

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

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: SM

Date of Birth: xx/xx/xx

Dates of Hearing: July 20, 2009

CLOSED HEARING

ODR#9931/08-09 KE

Parties to the Hearing:

Representative:

Ms. Ellen Budman, Superintendent
Bristol Township School District
6401 Mill Creek Road
Levittown, PA 19057

Pro Se

School District Attorney
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Date Record Closed:

July 27, 2009

Date of Decision:

August 11, 2009

Hearing Officer:

Deborah G. DeLauro

I. BACKGROUND

Student is an elementary age resident of the Bristol Township School District (hereinafter "District") who has just completed the third grade at the [redacted] Elementary School (hereinafter "School"). Although Student has a history of attention problems, Student is on grade level in both reading and math. In March 2008 when Student was in the second grade, Ms. (hereinafter "Parent") requested that her child be tested to determine whether the child qualified for special education services through an Individual Education Plan (hereinafter "IEP"). The Parent requested the evaluation due to her concerns regarding Student's academic performance. The District conducted an initial evaluation (hereinafter "ER") in May 2008 and although there were indications of attention problems, auditory comprehension difficulties and motivation, found that Student did not qualify for specially designed instruction under the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"). The District also found that Student did not qualify for a Section 504 Service Plan under the Rehabilitation Act of 1973 (hereinafter "Section 504") The Parent disapproved the Notice of Educational Placement (hereinafter "NOREP") and after unsuccessful attempts to resolve the dispute through Mediation and further due process, requested that the District fund an Independent Education Evaluation (hereinafter "IEE"). The District agreed and an independent neuro-psychological evaluation was conducted in January 2009 which resulted in an IEE report in February 2009. The District reviewed the IEE as well as a speech and language evaluation, and issued a Re-Evaluation Report (hereinafter "RR") in April 2009 again finding Student ineligible for both special

education services under IDEIA and accommodations under Section 504. In addition, an Auditory Processing Evaluation was conducted by the District in April 2009 which found Student to have underdeveloped auditory skills and recommended compensatory strategies. In April 2009, Parent filed a request for a due process hearing with the Office for Dispute Resolution (hereinafter “ODR”). After a Sufficiency Challenge filed by the District, the Parent amended her Complaint in May 2009 wherein she specifically requested that if her child did not qualify for special education services under the IDEIA, that Student be provided with a Section 504 Service Plan. Accordingly, a due process hearing was held in July 2009 to determine the following issues.

II. ISSUES

1. Whether the District failed to identify Student as a student with a disability under IDEIA?
 - 1) Whether the District’s evaluation was appropriate?
 - 2) Whether the District appropriately considered the independent educational evaluation conducted by [independent evaluator]?
 - 3) If not, then whether Student qualifies for a Section 504 Service Plan under the Rehabilitation Act of 1973?

For the reasons stated below, this hearing officer finds that the District’s evaluation is appropriate; that Student does not qualify for specially designed instruction under the IDEIA; but that the District did not properly consider the independent educational evaluation; and based on the weight of the evidence, Student does qualify for accommodations and modifications under Section 504.

III. FINDINGS OF FACT

1. Student is an elementary age student, born xx/xx/xx. Student is a resident of the Bristol Township School District.

2. Student is a regular education student having just completed the 3rd grade at Elementary School.
3. Student was evaluated in May 2008 when Student was in second grade and was found to be non-exceptional and not in need of specially designed instruction under the Individuals with Disabilities Education Improvement Act (hereinafter “IDEIA”). [S-18]
4. Student’s mother requested the evaluation due to her concerns regarding her child’s academic performance.¹ Although there were indications that issues relating to attention, auditory comprehension and motivation may impact Student’s performance at times, the school psychologist, found that there was no evidence that Student’s academic achievement had been hindered. [S-18]
5. The school psychologist found that Student was performing at benchmark in both reading and math and obtained average to above-average scores on achievement measures. Therefore, the school psychologist concluded that Student did not meet the requirements to be considered a student with a learning disability. [S-18]
6. The following recommendations for consideration by the school psychologist regarding “special education and related services” needed to enable Student to be involved and progress in the general education curriculum were indicated as follows:
 - 4) Obtain Student’s attention before giving instructions. This can be done by calling Student’s name or by a gentle tap.
 - 5) Monitor comprehension by periodically asking Student questions related to the subject under discussion.
 - 6) When asking questions of Student, first, assure Student is listening, then pose the question and allow Student time to process the question and then formulate the answer.
 - 7) Provide visual aids and handouts.
 - 8) Flexible preferential seating. Assigned seat should be away from the hall and street noise and not more than 6 feet from the teacher.
 - 9) Teach Student to be an advocate for listening, including recognition of the adverse listening conditions and development of coping strategies.
 - 10) Be sensitive to listening fatigue, as Student will expend more effort in paying attention and discriminating information than other children.
 - 11) Seat Student by a student with good work habits, whom Student can turn to for clarification when confused. [S-18]
7. The Parent testified that she understood that the above list of recommendations constituted an Individual Instruction Plan or “IIP” which would follow Student and that

