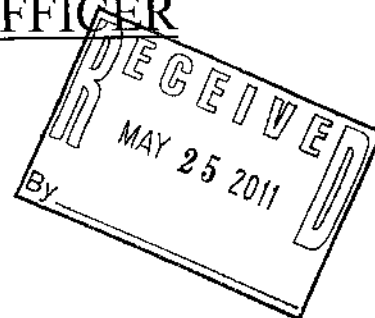


**PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER**



DECISION

DUE PROCESS HEARING

Name of Child: N [REDACTED] G [REDACTED]
ODR #1513/10-11 AS

Date of Birth:

[REDACTED]

Dates of Hearing:

April 4, 2011

May 6, 2011

CLOSED HEARING

Parties to the Hearing:

[REDACTED]
[REDACTED]
[REDACTED]

Representative:

Mark Voigt, Esquire
Plymouth Meeting Executive Campus
600 West Germantown Pike Suite 400
Plymouth Meeting, PA 19462

[REDACTED] School District
[REDACTED]
[REDACTED]

Timothy Gilsbach, Esquire
10 Sentry Parkway Suite 200 PO Box 3001
Blue Bell, PA 19422

Date Record Closed:

May 20, 2011

Date of Decision:

May 24, 2011

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is a teen-aged resident of the [REDACTED] School District (hereinafter District). The Student's mother (hereinafter Parent) requested this hearing alleging that the District failed to provide Student with a free appropriate public education (hereinafter FAPE) by not timely identifying Student as eligible under the IDEIA for special education programming. In the alternative, if Student is not deemed eligible under the IDEIA the Parent challenges the appropriateness of 504 Accommodation Plans the District offered. In either case, the Parent seeks an award of compensatory education for Student.

For the reasons set forth below I find in favor of the Parent.

Issues²

The Issues to be addressed in this decision are as follows:

1. Is Student eligible for special education under the IDEIA as a child with other health impairment, emotional disturbance, and/or a specific learning disability?
2. If Student is an eligible student and was denied a free appropriate public education from February 18, 2009 to the present, should Student receive compensatory education and if so in what kind and in what amount?
3. If Student is eligible for special education, must the District prepare an IEP for Student that comports in all respects with the requirements of the IDEIA?
4. If Student is not eligible for special education under the IDEIA, is Student a child with a disability and if so were the Section 504 Service Agreements offered timely and appropriate, and if not is Student entitled to compensatory education and a revised Section 504 Service Agreement?

Findings of Fact

1. Student is currently a 9th grade student in the District. [NT 40; P-34]

¹ The decision is written without further reference to the Student's name or gender to provide privacy.

² The Parent also preserved for the record one issue that is not within the hearing officer's jurisdiction: "If Student is not an eligible student under the IDEIA but is a protected handicapped student should the Parent receive reimbursement for expert witness fees in conjunction with this hearing?" [NT 38-39]

2. In third grade Student was evaluated for special education and found not eligible. Teachers noted "mild issues with organization and attention". [P-8]
3. According to the Wechsler Intelligence Scales for Children-Fourth Edition (WISC-IV), a cognitive assessment administered by the District in May 2010, Student achieved a Full Scale IQ of 119 [High Average Range, 90th percentile], a Verbal Comprehension Index of 130 [Very Superior Range, 98th percentile], and a Perceptual Reasoning Index of 112 [High Average Range, 79th percentile]. Student's Working Memory Index was 113 [High Average Range, 81st percentile]. [P-8]
4. Student's family history is positive for learning problems, ADHD, substance abuse, anxiety, and mood disorders. [S-7, P-10]
5. A document titled "Service Agreement" dated March 25, 2011 notes that Student has the following disabilities: Anxiety, Asthma, Sleep Disorder, and Depression. [P-46]

Illnesses, Attendance and Grades: 6th through 9th

6. Through the end of 6th grade, Student achieved good grades, enjoyed school and "enjoyed getting up, being with friends, and wanted to do well." [P-23 page 11]³
7. In 6th grade, the 2007-2008 school year, Student missed school one day and was late six times. [P-8]
8. In 6th grade, quarterly grades in major subjects were: Language Arts A-/B/A/B-; Math A/A-/B-/C-; Social Studies A/A-/A/B; Science B/B/A/C; Spanish B+/A/B+/A-. [S-12]
9. In 7th grade, Student developed a respiratory infection, was diagnosed with asthma, and was having difficulty sleeping. Student would wake up in the morning tired and having trouble breathing. [P-2, P-23 page 40]
10. In 7th grade, in April 2009 in the course of a physical medicine check up Student admitted to Trichotillomania.⁴ [P-9⁵]
11. In 7th grade, the 2008-2009 school year, Student began having attendance difficulties in the second semester. Student was absent 17 times [14 of these were

³ Rather than repeat previous testimony from the Parent in another Due Process Hearing the transcript from that hearing was entered into evidence as P-23 with my permission and no objection from the District's counsel. Additionally the Parent testified during the current hearing. [NT 41-41]

⁴ Trichotillomania is classified as an impulse control disorder in the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV) and is the compulsive urge to pull out one's own hair leading to noticeable hair loss.

