

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

DECISION

COVER SHEET

DUE PROCESS SPECIAL EDUCATION HEARING

FILE NUMBER:	14458/13-14AS
RESPONDENT/SCHOOL DISTRICT (LEA):	Warrior Run School District
SCHOOL DISTRICT COUNSEL:	Christian Stephanos, Esquire
STUDENT:	J.P.
PARENT[S]:	[redacted]
COUNSEL FOR STUDENT/PARENT	Phillip Drumheiser, Esquire
INITIATING PARTY:	Parent/Student
DATE OF DUE PROCESS COMPLAINT:	November 11, 2013
DATE OF HEARING:	January 23 and 24, 2014
PLACE OF HEARING:	Warrior Run School District
OPEN vs. CLOSED HEARING:	Closed
STUDENT PRESENT:	No
RECORD:	Verbatim-Court Reporter
DECISION TYPE:	Electronic
DUE DATE FOR DECISION:	March 17, 2014
HEARING OFFICER:	James Gerl, Certified Hearing Official

DECISION

DUE PROCESS HEARING

File No.: 14458/13-14AS

PRELIMINARY MATTERS

Prior to the hearing, Respondent filed a Motion to Dismiss based upon res judicata or in the alternative to accept the record from a previous hearing. By written Order, the hearing officer denied the Motion to Dismiss because the issues in this case were not the same as in a previous due process hearing contesting an independent educational evaluation at public expense. However, the Order granted the request to accept the record of the previous hearing as evidence in this due process hearing. Said Order is incorporated by reference herein.

Also prior to the hearing, Respondent issued a request for two subpoenas for the student's employer. Because it appeared to be redundant to call two witnesses to testify to the student's employment, particularly the application process Student had to undergo prior to the employer which was the reason for the request for the

subpoena, the hearing officer issued one subpoena but denied the request for the second subpoena. Said ruling is incorporated herein by reference.

A prehearing conference by telephone conference call was convened for this matter on December 2, 2013. As a result of said conference, a Prehearing Conference Order was entered herein. Said Order is incorporated herein by reference.

Counsel for the Respondent filed an unopposed motion to extend the hearing officer's decision deadline. Said motion was granted. The deadline for the hearing officer's decision is March 17, 2014.

On January 8, 2014, counsel for the parties filed a joint prehearing memorandum. Said memorandum contains numerous stipulations of fact and other items. Said memorandum is incorporated by reference herein.

Subsequent to the hearing, both parties filed written briefs and proposed findings of fact. All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a

proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

ISSUES PRESENTED

The issues presented in this due process hearing, as identified by the parties in the prehearing conference and as stated in the joint prehearing memorandum, are as follows:

1. Whether the school district should have found the student eligible for IDEA special education services and if yes, when the school district knew or should have known that the student was eligible.
2. Whether the school district should have found the student eligible for a Section 504 service plan and if yes, when the school district knew or should have known that the student was eligible.
3. Whether the school district discriminated against the student in violation of Section 504 of the Rehabilitation Services Act and if yes, what actions by the school district were discriminatory.
4. Whether the student is eligible for compensatory education services.

5. Whether the school district should provide the student with a mentor to complete the final part of Student's senior project during the 2013-2014 school year.

6. Whether the [redacted] disciplinary action should be removed from the student's school records based on the magistrate judge's decision that the student was not guilty of an offense.

FINDINGS OF FACT

Based upon the parties' stipulations of fact as contained in their joint prehearing memorandum, the hearing officer has made the following findings of fact:

1. The student is a [high school] student in the [redacted] grade at Respondent and Student's date of birth of [redacted] (Stip-1). (References to stipulations of fact in the parties' joint prehearing memorandum are hereby referenced as "Stip-1," etc.).

2. On or about September 13, 2012, when in [redacted] grade, the student suffered an injury when Student jumped over a [redacted] chair when leaving [redacted] class and was diagnosed with a concussion from hitting Student's head on the doorframe. (Stip-2)

3. The student returned to school on the day after the injury, September 14, 2012. The only restriction issued by Student's doctor was "no contact sports or PE until cleared by (Student's doctor)." (Stip-3)

4. On the date of student's return to school, September 14, 2012, the parent reported to the nurse that the student was not permitted to take any tests. There was no documentation provided by the parent to support this request. (Stip-4)

5. On September 18, 2012, a return to work certificate was issued by the student's doctor. The certificate included a stamp but no signature. Next to the word "restrictions" the word "none" was crossed out and "not cleared" was written by hand. (Stip-5)

6. One of the student's doctors issued a letter on September 19, 2012 stating that the student was being treated for an acute concussion and may require some accommodations including homework and test taking over the short term. (Stip-6)

7. On September 27, 2012, a certificate for return to school was issued and signed by one of the student's doctors, indicating that there were no academic restrictions for the student and only physical restrictions until October 1, 2012. (Stip-7)

8. On or about December 14, 2012, the parent reported to the district that the student had sustained a concussion on December 13, 2012 when Student hit

Student's head on a [redacted] pole during [redacted] class. The student was permitted to return to school but not permitted to perform any mental activity. (Stip-8)

9. The school district's athletic trainer conducted an impact clinical assessment of the student on December 14, 2012. (Stip-9)

