PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Student: John Doe

Date of Birth: 07/31/1990

Hearing Dates: April 23, 2009, June 30, 2009, August 25, 2009, September 1, 2009, September 15, 2009, December 7, 2009, and March 5, 2010

ODR File No.: 09469/0809LS
09645/0809KE
(Consolidated Decision)

CLOSED HEARING

School District: Centennial School District

Parties:

Mr. & Mrs. Doe

Centennial School District
433 Centennial Road
Warminster PA, 18974

Representatives:

Parent Attorney: Ilene Young, Esquire
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School District Attorney: Anne Hendricks, Esquire
Nicole Thompson, Esquire
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Date Record Closed: May 5, 2010

Decision Date: May 19, 2010

Hearing Officer: Gloria M. Satriale, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns the provision of a Free Appropriate Public Education (hereinafter "FAPE") for John Doe (hereinafter referred to as "Student"), a 19 year old student, who resides with his parents in the Centennial School District (hereinafter referred to as "District") and who has suffered from multiple medical conditions since kindergarten which have hindered his ability to attend school and fully participate in the regular educational process. The Parents contend that the District failed to fulfill its obligations under Child Find since, despite the presence of his medical challenges since the inception of his educational career and the chronic nature of the difficulties as the Student progressed through the grades, the Student was neither identified as a student eligible for special education services under the Individuals with Disabilities Education Act (hereinafter referred to as "IDEA") or as a student in need of protections under Section 504 of the Rehabilitation Act (hereinafter referred to as "Section 504"). The parents further asserted that, since the District failed to identify the student as one entitled to protections under IDEA or Section 504, that he was deprived of a FAPE, thereby entitling him to compensatory education. The Parents also asserted the right to an Independent Educational Evaluation (hereinafter referred to as an "IEE"). The District asserts that Section 504 accommodations put in to place immediately following the Districts' suspicions that accommodations may be necessary; however, no degree of accommodation could overcome the student's chronic failure to attend school and failure to make up the work missed as a result of his absences. Therefore, it is the District's position that the Student's inability to fully participate in regular public education is not a result of the Student's debilitating illness or the District's failure to adequately accommodate for his illness, but as a result of the Student's lack of effort and family's failure to fully avail themselves of District supports, attend school, and complete work as the Student was able.

Although this case involves a complex fact pattern regarding time frame (periods of homebound instruction, dual enrollment, attendance within the district and within alternative placement) issues regarding proper and improper accreditation of academic credit toward graduation requirements; and disputes within the record regarding disclosure by the parents and recognition by the District of symptomlogy of this Students medical condition, the core question is basic: Did the District have reason to suspect the Student has a disability? Did the District have reason to suspect that special education services may be necessary to address the disability? *W.B. vs Matula 67 F 3rd 484 (3rd Cir.1995)*. The question is not, as the District argues, that the Student is not in need of specially designed instruction and

hence ineligible as a student with a disability[1]. Eligibility is precisely the question one must answer. This question can only be answered by a thoroughly comprehensive evaluation in compliance with the law.

Due process was filed with the Office for Dispute Resolution by the District on November 19, 2008, in support of its denial of Parent's request for an Independent Education Evaluation. Thereafter, the District filed an Answer to its own Compliant, including a motion to dismiss, which was denied by Hearing Officer DeLauro. The Parents' Complaint was filed on January 23, 2009, at ODR#9645/08-09 KE. The two matters were thereafter consolidated. The claims sought within Parent's complaint were limited the period of time beginning January 23, 2007 through January 23, 2009 by Hearing Officer DeLauro[2]. The parties waived a resolution meeting.

A Due Process hearing ensued over eight (8) sessions on April 23, 2009, June 30, 2009, August 25, 2009, September 1, 2009, September 15, 2009, December 2, 2009, and December 7, 2009 before Hearing Officer Deborah DeLauro as well as on March 5, 2010 before Hearing Officer Gloria Satriale.

a. Exhibits were submitted and accepted on behalf of the Parent as follows:

P-2, P-4, P-5, P-6, P-7, P-8, P-9, P-10, P-11, P-13, P-14, P-15, P-16, P-17,
P-18, P-19, P-20, P-21, P-22, P-23, P-24, P-26, P-27, P-28, P-29, P-30, P-31,
P-32, P-33, P-33A, P-33B, P-34, P-40, P-40A, P-40B, P-40C, P-41, P-45, P-48

b. Exhibits were submitted and accepted on behalf of the District as follows:

SD-5, SD-6, SD-7, SD-8, SD-9, SD- 11, SD-12, SD-13, SD-14, SD-16, SD-17, SD-18, SD-19, SD-20, SD-21,SD-22, SD-23, SD-26, SD-27, SD-30, SD-37,

[1] As stated in 34 CFR §300.8, for a student to be a child with a disability, the child must need special education. Special education is defined by 34 CFR §300.39(a) as follows: (a) General. (1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including-- (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (ii) Instruction in physical education. (2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section-- (i) speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards; (ii) Travel training; and (iii) Vocational education. 34 CFR §300.39(a)(1).

34 CFR §300.39(a)(3) defines specially designed instruction. Specially designed instruction is defined as follows: (3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction-- (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 CFR §300.39(a)(3).

[2] Parent's exception to the grant of the District's Motion to Dismiss those portions of the Parent's claims extending beyond two years from the time the complaint was lodged is noted.

SD-38, SD-40, SD-41, SD-42, SD-43, SD-44, SD-47, SD-48, SD-57, SD-58, SD-59, SD-60, SD-62, SD-66, SD-67

For the reasons that follow, Parents' claims for an Independent Educational Evaluation at Public Expense and for compensatory education for the period of time beginning January 23, 2007 through January 23, 2009 are GRANTED.

ISSUES

1. Whether the School District violated its Child Find obligations in failing to evaluate the Student to determine whether he was a student with a disability in need of protections under IDEA or Section 504.
2. Whether the Parents are entitled to an IEE at School District expense.
3. Whether the Student is eligible for Special Education services under IDEA
4. Whether the 504 Service Agreement offered by the School District was appropriate.
5. Whether compensatory education should be awarded to the Student for the time period between January 23, 2007, and January 23, 2009[3].

FINDINGS OF FACT

1. The student was born July 31, 1990 and has, at all relevant times hereto been a school aged resident in the Centennial School District (hereinafter referred to as "District").
2. Although the Student has resided within the District, he has not consistently attended school within the District. [NT 58, 91-92; SD 43]
3. The Student was a student in the District between January 23, 2007 and January 23, 2009.
4. The Student was in the tenth (10th) grade during the 2006-2007 school year. [NT 79-80].
5. The Student was in the eleventh (11th) grade during the 2007-2008 school year. [NT 79-80]

[3] Pursuant to the ruling contained in Hearing Officer exhibit #2 the time period under which relieve could be sought was 2 years prior to filing the complaint.

6. The Student was in the twelfth (12th) grade during the 2008-2009 school year. [NT 79-80].
7. The Student has not attended school since December 22, 2008. [SD- 43 pp. 1-2, NT 511, 751, 882, 1394].
8. The Student received homebound instruction during the following time periods between January 27, 2007, and January 27, 2009:
    a. March 6, 2007, through June 15, 2007;
    b. September 24, 2007, through February 28, 2008. [SD- 43].
9. The Student registered at the School District for the 2006-2007 school year. [NT 1058].
10. During the ninth (9th) grade, the Student was enrolled at parochial high school (hereinafter referred to as "parochial school.").
11. The Student has been diagnosed, since prior to his kindergarten year, with multiple chronic medical difficulties, "REDACTED" [NT 529-542; 552-558; 568; 570; 578; P-33b pp 10, 12, 13]. He is also diagnosed with REDACTED disease and chronic sinus infections. [P -7, P-10, P-33b pp. 10, 12, 13].
12. Since the inception of his educational career, the Student's medical difficulties have interfered with his ability to be active in the morning and his ability to participate in regular education. [NT 557].
13. The symptoms and manifestations of the Student's disability are, and have always been, public, obvious and apparent. [NT 48, 49, 54-55; 840-844].
14. The Student has been under the care of Dr. Joe, a licensed physician with a specialty in pediatrics since birth. Dr. Joe recommended several periods of homebound instruction for the student. [P-7, P-8, P-10, P-11, P-13, SD-47, SD-48].
15. Although the District had the responsibility for Child Find for the Student while he was dually enrolled during the 2005-2006 and 2006-2007 school years, it did not initiate an evaluation during the years the Student was dully enrolled in the District. [NT 121:11,130]
16. District policy states that a parent does not have to specifically ask for an evaluation for one to be offered by the District. [NT 226].
17. If an oral request for an evaluation comes from a parent, then the District will ask the parent to convert the request to writing so that the written request can proceed through the proper channels. [NT 224, 690, 1065].
18. In 10th grade, the Student enrolled full time in the District with only one (1) History credit and one (1) Algebra credit from the period of dual enrollment. Credit obtained during the periods of homebound instruction was not given by the Parochial School.