¹ Student received a “Below Basic” score in reading on the PSSA in the Spring of 2009. [P-1]

every teacher would be aware that Student needed special accommodations and instructions. [N.T. pp. 31, 35; S-18] Parent also testified that when she asked the third grade teacher, if she was aware of the IIP, she had no idea what Parent was referring to until Parent showed her the recommendations on the ER. The teacher then said that she was already implementing some of the recommendations as “best practices” but that she would try to implement all of them now that she was aware. [N.T. pp. 35, 123]

8. The school psychologist stated that she never called the recommendations an IIP but that all of Student’s teachers would follow them through Student’s school years. [N.T. pp. 155-156]
9. Parent disapproved of the non-eligibility finding as stated on the NOREP dated May 29, 2008. The Parent stated her reason for disapproval was because Student had auditory processing difficulties, low working memory Index, and clinically significant ratings by Student’s 2nd grade teacher and Student’s mother on the Conners Rating System. Parent also indicated that because her child struggled academically in general education, it was lowering Student’s self-esteem. [S-17]
10. The Parties were unsuccessful in their attempts to Mediate the dispute in June and July 2008. [S-16; S-15; S-14] On July 17, 2008, the District issued another NOREP of non-eligibility which the Parent disapproved and requested a due process hearing. [S-13]
11. On September 16, 2008, upon receipt of a request for a due process hearing, the ODR issued a notice for a due process hearing scheduled for October 22, 2008.[S-12]
12. As part of the resolution process, however, the District agreed to fund an IEE and on February 6, 2009 the independent neuropsychological evaluation was conducted by an extern in neuro-psychology at [redacted] Hospital for Children [Hospital] and supervised by a pediatric neurologist and licensed psychologist at Hospital . On February 24, 2009 the IEE report was issued.[S-11]
13. The independent evaluator summarized her impression as follows: Student has a history of attention problems. Although Student is on grade level academically, Student reportedly needs substantial supportive home to maintain progress. For the most part, [the independent evaluator] found that Student’s cognitive abilities fell within the average range, although cognitively inefficiencies were noted in attention and executive functioning as well as learning and memory. More importantly, the independent evaluator noted that although Student’s current teacher denied significant inattention in the classroom, given behavioral observations during the current evaluation, current reports from Student’s mother, and reports provided by several educators at the time of the April 2008 evaluation, Student is a child at risk for attention deficit hyperactivity disorder (hereinafter “ADHD”) and the appropriateness of this diagnosis should continue to be considered. At this time, Student’s problems with attentional processing and inhibition are likely affecting Student’s ability to learn and Student’s academic performance, such that interventions and accommodations

used for children with ADHD should be considered. Finally, the independent evaluator found that it is likely that inefficiencies in attention, response inhibition, and encoding of new information are affecting Student's learning and academic progress, such that Student may benefit from specific interventions and accommodations to address these difficulties. Based on these results, he found that Student is a child who is at risk of having difficulty maintaining academic progress without the provision of appropriate interventions. [S-11]