⁵ The doctor's records in P-9 were given to the District in preparation for the June 2010 Due Process Hearing. It does not appear that these were in the District's possession before then. [P-23 pages 93-97]

in the second half of the year] and late 22 times [21 of these were in the second half]. [P-2, P-8]

12. In 7th grade, due to missed class work and incomplete assignments Student began to feel overwhelmed. [P-2]
13. In 7th grade, quarterly grades in major subjects were: Language Arts B/B/B-/F; Math C-/D-/D/F; Social Studies B/B+/C/B; Science C+/C+/F/F; Spanish B/A-/B/F. [S-12, P-8]
14. In Student's 7th grade year, in a therapy session on December 11, 2009 Student "revealed that [Student] has had an eating disorder for the last year". In May 2010 in the course of a physical medicine check-up Student was assessed as having had an eating disorder for more than a year. [P-9, P-10]
15. In the beginning of the 8th grade, the 2009-2010 school year, Student had another respiratory infection and Student's asthma worsened. The parent and the family doctor were working to determine the origin of Student's sleep disorder as well as trying to rule out other possible causes for Student's inability to attend school regularly. [P-2, P-23 page 12]
16. In 8th grade, the 2009-2010 school year, Student had a total of 36 absences and was late 49 times. [P-8]
17. In 8th grade, quarterly grades in major subjects were: Young Playwrights F/F/D-/C; Math F/C/C+/C; Social Studies D-, D-, D/F; Science D-/F/F/F. [P-8]
18. In 9th grade, the 2010-2011 school year as of the date of an FBA conducted in late winter/early spring 2011 Student had been absent 25.5 out of a possible 98 school days, resulting in a 74% attendance rate. [P-44]
19. Student, as of the writing of the FBA, had uncompleted work in all classes, missing 4 of 12 assignments in Environmental Science, 4 of 9 in Western Civilization, 4 of 10 in English, and 1 of 5 in Learning Center. [P-44]

District's Responses

7th Grade

20. In 7th grade the Parent met with the District psychologist and guidance counselor to discuss grades, and lateness. The District recommended outside counseling at the Parent's own expense because they thought Student might have depression, and recommended that a rewards system be tried at home to address school attendance. [P-23, page 41-42]

21. As the situation did not improve despite the rewards incentive the Parent kept in touch with the District guidance counselor in person and by email and asked for help and support. [P-23, page 43]
22. In 7th grade Student took an elective that was designed to “fully engage the kids across a wide spectrum of academic interests every day”. The class met at 10:30 am. Student was active, participated and really pushed [self. Student appeared distressed occasionally, and had ups and downs which the certified teacher, who holds bachelor’s and master’s degrees in fine arts and sculpture, thought were not unusual for middle school students and testified that Student did not appear to be “off on an extreme end of need in that pattern.” [NT 331-337]
23. Student began seeing a private therapist on June 23, 2009 to address anxiety issues, and a psychiatric appointment was pending for the end of November 2009.⁶ [P-2, P-10]

8th Grade

24. In 8th grade problems continued with health, lateness and attendance. The District continued suggesting motivation with the rewards system that had not proven effective. The District did not put anything in writing about the system nor was there progress monitoring about this intervention. [P-23 page 47]
25. Student’s therapist recorded that she called the District guidance counselor on or about October 13/14, 2009 and “relayed what did in session”. Another call with the guidance counselor was noted in the therapist’s notes for October 30, 2009. [P-10]
26. The District guidance counselor told the therapist that Student “needs to make academics a priority” and said that Student “will be discussed in Child Study”. [P-10]
27. On October 28, 2009 Student’s physician indicated in a note given to the District that “It is medically necessary for [Student] to have support during school due to asthma and a sleeping disorder”. [P-2, P-9]
28. The District constructed a “Protected Handicapped Student Service Agreement” [hereinafter 504 Service Agreement] dated November 1, 2009 which removed Student from Spanish class and substituted a learning support class for that period, encouraged Student to drop a “Young Playwrights” class and take a less rigorous language arts class (Student declined this recommendation), encouraged Student to take a Math Lab to build math skills and make up missing work, offered the opportunity to touch base with the guidance counselor regularly, and set the expectation that Student would stay after school with content area teachers according to a schedule provided by the guidance counselor. [P-2]

⁶ At the time of a December 2010 IEE Student was still in treatment but with another therapist although the therapeutic alliance was very fragile. [NT 122-123]

29. However, and for reasons not explained in the record, the principal did not sign the 504 Service Agreement until December 1, 2009; it was not sent to the Parent until January 22, 2010; it was not returned signed as "approved" until February 22, 2010. [P-2, P-24]
30. Despite not being signed by District administration, issued to the Parent by the District, or approved in writing by the Parent, the 504 Service Agreement appears to have been implemented at least in part. A November 9, 2009 email from Student's language arts teacher to Student's guidance counselor asked, "What should I do now that [Student] is with Carol⁷ and the marking period has ended? Even if [Student] does try to make up the work [Student is] only going to fall behind in the new marking period". [P-17]
31. On November 4, 2009, notwithstanding the 504 Service Agreement, the District's dean of students issued a letter stating that Student had been absent for 10 days or more and that any absences not verified by an excuse from a licensed physician would be considered illegal and may result in truancy proceedings. [P-17]
32. On November 11, 2009 the dean of students issued a letter to the Parent noting 11 latenesses, with 4 of these being unexcused. The letter states in bold print, "Any and all further latenesses to school must be accompanied by a doctor's excuse note. Continued lateness will result in more severe consequences, including possible referral to the local magistrate." [P-17]
33. In mid November, 2009, the District began assigning Student to in-school detention for lateness. [P-23 pages 55-56]
34. On November 15, 2009 the Parent responded to the dean of students by email explaining that Student was under a doctor's care, that a psychiatric appointment had been made and that a 504 Service Agreement was being created. The Parent noted that detentions were keeping Student from seeing teachers after school and further demotivated Student. She offered to provide any additional information needed. [P-17]
35. On November 17, 2009 the dean of students issued a letter noting four more days of absence, writing "the administration has determined that the absences cited above were unexcused and therefore constitute a violation of the compulsory attendance code of the PA Public School Code and █████SD Policy 204 regarding Pupil attendance." The letter was presented as the Parent's "official notification" that unexcused absences are a summary offense, that penalties may be imposed on parents, and that truancy proceedings may result. [P-17]
36. On November 19, 2009 the Parent met with Student's teachers and explained that the detentions were making Student's grades worse. [P-1, P-23 page 59]

