

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

ODR No. 00647-0910AS

Child's Name: A.S.

Date of Birth: [redacted]

Dates of Hearing: 3/8/10, 3/15/10, 4/16/10

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

School District
Western Wayne
PO Box 500
South Canaan, PA 18459-0158

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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June 18, 2010

July 3, 2010

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student, a resident of the Western Wayne School District who recently completed 9th grade, was diagnosed with ADHD in the pre-school years and since then has been continuously treated with medication to reduce symptoms.

Beginning in 6th grade, Student was evaluated several times for IDEA eligibility or to determine whether there was a need for services under §504 of the Rehabilitation Act of 1973. A §504 Service Plan was first implemented for Student beginning in 7th grade (2007/2008 school year) and has been amended several times, most recently in January 2010. A disciplinary incident in 2009 led to the most recent District IDEA evaluation, which again concluded that Student is not eligible for special education. After Parents filed a due process complaint, the District funded an independent psychiatric evaluation, but did not subsequently alter its eligibility conclusion, resulting in a second due process complaint in January 2010 challenging both the District's denial of IDEA eligibility and the effectiveness of the §504 Service Plans that have been provided to Student.

With the concurrence of counsel and the parties the first two hearing sessions, in March 2010, were directed toward determining whether the District was correct in denying Student IDEA eligibility, since that conclusion affected the scope of the hearing. After an interim ruling upholding the District's eligibility conclusion, a third session in April completed the testimony concerning the effectiveness of the §504 services Student has received from the District.

Based upon the evidence produced in the due process hearing, Parents' claims for compensatory education arising from the District's determination that Student is not IDEA eligible or from the services that have been provided to Student are denied, and, the District is not required to provide additional services to Student at this time.

ISSUES

1. Did the School District violate its obligations under §504 of the Rehabilitation Act of 1973 and/or the IDEA statute by failing to:
 - a. Determine that Student is IDEA eligible;
 - b. Timely determine that Student is a protected handicapped student?
2. Did the School District fail to provide Student with appropriate educational services, supports and/or accommodations?
3. Is Student entitled to compensatory education, and if so, in what amount, in what form and for what period?

FINDINGS OF FACT

1. Student is a teenaged student, born [redacted]. Student is a resident of the School District and a qualified handicapped student under §504 of the Rehabilitation Act of 1973. (Stipulation, N.T. pp. 12, 13, 14)
2. Student was diagnosed with ADHD (Attention Deficit/Hyperactivity Disorder) before entering kindergarten in the District. Student has been taking medication to treat ADHD symptoms since the pre-school years, and has been provided with ongoing private therapy services. (N.T. pp. 278—281; P-3, S-26)
3. During kindergarten and the early elementary school years, Student was educated in regular education classes with no problems that seriously affected academic and social progress, notwithstanding teacher comments at the end of 4th grade indicating some early behavior issues that improved by the end of the school year. (N.T. pp. 281—283; P-1, P-2, P-4, P-5, P-6)
4. By the end of 5th grade (2005/2006 school year), Parents, Student's private therapist and the student concerns group in Student's elementary school had become concerned about Student's failures to comply with school rules and impulsive, inappropriate behaviors toward both adults and peers. In addition, although Student was provided with classroom supports such as preferential seating, verbal re-direction and opportunities for movement, there were concerns about organization and ability to sustain focus on school tasks. Student's final report card indicated that attentive and active listening, following directions, work habits and self-control were work/study skill areas that needed improvement. Most work/study skills, however, were satisfactory and by the 4th marking period, all problem areas other than following directions and listening skills were improving. (N.T. pp. 284—289, 520, 521; P-7, S-1)
5. In May 2006, Student was referred for a §504 evaluation. Parents' input noted academic and social concerns arising from difficulty remembering homework assignments,