14. The following recommendations were delineated in the IEE:
 - 1) The District should continue to provide Student with educational support through the response to intervention model, we should also include more intensive and frequent small group instruction in academic subject areas.
 - 2) The District should develop a Section 504 plan to document accommodations necessary to address problems with attention, response inhibition, and encoding of information.
 - 3) The District should consider providing Student with resource room services to allow Student an opportunity to further review information being taught in the classroom and to complete class work and/or homework with necessary assistance in comprehending task instructions and content.
 - 4) Because of Student's difficulties with verbal learning/memory, Student's tendency to make an unusual number of intrusion errors on learning tasks, Student's difficulty comprehending complex task instructions, the tangential nature of Student's conversational speech may reflect deficits in higher-level semantic and syntactic language processing. Therefore, it is recommended that a speech and language evaluation be completed with a significant focus on higher-level language processing, semantic organization, and comprehension.
 - 5) Multi-sensory instructional strategies.
 - 6) Medication for attentional difficulties should be considered.[S-11]
15. The Special Education Supervisor stated that Student's performance was compromised on the IEE because the testing was conducted over a 6 to 8 hour period. This explanation was also provided by the third grade teacher. [N.T. pp. 80-84]
16. On March 5, 2009, the District issued a Permission to Evaluate (hereinafter "PTE") in order to review the IEE and conduct a speech and language evaluation. [S-10] The District conducted a speech and language evaluation on March 25, 2009, April 1, 2009 and April 8, 2009 and determined that Student's speech and language skills were within the average range for Student's age. Possible auditory processing difficulties may be addressed in the classroom through the continued use of strategies. Based on a criteria established by the Bucks County Intermediate Unit (hereinafter "IU") school age speech language program, speech and language services are not recommended at this time. [S-6]
17. On March 12, 2009, the District issued a NOREP indicating that they had reviewed the IEE and determined that Student did not present with the eligibility criteria needed for special

education services. They did however agree to implement the recommendations included in the IEE report. [S-9] The Parent requested a due process hearing stating that her child was struggling academically and was missing important instructions due to daydreaming. [S-9]

18. On April 1, 2009, Parent filed for a due process hearing stating that the District refused to comply with the recommendations of the independent neuro-psychologist. [S-8]
19. On April 23, 2009, the IU conducted an Auditory Processing Evaluation and found that Student has underdeveloped auditory skills that may improve with compensatory strategies and/or maturation. Other learning difficulties may coexist with this diagnosis of auditory processing difficulties that impact Student's educational success. [S-7]
20. On April 30, 2009, the District completed a Re-Evaluation Report and again found that Student was not eligible for special education services. [S-6]
21. On May 19, 2009, Parent submitted an Amended Complaint wherein she clearly stated that based on the IEE, she believed that Student was at-risk of having difficulty maintaining academic progress without the provision of appropriate interventions. The Parent stated further that she wanted the District to provide her child with more intensive and/or frequent small group instruction in academic areas, and if the option for an IEP is denied, she wanted a 504 Plan developed to document accommodations necessary to address Student's problems with attention, response inhibition and encoding information. [S-5]
22. On June 4, 2009, the District issued another NOREP indicating that based on their review of the IEE, Student was not eligible for special education services because Student does not present with the two-pronged eligibility criteria necessary to qualify for special education services, and that a speech and language evaluation was conducted which also did not identify Student as a student with a speech/language impairment. [S-4]
23. On July 14, 2009, the Parties convened a Resolution meeting to discuss the issues in dispute, but were not able to come to an agreement. [S-1]
24. On July 20, 2009, a due process hearing was held.
25. The Special Education Supervisor testified that the District had developed and was implementing a Response to Intervention (hereinafter "RTI") program where the step is to evaluate all of the students in order to get baselines for academic performance. Step Two then is to determine whether they performing at the benchmark level, the middle level or the at risk level. She testified further that the teachers were trained in specific interventions that were categorized as Tier 1, Tier 2 or Tier 3 interventions. [N.T. pp. 85, 87-89 91-96]
26. The Special Education Supervisor credibly testified that Student was tested and determined to have a weakness in reading comprehension which could be addressed through Tier 1 RTI strategies. [N.T. pp. 98-100. 105-106]