10. The student attended school from the time of Student's concussion on December 13, 2012 until the start of winter break. Student then returned to school after the conclusion of winter break. (Stip-10)

11. The parent provided a report from another doctor, dated December 13, 2012, that the student was diagnosed with a concussion. The report indicated that a referral was made to "peds neuro" and "neuropsychology" for student to be active for at least 60 minutes and to limit television, computer and videogames. (Stip-11)

12. On December 17, 2012, the parent provided the district two orders from a pediatric neurologist which ordered the student not to participate in any mental activity or physical activity and recommended a 504/IEP plan evaluation with a follow-up visit in three months. (Stip-12)

13. On December 20, 2012, the parent sent a written request to the school requesting an educational evaluation of the student. At the time of the request on December 20, 2012, the parent provided a parental input form to provide the reason for the referral. (Stip-13)

14. On January 7, 2013, the district sent a second PTE to the parent. The parent signed the form on January 7, 2013 indicating her concerns were "concussion issues" and to "see neuro report."

15. On January 3 and January 7, 2013 a neuropsychological assessment of the student was completed by a clinical neuropsychologist. (Stip-15)

16. The district completed its initial evaluation of the student on March 4, 2013. The district's evaluation was completed in accordance with district procedures and within the 60 days required by law. (Stip-16)

17. The district's March 4, 2013 evaluation did not find the student qualified for a Section 504 service agreement. (Stip-17)

18. The district's March 4, 2013 evaluation also did not find the student eligible under IDEA for services in special education. (Stip-18)

19. A meeting was held on March 19, 2013 with the parent to review the results of the evaluation. (Stip-19)

20. A copy of the March 4, 2013 ER was sent home by mail to the parent on March 4, 2013 to the address listed on the ER, which is the same as listed on the parent's independent educational evaluation request. Before the meeting was held on March 19, 2013, the parent and student reviewed the ER. (Stip-20)

21. The parent hand delivered to the district on June 7, 2013 a typed request dated May 28, 2013 for an independent educational evaluation. (Stip-21)

22. In response to the parent's request for an independent educational evaluation, the district filed a due process complaint with the Office of Dispute Resolution on June 13, 2013. (Stip-22)

23. On September 10, 2013, this hearing officer rendered a decision finding the district's evaluation of the student was appropriate and complied with all legal requirements. As such, the parent was not entitled to an independent educational evaluation at public expense. (Stip-23)

24. The parent filed an appeal of this hearing officer's independent educational evaluation decision in U.S. District Court, Middle District of Pennsylvania on December 8, 2013. (Case 4-13-cv-02946) (Stip-24)

Based upon the evidence in the record, the hearing officer makes the following findings of fact:

25. At the neuropsychological evaluation of the student in January 2013, the student and Student's mother reported to the neuropsychologist that the student had suffered concussions on three previous occasions: one in 2009 as a result of a [sports] injury, one in September 2012 from hitting Student's head on a door, and one on December 13, 2012 when Student hit Student's head on a pole in [redacted] class. The family history section of the report of the neuropsychologist notes that there is a family history of aggression, learning disability, depression, anxiety, or adjustment

problems, alcohol abuse, substance abuse, antisocial behavior, arrests/incarceration, physical abuse (victim) and physician abuse (perpetrator). The evaluator administered a number of tests, including the Wechsler Intelligence Scale. The evaluator found the student had a full scale IQ of 91 which is in the average range and determined that the student's profile is consistent with normal neuro-cognitive development with no evidence of attention deficit disorder, learning disability, developmental language delay or other cognitive processing disorder. In addition, the test findings did not indicate features of classic post-concussion syndrome, which almost universally reveals deficits in both lower level executive functions and learning of new information. The primary diagnostic impression of the evaluator was that the student had an adjustment reaction disorder with mixed emotional features. The evaluator also found that the student had resolving post-concussional syndrome. The report made no specific ability recommendations in light of the neuropsychological test findings showing no evidence of deficits across measures of verbal, perceptual motor, lower level executive, higher level reasoning and learning/memory. The report made no specific academic skill recommendations in view of the neuropsychological test findings showing no evidence of risk factors for a learning disability in reading, spelling or math. The evaluator did recommend the use of cognitive behavioral approach in view of the problems the student was having at home. Family counseling was also recommended. (P-16; S-3) (References to exhibits shall hereafter be referred

to as "P-1," etc. for the Petitioner's exhibits; "S-1," etc. for school district exhibits; and "J-1," etc. for the joint exhibits; references to testimony at the hearing is hereafter designated as "T".)