19. In advance of the 2006-2007 school year the Student's mother contacted the school to discuss the Student's history and needs. [NT 345; 356-360]. Additionally, the Student had ongoing discussions with District personnel regarding his illness, the effects of his illness, and his resultant needs. [NT 841-842].
20. The Student began receiving homebound instruction on March 5, 2007. [NT 374, 1075, SD-43].
21. Almost immediately following the start of the 2006-2007 school year, on September 19, 2006, the District called a meeting to address the Students attendance because he had already missed six (6) days of the 2006-2007 school year. [SD-43, SD-62 pp 668, 671, 672, 1066, 1067].
22. At the meeting on September 19, 2006 it was decided that the Student would be allowed to miss the first two (2) periods of school and come in at the start of third period. [SD-17, SD-59, NT 674, 1068]. Additionally the plan also included allowing the Student's parents to pick up make up work for him if he was out of school, and for the Student to have access to the social worker's office when ill during school hours. The social worker was also tasked with informing other teachers about the Student's illness. [NT 364-366]. The access to the social worker was discontinued as of December. Notwithstanding a "plan" being put into place, this meeting was not referenced as a 504 meeting.
23. No provision was made for receipt of missed instructional hours, or a teacher to deliver the missed hours of instruction to the Student. [NT 354].
24. Absences were excessive in January, February and March. Work missed was not completed by the Student. The Student's mother had a conference with the teachers to discuss the Student's difficulties. [NT 366-367].
25. At the meeting on September 19, 2006, the Student's mother did not request an evaluation of any kind for the Student. [NT 689, 1072].
26. During the 2006-2007 school year, the Parents did not make any written requests for an evaluation of the Student to be conducted. [NT 691].
27. Only one credit was received by the Student for the entire 2006-2007 school year. [SD-44 p.6, NT 917].
28. An attempt to attend summer programming to receive additional instruction and credit also failed. [NT 358].

29. At the request of the District, the Parent secured several evaluations focused to rule out a psychological basis for the Student's illness. The evaluation established that the basis of the illness were medical and not psychological. [SD-49 p.19, NT 410-411].

30. Dorothy Henry Satellite School (hereinafter referred to as "Dot Henry") is a part of William Tennent High School. [NT 697, 835, 1337, 1338, 1419].
31. Students must apply to attend Dot Henry. [NT 701, 1338].
32. The Student and his mother completed the application to Dorothy Henry Alternative School. [SD-13, NT 600, 707, 888].
33. The Student participated in the two-day visit at Dot Henry that is a part of the school's application process. [NT 1354-1355].
34. The Student's mother admits that when Dot Henry was first mentioned to her by John Fafara, she was told that Dot Henry was a smaller school and the District felt as though the smaller learning environment would be an advantage to the Student. [NT 414].
35. Courses offered at Dot Henry were not the same as the Student had been receiving on homebound instruction. No transition coordination or transfer of credit earned to date of enrollment in Dot Henry was evident. [NT 414-416; P-13].
36. The Student was unable to regularly attend Dot Henry and was unable to teach himself the material he missed due to illness. [NT 862-863].
37. Per District policy, students are not allowed to make up the work that they have missed when their absence is unexcused. [NT 1366].
38. If a student has an unexcused absence, per District policy, the student receives an automatic zero on the work the student has missed. [NT 1366].
39. When the Student was attending Dot Henry, but out sick he did not complete that work that his mother picked up from school for him. [NT 1367].
40. On May 14, 2008, none of the teachers at Dot Henry had work from the Student to grade for the fourth quarter. [NT 1373].
41. On May 15, 2008 a request from Dr. Joe for homebound instruction was denied. [P-8].
42. Dr. Lowe Bow, a psychologist retained on behalf of the Parents, had sent the District a letter stating that he believed the Student was entitled to a 504 Service Agreement and an IEP. [P-14].
43. A meeting to conduct a 504 evaluation of the Student was held on June 11, 2008. [NT 590, 710, 1150, 1299].