27. The Special Education Supervisor however, misstated the eligibility standard for qualifying for a Section 504 Service Plan when she stated that Student did not need an IEP or a 504 Plan because Student did not have a disability and therefore would not benefit from a 504 Plan. [N.T. p. 112]
28. The Instructional Support Teacher, (hereinafter “IST”) stated that most of the students who had IEPs were receiving RTI in Tier III and that would be the same for students with 504 Plans. She stated further that she felt that an IEP or 504 plan would be completely unnecessary and would hinder Student’s academic achievement. [N.T. pp. 102-103; 112] Moreover, when asked to explain why Student wouldn’t benefit from having accommodations identified in a Section 504 Plan, the IST stated that Student wouldn’t benefit because Student didn’t have a disability; and secondly, the kinds of strategies that we’re doing are best practice, and not anything they above and beyond what we would do for any student. [N.T. p. 112]
29. The third grade teacher testified that Student did not complete the 100 Book Challenge and Parent did not complete the communication log on a regular basis, the implication being that Student’s reading would be better if Parent had made sure that Student’s log was filled out and that Student was completing the 100 Book Challenge. [N.T. pp. 119-123]
30. The third grade teacher also testified that the only adjustment which she made after she read the ER recommendations was to change Student’s seat. [N.T. p. 124] This was contradictory to Parent’s testimony. [N.T. pp. 35, 123]
31. The third grade teacher acknowledged that Student frequently “is distracted... looks out the window... is a daydreamer” but then added that Student needs no more re-direction than the other students in the class. [N.T. pp. 128-130] Teacher then contradicted herself again when she stated to the independent neuro-psychologist that Student “takes more time to complete work than Student’s classmates” and “sometimes needs assistance to complete work.” [N.T. pp. 135; S-11]
32. The third grade teacher stated that she was only “somewhat” familiar with ADHD, but then stated that she absolutely doesn’t feel that Student displays any behaviors associated with ADHD. [N.T. p. 131]
33. The school psychologist contradicted the results of the Conner she administered to Student when she testified that Student doesn’t display signs of ADHD to the degree that would be clinically significant. [N.T. pp. 142-143; S-18]
34. The school psychologist revealed that she did not understand what is necessary to determine whether a student qualifies for a 504 Plan due to ADHD when she testified that Student doesn’t have ADHD because the Conners is a rating scale and cannot “stand alone.” [N.T. p. 144]

35. The school psychologist further demonstrated that she did not understand the eligibility standards under Section 504 when she testified that because there was no discrepancy between Student's ability and achievement, and there was no evidence to find that Student was in need of special "exam instruction," Student did not qualify for a 504 Plan. [N.T. pp. 146-147]
36. The school psychologist and the Special Education Supervisor testified that giving Student an IEP or a 504 Plan would hinder Student because Student would be pulled out of class and would miss valuable instruction. [N.T. pp. 66-67]
37. When asked by the Parent on cross examination "How would these instructions in the IIP differ from a 504 Plan?" The school psychologist stated that she was not familiar with eligibility requirements for a 504 Plan. [N.T. 158-159]

IV. CREDIBILITY OF WITNESSES

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision should be based solely upon the substantial evidence presented at the hearing.² Quite often, testimony or documentary evidence conflicts; which is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003)*. This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. This hearing

officer found the District's Supervisor of Special Education to be highly credible and it was her testimony about the District's Response to Intervention program as well as her knowledge about the appropriate criteria for speech and language services which established a significant part of the District's case. On the other hand, although the District's Instructional Support Teacher was highly knowledgeable and to her credit, appears to be a major force in developing and implementing the District's RTI program, her testimony was weak when she consistently equated eligibility under IDEIA and Section 504. Her explanation about why Student wouldn't benefit from a 504 Plan was of particular concern as it was not only legally incorrect but also somewhat evasive. Although the school psychologist testified credibly, it was clear from her testimony that she did not fully understand the eligibility criteria under Section 504 when she stated that because student did not have an official medical diagnosis of ADHD and in spite of the fact that Student was in the clinically significant range in the following categories on the Conners Rating Scale: Oppositional; Cognitive Problems/Inattentive; as well as on the Conners' ADHD Index, Student was not eligible for a Section 504 Service Plan due to Student's ADHD behaviors. The only District witness this hearing officer found in general not to be credible was the third grade teacher. Her testimony particularly about Student's attentional difficulties in class lacked sufficient legal weight to counter evidence on the record. Furthermore, her testimony that she was only somewhat familiar with ADHD but was absolutely sure that Student did not display any behaviors associated with ADHD was contradicted by her previous statements to the independent neuro-psychologist, her statements to the Parent and her notations on Student's report card. [S-2]

² Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District*

The Parent is clearly committed to her child and concerned that Student receive an accurate classification and an appropriate educational program. This is not a Parent who is satisfied with waiting to see if her child fails, she has been proactive and persistent in making sure that Student has the necessary academic support to make meaningful progress in the curriculum. This hearing officer appreciates the perseverance this Parent has demonstrated in the face of the District's consistent refusal to find Student eligible for special education services under the IDEIA or for accommodations under a 504 Service Plan.