⁷ The learning support teacher

37. By late November 2009 the District was assigning Student to “double detention”, meaning that Student had to serve two detentions for every day Student was late for school. This made it harder for Student to meet with the teachers or make up missed work. [P-23 pages 59, 69-70]
38. On November 20, 2009 the dean of students issued another letter noting six absences, four of which were already noted in the November 17th letter. The letter repeated information in the November 17th letter and requested a meeting on November 24, 2009. [P-17]
39. In a note dated November 20, 2009 Student’s private therapist stated that Student had been in treatment since June 23, 2009, and that initial problems of academic difficulty, trouble concentrating and sleep disturbance continued to persist and were being addressed in therapy. The Parent gave this note to the District. [P-10, P-23 pages 59-60]
40. A social worker, on District letterhead, sent the Parent a letter that began, “The Wallingford-Swarthmore School District is pleased to provide your child with the special education related services in your child’s Individualized Education Plan (IEP). We are notifying you that your child is possibly eligible for Medical Assistance.” The letter continues, “Student enrollment in the MA program allows us to access federal funds. This funding helps our school district pay for special education services.” The letter concludes by encouraging the Parent to apply for MA and offering help in completing the form. [P-17]
41. On December 1, 2009 the District constructed a “Truancy Elimination Plan” [hereinafter TEP] that noted that Student had “anxiety, sleep problems, and asthma”. [P-4]
42. The TEP assessed that the reasons for absences were “work becomes overwhelming when behind”, “so far behind it feels hopeless”, “too tired to get up/sleep issues” and “anxiety”. [P-4]
43. The two solutions offered in the TEP were a “contract attendance goal” providing that if Student’s attendance and grades improved over the next month detentions would be dropped and Student would start fresh, and an 8 am start time for the next month. [P-4]
44. The TEP noted the consequences for non-compliance to be “detentions to fulfill” and “truancy court”. [P-4]
45. On December 8, 2009 the District psychologist and the guidance counselor met with the Parent and advised her that Student had been inducing vomiting at school. They continued to recommend private counseling, which the Parent had already obtained. [P-23 pages 68-69]

46. On January 15, 2010 the District issued a Permission to Evaluate (PTE) which the Parent signed on January 27, 2010; it was received at the District on February 2, 2010. [P-24]
47. The Parent continued to communicate with the District and meet with District personnel about Student's attendance and academic issues. [P-24]
48. The Parent Input Form received by the District on February 2, 2010 noted "asthma, sleep disorder, anxiety, may have balemia [sic]" as well as family issues. [P-15]
49. On February 3, 2010 the Parent wrote to the dean of students, the principal and the school psychologist among others saying that she "disagree[d] with the suggestion of out of school suspension for further lateness as our goal (at least I thought it was a joint goal) is to get [Student] to school." P-17
50. On February 12, 2010 Student's Family Medicine physician wrote a note that Student had been diagnosed with multiple medical issues and would not be able to attend school until 9 am each morning. A symptom review of that date notes depressed affect and a diagnosis of insomnia. [P-11]
51. The District referred Student to a psychologist not affiliated with the District to conduct an assessment for medical assistance. The ensuing report dated March 3, 2010 noted Student had an eating disorder (bulimia), trichotillomania, was over-exercising and had a sleep disturbance. He noted that Student admitted that the sleep disorder has had an emotional and a physical effect. He concluded that medical assistance was needed to treat Student's "emotional disturbance and sleep disorder" and noted that "therapy and further evaluations are needed to assess additional psychiatric disturbances". [P-13, P-23 pages 71-72]
52. On March 8, 2010 the dean of students issued a letter noting that Student had accumulated a total of 16 demerit points, and that 30 points would prevent a student from attending a Hershey Park trip in June and the eighth grade dance. [P-17]
53. In a March 15, 2010 email the Parent recalled⁸ that in a meeting that day the dean of students said he would allow Student only 5 more days of missing school and then he would proceed with truancy proceedings as it may be helpful for a judge to come down on Student. The Parent also recalled being told by the District psychologist that the school had no program for emotionally challenged children, but that the high school did, and support would be recommended for the next

⁸ Although it did not relate to the single IEE issue at the previous Due Process Hearing, Hearing Officer McElligott admitted the email as an exhibit because "it's mother's contemporaneous reflections on what happened at the meeting". For purposes of the current decision this hearing officer also accepts the exhibit for the same reasons. [P-23 page 75]

year. The Parent recalled that the school psychologist was recommending an alternate school for the remainder of the year. The Parent noted that the social worker, the psychologist and the guidance counselor have agreed to come to the house in the morning if Student reverts back to sleeping in. [P-17, P-23 pages 73-77]