44. At the 504 meeting there was a discussion as to whether the Student should have a 504 plan or an IEP. [NT 591, 1150, 1316, 1378, 1469, 1470].

45. At the 504 meeting, the 504 team considered all of the medical notes provided to the District by the Student's doctor. [NT 1486]. The District did not conduct its own evaluation.
46. A 504 Service Agreement was offered by the District. [SD-7, NT 1151].
47. The 504 Service Agreement went into effect at the beginning of the 2008-2009 school year because the 504 meeting took place on the last day of the 2007-2008 school year. [SD-43, NT 1162].
48. The 504 Service Agreement provided:
    a. The Student will receive a schedule of work for his classes. A calendar of assignments will be given to the Student. If the Student is unable to get his assignments because he is ill; his parents will pick up the schedule of work.
    b. The Student and his Parents will meet with Dot Henry School Personnel every 2 weeks for the first 2 months of school.
    c. A Second set of books will be provided for home use.
    d. Dot Henry staff will E-mail the family every week regarding academic progress. (On Friday).
    e. If the Student is absent, he can turn in assigned work the following school day.
    f. If the Student is absent he must E-mail what assignments he did while he was out to the appropriate teacher (also E-mail Leigh Newbuck).
    g. If the Student is late to school, he will use his PE time to do academic work and this time period will count as community service time toward his probation.
49. Final exams are typically given the last three (3) days of the school year. [NT 1169-1170].
50. June 11, 2008, was the last day of school for the 2007-2008 school year. [NT 1387-1388].
51. The Student was absent the last three (3) days of the 2007-2008 school year. [NT 1170].
52. In the District a student cannot pass a class if he does not take his final exam. [NT 1169, 1389].
53. The Student did not take his Geometry final exam at the end of the 2007-2008 school year. [NT 1388].
54. On October 22, 2008, the parents requested that the District provide them with an IEE of the Student. [P-34, NT 603, 1479].

DISCUSSION AND CONCLUSION OF LAW

The Right to a Free and Appropriate Public Education and Burden of Proof

The Individuals with Disabilities Education Act ("IDEA") requires that a state receiving federal education funding provide a "Free Appropriate Public Education" ("FAPE") to disabled children. 20 U.S.C. § 1412(a)(1). In Pennsylvania, the Commonwealth has delegated the responsibility for the provision of a FAPE to its local school districts. School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP "must be 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.' " *Shore Reg'l High Sch. Bd. of Ed. v. P.S.,* 381 F.3d 194, 198 (3d Cir.2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16,* 853 F.2d 171, 182-85 (3d Cir.1988). In assessing whether an individualized program of instruction is "reasonably calculated" to enable the student to receive meaningful benefit, the progress noted must be more than a trivial or *de minimis. Board of Education v. Rowley, 458 U. S. 176, 73 L.ed.2d.690, 102 S.Ct.3034 (182); Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999)*

A parent who believes that a school has failed to provide a FAPE may request a hearing, commonly known as a due process hearing, to seek relief from the school district for its failure to provide a FAPE. 34 C.F.R. § 300.507. In Pennsylvania, the hearing is conducted by a Hearing Officer. *Carlisle Area Sch. v. Scott P.,* 62 F.3d 520, 527 (3d Cir.1995).

As the moving party, the student bears the burden of proof in this proceeding. The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education provision of a FAPE is upon the party seeking relief, whether that party is the disabled child or the school district. *Schaffer v.Weast_U.S, 126 S. Ct.528, 163L. Ed.2d 387 (2005). In Re J.L and the Ambridge Area School District, Special Education Opinion No. 1763 (2006)*. Because a student's parents seek relief in this administrative hearing, they bear the burden of proof in this matter, i.e., they must ensure that the evidence in the record proves each of the elements of their case. The United States Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., student's parents) must lose because the party seeking relief bears the burden of persuasion. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005); *L.E. v Ramsey Board of Education, 435 F. 2d 384 (3d Cir.2006).* Of course, where the evidence is not in equipoise, one party has produced more

persuasive evidence than the other party.

Has the District Violated its Child Find Obligation?