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Special Education

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

B. Child Find

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

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

v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

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

D. Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, The burden of persuasion for cases brought under the IDEA is properly placed upon the Party seeking relief. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). The Parent requested this hearing to challenge the District's determination that Student is not eligible for special education services under the IDEIA and is therefore assigned both the burden of persuasion and the burden of production (presenting its evidence first) in the hearing. Application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. This is not the case here.

Typically, the burden of proof in an administrative hearing alleging a FAPE denial is upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); *L.E. v. Ramsey Bd. Of Educ.*, 435 F.3d 384 (3d Cir. 2006); *In Re a Student in the Ambridge Area School District, Special Education Opinion No. 1763* (2006) Here, the substantive dispute in this case centered not only on the School District's evaluation from which it concluded that Student was not eligible for IDEIA special education services but also on the District's consideration of the IEE and eligibility under Section 504. In the instant matter, the appropriateness and accuracy of the School District's evaluation and the resulting eligibility determination were **not** raised in the context of the Parents' request for the District to fund an Independent Educational Evaluation (hereinafter "IEE"), since the District agreed to fund an independent neuro-psychological evaluation, but instead focused on the District's consideration of the IEE and the question of eligibility under IDEIA and Section 504. Therefore, although the District typically has the burden of proving that its evaluation is appropriate and that it correctly determined that Student is not IDEIA eligible, in this instance, the Parent has the burden of proving that the District failed to provide FAPE by denying student eligibility under the IDEIA, by not properly considering the IEE and appropriately determining Student's eligibility under Section 504.

E. Independent Educational Evaluation

Parents have a conditional right to an independent educational evaluation at public expense if the parent disagrees with the District's evaluation. 34 CFR 300.502(b). Parents also have the right to have the IEE considered by the District in any decision made with respect to providing FAPE for that student. 34 CFR 300.502(c)(1) Consideration, however, is contingent on the IEE meeting District's criteria. This section of the statute imposes an affirmative obligation on the District to consider the results of an IEE in any decision regarding the provision of FAPE to the student, if that evaluation meets District criteria. The requirement, however, does not mean that the District is compelled to consider the IEE in its decision regarding the provision of FAPE, if it does not meet District criteria. If the District believes that the IEE does not meet

agency criteria, it would be appropriate for the District to explain to the parent why .71 Fed. Reg. 46,690 (2006)

Here the District made much of the fact that the independent evaluator made reference to “Resource Room” services which are no longer the model for delivering special education in the District. [S-11; N.T. p.70] On the other hand, the District agreed with the independent evaluator’s determination that Student does not appear to be a child in need of special education services through an IEP at this time, and supported the District implementation of the RTI model.

F. Evaluations

In conducting the evaluation, the school district must 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 not only whether the child is a child with a disability, but also whether the student is able to be involved in and progress in the general education curriculum. 34 CFR §300.304(b). The evaluation must also be sufficiently comprehensive to identify all of the child’s special education and related services needs. 34 CFR §300.304(b)(c)(6). Furthermore, the student must be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 CFR 300.304(c)(4). Assessment tools and strategies to provide relevant information that directly assists persons in determining the educational needs of the student must be provided. 34 CFR 300.304(c)(7). No single measure or assessment may be used as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational

program for the child. 34 CFR 300.304(c)(2). Only technically sound instruments that assess the relative contribution of cognitive and behavioral factors in addition to physical or developmental factors may be used. 34 CFR 300.304(b)(3). Assessments and other evaluation materials must be used for purposes for which they are valid and reliable; must be administered by trained and knowledgeable personnel; and must be administered in accordance with any instructions provided by the producer. 34 CFR 300.304(c)(1)(iii)-(v). Assessments and other evaluation materials must include those tailored to address specific areas of educational need and not merely those that are designed to produce a single general intelligence quotient. 34 CFR 300.304(c)(2).