54. The District then gave the Parent a referral package to the private school under consideration. The District psychologist who prepared the packet wrote, “[Student] is struggling in the general education environment due to [Student’s] absences and latenesses that seem attributable to [Student’s] emotional needs....In school supports have been put in place but have not been overly effective. [Student] has some medical issues in addition to [Student’s] emotional needs...Moving in to the fourth quarter [Student] is failing 2 major subjects and barely passing the others”. [P-25]
55. The District psychologist wrote under the section titled “Description of behaviors to be corrected before student can be considered for placement back to neighborhood school” as follows: “1. Regular attendance; 2. Improved grades; 3. A willingness to work on emotional issues and develop coping strategies.” [P-25]
56. On or about April 13, 2010 the Parent contacted the superintendent of the District to see if he was aware of Student’s situation. The superintendent referred the Parent to the school principal who promised the Parent that he and the school psychologist would call her back. They did not do so. P-23 pages 77-78]
57. The District’s evaluation was issued on May 11, 2010 and concluded that Student was not eligible for special education. [P-8]
58. For purposes of the District’s evaluation, the District’s school psychologist did not seek to access or review records from private medical and mental health professionals treating or assessing Student. [P-23 pages 138-140]
59. The Parent requested an Independent Educational Evaluation [IEE]. In the Due Process Hearing called specifically to address the appropriateness of the District’s evaluation and the IEE request Hearing Officer McElligott noted that the evaluation report was “internally contradictory”, writing “*While noting that the student does not qualify under the category of emotional disturbance, the report notes that “(the student’s) profile fits much more appropriately under Other Health Impairment including (the student’s) asthma, sleep disorder, anxiety as well as (the student’s) more recent issues with eating” and that “(the student) does present with a need for specially designed instruction and most critically would benefit from accommodations to (the student’s) academic program...” Yet the report notes that out-of-school behaviors and medical diagnoses are at the root of the student’s attendance issues and that attendance issues are the sole cause of the student’s academic difficulties.*” [P-24]

60. Hearing Officer McElligott found Student's "long history of ...difficulties with attendance and its effect on [Student's] academic performance" [to be] "especially problematic". [P-24]
61. On July 8, 2010 Hearing Officer McElligott issued his decision granting the Parent's request for an Independent Educational Evaluation (hereinafter IEE) at public expense. [P-24]
62. The IEE was conducted in August and September 2010, but the report was not issued until December 28, 2010.⁹ [P-29]

9th Grade

63. In early November 2010 the Parent again spoke with the District guidance counselor about Student's ongoing problems with asthma, sleep and emotional issues. [NT 61]
64. In a November 9, 2010 letter the District social worker noted Student's multiple absences and asked for additional medical documentation that the absences were related to health concerns. [NT 62; P-39]
65. During the IEE process Student told the private evaluator that Student had begun staying up all night so as not to have an inability to wake up in the morning leading to further absences. [NT 196-197, 199]
66. During the IEE when the question of medication for anxiety was raised Student stated, "I'm very afraid of that" (Q) I feel like I have to have all the energy I have to just control myself. I'm afraid to take medicine for fear I'll have less control". [NT 199-200]
67. On November 24, 2010 the District prepared a new 504 Service Agreement. Student was assigned to the District's learning center for a 45-day diagnostic period, but there were no goals set and no monitoring of progress. [NT 63-67; P-28]
68. The independent evaluator issued his report over the winter break. The District held a meeting on February 3, 2011 to discuss the findings. The District proposed placing Student in the Extensions program at the middle school and the Parent agreed because the program offered emotional support in a small classroom setting. [NT 71-72; P-39]
69. The District issued a PTE on February 3, 2011 and the Parent agreed to a re-evaluation as proposed. [P-43]

⁹ The delay was occasioned by the father's initially withholding permission for the evaluation and then by a period during which the independent evaluator was waiting to see if Student would agree to complete testing which had been aborted when an appointment was missed. [NT 161-165, 168-169, 175, 202-204]

70. On February 11, 2011 the District met with the Parent and Student and told them Student was not eligible for the Extensions program. At this meeting the Parent was reduced to tears when the threat of truancy proceedings was again raised. The District issued a new 504 Service Agreement which required Student to make up work and required the Parent to send medical documentation for each lateness and absence in order for them to be excused. [NT 73-74; P-33]
71. By letter dated March 17, 2011 the District indicated the intent to provide homebound instruction to assist Student to catch up. [NT 71, 80-81; P-39]
72. On March 25, 2011 the District completed its re-evaluation and found that "The student does not have a disability and therefore is NOT ELIGIBLE for special education" [emphasis in the original]. The statement that Student does not have a disability is contradicted by the District's issuing several 504 Service Agreements. [P-43]
73. Despite its finding that Student does not have a disability, the District noted that it had provided a 504 Service Agreement and updated it on March 8, 2011, that it conducted a Functional Behavior Assessment (FBA) and developed a Behavior Support Plan, noted that Student would receive counseling services twice weekly with the guidance counselor and that a homebound tutor would be provided to address the morning subject Student would miss because of Student's sleep disorder. [P-43]
74. The FBA noted that the antecedents for Student's absences from school were sleep disturbance and illness. The FBA notes that in the current school year Student had been absent 25.5 out of a possible 98 school days, resulting in a 74% attendance rate, and that these frequent absences have impacted Student's academic performance. [P-44]
75. The FBA evaluator noted that "It seems clear that [Student's] Absence from School is the result of lack of sleep and frequent illness. However, what is not clear is the source of these issues. It is possible that there is some organic basis for [Student's] sleep disturbances and illnesses. However, it seems far more likely to this evaluator that these two problems are the result of psychosomatic issues." The evaluator goes on to hypothesize that Student's difficulties may be attributable to family stress around parental divorce and that this stress has at the very least had a contributory role. [P-44]
76. The District issued yet another 504 Service Agreement on March 25, 2011. This Agreement required Student to retake algebra in summer school. The Parent was not in agreement regarding summer school as she cannot get Student to school during the academic year. [NT 83-85; P-46]
77. Student's 504 Service Agreements focus, for example, on Student making up work missed, seeing teachers about work missed, and/or dropping challenging

classes; assignment to the District's learning center for a 45-day diagnostic period, with no goals set or progress monitoring; requiring parent to send a medical excuse for every lateness; requiring Student to retake algebra in summer school when Student could not manage attendance during the regular school year. [NT 225-231; P-2, P-33, P-43, P-46]