26. On January 23, 2013, the school district's former special education director wrote a letter to the student's mother requesting a copy of the report of neuropsychological evaluation of the student. (P-21; J-2: T of former special education director)

27. On January 31, 2013, a medical doctor issued a note saying that the student was under his care for neurology. The note stated, "I think the student will need to be evaluated for IEP or 504 plan." (P-22)

28. On February 1, 2013, a medical doctor issued a note stating that the student was under his care for neurology and that the student would need to be evaluated for IEP or 504 plan and the student has medical clearance to be evaluated psychologically within the school setting. (P-23)

29. The school district received the report of the neuropsychological evaluation of the student on February 1, 2013. (J-2: T of former special education director; S-3)

30. On March 14, 2013, a medical doctor issued a note stating that the student had been seen by the doctor and that Student is under neurology care. The note stated that the student will need to do no contact sports but could do some

school work with accommodation and as tolerated according to IEP or 504 plan. (P-26)

31. The school district's former special education director oversaw the collection of data and development of a draft evaluation report once a request for evaluation is received. She properly collected information from members of the student's Multi-Disciplinary Team and provided it to the former school psychologist. The former special education director gave members of the Multi-Disciplinary Team sentence starters written in the third person in order to solicit the appropriate information. Members of the Multi-Disciplinary Team provided their own information on the template, with the exception of one teacher who was having difficulty with her own computer, so she used the former special education director's computer to input the data and one teacher who was not comfortable using computers, so he dictated the information allowed to the former special education director to type the information on her own computer while he was standing over her shoulder. All members of the Multi-Disciplinary Team reviewed the information attributed to them in the report before the report was finalized. (J-2: T of former special education director; J-2: T of counselor; S-7; J-1)

32. The school district's former school psychologist was the primary evaluator of the student. She has a master's degree in school psychology and 24 years

of experience as a school psychologist. The school psychologist was well trained and knowledgeable about the assessments used and well qualified to administer the assessments she gave to the student. (J-2: T of former school psychologist; S-3)

31. The evaluation report prepared by the school district on March 4, 2013 begins with a detailed history of the student's recent concussions and doctor's notes prohibiting academic activity. The evaluation report analyzes in detail the neuropsychological assessment of the student conducted in January 2013. The detailed discussion of the neuropsychological assessment covers two and a half pages of the 48-page report. The evaluation report catalogues the observations and input contributed by the student's teachers, Student's counselor, the school nurse and the former school psychologist. The input of the teachers and other staff was accurately recorded in the evaluation report. The report provides a detailed analysis of the student's grades and test scores. In addition, the evaluation report states that two formal assessments were conducted by the former school psychologist as a part of the evaluation: The Woodcock Johnson Cognitive Achievement Test, Third Edition and the Behavior Assessment System for Children, Second Edition (BASC-2). The student's achievement levels on the Woodcock Johnson Test were all within the average range; this result is consistent with the testing done by the parent's neuropsychologist. The BASC assessment provides information about social and emotional issues, as well as adaptive behavior. The student's ratings on the BASC

were all in the average range with the exception of the ratings of one teacher. The school psychologist inquired of the teacher concerning the matter and the teacher stated that the student was not paying attention because Student did not have to do anything because of medical restriction on Student's ability to do school work. The formal assessment measures employed by the school district in evaluating the student were reliable and valid and were applied according to their directions. The comments and input provided by the parent on her background questionnaire were discussed and considered in detail in the report. The school psychologist also conducted a formal interview with the student as a part of the evaluation process. During the student interview, the student told the former school psychologist that the previous 12 months had been the worst period of Student's life. The student brought up alcohol-related issues, both with Student's father and with Student's mother's boyfriend. The student also told the evaluator that Student injured Student's thumb [redacted] and aggravated the injury when having to break up a fight between Student's sister and Student's mother. The evaluation process included two formal classroom observations by the former school psychologist and two formal classroom observations by the school counselor. The report concludes that the student has a disability due to Student's two concussions. Despite the disability, however, the evaluation report accurately concludes that the student is not in need of specially

designed instruction and that the disability does not substantially limit the basic life function of learning. (J-2: T of former school psychologist; S-3)

32. On September 3, 2013, a medical doctor faxed a doctor's note to the school district. The doctor stated that the student was seen in his office and that Student is under neurology care. The note stated that the student will need an IEP plan to help Student at school due to Student's underlying medical condition. It went on, "In the absence of IEP, the student will need to be cyber schooled while attending regular school few hours every day. IEP should be in place shortly so that the student can return to school." (P-55)

33. After receiving the September 3, 2013 note from the student's doctor, respondent's new special education director checked with the counselor to determine how the student was doing. It was determined that the student was continuing to do well and progressing without accommodations in Student's part in-school part cyber school program. Because the September 3, 2013 doctor's note contained no evaluation and because the student was continuing to do well, the new special education director took no further action. (T of new special education director)

34. In September 2013, the counselor met with the student and the parent and revised the student's schedule so that Student could enroll in three cyber school classes. The student attended the following classes at respondent: Art Studio 2, Algebra 2, Basic Woodworking and Career Readiness 2 classes. Student also

registered for cyber classes in American History 1, Cyber History Science and Cyber English 2. (S-10)

35. The student made a statement to the Brain Steps team that Student was behind in Student's cyber courses only because Student did not log in every day. The student often goes for seven to eight days at a time without logging into Student's cyber courses at all. (S-12)

36. When the student did log in, Student was successful in completing assignments for Student's cyber school courses. When Student's mother found that a deadline was approaching for American History class on January 9, 2014 and the student still had ten uncompleted assignments, the student logged in on January 9, 2014 for a total of 249 minutes and completed all 10 uncompleted assignments at that time. In reference to Student's completing the 10 assignments in one day, the student's mother made a statement to the secretary of the Director of Curriculum that, "Student can do the work. Student's just lazy." (S-10; T of director of curriculum)