In connection with the responsibility to provide a FAPE the IDEA places duty on school districts to identify, locate and evaluate all children with disabilities who reside within their boundaries. 20USC Section 1412(a)(3), 34C.F.R 300.125. This "Child Find" duty is triggered when the school District has reason to suspect a child has a disability. *W.B. vs Mantuala 67 T. 3d 501 (3rd cir 1995).* This duty is an affirmative duty and is not dependent upon any indication by the parent of suspicion of a disability or of a parental request to evaluate. A Parent request is not a prerequisite to the rise of District obligations to identify under Child Find, nor are District obligations obviated, limited or mitigated by the lack of parent initiations, suspicions or requests. *Pleasant Valley Sch. Dist 28 IDEA 1295 (SEA Iowa 1998).*

Notwithstanding the lack of a requirement for parent initiation the District's entire argument in support of its assertion that it complied with its Child Find mandate seeks to shift the burden to the parent. The District asserts:

> *There is no doubt that the School District complied with both the federal and state regulations regarding child find in this matter. First, the School District engaged in public awareness activities to inform the public of its special education programs. The School District publishes information regarding special education and special education services on its website. Since its creation in 2000, the Centennial School District website has contained information as to what steps a parent should take if the parent believes his child is in need of special services. (School District Exhibit 42, N.T. pp. 218-219). Second, since at least the 1994-1995 school year, the School District calendar has provided parents with information as to what steps they should take if they believe their child is in need of special services. (School District Exhibit 64, N.T. pp. 217, 318, 319-320, 321, 323). The School District's calendar is distributed on the first day of school for the students to take home. (N.T. p. 218, 318). Finally, since at least September 25, 1995, the School District has published either in the Intelligencer/Record or the Courier Times, two newspapers local to communities surrounding the School District, a notice of special education*

services and how the confidentially of the student's information will be protected. (School District Exhibit 40, N.T. pp. 189, 199-214).

Not only does the School District inform parents of the special education services offered by the School District through notices in the newspaper, notice in the School District calendar, and notice on its website, but the School District also publishes a pamphlet that discusses special education and Section 504. (N.T. p. 189). The pamphlet contains information about special education in the School District and the process that a parent should take if they believe that their child is in need of special education. (N.T. p. 234). Between 1996 and January 2007, this pamphlet was given to parents when they registered their children in the School District. (N.T. p. 234).

Finally, in addition to all of the material that is provided to the parents in the School District, on a continuous basis, the School District holds professional development sessions for teachers and other staff members regarding the special education and Section 504 support and services that are offered by the School District. (N.T. p. 190). Additionally, all of the school principals are knowledgeable regarding the School District's policies pertaining to special education and share their knowledge on a regular basis with their staffs. (N.T. p. 190). The School District also has in place teams at every level of the child's education, to ensure that if a student is having problems, his needs are being identified or addressed in same manner by all of the student's teachers. (N.T. pp. 197-198).

The teams in place at the elementary, middle, and high school levels demonstrate that the School District is also in compliance with the federal regulation that governs Child Find because the teams ensure that if a child is suspected of having a disability, the child is referred for an evaluation by the Department of Pupil Services. (N.T. pp. 197-198). As Mrs. Klyman testified, the teams are "a central repository to make sure that the children's needs are identified." (N.T. p. 198).

Clearly with so many safeguards in place someone at the District should have raised an inquiring brow of concern and curiosity over a student whose absence from school, under any "Normal" circumstances would rise to the level of actionable truancy. Further consistent failure of a student has always constituted a "red flag" regarding a student's ability to meaningfully access education. The District's reliance on this student's "good" performance during periods of consistent attendance and "feeling well" to obviate the need to evaluate in the face of excessive absence and consistent failures is misplaced. In fact, the disparate demonstration of performance should have led the District to evaluate in order to rule out the possibility that something more was remiss. Further the foundational principal of Child Find and the trigger of responsibility being more suspicion lead to error on the safe side, act conservatively and when in doubt to check it out.

There is no doubt that the District had ample reason to suspect a problem and evaluate. Thus the District has violated its obligations under the child find provisions of the IDEA.