- planning/time estimation, concentration and focus. (N.T. pp. 286—290, 505, 521; S-1, S-2)
6. Early in the 2006/2007 school year (6th grade), teacher input for the §504 evaluation noted a few missed assignments and low quiz scores. At the end of October 2006, rather than limit or abbreviate the evaluation to determine whether Student should be provided with a §504 Plan, the District issued a Permission to Evaluate for a full psycho-educational evaluation in order to also determine whether Student might be eligible for special education. (N.T. pp. 291—293, 550—553; S-4, S-5)
 7. The Evaluation Report (ER) issued on February 26, 2007 concluded that Student was not IDEA eligible. Standardized achievement test results placed Student in the high average to above range on all subtests and well above grade level. School-based and state assessments indicated good academic progress, with grades primarily in the A-B range through the first 2 quarters of the school year and a Proficient PSSA writing score in 5th grade. Based upon the same evaluation results, the District also concluded that Student did not need academic supports via a §504 Service Plan. (N.T. pp. 40, 107—114, 177, 178, 294, 295, 554—556; S-6, S-7, S-34, p. 12)
 8. Near the end of 7th grade (2007/2008 school year), the District again issued a permission to evaluate, and subsequently conducted an evaluation, to determine whether Student qualified for services under §504. Although the District had no concerns about Student's ability to continue making academic progress without a §504 Plan, the District acceded to Parents' request for accommodations to address Student's organizational skills, focus and ability to stay on task. (N.T. pp. 507, 508, 559, 560; S-8, S-11)
 9. The District proposed a §504 plan to be implemented in 8th grade (2008/2009 school year) providing for extended time (up to 2 days) to complete assignments and a homework journal for recording assignments, which the guidance counselor was to check at the end of each school day. In August 2008, Parents approved that plan with the addition of provisions for teachers to check for clarification of directions and staging of multiple step or quarterly projects, along with posting a list of necessary books and materials on Student's homework log and locker. (N.T. pp. 128, 129, 295, 296, 300, 301, 445, 561—565; S-11, S-12)
 10. On February 27, 2009 Student opened a capsule of Student's ADHD medication in the school cafeteria, referred to the contents as crack cocaine and ingested some of the powder. Student also displayed two capsules of acetaminophen, and one was later found in Student's pocket. Student received a 10 day out of school suspension for violation of the school policy against possession of prescription or over the counter medications on school property and was referred for possible expulsion, since a manifestation determination review resulted in a finding that the behavior was not a manifestation of Student's ADHD disability. Student returned to school after the 10 day suspension and no further disciplinary action was taken. (N.T. pp. 181—187, 303, 304, 306, 336, 337, 481, 519, 520; S-13, S-15, S-28, p. 2)

11. After the drug incident, Parents requested another evaluation to revisit the question of IDEA eligibility. Based upon a review of records, updated standardized test results, prior and current course grades primarily in the A-B range, PSSA scores at the Proficient level, teacher input and a classroom observation, Student was again found ineligible for special education, despite concerns expressed by Parents concerning impulsivity, organization, peer relationships and negative behaviors, all of which were observed at home. (N.T. pp. 100—106, 170, 189—193, 195—200; P-41, S-24, S-34, pp.1—10)
12. Student's §504 committee met on March 30, 2009 and revised Student's §504 plan to add services by the school social worker to assist Student in maintaining organizational skills and to be available to consult with Student's private therapist and Mother to provide additional support for Student's transition to high school. All of the provisions of the original §504 plan remained in effect. (N.T. pp. 126, 127, 130, 306, 307, 569—572; S-20, S-21)
13. End of the year reports from Student's 8th grade teachers disclosed that the §504 accommodations were either effective or not used/needed. All but one of the teachers reported no problem with late assignments. The teacher who expressed a concern noted that it was directed to the next school year, since late work had not adversely affected Student's grade in that class. (N.T. pp. 509—511; S-22)
14. On October 29, 2009 after conducting an evaluation consisting of a review of records and interviews with Student and Parents, an independent psychiatrist selected by Parents issued a report that confirmed Student's ADHD diagnosis, noted improvements in impulsivity and other negative behaviors and found no need for a behavior plan at that time. The independent evaluator offered the opinions that Student is eligible for specially designed instruction and should receive more formalized instruction in organizational support and study skills to address relative weaknesses in working memory, processing speed and executive functioning, indicating a possible learning style difference. (N.T. pp. 144—149, 307, 308, 360, 361; S-26, p. 6)
15. Although the District agrees with some recommendations in the independent psychiatric report and provides some of the recommended services, the District disagrees with the conclusion that Student's executive functioning deficits or other symptoms of ADHD impact Student's educational progress to the extent that Student needs specially designed instruction. (N.T. pp. 134—143, 146, 150, 151; S-28, pp. 1, 2, S-29)
16. In January 2010, Student's §504 team met again to revise Student's Plan and added three more supports to all of the prior provisions: 1) prompting to Student to use Student's schedule to determine the books and materials needed for class, to determine when Student needs to visit the locker to exchange books, and to organize all homework papers to be submitted; 2) monthly meetings with the guidance counselor and social worker for modeling and reinforcement of organizational systems; 3) weekly monitoring of Student's homework completion by the guidance counselor. (N.T. pp. 131, 139, 309, 414, 415, 421, 575—578; S-32)

