit likely to be enhanced through the development of a 504 Service Plan [FF 85, 86]. In looking at any deprivation of FAPE, therefore, it is clear that from May 16, 2008 to the end of the school year, on or about June 16, 2008, Student should have had a 504 Plan in the typical public school setting. Starting again in September 2008 and continuing until the February 5, 2009 placement in the alternative program, the denial of FAPE continued, bringing the period of deprivation from mid-May 2008 to the end of January 2009 to six months. We have considered the complicating factor that the District had offered this appropriate alternative educational placement in June 2008 for the 2008-2009 school year but it was rejected by the Parents [FF 8]. It is not known whether an appropriate evaluation followed by an appropriate 504 Plan in May 2008 would have eliminated the need for the alternative placement or would have made the Parents more likely to accept the alternative placement. In an effort therefore to balance out this rather unwieldy calculus equitably, we have determined that we will award Student three hours [rather than the high school day of 5 hours] for every day Student was present in school for any part of the day [rather than for every day school was in session or any whole day of attendance] from May 16, 2008 through January 31, 2009.²⁹ The number of days Student was present will be determined by counsel for the parties who will jointly examine official attendance records.

²⁸ Pennsylvania did not adopt the federal requirement of calendar days until December 2008.

²⁹ We would much have preferred a compensatory education award that follows *BC v Penn Manor*, but are frankly at a loss as to how to discern where Student would be at this time but for the denial of FAPE.

ORDER

It is hereby ordered that:

1. The evaluation conducted by the District was not appropriate and the Student is entitled to an Independent Educational Evaluation at the District's expense. The District must therefore pay for the IEE conducted by Dr. Nancy Bloomfield.
2. The District did fail in its child find responsibilities by not identifying Student as a protected handicapped student and therefore denied Student a free appropriate public education by reason of its not providing Student with a 504 Service plan.
3. Student entitled to compensatory education which has been fashioned as an equitable remedy as follows: 3 hours per day for every day Student was present in school for any part of the day from May 16, 2008 to the last day of the school year in June 2008, and from the first day of school in September 2008 to January 31, 2009.
4. Student's current placement in the alternative educational setting is appropriate.
5. Within 10 school days of receiving this decision the District and the staff at the alternative program must convene a 504 Service Plan meeting with the independent evaluator, the Parents and the Student to develop an appropriate 504 Service Plan including but not limited to the recommendations offered by the independent evaluator in her evaluation report and in her testimony of December 1, 2009. The independent evaluator must be compensated at her usual and customary hourly rate for her attendance at the 504 Service Plan meeting.

Deborah G. DeLauro, Esquire

Deborah G. DeLauro, Esquire
Pennsylvania Special Education Hearing Officer

February 13, 2010
Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D.
Pennsylvania Special Education Hearing Officer
NAHO Certified Hearing Official