37. During the 2013-2014 school year, the student is being monitored by the counselor concerning Student's academics and Student is being monitored by the school nurse regarding Student's concussion symptoms. (T of new special education director; T of nurse)

38. The student's academic performance did not vary before and after Student's two concussions during the relevant timeframe. Consistently throughout the entire period, the student put forth effort and did well in courses that Student enjoyed and Student did not put forth effort and did not do well in courses that Student did not enjoy. There was no difference in Student's academic performance in art classes in 9th grade, 10th grade and 11th grade before and after the concussions; in art classes before and after the concussions, the student was consistent in Student's ability to concentrate, focus and complete assignments. Student's academic performance was similarly consistent in all other courses. The student was able to access Student's education without any accommodations when Student determined that Student wanted to. (J-2: T of counselor; J-2: T of former school psychologist; S-3; J-1; T of drama teacher; T of career readiness teacher; T of basic woodworking teacher; T of art teacher)

39. The student's grades [last year] were slightly better than Student's grades in [the previous year]. For the [current] school year, the student is passing all Student's classes. (T of mother; P-51; S-9)

40. On approximately January 9, 2013, the student's school counselor contacted the Brain Steps program concerning possible services for the student. Brain Steps is a voluntary program coordinated by the Intermediate Unit to help students who have suffered concussions and other acquired brain injuries return to

school. The Intermediate Unit Brain Steps team has handled 38 students with brain injuries of whom 7 have had IEPs. 13 of the cases are still active and of those students, 3 have §504 plans. After the student's doctor cleared Student to return to academic work at school, the student's Brain Steps team met on March 28, 2013. The team members included the program consultant from the Intermediate Unit, another staff member of the Intermediate Unit, a speech therapist, a neuropsychologist, a teacher, a special education supervisor, the new special education director, the school nurse, the school counselor, the new school psychologist, the student, the student's mother, the student's attorney, and the school district attorney. The Brain Steps committee met on March 28, 2013 and developed a "return to school plan" for the student. The plan required the student's teachers to provide the counselor with a list of essential quizzes, papers, projects and assignments that were critical and the student was to meet with the counselor first thing each morning to be provided a list of the work to be accomplished that day. The plan provided that when the student was absent, the student's mother would contact the counselor for work that day. The plan reviewed the student's status in each of Student's courses. The plan required teachers to reduce tests to critical information, as necessary, until such time that the team met again. The team also recommended that the student have scheduled rest periods in the nurse's office for 10 to 15 minutes at the beginning of Period 2 and Period 7, that the student should use Student's after school time to do current

assignments and use in school time to complete the make-up work, that a WC2 book would be forwarded home for use, if available, that the student be registered for bookshare.com to access audio text online. The team was scheduled to meet again approximately every four weeks. (S-12; T of Intermediate Unit Brain Steps consultant; T of Intermediate Unit Brain Steps assistant)

41. During the April 22, 2013 meeting of the Brain Steps team, the team developed additional recommendations. (S-12; T of Intermediate Unit Brain Steps consultant; T of Intermediate Unit Brain Steps assistant)

42. On May 10, 2013, the Intermediate Unit Brain Steps coordinator observed the student in Student's multi science class. During the class, the student asked questions along the way, participated in the class and had Student's materials out and available. The consultant noticed that the student did not have Student's agenda with Student during the class to write down assignments in. When she asked Student about the agenda, the student stated that it was no problem for Student to remember what Student was doing and then be able to write an agenda at the end of the day. (S-12; T of Intermediate Unit Brain Steps consultant)

43. The student's Brain Steps team met again on May 23, 2013. At the meeting, the Intermediate Unit Brain Steps consultant shared her report concerning her observation of the student's multi science class. The multi science teacher told the consultant that the student is catching up quite quickly in Student's classwork. On the

same day that the consultant observed the student in Student's multi science class, she had also tutored Student concerning ways to use book share. The team determined that the student was doing well and developed further recommendations for the student. (S-12; T of Intermediate Unit Brain Steps consultant; T of Intermediate Unit Brain Steps assistant)

44. On September 10, 2013, the school counsellor completed an annual Brain Steps student check in form for the student. He reported that the student demonstrates task completion, homework completion and classroom performance comparable to Student's peers. (S-12)

45. On September 13, 2013, the student told the school nurse that Student was not experiencing any concussion symptoms and there was no use for Student to fill out the concussion questionnaire because all of the answers would be negative. The nurse reported this statement to the Brain Steps team at its next meeting. (T of school nurse; S-11; S-12)

46. The student's Brain Steps team met again on November 11, 2013. The meeting was requested by the school counsellor whom the student's mother had told that she had updated medical information from the student's neurologist. The mother presented no new medical information at this meeting. The team leader, who is the Intermediate Unit Brain Steps consultant, noted that the student was not reporting any symptoms. She stated that without additional information from the

student's doctor, there would be no reason for the Brain Steps team to continue meeting for this student. The student's mother refused to give permission for the Brain Steps team to talk to the student's doctor. The student's mother wants the Brain Steps program to continue, but because of her refusal to provide a medical authorization to the team, the team has not met since November 11, 2013. (S-12; T of student's mother; T of Intermediate Unit Brain Steps consultant; T of Intermediate Unit Brain Steps assistant)