17. Student demonstrates knowledge of organizational strategies, such as how to separate and maintain assignments, notes and other school materials for each academic subject area. Student uses a large binder with a separate folder for each course for that purpose. Student's guidance counselor confirmed Student's knowledge of organizational strategies and skills through weekly monitoring of assignments, as well as through assessment of areas of need for modeling organizational strategies as provided in the most recent revision of Student's §504 Plan. (N.T. pp. 58, 59, 138, 141, 159, 160, 170, 171, 273, 274, 414, 416, 417, 420, 428, 429, 458)
18. Student has a planner/notebook for recording and keeping track of class projects and homework assignments that Student used successfully and consistently during the second half of the 2009/2010 school year. Student still misses some assignments and exhibits continuing difficulty keeping track of all necessary books and materials, demonstrating inconsistency in the use of organizational skills and strategies. Overall, Student timely submits the majority of school assignments. (N.T. pp. 26, 58, 59, 138, 141, 170, 273, 414—416, 429, 430, 441—444, 446—449, 489; P-48, pp. 75, 76)
19. Parents and District staff have observed Student's continuing need for prompting to assure use of organizational strategies and tools, to plan for successfully completing long-term assignments and to prepare for tests (N.T. pp. 25, 58, 273—277, 418, 444, 458, 479)
20. Between 6th and 9th grades, Student accumulated a number of minor disciplinary referrals resulting in warnings, loss of privileges, and ultimately a number of morning or lunch detentions. The only serious disciplinary infraction, other than the February 2009 drug incident, occurred at the end of 8th grade, on June 4, 2008, when Student brought tobacco to school and received a 3 day out of school suspension. Neither the number of disciplinary referrals, or their nature, in terms of seriousness, were sufficient to trigger the need for a positive behavior support plan because Student was easily re-directed from classroom disruptions, and the incidents or accumulation of incidents that resulted in disciplinary referrals were corrected with ordinary consequences for violations of student conduct standards. (N.T. pp. 77—83, 86—99, 299; S-9, S-38)
21. Between 6th and 8th grades, Student earned at least a B as the final report card grade in all but two classes, 7th grade math and social studies, which were Cs. (N.T. pp. 40, 41, 55, 56, 340—343, 477; S-35, pp.1-3)
22. In 9th grade (2009/2010 school year), Student's grades have been more inconsistent, with 2 first quarter Ds and Cs and an F. In the second quarter, Student's grades improved, with only 2 grades below B and no F. As of March 1, 2010 Student had 2 Ds, with the remaining academic grades Bs and Cs and an A in [redacted]. When Parents expressed concerns about Student's grades near the end of the first marking period, the District provided Student with tutoring and other assistance, including more frequent contact with the guidance counselor. (N.T. pp. 314, 315, 343, 423—427, 431, 432, 487; S-33, pp.2—4, 6, S-35, pp. 4, 5, S-37)

23. When questioned about fluctuating academic performance during 9th grade, Student noted that Student “wasn’t on [my] A game” at times, and also cited absences and school closings for snow days that made it difficult to keep from falling behind and to make up missed work. Student’s Mother also described recent difficulties at home that may have adversely affected Student, including school performance. The guidance counselor noted that the transition to high school frequently creates adjustment issues for 9th grade students generally. (N.T. pp. 368—378, 422)

DISCUSSION AND CONCLUSIONS OF LAW

I. IDEA Eligibility

As stated in an informal ruling transmitted to counsel prior to the third hearing session in this matter, the record does not support Parents’ contention that Student should have been identified as IDEA eligible, either at the time the District issued the first evaluation report in February 2007 (FF 7), or when the District completed its second IDEA evaluation in June 2009 (FF 11), or after receiving an independent psychiatric report in October 2009 (FF 14).