Independent Educational Evaluation

78. The independent evaluator is a certified school psychologist in Pennsylvania, Delaware and New Jersey and a Pennsylvania licensed psychologist who currently is employed as a school psychologist in a school district in Delaware and who also has a private practice. The independent evaluator has been certified as a school psychologist for 20 years. [NT 117; P-16]
79. The independent evaluator was previously the executive director of a child and family outpatient mental health center where he supervised a staff of 40 clinicians. [NT 118]
80. The independent psychologist has completed multiple hours of continuing education relevant to this matter. Particularly noted for the purposes of this decision are: 3 hours in Executive Functioning in November 2010, another 3 hours in February 2009, and another 5 hours in October 2004; 3 hours in the Wechsler Individual Achievement Test-Third Edition (WIAT-III) in March 2010 and another 3 hours on the WIAT-III in October 2009; 7 hours on the Stanford-Binet Intelligence Scales-Fifth Edition in October 2004; and 3 hours in WISC-IV Factors Predicting WIAT-II Achievement Scores in October 2005. [P-16]
81. According to the Stanford-Binet-Fifth Edition (SB-5) a cognitive assessment administered for the IEE, Student achieved a Full Scale IQ of 108 [Average Range, 70th percentile], a Verbal IQ of 107 [Average Range, 68th percentile], and a Non-Verbal IQ of 109 [Average Range, 73rd percentile]. Student's Working Memory Composite was 94 [Average Range, 34th percentile]. [P-29]
82. The independent evaluator noted that the scores he recorded as opposed to the scores the District evaluator recorded three months previously evidenced a "precipitous drop" and could "very well be an indication that [Student's] performance is deteriorating". The WISC-IV and the SB-5 should come within 5 to 7 points of each other. [NT 137-138, 192-193; P-29]
83. Student displayed an out-of-proportion reaction to the independent evaluator's coming late and having to cancel the second testing session, and in addition to excoriating the evaluator ["You are not qualified to ever see anyone else again!"] in person and later in writing. Student refused to cooperate with further testing. [NT 154-155, 163-164, 170-173; P-29]

84. The IEE records teacher ratings¹⁰ on the Connors3. All raters responded in a way that the scoring system of the instrument judged to be a valid manner. The Health and PE teacher's rating yielded a Very Elevated score for Executive Functioning, the Math teacher's rating yielded an Elevated score for Executive Functioning, and the English teacher's rating yielded an Elevated Score for Executive Functioning. [P-29]
85. Students with Executive Functioning deficits typically have problems which include inability to start and finish projects, completing projects at the last minute, poor planning, poor prioritizing and poor organizational skills. [NT 241-242; P-29]
86. The IEE records teacher ratings on the BASC-2. All raters responded in a way that the scoring system of the instrument judged to be a valid manner. The Health and PE teacher's rating yielded At-Risk scores for Depression, Somatization, Internalizing Problems and Leadership, the Math teacher's rating yielded a Clinically Significant score for Social Skills and At-Risk scores for Adaptive Skills and Developmental Social Disorder, and the English teacher's rating yielded no significant scores. [P-29]
87. Some of Student's teachers declined participation in the IEE in terms of completing rating scales because they believed that due to attendance issues they did not know Student well enough. [NT 145]
88. Student's responses to rating scales reflected anxiety and depression. [NT 209-210]
89. The Parent's responses to rating scales reflected that Student experiences somatization, that is, the conversion of anxiety to physical symptoms that are experienced as real physical distress. [NT 211, 213, 239-240; P-49]

Eligibility

90. The independent evaluator deferred to the District's multidisciplinary team to make a final determination of eligibility, recommending that the District consider his findings and make an assessment as to whether Student meets Pennsylvania guidelines as a student with an emotional disturbance and/or a learning disability. [NT 150-151, 157-158; P-29]
91. The independent evaluator clarified his findings in a letter dated March 11, 2011. He stated that in his opinion Student meets the criteria as a student with an emotional disturbance and may also qualify as a student with a specific learning disability. [P-30]

¹⁰ Although the Parent and Student also completed rating scales, for purposes of this decision the teachers' ratings are most relevant. [P-29]

92. The independent evaluator testified that Student qualifies as a student with Emotional Disturbance under the IDEIA because Student has enduring emotional symptoms of anxiety, depression, and an eating disorder and complaints of severe stress. Student has difficulty with interpersonal relationships with both peers and teachers which Student handles by being polite and avoidant. [NT 214-215]
93. The District's psychological consultant who performed the FBA and proposed a treatment plan for counseling testified that Student's sleep disorder and vomiting are symptomatic of Student's developing physical symptoms or fears associated with personal or school problems and that this adversely affects school performance. [NT 448]
94. The independent evaluator testified that Student qualifies as a student with Other Health Impairment under the IDEIA. Student has asthma and a sleep disorder and limited health and vitality. [NT 216]
95. The District psychologist concluded in her evaluation that Student has an Other Health Impairment. [P-8]
96. The District's psychological consultant who performed the FBA and proposed a treatment plan for counseling concluded that asthma adversely affects Student's performance. [NT 449-450]
97. The independent evaluator opined that the question of whether Student has a specific learning disability needs to be deferred until Student is more emotionally stable. [NT 217]
98. Student requires help to initiate and maintain the work process. [NT 218]
99. Student requires assistance in managing guilt about physical and mental health-related absence and lateness. [NT 218-219]
100. When Student has the energy Student should be assisted in making up work within reason and praised for doing so. [NT 219]
101. Student requires small class sizes with many opportunities for one-to-one instruction as Student's pace and rate are dramatically slow. [NT 219-220]
102. Student requires an arrangement for reduced homework or homework passes. [NT 220-221]

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome determining rule applies only when the evidence is evenly balanced in "equipoise," as otherwise one party's evidence would be preponderant. *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). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

Here, the Parent requested this hearing and was therefore, assigned the burden of persuasion pursuant to *Schaffer* and also bore the burden of production. The Parent met her burden of persuasion and prevailed, given the preponderance of the evidence in her case and the resulting lack of evenly balanced evidence between the parties.