47. Respondent's athletic trainer administers impact tests as a brief screening battery for athletes who participate in certain contact sports. After a baseline data is established, the screening battery is administered again after a concussion to help determine when a student might be ready to return to play sports. The school's athletic trainer administered a baseline impact screening for the student on December 2, 2011 before Student participated in [sport redacted]. The athletic trainer conducted another impact test on the student after Student's second concussion; the screening was conducted on December 14, 2012. The trainer conducted an additional impact screening on the student on August 9, 2013 at the request of the student's parent. The student's cognitive efficiency index on the impact test went up from .16 on December 14, 2012 to 0.34 on August 9, 2013, indicating that Student's post-concussion symptoms were decreasing. The impact screening tool helps with returning athletes to play sports after a concussion, but it does not concern itself with

recommendations with regard to whether the student needs accommodations or assistance with academic classes. It is not common practice for the athletic trainer to share the results of the impact screenings with the school nurse or the student's teachers. The former school psychologist did not know how to interpret the data on the impact forms, and she did not use the impact screening data in the evaluation process because she had more reliable information in the report of the neuropsychologist. The athletic trainer was also unable to interpret the impact screening results. (S-14; P-54; T of respondent's athletic trainer; J-2: T of former school psychologist)

48. The student's high school principal did not approve Student's request to attend a criminal justice program at the local career and technology consortium for the 2012-2013 school year because of Student's excessive absences. In determining which students to recommend for admission to the career and technology consortium programs, the principal looks at data concerning the student's absences and disciplinary actions without access to the students' names, which she covers up. The principal does not distinguish between excused and unexcused absences because the grading program at the career and technology consortium uses absences as one of its criteria for assigning grades. The student was placed on the waiting list for the 2011-2012 school year but did not get accepted into the program. For the same reasons, the principal did not approve the student's application for the career and technology

consortium program for the 2012-2013 school year. The student's name was again placed on the waiting list for the program. (P-2, P-49; T of school principal)

49. Respondent does not assign mentors to students for their senior project or for other reasons. (T of school principal)

50. On May 22, 2013, the school lunch proctors notified the principal's office that two students, including the student, were exchanging something in the cafeteria. When confronted, the student admitted that Student had [redacted]. Because [redacted] violates school policy, the school district suspended the student for two and a half days and reported Student in a criminal complaint for [redacted]. A magistrate judge dismissed the criminal complaint when the student did not appear because Student had an employment interview. The school district has not removed the [redacted] incident from the student's records. (P-32; S-11; T of student's mother; T of school principal; P-53)

51. The student's concussions do not adversely affect Student's educational performance. By reason of the student's concussions, Student does not need special education and related services. (Record evidence as a whole)

52. The student's concussions do not substantially limit a major life activity such as learning. (Record evidence as a whole)

53. Respondent has not discriminated against the student by treating Student differently than students who do not have disabilities. (Record evidence as a whole)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. Under IDEA, a child with a disability is defined as "a child:
 - (i) With a mental impairment, hearing impairments, including deafness, speech or language impairments, visual impairments (including blindness), social emotional disturbances (referred to in this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities; and (ii) who by reason thereof needs special education and related services." IDEA § 602(3); 34 C.F.R, §300.8

2. In addition, to be eligible under IDEA, the student must meet the definition of one of the enumerated disabilities, which includes a requirement that the disability adversely affects a child's educational performance. 34 C.F.R. § 300.8(a)(9); 22 Pa. Code § 14.101.

3. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of her or Student's disability be excluded from participation and/or be denied the benefits of or be subjected to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34

C.F.R. § 104.33; 22 Pa. Code § 15.1. In order to prove a violation of Section 504, parents must show that "1) that the student is disabled, 2) that the student was otherwise qualified to participate in school activities, 3) that respondent receives federal financial assistance, and 4) that the student was excluded from participation and/or denied the benefits of education as a result of discrimination by Respondent.” Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); 29 U.S.C. § 794; 34 C.F.R. 104.33(b)(1); 22 Pa. Code § 15.3. In order to be eligible, a student's disability must substantially impair a major life activity; such as learning. 34 C.F.R. § 104.3(i) and (j); 22 Pa. Code § 15.2; Macfarlan v. Ivy Hills SNF, LLC, 675 F.3d 266, 112 L.R.P. 16588 (3d Cir. 2012).

4. A professional evaluator, including a physician, may not simply prescribe special education, rather the eligibility team must consider all relevant factors. Marshall Joint School District No. 2 v. CD by Brian and Traci D., 616 F. 3d 632, 54 IDELR 307 (2010); District of Columbia Public Schools, 111 L.R.P. 76506 (SEA DC 2011).

5. A child with a disability is provided protection under the special education laws from disciplinary changes of placement for conduct that is a manifestation of Student’s disability. IDEA §615(k); 34 C.F.R. §§300.530 – 300.537. See also 34 C.F.R. §104.35; 22 Pa. Code § 14.143.