Under the IDEA statute and its implementing regulations, a local educational agency is required to provide special education and related services only to its resident students who meet the definition of a “child with a disability” set forth in 20 U.S.C. §1401(3):

In general

The term “child with a disability” means a child--

- (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments(including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

See also 34 C.F.R. §300.8(a).

There is no dispute in this case that Student has a long-standing ADHD diagnosis for which Student has always been medicated. (FF 2) In its most recent ER, the District acknowledged that Student meets the first prong of the eligibility criteria. (S-24, p. 14)

Consequently, the eligibility issue centers on whether “by reason of” the identified impairment, Student “needs special education and related services.”

Based on the evidence of record, there is no question that Student has always been educated entirely in regular education classes, where Student has been quite successful, with above average final grades throughout the middle school years. (FF 21) In addition, the standardized tests administered in connection with both the February 2007 and June 2009 District evaluations, curriculum based assessments and state assessments disclose neither a discrepancy between ability and achievement nor a failure to make progress commensurate with same age/grade peers, thereby precluding a determination that Student has a learning disability. *See* 34 C.F.R. §§300.8(c)(10), 300.307(a)(1), 309(a)(1),(2).

The evaluation report submitted by Dr. N, the psychiatrist who conducted a District-funded independent evaluation, does not establish IDEA eligibility by reason of a learning a learning disability or otherwise, notwithstanding his conclusion that Student should receive specially designed instruction. Dr. N’s identification of a “relative weakness” in the processing speed and working memory index scores on the WISC-IV assessment administered by the District school psychologist does not establish a need for special education. (FF 14; S-26, p. 6) As the District school psychologist pointed out in her testimony, both of those index scores fall within the average range, along with Student’s verbal comprehension index and full scale IQ scores. (N.T. pp. 105, 135, S-24, p. 8) The school psychologist’s opinion that comparing Student’s perceptual reasoning index score, in the superior range, to the remaining scores, all in the solidly average range, indicates a relative strength in perceptual reasoning rather than a weakness in all other scores is a far more cogent explanation of the unusual results than Dr. N’s conclusion. In fact, Dr. N provided virtually no explanation to support his conclusion that the

District's 2009 WISC-IV results establish that Student is eligible for specially designed instruction. For that reason, Dr. N's opinion was accorded no weight.

In addition, Dr. N stated only that the discrepancy he noted in Student's WISC-IV index scores **may** indicate a "learning style difference." He did not diagnose a learning disability. Dr. N's opinion that Student is eligible for special education due to the possibility of a "learning style difference" does not meet the legal standard for eligibility, as there is no IDEA disability category designated "learning style difference." Moreover, the need for specially designed instruction certainly cannot be based upon a mere possibility even if Dr. N had intended to offer the opinion that the difference in Student's WISC-IV index scores establish a learning disability. The District, therefore, was entirely justified in rejecting Dr. N's opinion and refusing to alter its conclusion that Student is not IDEA eligible by reason of a specific learning disability. (FF 15)

There is also no basis in the record for concluding that providing Student with specially designed instruction in organizational skills would address the effects of Student's ADHD any more effectively than the services the District is currently providing via a §504 Service Plan. Parents provided no testimony or other evidence suggesting that specially designed instruction in organizational skills would reduce the number of prompts Student needs to implement organizational strategies, or assure that Student uses whatever organizational skills Student might be taught, or would reduce Student's need for additional time to complete assignments.

The record establishes that Student is aware of effective organizational strategies and uses them, but not consistently. (FF 17, 18) Prompting and extended time are frequently used in conjunction with direct, specially designed instruction in organization and study skills for students who are IDEA eligible under the OHI category because of ADHD. Neither the evidence

nor common experience suggests that instruction in organizational skills will necessarily lead to using such skills independently.