There are both federal and Pennsylvania substantive legal standards governing evaluations and the determination of IDEA eligibility which set forth the criteria the School District is required to meet to in order to conduct an appropriate evaluation and determine whether Student is eligible for special education. *See*, 20 U.S.C. §1414(b), (c); 34 C.F.R. §§300.12, 500(b)(2), 532– 536; 22 Pa. Code §14.123. Federal and state special education rules also define the various conditions which support the determination that a student is a “child with a disability” and add an essential additional eligibility criterion, *i.e.*, that “by reason of” such identified condition, the student needs specially designed instruction. 20 U.S.C. §§1414(3)(A)(i), (ii), 30(A); 34 C.F.R. §300.7(a), (c); 22 Pa. Code §§14.101, 102(a)(2)(ii).

G. Appropriateness/Accuracy of the District’s Evaluation and Eligibility Determination

The issue of Student’s IDEIA eligibility with respect to the whether Student is a “child with a disability” centers on whether Student meets the objective criteria for one or more of the disability categories as defined in the IDEIA 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). *In Re: The Educational Assignment of Vincent D., Special Education Opinion No. 1413 (Sep. 23, 2003); In Re: The Educational Assignment of Michael M., Special Education Opinion No. 1019 (June, 2000)*. Here, the District determined that Student was not eligible for special education services under the IDEIA as a child with a specific learning disability because Student was on grade level in both reading and math and any attentional issues Student displayed were not significant enough to create a barrier to accessing Student’s education but were instead more of a cognitive style. [N.T. 143-144;]

A “specific learning disability” is defined as,

...a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia.

20 U.S.C. §1401(30); 34 C.F.R. §300.7(c)(10), 22 Pa. Code §§14.102(a)(2)(ii). Additional criteria relating to evaluations and determining whether a specific learning disability exists found in federal and state regulations specify that a “team of qualified professionals” and the parents must determine “whether a child suspected of having a specific learning disability is a child with a disability” and further specify that the team must include a regular classroom teacher who teaches the child and a school psychologist. 34 C.F.R. §300.540; 22 Pa. Code §14.124(a). The regulations further provide that

- (a) A team may determine that a child has a specific learning disability if–
 - (1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child’s age and ability levels and

(2) The team finds that the child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas: (i) oral expression. (ii) Listening comprehension. (iii) Written expression. (iv) Basic reading skill. (v) Reading Comprehension. (vi) Mathematics calculation. (vii) Mathematics reasoning.

34 C.F.R. §300.541(a).

However, the most recent amendments to the IDEA statute provide that

[W]hen determining whether a child has a specific learning disability as defined in §602 a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation or mathematical reasoning.

In determining whether a child has a specific learning disability a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures described in paragraphs (2) and (3).

20 U.S.C. §1414(b)(6)(A), (B). Consequently, as of July 1, 2005, determining whether a “severe” discrepancy between achievement and intellectual ability exists is no longer mandatory and response to intervention may be considered in evaluating a child for a specific learning disability.

More specifically, when determining whether a child has a specific learning disability, the

District:

- (1) must not require the use of the severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability as defined in section 300.8(c)(10);
- (2) must permit the use of the process based on the child’s response to scientific, research based intervention;
- (3) may permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability.

Here the testimony and evidence shows that not only is the Student performing at grade level in reading and math, but also the District has developed and is implementing a RTI model³ where Student was receiving “the core plus more” having been assessed at the benchmark level⁴ and placed in Tier 1 receiving reading interventions in comprehension. [N.T. pp. 91-92; 93-96, 98-100, 102] A review of the record also supports the District’s contention that Student responded well to the RTI and made academic progress. [N.T. pp. 113; 115-117; 124-126; S-2]

The District witnesses also testified that Student’s below basic score on the PSSA test was an aberration and could be explained by the fact that this was the first time Student and the other third graders had ever taken the PSSA’s and they were all a little anxious. [N.T. pp. 103; 117-118;]

Finally, the independent neuro-psychologist found that Student does not need special education services through an IEP at this time and instead endorsed the District’s efforts to provide Student with educational support through the RTI program. [S-11]

Therefore, for all of the above reasons, this hearing officer finds that Student does not qualify for special education services at this time.