6. A special education due process hearing officer has the authority to control the hearing process and to require a clear statement as to what the issues presented by a due process complaint. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (SD WVa 2009); Letter to Anonymous 23 IDELR 1073 (OSEP 1994); O'Neil v. Shamokin Area Sch. Dist. 41 IDELR 154 (Pa. Comm. Ct. 2004); Stancourt v. Worthington City Sch. Dist. Bd. of Educ. 44 IDELR 166 (Ohio App. Ct. 2005); Renollett by Renollett v. Indep. Sch. Dist. No 11, Anoka-Hennepin 105 LRP 3047 (D. Minn. 2005); Central Susquehanna Intermediate Unit 102 LRP 11145 (SEA PA 2000); Utah Schs for the Deaf & Blind 111 LRP 29590 (SEA UT 2011); Dist of Columbia Public Schs 111 LRP 77405 (SEA DC 2011); School District of Swastopol 24 IDELR 482 (SEA WI 1986); Philadelphia School District 29 IDELR 780 (SEA PA 1999); Clark County Sch Dist 111 LRP 65198 (SEA NV 2011).

7. In the instant case, Respondent properly found that the student was not eligible under IDEA for special education and related services.

8. In the instant case, Respondent appropriately determined that the student is not eligible for services under Section 504.

9. In the instant case, Respondent has not discriminated against the student in violation of Section 504.

10. In the instant case, Respondent has not violated the special education laws by failing to provide a mentor to the student.

11. In the instant case, Respondent has not violated the special education laws by failing to remove a disciplinary incident involving [redacted] from the student's educational records.

DISCUSSION

Issue No. 1: Whether the school district should have found the student eligible for IDEA special education services and if yes, when the school district knew or should have known that the student was eligible.

In this case, the school district found the student to be not eligible under IDEA. The parent contends that the district's action in this regard was incorrect and that the student should have been found eligible under the category of other health impairment.

In order to be eligible under IDEA, a student must have one of the enumerated conditions in the definition of a “child with a disability,” which also includes a requirement that the student's disability adversely affect Student’s educational performance. In addition, to be eligible, the student must by reason of Student’s disability need special education and related services. In this case, it is clear that the student had a disability and that Student suffered two concussions in the relevant time period. The parent has not proven, however, that the student's concussions adversely

affected Student's educational performance or that by reason of Student's concussions Student needed special education and related services. Instead, the evidence in the record consistently shows that the student put forth effort and did well in the courses that Student enjoyed and that Student did not put forth effort and did not do well in the courses that Student did not enjoy. Student's academic performance did not vary before and after Student's two concussions during the relevant timeframe. There was no difference in Student's ability to concentrate, focus or complete assignments for the period before to after the concussions. Student is able to perform well in classes without any accommodations and modifications. That the student's academic performance was not affected by Student's concussions was the conclusion of the previous school psychologist who was the primary evaluator of the student. The testimony of the previous school psychologist in this regard is supported by all of the evidence in the record, including the testimony of a number of the student's teachers and the student's counselor.

Moreover, the testimony of respondent's staff in this regard is also supported by the report of the parent's own neuropsychologist. The neuropsychologist specifically made no recommendations concerning ability in light of his neuropsychological test findings showing no evidence of deficits for the student across measures of verbal, perceptual motor, lower executive, higher level reasoning

and learning/memory. In addition, the neuropsychologist made no academic skill recommendations for the student.

The parent has offered no evidence that anything has happened since the March 4, 2013 evaluation report that should have caused to reconsider its conclusion in the evaluation report. Indeed, the record evidence shows that the student was doing well in Student's academics [last year], that Student was passing all Student's classes and that Student's grades were up slightly [last year]. In addition, the respondent's new special education director testified that the student was being monitored throughout Student's [current] school year by a counselor for academics and by the school nurse for concussion symptoms. Particularly persuasive in this regard was the testimony of the student's art teacher who taught the student in three consecutive school year classes, both before and after Student's concussions. He observed no differences in the student's academic performance before and after the concussions. This testimony is consistent with the testimony of the student's other teachers and the evaluation report. When motivated to do the work, the student was able to do it well as evidenced by Student's completion of ten assignments in Student's cyber school course in American History in one night. The student told the school nurse in September 2013 that Student is no longer suffering any concussion symptoms. No evidence in the record supports the parent's contention that the March 4, 2013 evaluation report reached the wrong conclusion.

It must be concluded from the evidence in the record that the student's disability did not adversely affect Student's educational performance. This student is not eligible under the other health impaired category. In addition, it must be concluded that the student did not need special education because of Student's disability. See 34 C.F.R. §§ 300.8(a)(1) and 300.8(a)(9). Accordingly, the student is not eligible for IDEA services.

The parent points to a number of notes from the student's physician which appear to prescribe special education for the student. A physician, or professional evaluator, however, may not simply prescribe special education; the eligibility team must consider all of the relevant factors. A physician, of course, can supply useful information concerning the nature of a student's disability to the eligibility team, but Student cannot simply prescribe special education. Marshall Joint School District No. 2 v. CD by Brian and Traci D., 616 F.3d 632, 54 IDELR 307 (7th Cir. 2010); District of Columbia Public Schools 111 L.R.P. 76506 (SEA D.C. 2011). The parent's argument that the school district should have found the student eligible for special education because a physician prescribed it is rejected.