Finally, in light of Student's above average academic achievement to date, there is no basis, in Dr. N's report, or otherwise, for concluding that Student needs additional study skills instruction, since Dr. N again provided no explanation of that recommendation

Although there is evidence that Student has exhibited more difficulty with school demands in the recently concluded school year than in middle school (FF 21, 22, 23), there is no reason to conclude that the services Student receives under the §504 Service Plan could not be adjusted to increase supports and accommodations to meet future needs, as the District has done to address recent issues. (FF 22)

If Student's need for services to maintain educational progress increases or significantly changes, and/or if progress toward remediating Student's disability stalls, by, *e.g.*, an increasing rather than diminishing need for prompting to use organizational strategies over a long enough period to suggest that Student is experiencing more than a short-term setback, the question of IDEA eligibility can and should be reexamined to determine whether Student has developed a need for specially designed instruction. At present, however, although there is no dispute that Student's ADHD would put Student in the OHI disability category under IDEA, there is no evidence to support the conclusion that "by reason thereof" Student needs special education and related services.

II. §504 Claims

A. Legal Standards Applicable to a §504 FAPE Claim

The statute prohibiting disability-based discrimination in various settings, commonly referred to as “§504 of the Rehabilitation Act of 1973” or simply “§504” is found at 29 U.S.C. §794(a), and provides as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Notwithstanding the statutory language which, by its plain terms, proscribes discriminatory conduct by recipients of federal funds, in the context of education the protections of §504 are considered co-extensive with those provided by IDEA with respect to the obligation to provide a disabled student with FAPE. *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009)

In 22 Pa. Code Chapter 15, Pennsylvania law makes that obligation explicit for all school-aged children with disabilities, including those students who are not eligible for special education and related services under IDEA. The relevant portions of Chapter 15 provide as follows:

§15.1. Purpose

(a) This chapter addresses a school district’s responsibility to comply with the requirements of Section 504 and its implementing regulations at 34 CFR Part 104 (relating to nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from federal financial assistance) and implements the statutory and regulatory requirements of Section 504.

(b) Section 504 and its accompanying regulations protect otherwise qualified handicapped students who have physical, mental or health impairments from

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

§15.2. Definitions.

Protected handicapped student—A student who meets the following conditions:

- (i) Is of an age at which public education is offered in that school district.
- (ii) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program.
- (iii) Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under § 15.10 (relating to discrimination claims).

Service agreement—A written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student.

§ 15.11. Rules of Construction.

(a) The full description of substantive responsibilities of school entities is set forth in Section 504 and the Section 504 regulations at 34 CFR Part 104 (relating to nondiscrimination on the basis of handicap in programs and activities receiving or benefitting from federal financial assistance) and not in this chapter.

The federal regulations referenced in Chapter 15 give substance to the §504 statutory language in the context of the education of protected handicapped students by public schools. The regulations relevant to this case provide as follows:

§ 104.33 Free appropriate public education.

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

(b) Appropriate education.

(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

The federal and state regulations further provide procedural safeguards, including the opportunity for a due process hearing, as a means of challenge a school district's conduct for parents who believe that a public school district failed to meet any of the substantive legal standards set forth above:

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

34 C.F.R. §104.36. *See also* 22 Pa. Code §15.8(d), which provides that when parents and school districts are unable to informally resolve disputes concerning §504 issues, either may request a formal due process hearing governed by the provisions of 22 Pa. Code §14.64(m), governing IDEA due process hearings. In Pennsylvania, therefore the procedural safeguards provisions of §104.36 are fulfilled by complying with IDEA procedures.

B. Elements of a §504 Claim

To assert a successful §504 claim a parent must prove four elements: 1) that the student has a disability; 2) that he or she is otherwise qualified to participate in school activities; 3) that the LEA receives federal financial assistance; 4) that the student was excluded from participation in, denied the benefits of or subjected to discrimination at school. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490 F.3d 337, 350 (3rd Cir. 2005); *School District of Philadelphia v. Deborah A.*

In this case, although there was no explicit evidence establishing that Parents have satisfied the first three elements of a §504 claim, there was also no dispute as to those matters. The dispute, therefore, centers on whether the District has provided educational services that meet Student's needs as adequately as the needs of non-disabled students as required by 34 C.F.R. §104.33(b)(1)(i).