H. Eligibility Under Section 504

Section 504 states: An otherwise qualified individual with a disability in the United States, . . . 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@ 29 U.S.C.S. § 794. The substantive requirements

³ The District’s RTI is based on school wide assessment of students to determine whether they are at benchmark, in the middle or are at risk and require intensive interventions. Then, the IST and teachers reviewed progress after 6 weeks and determined whether the student was making progress or required additional interventions.

⁴ Tier II is the strategic level where students receive additional interventions; and Tier III is the intensive level where students are pulled out of class to receive intensive programs in reading like Wilson and SRA.

of the Rehabilitation Act in the education context are equivalent to the requirements set forth in the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. See *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citing *W.B. v. Matula*, 67 F.3d 484, 492-93 (3d Cir. 1995)). The regulations implementing the Rehabilitation Act provide that districts "shall provide a free appropriate public education to each qualified handicapped person who is in the district's jurisdiction." 34 C.F.R. § 104.33(a); see also *W.B.*, 67 F.3d at 493.

Under Section 504, an individual is disabled if he/she has, or has a record of having, or is regarded as having, a physical or mental impairment that significantly interferes with one of life's major activities. 34 CFR 104.3(j) Major life activities are "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, **learning** and working." 34 CFR 104.3(j)(2)(ii) Therefore, for the purposes of school program eligibility, a student with a disability is "otherwise qualified" if he/she is of school age. 34 CFR 104.3(1)(2)

Students who are eligible for services under IDEIA will always meet the definition of eligibility for Section 504, but the converse is not true. The non-categorical criteria for determining eligibility under Section 504 are generally broader, or more inclusive, than the categories of eligibility under the IDEIA, As a result, there are students eligible for educational program adaptations and services under Section 504 who are ineligible under the IDEIA.

To establish a violation of § 504, Student must demonstrate that (1) he/she is disabled as defined by the Act; ⁵ (2) he/she is "otherwise qualified" to participate in school activities; (3) the school or the Board receives federal financial assistance; and (4) he/she was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *Ridgewood Board of Education v. N.E.* 172 F.3d 238, 253 (3d Cir. 1999); *J.F. v. School District of Philadelphia*, 2000 U.S. Dist. LEXIS 4434, No. 98-1793, (E.D.Pa. 2000); *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1380 (3d Cir. 1991); 34 C.F.R. § 104.4(a). In addition, to be liable, the District must have known or have been reasonably expected to know of Student's disability. *Nathanson*, 926 F.2d at 1381. However, plaintiffs "need not establish that there has been an intent to discriminate in order to prevail under § 504." *Id.* at 1384. *See*,

⁵ A "Handicapped person" under Section 504 of the Rehabilitation Act is defined as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 34 C.F.R. §104.3(j).

Alexander v. Choate, 469 U.S. 287, 297, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985); *Ridgewood*, 172 F.3d at 253; *Matula*.

A review of the testimony and documentary evidence in this matter clearly indicates that Student displayed ADHD behaviors which frequently affected Student's ability to learn and Student's academic performance, such that interventions and accommodations used for children with ADHD should be considered. [S-11]

As a resident of the District, Student was "otherwise qualified" to participate in school activities at the District. The issue then, is whether Student was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. Student has argued that the District did not provide Student with an appropriate education because the District should have provided Student with a § 504 Service Agreement since the District's ER found Student's scores on the Conners to be clinically significant for attentional issues, the teachers noted Student's distractibility and need for frequent redirection and the independent evaluator recommended that Student be provided with a 504 Plan in order to address attention issues and therefore, not deny Student access to the curriculum and a FAPE.

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 non-handicapped persons are met." 34 C.F.R. § 104.33(b)(1). There are no bright line rules to determine when a school district has provided an appropriate education as required by § 504. *Eric H. v. Methacton Sch. Dist.*, 265 F. Supp. 2d 513 (E.D.PA 2003).