To the extent that the testimony of the parent is inconsistent with the testimony of respondent's witnesses, the testimony of respondent's witnesses is more persuasive and credible than the testimony of the parent. This conclusion is based

upon the demeanor of the witnesses, as well as the following factors: there were some serious inconsistencies in the testimony of the student's mother. She testified at both hearings that the student had suffered at least five concussions throughout the years. The report of the neuropsychologist, however, reflects that when the student's mother provided the student's medical history, she informed the neuropsychologist of only three concussions that the student had suffered, including the two concussions during 2012. In addition, at the hearings herein, the student's mother testified that the student's academic performance was affected by Student's concussions. It was the unrebutted testimony of the respondent's director of curriculum, however, that after the student had completed ten assignments for Student's cyber course in one night that Student's mother stated to her secretary that "Student can do the work, Student's just lazy." Also, the mother's testimony concerning the nature of the December 17, 2012 physician notes is inconsistent with one of the stipulations of fact by the parties herein. See discussion of Issue No. 3 herein concerning the credibility implications of this testimony.

The parent's post hearing brief raises one additional argument concerning this issue that needs to be addressed. The parent's brief seems to argue that in addition to the concussions, the student was disabled because of asthma and/or certain allergies. There is no mention of allergies or asthma in the parent's due process complaint,

however, and a party cannot raise new issues that were not specified in a due process complaint. IDEA § 615(f)(3)(B).

Issue No. 2: Whether the school district should have found the student eligible for a Section 504 service plan and if yes, when the school district knew or should have known that the student was eligible.

In the March 4, 2013 evaluation report, and in the eligibility meeting conducted thereafter, the school district representatives on the eligibility team concluded that the student was not eligible for a Section 504 plan. They concluded that the student clearly had a physical impairment in that Student had concussions; however, Student's disability did not substantially limit a major life activity, in this case learning. The parent contests that conclusion.

The record evidence indicates clearly that the student's academic performance did not vary before and after Student's two concussions during the relevant timeframe. Consistently throughout the entire period, the student put forth effort and did well in courses that Student enjoyed and did not put forth effort and did not do well in courses that Student did not enjoy. Student was able to access Student's education without any accommodations and there was no difference before and after the concussions concerning Student's ability to concentrate, focus or complete

assignments. The discussion in the previous section concerning Issue No. 1 is incorporated by reference herein.

It is concluded that the parent has not proven that the student's concussions substantially limited a major life activity. Accordingly, Respondent correctly concluded that the student is not eligible under Section 504.

Issue No. 3: Whether the school district discriminated against the student in violation of Section 504 of the Rehabilitation Services Act and if yes, what actions by the school district were discriminatory?

As a preliminary matter, it must be noted that the parent has not been shown that the student is eligible for Section 504. Student's disability does not substantially affect a major life function, in this case learning. The discussion in the previous section concerning Issue No. 2 is incorporated herein by reference.

Given that the student is not eligible under Section 504, the discrimination prohibitions under the law do not apply. Accordingly the allegations of discrimination in the complaint are rejected.

Even assuming *arguendo*, however, that the student were eligible under Section 504, there is no basis for the parent's claim of discrimination in this case. At the prehearing conference prior to the due process hearing, the hearing officer asked for

clarification because this issue had been stated so broadly in the due process complaint. Counsel for the parent cited two ways in which the student had allegedly been discriminated against: limited involvement in the Brain Steps program and failure to consider the impact screenings by the athletic trainer in the eligibility determination.

Brain Steps is a voluntary program coordinated by the local Intermediate Unit to help students who have suffered concussions and other acquired brain injuries to return to school. After the student's medical restrictions preventing Student from doing academic work were lifted by Student's physician, the Brain Steps committee met for the student and began work on a return to school plan. The plan included accommodations to ease the student's return to school work. The Brain Steps committee continued to meet until November 11, 2013 when the Brain Steps consultant noted that the student was no longer experiencing concussion symptoms. The school counsellor and the school nurse had also provided reports to the Brain Steps committee that the student was no longer experiencing concussion symptoms. The school counsellor and the school nurse reported to the Brain Steps committee that the student was no longer suffering concussion symptoms. The consultant requested that the student's mother provide an authorization to obtain information from the student's physician, and the student's mother refused to give permission to speak with the physician. The student's mother testified that she was happy with the

Brain Steps program and wanted it to continue; however, she was not willing to provide an authorization for medical information to the committee. Thus, the Brain Steps committee was convened for the student and continued to meet until the parent refused to provide them with a medical authorization to speak with the student's physician. Given that the student's concussion symptoms appeared to have been resolved, there was no longer any need for the Brain Steps committee to continue meeting. It is difficult to understand how the Brain Steps committee's services to the student constituted discrimination in any way. It appears from the evidence in the record that the Brain Steps program served the student well until the student stopped having concussion symptoms. The parent's argument is rejected.