Is the Parent Entitled to an IEE at District Expense

Under both Section 504 and IDEA, the School District is required to fully evaluate any child "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." where the child is suspected to be in need of special education 34 CFR Sec. 300.532 If the Parent's disagree with an evaluation, they have the right to request an independent educational evaluation at public expense. 34 C.F.R. 300.503. The District is obligated to grant that request or request due process. Id. The District Asserts that the Parent is not entitled to an IEE as the District has not evaluated and, hence, there is no District evaluation to disagree with. While it is true that pursuant to 34 CFR §300.502(b)(i), a parent is entitled to reimbursement of an IEE at public expense if they disagree with the District evaluation report and the District evaluation report is in some way inappropriate. *Holmes v. Millcreek Tp. School Dist., 205 F.3d 583 (3rd Circ. 2000).* There are also decisions supporting the reimbursement of an IEE on equitable grounds even if there was not a previous District evaluation conducted with which the parent disagreed. The regulation is broadly applied to permit reimbursement not only when the parents expressly disagree with the evaluation but also when "the parents[] fail[] to express disagreement with the District's

evaluations prior to obtaining their own" evaluation because unless the regulation is so applied "the regulation [would be] pointless because the object of parents' obtaining their own evaluation is to determine whether grounds exist to challenge the District's. *Warren G. ex rel. Tom G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 87 (3d Cir. 1999). Consequently, reimbursement, or in this case, allowing an IEE to be performed at District expense, may be warranted where a parent does not take a position with respect to the district's evaluation or otherwise "fails to express disagreement." *Lauren W v. Radnor School District* 480 F.3d 259 (3rd Cir 2007), PA Spec. Educ. Op. No. 899 (1999); PA Spec. Educ. Op. No. 1111 (2001); PA Spec. Educ. Op. No. 1140(2001); PA Spec. Educ. Op. No. 1573 (2005); PA Spec. Educ. Op. No. 1733 (2006).

Alternatively, the District argues that no entitlement to an IEE lies in that the District has not yet been given the opportunity to perform an evaluation. I disagree. In connection with the District's assessment for the need for a 504 Service Plan or an IEP[4], an evaluation was conducted and, by the District's own choice was limited to medical records requested from and provided by the Parents. [NT 1144; 1149; 1486; SD- 9, SD-18; P-24].

The grant of an IEE at public expense is warranted on either ground: 1) that an evaluation was not conducted all; or 2) a limited "evaluation" consisting of a review of existing records only was conducted and was inadequate.

The starting point for the determination of the appropriateness of an offer of a FAPE is the initial evaluation from which the needs of a student are identified. In order for an evaluation to be determined to be appropriate, it must meet the requirements of 34 CFR § 300.532. More specifically, the Evaluation Report (ER) should: 1) utilize a variety of assessment tools and strategies to gather relevant functional and developmental information about the student, including information provided by the parents; 2) assess the student in all areas related to the suspected disability; 3) be sufficiently comprehensive to identify all of the student's special education and related services needs; and 4) utilize technically sound instruments to assess the relative contribution of cognitive, behavioral, physical and developmental factors. *See In Re the Educational Assignment of L.-M. B., Special Educ. Op. No. 1795 (2007)*. It is clear that a mere records review performed by the District does not comply with 34 CFR § 300.532.

Is the Student is Eligible for Special Education Services under IDEA

Indeed without an appropriate evaluation ever having been conducted and special education services never having been previously in place, how can an analysis to determine whether the student is

[4] At the 504 meeting there was a discussion as to whether the Student should have a 504 plan or an IEP. [NT 591, 1150; 1316;1378; 1469; 1470]

currently eligible for special education services under IDEA be undertaken? The District argues that, on precisely this basis it cannot. However the recent extrapolation of the basis for finding the ability to reimburse for a private placement without special education services ever having previously in place under *Forest Grove Sch.v.T.A.,52 IDELR 151 (2009)* applies here to warrant a finding of eligibility. In that case, the Court addressed the issue of whether the IDEA provisions on reimbursement for unilateral private placements prohibit reimbursement for private school costs if a child had not previously received special education services from the local educational agency. The IDEA provision states that "[i]f the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents of the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." 20 USC Section1412 (a)(10)(C)(ii) (emphasis supplied.) Some courts read the provision literally, and held that the parents were barred from seeking reimbursement for unilateral placements unless the child had previously received special education services from the public education services from the public school in question. See, e.g. Greenland Sch. Dist. V Amy N., 358 F.d 150, 40 IDELR 203 (1st Cir. 2004).