C. Analysis of Parents' §504 Claim

In general, the conclusions set forth and explained above, in connection with rejecting Parents' claim for IDEA eligibility also apply to Parents' claim that the §504 Plans provided by the District failed to adequately address Student's educational needs. In essence, Parents' contentions that Student has been provided with inadequate services are based upon unreasonable expectations that go far beyond the legal standards the District is obligated to meet. Parents appear to believe that an adequate and effective §504 Plan would eliminate all of Student's difficulties with organization and significantly improve Student's academic performance.

In addition, Parents' conviction that the §504 Plan is ineffective is reinforced by intensive scrutiny of Student's day to day ability to meet academic demands, and unfortunately prevents

Parents from accepting the success that Student has consistently achieved despite Student's ADHD disability.

It is highly unlikely that any student, or any adult for that matter, would appear to be consistently well-organized and performing well if subjected to frequent examination of task completion. Everyone has bad days—and sometime bad weeks—when it is a struggle to focus, to consistently stay on task and to complete long term or short-term projects with optimum efficiency. That very human fluctuation in motivation and use of clearly mastered skills is the reason that performance in most areas of life, whether school or work, is assessed over a period of time. It is certainly reasonable to expect that the normal fluctuations in performance, motivation, attention, focus and use of skills and strategies that assure success will be more pronounced in persons with disabilities, especially a student with ADHD. It is also understandable, and commendable that Parents are vigilant in monitoring Student's progress in order to address any problems that arise as quickly as possible.

Nevertheless, nothing in the IDEA statute or regulations suggests that school districts' compliance with statutory requirements are to be assessed in terms of outcomes or results, especially on a daily or weekly basis. Moreover, the U.S. Supreme Court and the Court of Appeals for the Third Circuit sensibly interpret the "appropriate" component of FAPE in terms of meaningful educational benefit and significant learning, explicitly rejecting the notion that school districts are required to assure optimal progress. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999). There is no reasonable basis for concluding that legal standards applicable to §504 service plans exceed IDEA FAPE requirements.

This evidence in this case brings it squarely within the Supreme Court's *Rowley* analysis. The School District has provided, and continues to provide, supports and services to level the playing field for Student, *i.e.*, to minimize the effects of Student's ADHD disability on academic performance and progress. The evidence supports the conclusion that the District has been responsive to Student's needs and proactive in maintaining appropriate levels of support. Prior to 8th grade, the District evaluated Student and correctly concluded that Student's ability to make good overall academic progress in regular education classes precluded a finding of IDEA eligibility, despite the acknowledged existence of a disability that often triggers a need for specially designed instruction, but not in this case. (FF 7) Student's report cards from 6th and 7th grade demonstrate the ability to successfully access regular education classes without curriculum modifications or any supports/services beyond those available to all students. (FF 21) A simple averaging of Student's final grades in both 6th and 7th grades demonstrates above average performance, at a B level, in both school years. (S-35, pp. 1, 2; FF 21)¹ Nevertheless, with 2 final grades in academic subjects at a C level in 7th grade, the District provided Student with a §504 Service Plan for 8th grade. None of Student's final grades fell below a B in that year, and a simple average places Student's overall performance solidly in the B range. (FF 21)

Parents' aspiration for Student is that all of Student's grades will be As and Bs (N.T. p. 441), and that Student will independently and consistently, meaning without any lapses whatsoever, employ organizational skills that assure timely completion and submission of every assignment, which Parents believe will assure future success. (N.T. p. 339) It is hard to imagine any parent of a school-age child who would want anything less, and who would not

¹ This average is based upon the simple mathematical calculation of adding all final grades and dividing by the number of classes listed, and is intended only for purposes of illustration. There was no evidence in the record concerning how the District calculates grade point averages for students, and any such evidence would have been minimally relevant at best. The averaging calculation is simply a quick, easily understood perspective on where Student stood at the end of those school years.

wish to require his/her school district to guarantee such an outcome. Such aspirations, however, cannot be realized via the protections afforded by §504, or by the special education requirements of IDEA. No statutory/regulatory language or court interpretation of the applicable legal standards requires school districts to meet such an extraordinarily high and exacting standard.