Credibility of Witnesses

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. 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).

The testimony of the independent evaluator was given considerable weight. He is and has been employed as a school psychologist by another school district and as such routinely participates on teams that determine students' eligibility for special education, he has extensive experience in the area of child mental health, and has participated in numerous hours of continuing education. He presented reasoned, clearly explained and balanced testimony and did not hesitate to praise the District's efforts, for example candidly noting that the FBA was a step forward and that the counseling treatment plan was appropriate as well. He answered all questions posed to him by both attorneys in a low-keyed and respectful manner and, if disagreement was necessary, could disagree without rancor.

The psychologist contracted to the District through Elwyn was a knowledgeable and experienced professional. He was courteous and candid in answering questions put to him by both counsel. His work products in the form of the FBA and the counseling treatment plan were thorough and on point. While falling short of saying that Student is eligible under IDEIA this witness' forthright testimony supported the independent evaluator's finding that Student was emotionally disturbed and other health impaired and that these handicapping conditions adversely affected Student's educational performance.

The Parent was very credible and her testimony was given considerable weight. She did not embellish nor exaggerate, and remained courteous to Student's teachers as they arrived to give testimony. It was clear that she had been trying everything she could to assist her child – she attended numerous meetings with District staff, she conducted regular email correspondence, she sought and obtained private therapy for Student, she applied for medical assistance at the District's request, and she provided notes and records from professionals who were seeing Student privately. She is to be given much credit for persevering despite the numerous threatening letters regarding her child's absences and latenesses, and for her constant efforts to have the District understand the situation.

A number of District staff and teachers testified at the hearing. Although these witnesses appeared earnest they seemed singularly focused on the talking point that Student seemed fine in class when they saw Student there and that Student's poor grades were solely attributable to Student's attendance and lateness issues and that these issues were within Student's control. Given that they are neither trained in the mental health nor the medical field their testimony as a whole could not be credited with regard to the question of eligibility.

Child Find – Legal Basis

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* The IDEIA sets forth the responsibilities (commonly referenced as “child find” responsibilities) borne by school districts for identifying which children residing in its boundaries are in need of special education and related services such that “[all] children with disabilities residing in the State...regardless of the severity of their disabilities...are identified, located and evaluated...” 20 U.S.C. §1412(a)(3).

A district is on notice of the possibility of a disability where a student is experiencing failing grades, or where it has notice that the student has been identified for ADHD. See, *S.W. v. Holbrook Public Schools* 221 F.Supp.2d 222, *226 -227 (D.Mass., 2002). The possibility that the student's difficulty *could* be attributed to something other than a disability does not excuse the district from its child find obligation. See *Richard V. v. City of Medford*, 924 F.Supp. 320, 322 (D.Mass.1996)

Student is being considered under the classification of emotional disturbance. The applicable regulations define emotional disturbance as follows:

(i) *Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

34 C.F.R. § 300.8(a)(4).

Student is also being considered under the classification of other health impairment. The applicable regulations define "other health impairment" as:

"... having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that-

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance." 34 C.F.R. §300.8(a)(8) (emphasis added)

34 C.F.R. § 300.8(c)(9).

Once disabled children are identified as being eligible for special education services the IDEIA requires the State to provide them with a "free appropriate public education". 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26

Discussion

Student is disabled.

In light of the findings of fact as applied to the relevant statute and regulations, it is my conclusion that Student is eligible for special education as a Student with emotional disturbance as defined in the IDEIA and other health impairment as defined in the IDEIA.

Emotional Disturbance: As early as 6th grade, Student developed bulimia, an eating disorder; in 7th grade the District informed the Parent that Student had been inducing vomiting in school and recommended that the Parent seek mental health treatment for Student [FF 14, FF 45]. In 7th grade Student admitted to engaging in hair-pulling that was at a level as to be diagnosed as Trichotillomania [FF 10]. The District's TEP noted that the reasons for Student's absences were "work becomes overwhelming when behind", "so far behind it feels hopeless", "too tired to get up/sleep issues" and "anxiety" [FF 42]. In a packet prepared for application to a private therapeutic school the District psychologist wrote, "[Student] is struggling in the general education environment due to [Student's] absences and latenesses that seem attributable to [Student's] emotional needs....In school supports have been put in place but have not been overly effective..." [FF 54]. Student's responses to rating scales reflected anxiety and depression [FF 88], but during the IEE when the question of medication was raised Student stated that anxiety medication was not an option because Student feared it would cause Student to experience a lack of control [FF 66]. Student displayed a remarkably out-of-proportion reaction to the independent evaluator's coming late and having to cancel the second testing session and this reaction derailed completion of the independent evaluation [FF 83]. The independent evaluator testified credibly that Student qualifies as a student with Emotional Disturbance under the IDEIA because Student has enduring emotional symptoms of anxiety, depression, and an eating disorder and complaints of severe stress. Student has difficulty with interpersonal relationships with both peers and teachers which Student handles by being polite and avoidant [FF 92]. The District's psychological consultant who performed the FBA and proposed a treatment plan for counseling supported the independent evaluator's conclusions, noting that it was *clear* that Student's absence from school is the result of lack of sleep and frequent illness, although the source of these issues is likely to be psychosomatic [FF 75]. The District's psychological consultant testified that Student's sleep disorder and vomiting are symptomatic of Student's developing physical symptoms or fears associated with personal or school problems and that this adversely affects school performance [FF 93].