Factual background – In *Forest Grove,* a high school student began having problems with attention and school work and was seen by a school psychologist, who interviewed him, examined school records, and administered cognitive ability testing for either learning disabilities or other health impairments. The problems, however worsened during the student's junior year, and he was formally diagnosed privately, with ADHD and a number of disabilities related to learning and memory. After a private specialist recommended a structured residential learning environment, the parents placed the student in a private academy focusing on educating students with special needs. Four days after enrolling him in the private school, the parents hired a lawyer to advise them and provide notice to the school district of the private placement. After the parents filed a request for due process hearing, the school multidisciplinary team met and determined that the student was not IDEA-eligible because his ADHD did not have a sufficiently significant adverse impact on his educational performance. The student remained enrolled in the private school for his senior year.

Justice Stevens, writing for the majority, held that the IDEA provision was not categorical bar to reimbursement in situations where the child had not previously received services from the public school in question. First, he reasoned that the policies underlying the reimbursement remedy applied equally in situations where the school had not provided special education services because it failed to properly identify the child. In fact, the opinion posits that a failure-to-identify is actually a more egregious violation that failing to provide an adequate IEP to an identified child. Secondly, he interpreted the text of the IDEA

provision as not imposing a bar to reimbursement in these situations, writing that "clause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a FAPE by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special education services and the child's parents believe those services are inadequate." [i]t would be particularly strange for the Act to provide a remedy, as all agree it does, when a school district offers a child inadequate special education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether."

There has already been a determination, infra, that the District failed to identify in this case; thereby *this student was unreasonably denied access to services altogether*. Id

The District also relies on the two pronged test for IDEA eligibility: a disability category[5] and need for specially designed instruction to wit: a child is IDEA eligible if he or she is a "child with a disability" defined as having one of the conditions listed in 34 C.F.R Sect 300.508 and who by reason there of needs specially designed instruction" as a basis to deny eligibility.

The District contends that since there is nothing in the record to demonstrate that the content, methodology, or delivery of the instruction needs to be modified so that the Student can be successful in school, the student is not in need of specially designed instruction. Common sense and case law support the proposition that a need for homebound instruction is tantamount to receiving specially designed instruction. In *Board of Education of Montgomery County USG 45 IDELR 93 (D md 2006),* the court found that homebound instruction amounts to specialized instruction under the IDEA regardless of whether that instruction is altered in content or form[6]. Additionally, although this District argues that there is no evidence in the record to support the need for special education services, the only expert medical testimony offered specifically indentifies the need for an evaluation and asserts the opinion that special education services are likely necessary. [NT 939-1021; 290-330; 528-571]

The District's assertions that the Student's needs likely do no rise to the level of requiring specially designed instruction, but rather can be adequately justified through a Section 504 Service Plan, may have merit had an adequate Section 504 Service Plan been put into place.

Was the Section 504 Service Plan offered by the District appropriate?

[5] Although there has not been an evaluation it is presumed, based upon the findings of fact that the disability category would be determined as Other Health Impairment or OHI.

[6] As the District agreed with the prescription for homebound instruction for at least certain periods of the instruction, Homebound instruction amounts to specialized instruction" for those periods under *Molly L.*

An appropriate Section 504 Service Plan is one that is one "that reasonably accommodates the needs of a handicapped child." *Molly L. ex rel. B.L. v. Lower Merion School Dist,* 194 F.Supp.2d 422, 428 (E.D.Pa.,2002). The Court in *Molly L.* went on to state:

> Although the Third Circuit has not specifically addressed the reasonable accommodation issue in relation to the Rehabilitation Act's requirement of an "appropriate" education, this Court concludes 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., 205 F.3d at 577 (quoting Polk, 853 F.2d at 182, 184*), but that it "need not maximize the potential of a disabled student." *Ridgewood, 172 F.3d at 247. Id.* (Emphasis added).