Although there is no dispute that the §504 Plans provided to Student in this case have not permitted Student to completely overcome the effects of Student's ADHD disability—much less the universal effects of the adolescent stage of human development—there is no legal requirement that the District provide a perfect plan or one that assures that within a particular time frame, Student will achieve a certain level of success in the continuing efforts to mitigate the effects of Student's disability on school performance. Here, the evidence establishes that the §504 accommodations, supports and services are adjusted when necessary and effective for Student, albeit not perfectly and not without continued prompting. (FF 19, 2, 16, 17, 18, 21) Student, however, has only completed the first year of high school. Both Student and the District have several more years to work on fading prompts and to increase independence and consistency in the use of the strategies and skills that Student has but does not presently employ on a regular basis without close monitoring. Given the level of success Student has achieved to this point, further progress can reasonably be expected with the continued assistance of the §504 Plan provisions.²

Finally, in addition to the evidence that unequivocally establishes that the District has met its legal obligations to Student through the end of the 2009/2010 school year, Parents provided

² Nevertheless, the other side of assessing the likelihood of continued progress at such an early stage in Student's high school career is the truism that no one can predict the future, including stressors and circumstances that Student may experience going forward that could interfere with progress in any area. The District is not required to assure a particular level of progress in the independent and consistent use of organizational skills by the time of Student's high school graduation any more than it is required to have assured a particular level of success to this point.

only vague references to teaching Student organizational skills, without specifying in any way skills and strategies Student doesn't know and should be taught. That is understandable, since Parents' belief that Student needs additional instruction is based upon inconsistent use of strategies that Mother acknowledged Student has, and that Student uses with monitoring and prompting. There is, however, no evidence that research-based instruction to teach Student additional strategies would effectively address the essence of the problem that Parent identifies, *i.e.*, how to assure that Student consistently and independently uses organizational skills and strategies to assure effective and successful test preparation and timely, successful completion of all daily homework and short and long-term assignments.

III. Statute of Limitations Issues

Parents raised a number of legal arguments concerning their right to seek compensatory education for more than 2 years prior to the filing of the original complaint in this matter.³ In light of the substantive decisions concerning the District's compliance with the applicable laws governing both IDEA and §504 standards the limitations issues are effectively moot.

Nevertheless, it is important to note that contrary to Parents' representation in their closing argument that the limitations period governing §504 claims must be borrowed from state tort law, the Court of Appeals for the Third Circuit has recently determined that §504 claims alleging a denial of FAPE are subject to the IDEA limitations period, including the applicability of the exceptions that may serve to extend the normal 2 year period. *P.P. v. West Chester Area School District*, 585 F.3d 727 (3rd Cir. 2009).

³ Pursuant to the agreement of the parties and counsel that permitted Parents' withdrawal of the original due process complaint submitted in March 2009 and amended to its final version in April 2009, Parents were permitted to seek compensatory education dating to March 2007, except for the period September 2009 to January 2010, when Parents were awaiting an independent psychiatric evaluation and report that the District had agreed to fund, as well as additional time to permit the parties to review the report and determine whether the issues in dispute could be resolved. The limitations issue, therefore, involves the time prior to approximately the last third of the 2006/2007 school year. At the final hearing session in this matter, Parents acknowledged that the period for which they are seeking compensatory education extends only to the beginning of the 2006/2007 school year. N.T. p. 546

It must also be noted that Parents provided no evidence that either of the exceptions to the IDEA limitations period applies to extend the limitations periods in this case, or that any actions of the District otherwise prevented Parents from filing a due process hearing to address any perceived deficiencies in Student's educational program from the beginning of the 2006/2007 school year through March 10, 2007, near the end of the third marking period of Student's 6th grade year.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that all of the claims asserted in this matter, whether or not specifically addressed by this decision and order, are **DENIED** and **DISMISSED**, and the School District need take no action with respect to such claims.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

July 3, 2010