Other Health Impairment: In 7th grade, Student developed a respiratory infection, was diagnosed with asthma, and was having difficulty sleeping. Student would wake up in the morning tired and having trouble breathing [FF 9]. In the beginning of the 8th grade Student had another respiratory infection and Student's asthma worsened. The parent and the family doctor were working to determine the origin of Student's sleep disorder as well as trying to rule out other possible causes for Student's inability to attend school

regularly [FF 15]. In October of 8th grade Student's physician indicated to the District that it was medically necessary for [Student] to have support during school due to asthma and a sleeping disorder [FF 27]. In November 2009 Student's private therapist wrote that Student had been in treatment since June 23, 2009, and that initial problems of academic difficulty, trouble concentrating and sleep disturbance continued to persist and were being addressed in therapy [FF 39]. The District's TEP assessed that the reasons for absences were "work becomes overwhelming when behind", "so far behind it feels hopeless", "too tired to get up/sleep issues" and "anxiety" [FF 42]. In February 2010 Student's Family Medicine physician wrote a note that Student had been diagnosed with multiple medical issues and would not be able to attend school until 9 am each morning. A symptom review of that date notes a diagnosis of insomnia [FF 50]. The District referred Student to a psychologist not affiliated with the District to conduct an assessment for medical assistance. The ensuing report dated March 3, 2010 noted Student had an eating disorder (bulimia), trichotillomania, was over-exercising and had a sleep disturbance. He noted that Student admitted that the sleep disorder has had an emotional and a physical effect [FF 51]. The District's initial ER noted that "(the student's) profile fits much more appropriately under Other Health Impairment including (the student's) asthma, sleep disorder, anxiety as well as (the student's) more recent issues with eating" and that "(the student) does present with a need for specially designed instruction and most critically would benefit from accommodations to (the student's) academic program..." [FF 59]. The District's FBA noted that the antecedents for Student's absences from school were sleep disturbance and illness [FF 74]. The independent evaluator testified that Student qualifies as a student with Other Health Impairment under the IDEIA. Student has asthma and a sleep disorder and limited health and vitality [FF 94]. The District's psychological consultant who performed the FBA and proposed a treatment plan for counseling concluded that asthma adversely affects Student's performance [FF 96].

Student requires specially designed instruction.

Student's disabilities occasioned missing a great deal of school because of absence and chronic lateness, and Student changed from having 1 absence and 6 latenesses in 6th grade, to missing 14 days and being late 21 times in the second half of 7th grade, to accumulating 36 absences and 49 latenesses in 8th grade, to being absent 25 out of a possible 98 school days by late winter/early spring of the current 9th grade year. Through the end of 6th grade, Student achieved good grades, enjoyed school and wanted to do well [FF 6, FF 7, FF 8]. Subsequent to Student's burgeoning physical and emotional disabilities, Student dropped from being an A-B student in 6th grade to being a B-F student in 7th grade to being a C-F student in 8th grade and has continued this downward slope into the current 9th grade school year. Although absence and lateness likely account for much of this bright Student's academic difficulties, Student also works at a very slow pace and has executive functioning deficits that compound efforts to make up missed work and learn new work in the regular classroom setting. [FF 6 through FF 19]. Student's disabling conditions clearly affect Student's educational performance as demonstrated by an inability to attend school regularly and on time, an inability to make up missed work, and a corresponding inability to earn grades commensurate with

Student's excellent cognitive ability. Notwithstanding Student's PSSA scores and Student's achievement test scores, assessments which look at reading, math and writing mastery, Student's disability is affecting the acquisition of *content* in high school subjects, content which is designed to lay the foundation for the body of knowledge Student will carry into a post-secondary setting. Student requires specially designed instruction to organize, synthesize, memorize and understand school work. The fact that Student has managed to squeak by so far over the past two years without failing a subject for the year [although algebra is in question currently] is not dispositive of Student's receiving an appropriate education. The United States Supreme Court held that merely passing from grade to grade and achieving passing grades is not dispositive that a student has received a FAPE. Board of Educ. v. Rowley, 458 U. S. 176, 203, n.25 (1982). 34 C.F.R. §300.101(c)(1) provides: "Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade."

Student requires emotional support services.

The next relevant consideration revolves around whether a district is responsible for addressing emotional disabilities regardless of their origin. The Third Circuit articulated its position that education is more than academics and involves emotional and social progress in its holding that an IEP is appropriate if it offers meaningful progress in *all relevant domains under the IDEA* (emphasis added). M.C. v. Central Regional S. D., 81 F.3d 389 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996). Again turning to its finding in M.C. when deciding Breanne C. v. Southern York County School District, 2010 WL 3191851, M.D. Pa, Aug 11, 2010 our Third Circuit noted that when an eligible child receives an IEP, that IEP must be reasonably calculated to afford the child the opportunity to receive a "meaningful educational benefit" [Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 198 (3d Cir.2004) ; Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir.1999)] and that an IEP confers a meaningful educational benefit when it is more than a trivial attempt at meeting the educational needs of the student, and it is designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social and emotional. Further support for the finding that school districts are mandated to attend to behavioral, social and emotional education is found in Pennsylvania statutes. The Pennsylvania Department of Education [PDE], headed by the Secretary of Education, is charged by the General Assembly with developing rules and regulations to carry out its legislative enactments as set forth in the Pennsylvania School Code. Act of July 23, 1969, P.L. 181, § 1, 71 Pa. Stat. Ann. §§ 1037, 1038; Act of June 16, 1994, P.L. 319, No. 49, § 9, 64 Pa. Stat. Ann. § 468. The PDE explains that public education "prepares students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens." 22 Pa Code § 4.11(b).