It is, at best, a stretch to agree with the District, that the minimal accommodations set forth in the Section 504 plan provided significant learning as required under *Ridgewood*. The Plan merely extended due dates for assignments to permitting the Student to turn in assigned missed school work the following school day. (SD-7). If he was absent, he could email his assignments to his teachers while he was out so that he could get credit. (SD-7, NT1386). There were times, many times, where the student was successively absent for up to two weeks at a time. The amount of work accumulated within a two week period of time at the high school level could easily beome insurmountable and potentially incomprehensible without the additional support of individualized tutoring. The Section 504 Plan made no provisions to ensure that a duly qualified teacher would be responsible to ensure significant learning or meaningful benefit. Dr. Goldberg's recommendation that "tutoring/supportive instruction to make up for missed classroom time and work/assignments" be provided was not implemented. Rather, the District is satisfied that "*at the time, Dot Henry had thirty (30) students and three (3) teachers. There is absolutely no reason that [the student] could not have received assistance from a teacher"* [NT 1350-1351]. The Plan does not set forth specific supports for which the District can present evidence that the Student did not access. Instead of providing a structure for specific access to additional help and adding elements for supervision and monitoring by District personnel, the District shifts the burden to the student requiring him to seek out help and relies on pure conjecture regarding the ready availability of professional help. The Plan again shifts the burden to the Student and the family by viewing the "accommodation" of allowing the Parent to pick up missed work, as constituting an opportunity to make up missed work. The use of e-mail for routine contact between teachers and family is

regarded as sufficient to monitor progress. If the Student was absent, his parents could pick up the work on Friday and he could turn it in on Monday. (SD- 7, NT 1386).[7]

Compensatory Education as a Remedy

Compensatory education is an appropriate remedy where a school district knows or should know that a child's educational program is not appropriate or that the student is receiving only trivial educational benefit, and the district fails to remedy the problem. The period of compensatory education granted should be equal to the period of deprivation, excluding the period of time reasonably required for the district to act accordingly. *Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999); M.C. v. Central Regional School District, 81 F. 3d 389 (3rd Cir. 1996).*

If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a "Free Appropriate Public Education as defined by the Act." Polk, Rowley. As discussed above, since the Section 504 service plan was inadequate to provide sufficient ***supportive services to permit the student to benefit from the instruction the child is receiving a "Free Appropriate Public Education as defined by the Act."*** (emphasis added) *Id,* the student was denied a FAPE and is entitled to compensatory education.

CREDIBITLTY 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. 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).* 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.

[7]It seems that the District sought to buttress its position that the Student's issues were related more to his lack of effort than the failure of any accommodation in that frequent references are made to " Even though John had all of the work provided to him that was provided to the other students, John did not complete the work he was given. (N.T. p. 1377). Instead he would be out socializing with his friends." (N.T. pp. 1376-1377, 1439). Rather than the evidence establishing a chronic situation of abandoning academic responsibilities, there is only one reference to the student being observed out with friends on a day where he was not in school in over 1500 pages of testimony. Under the circumstances of the limited time allowed to make up work, it would seem that the District is indicating that the Student should not be permitted *any* outside activity.

Hearing Officers have the plenary responsibility to make "express qualitative determinations regarding the relative credibility and persuasiveness of the witness". *Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIZ 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 witness will be appearing in person. While this Hearing Officer was not personally present for all of the testimony delivered in this matter due to the reassignment of the case, copious notes from the previous Hearing Officer were maintained and reviewed in conjunction with the standard review of the notes of testimony. The consistent and articulate testimony of the Student along with that of his mother is supported by the testimony of the student's long-time physician and is further supported by the long history of the case and the events as they developed whether those events were outlined by District or Parent witnesses.

CONCLUSION

For all of the foregoing reasons, the student has been denied a FAPE in the Districts failure to properly evaluate in accordance with its child find obligations and in failing to make the commensurate assessments regarding eligibility under Section 504 of the Rehabilitation Act and IDEA and by failing to formulate reasonable accommodations which ***provide 'significant learning'*** and confer '***meaningful benefit***,' " once a Section 504 Plan was deemed appropriate for the Student by the team. Accordingly, as outlined below the Student is entitled to an IEE at public expense and to compensatory education sufficient to remediate the depravation of free access to a public education for the entire period applicable.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby ordered to take the following actions:

1. Be responsible for payment of an Independent Educational Evaluation as secured by the Student.

2. Provide the Student with compensatory education for the entire period of deprivation in the form of full days for each applicable day of the school calendar from January 23, 2007 to January 23, 2009. The value of those services shall be measured by the cost to the District in providing such services and may be utilized by the Student to acquire

a high school diploma or other vocational/technical training as well as any related services which may be indicated as a result of an IEE.

Dated: May 19, 2010

Gloria M. Satriale

Gloria M. Satriale, Esq.,
Special Education Hearing Officer