What is known is that §504 requires a recipient of federal funds to make "reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped" person. 34 C.F.R. §104.12 (a). Although the Third Circuit has not specifically addressed what is a "reasonable accommodation" in relation to the Rehabilitation Act's requirement of an "appropriate" education, Courts have concluded that a reasonable accommodation analysis comports with the Third Circuit's explanation that an "appropriate" education must "provide 'significant learning' and confer 'meaningful benefit,'" *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna*

Intermediate Unit 16, 853 F.2d 171, 182, 184 (3d Cir. 1988), but that it "need not maximize the potential of a disabled student." *Ridgewood, 172 F.3d at 247; Molly L v. Lower Merion School District, 194 F. Supp. 2d 422 (E.D.PA 2002)*.

Both the District's school psychologist and the independent psychologist recommended a number of accommodations which would provide Student with access to the curriculum. In fact, the independent neuro-psychologist recommended that Student be provided with a 504 Plan as Student's problems with attentional processing and inhibition are likely affecting Student's ability to learn and Student's academic progress, such that interventions and accommodations should be used for children with ADHD should be considered. [S-11] Instead, the District refused to find Student eligible for accommodations under Section 504 because the Parent had not obtained a medical diagnosis. The Office of Civil Rights (hereinafter "OCR") has made it clear that a medical diagnosis, while required for medical treatment, including medication, is neither necessary nor controlling for determining whether a student has ADHD for purposes of Section 504 eligibility. Rather as a matter of consideration, districts should give any available medical diagnoses due weight, but as a matter of determination, they should, after obtaining parental consent, have trained personnel compile the requisite data via professionally accepted instruments. The District should have provided Student with a § 504 Service Agreement based on the reasons listed above.

VI. COMPENSATORY EDUCATION

Student has a history of ADHD behaviors including, but not limited to, distractibility; frequent need for redirection; failure to follow through on tasks. The School District has been aware of Student's ADHD behaviors since the initial ER in May of 2008. In February 2009, the District funded an IEE which confirmed that Student required a 504 Service Plan in order to address attentional issues which were likely affecting Student's ability to access the curriculum and make academic progress. Furthermore, the record is replete with evidence that the District's

school psychologist, the instructional support teacher and the regular education teacher did not fully understand the eligibility requirements under Section 504.

Thus, for approximately eight months, from May 2008 through June 15th 2008 and then continuing from September 2008 through April 1, 2009, the Student did not have a 504 Service Plan which typically would constitute a denial of FAPE in violation of Section 504.

Compensatory education may be awarded for the period of time that a school district deprives an eligible student of FAPE. Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999) In this case, I will award one hour of compensatory education for each school day which the Student was in attendance between May 9, 2008 and the last day of the 2007-2008 school year and from the start of the 2008-2009 school year up to April 1, 2009.

VII. SUMMARY

Based upon the evidence of record and the applicable law: the District's evaluation and eligibility determination under the IDEIA was appropriate and its conclusion is supported by both the record and the legal standards applicable to the issue of eligibility; the District did not properly consider the IEE; nor did it appropriately apply the eligibility criteria for eligibility under Section 504; and therefore, based upon the both the record and the legal standards applicable to the issue of eligibility, the Student meets the eligibility criteria for accommodations under Section 504 and the District must formulate and develop a Section 504 Service Plan.

VIII. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Bristol Township School District appropriately evaluated Student and correctly determined that Student is not a "child with a disability," i.e., a student who exhibits the

characteristics of a learning or other disability and, “by reason thereof” needs special education.

It is **FURTHER ORDERED** that the Bristol Township School District develop a 504 Service Plan for Student , and provide Student with compensatory education: one hour for each school day Student was in attendance between May 9, 2008 and the last day of the 2007-2008 school year and from the start of the 2008-2009 school year up to April 1, 2009.

The form and utilization of services shall be decided by the Parent and may include only appropriate developmental, remedial or enriching instruction or therapy. The services may be used after school, on weekends, or during the summer. The services may be used hourly or in blocks of hours. The cost to the District of providing the awarded hours of compensatory education shall not exceed the rate the District would have paid for any like contracted services. The District has the right to challenge the cost of the services.

Dated: August 11, 2009

Deborah G. DeLauro
Deborah G. DeLauro, Hearing Officer