If schools must address behavioral, social and emotional domains in public education when educating disabled students, then a student with a disability in these domains who has not benefitted from regular education programming to address these domains necessarily requires specially designed instruction in these areas. Clearly Student did not profit from regular education initiatives in this regard, whether these initiatives were positive [reward system] or punitive [numerous detentions and repeated threats of truancy court].

Compensatory Education

Student is entitled to compensatory education as Student is eligible for special education and was denied a free appropriate public education.

For eligible students, special education and related services are the critical constituents of a free *appropriate* public education (FAPE). Special education has at its focal point specially designed instruction (SDI), which to be *appropriate* adapts to an eligible child's unique needs the content, the methodology, or the delivery of instruction, with access to the general curriculum that allows the meeting of state education agency standards for all. In-kind compensatory education is a remedy for a span of FAPE denial by district action or inaction, less a reasonable period when it could have been rectified, its form and timing to be a matter of parental discretion as long as costs are commensurate with what was denied and it does not replace otherwise currently "entitled to" programming.

I now apply the calculus of the equitable remedy of compensatory education under the applicable case law authority. The following analysis serves two purposes: 1) determining the "reasonable time" for fulfilling the District's duties under the IDEIA,¹¹ and 2) estimating the reasonable rectification deduction for compensatory education.¹²

Student began showing strikingly aberrant emotional and educational functioning in the second half of 7th grade, the 2008-2009 school year. Starting with the date of the issuing of third quarter grades for the 2008-2009 (7th grade) school year in spring 2009 the District should have recognized that the combination of plummeting grades across the board and uncharacteristic absences during that quarter warranted an evaluation, regardless of the possible source of Student's difficulties¹³. Allowing time for the District to issue a PTE and for the Parent to sign and return it, and then allowing 60 calendar days for completion of the evaluation, I estimate that an IEP should have been developed by the end of the 7th grade school year for immediate implementation at the beginning of 8th grade, the 2009-2010 school year. As Student's disabilities, in the absence of special education delivered under an IEP, affected Student's educational progress across all four major subjects Student is entitled to 45 minutes per subject per day for a total of 180 minutes per day. Given that Student's absences and latenesses were

¹¹ W.B. v. Matula, 67 F.3d 484, 501 (3d Cir. 1995).

¹² M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d at 397.

¹³ The District has largely centered its analysis of Student's problems on the parents' divorce. Parents separated in 2005 and became divorced in 2008. If Student's distress over this fairly common phenomenon among peers caused Student's somatization, absences, sleep disturbance, mental health issues and academic floundering to the extent the District asserts, even more support is garnered for a classification of emotional disturbance. [S-7]

a function of Student's disability there will be no deduction for days Student was not in school and therefore the 180 minutes per day will be granted for every day school was in session for the entire 2009-2010 school year and the entire 2010-2011 school year.

The parent may select the form of the compensatory education so long as it addresses any appropriate developmental, remedial, transitional or therapeutic service that furthers the goals of the student's future IEPs. Such hours must be in addition to the student's then current IEPs and may not be used to supplant such services. There are financial limits on the parent's discretion in selecting the appropriate developmental, remedial, transitional or therapeutic services that further the goals of the Student's future IEPs. The costs to the District of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services and the actual costs for salaries, tuition and transportation for contracted services. This principle sets the maximum cost of all of the hours or days of the compensatory education awarded. The parent may balance expensive and inexpensive instruction or services so long as the total cost and hours do not exceed the maximum amount. The parent also may use fewer hours of expensive services so long as the maximum amount is not exceeded. Finally, the parent must not be required to make co-payments or use personal insurance to pay for these services.

Given that Student is entering the 10th grade and has three full years left in high school, it is reasonable that Student will be able to use the compensatory education on school days, in the evenings, on the weekends and/or during the summers such that the entire award is used by the end of the summer immediately after Student graduates from high school whether or not the Student remains enrolled in the District.

Section 504

To establish a violation of §504 of the Rehabilitation Act of 1973, 29 U.S.C. §793 *et seq.* the Parent must demonstrate that (1) Student is disabled as defined by the Act;¹⁴ (2) Student is "otherwise qualified" to participate in school activities; (3) the school or the Board receives federal financial assistance; and (4) Student 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).

Section 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

¹⁴ 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).

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).

The Parent did not argue that the evidence established a separate and distinct claim under §504 in addition to the District's alleged violations of IDEIA. The Parent's 504 claim was based entirely upon the same facts that were asserted in support of the IDEIA claims. As the Parent prevailed on the IDEIA claims, this decision satisfies the 504 claims as well. See West Chester Area School Dist. v. Bruce C., et al., 194 F.Supp.2d 417, 422 n.5 (E.D.Pa. 2002) (court found issue of whether student was entitled to Section 504 Service Plan to be moot because court found student eligible for IDEA services).

Order

It is hereby ordered that:

1. Student is eligible for special education under the IDEIA as a child with other health impairment and emotional disturbance.
2. Student was denied a free appropriate public education from February 2009 to the present. Applying a reasonable rectification period, Student is entitled to compensatory education from the first day of school in September 2009 to the present, in the amount of 180 minutes per day for every day school was in session during the 2009-2010 and the 2010-2011 school years.
3. As Student is eligible for special education, within 15 calendar days of receiving this decision the District must convene an IEP team meeting and the team must develop an IEP for Student that comports in all respects with the requirements of the IDEIA, taking into account Student's needs and strengths.
4. Student is eligible for special education under the IDEIA, therefore the question of the appropriateness of the 504 Service Agreements need not be reached.

Any claims not specifically addressed by this decision and order are denied and dismissed.

May 24, 2011

Date

Linda M. Valentini, Psy.D., CHO

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