The impact screening is a process used by the respondent's athletic department to determine an athlete's ability to return to playing sports after a concussion. The athletic department obtains baseline information for certain athletes and then conducts a screening after they have had a concussion. The athletic department does not normally share information from the impact screening results with a student's educators, it is simply a tool to determine when a student is prepared to return to participate in certain sports. Thus, there was no reason for the previous school psychologist, who could not interpret the impact screening results, to consider the impact screening results in preparing an evaluation of the student. Moreover, the previous school psychologist had available to her the neuropsychological evaluation

completed by the parent's neuropsychologist which provided a much better quality and quantity of information relevant to the issue as to whether the student's concussions were adversely affecting Student's educational performance. Inasmuch as the student was clearly not eligible for special education or Section 504, any failure to consider the impact screenings did not adversely affect the eligibility results. Accordingly, the parent's argument is rejected.

In her post hearing brief, the parent asserts that the hearing officer does not have authority to limit or define the issues at a prehearing conference. Clearly, however, a special education due process hearing officer has the authority to control the hearing process and to require a clear statement as to what the issues presented by a due process complaint. O'Neil v. Shamokin Area Sch. Dist. 41 IDELR 154 (Pa. Comm. Ct. 2004); JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (SD WV 2009); Letter to Anonymous 23 IDELR 1073 (OSEP 1994); Stancourt v. Worthington City Sch. Dist. Bd. of Educ. 44 IDELR 166 (Ohio App. Ct. 2005); Renollett by Renollett v. Indep. Sch. Dist. No 11, Anoka-Hennepin 105 LRP 3047 (D. Minn. 2005); Central Susquehanna Intermediate Unit 102 LRP 11145 (SEA PA 2000); Utah Schs for the Deaf & Blind 111 LRP 29590 (SEA UT 2011); Dist of Columbia Public Schs 111 LRP 77405 (SEA DC 2011); School District of Swastopol 24 IDELR 482 (SEA WI 1986); Philadelphia School District 29 IDELR 780 (SEA PA 1999); Clark County Sch Dist 111 LRP 65198 (SEA NV 2011). Not identifying

issues before the hearing constitutes a type of trial by surprise which is not acceptable. The parent's argument that the hearing officer cannot obtain clarity as to the issues at a prehearing conference is rejected.

However, even if other allegations of discrimination stated in Petitioner's posthearing brief that were not identified in the prehearing conference were properly before the hearing officer, the record evidence does not support the allegations. At the hearing, the parent argued that the student was discriminated against because the school district failed to authorize Student to attend a criminal justice program at a career and technology center.

It was the unrebutted testimony of the school principal, however, that she reviews data concerning applicants for the program's attendance and disciplinary records without identifying which student the data belongs to. For all students who apply for these programs, if the student has a significant number of absences, Student is not approved for participation. With regard to all students, it does not matter whether the absences are approved absences or unapproved absences. The career and technology consortium program grades students in part based upon attendance, and, accordingly, attendance records are important for admission to the program. It is clear from the evidence in the record that the student was treated the same as and not differently from all other students with regard to the criminal justice program at the

career and technology consortium. Accordingly, the parent has not proven that the student was discriminated against in this regard.

In addition, the parent argues in her post hearing brief that the student has been discriminated against by the respondent by denying Student access to academic work when Student's medical doctor recommended limiting the academic demands for the student in October 2012. It is difficult to understand this argument. There are no doctors' notes for the student in the record dated October 2012. At the hearing, counsel for the parent asked a number of questions about two orders from a physician for the student described as return to work or school forms that were both issued on December 17, 2012. The first order states, "(The student) will need 504/IEP plan evaluation and **no mental activities at school** including tests." (emphasis added). The second order by the same physician on the same date states, "Patient cannot undergo any physical activities like swimming or gym or wrestling or mental activity like videogames or texting." The first of these two orders clearly places a restriction on any mental activity at school including tests.

It appears that the parent is arguing that by following the first of these two orders on December 17, 2012 that the school district was somehow discriminating against the student. The argument makes no sense. The student's physician clearly restricted Student's academic activity at school. Indeed, if there were any serious

doubt as to this fact, it should have been resolved when the parties stipulated in their joint prehearing memorandum that the December 17, 2012 physician notes ordered the student not to participate in any mental activity. A party cannot stipulate to a fact and later contest the fact. The fact that the parent stipulated prior to the hearing that the doctor's note orders the student not to participate in any mental activity and later backtracks from that position in her testimony at the hearing severely compromises the credibility of the mother's testimony. The parent's argument is rejected.

It is clear from the evidence in the record that, even if the student were eligible for Section 504, respondent has not discriminated against Student in violation of Section 504.

Underlying Issue No. 4: Whether the student is eligible for compensatory education services.

Compensatory education is not a separate issue, but rather a type of relief available to remedy violations of the special education laws. Central School District v. KC by SC and SC, 61 IDELR 125 (E.D. Penna. July 3, 2013); Reid ex rel. Reid v. District of Columbia, *supra*; Ferren C. v. School District of Philadelphia 612 F.3d 712, 54 IDELR 274 (3d Cir. 2010). Because the parent has not proven any violation of IDEA or Section 504, relief, including compensatory education services, would be

inappropriate. Accordingly, no compensatory education is awarded to the student in this case.

Issue No. 5: Whether the school district should provide a student with a mentor to complete the final part of the senior project during the 2013-2014 school year.

Because the student is not eligible under either IDEA or Section 504, there is no basis for the relief requested. The discussion concerning Issues No. 1 and 2 is incorporated by reference herein. Accordingly no such relief is awarded.

Assuming arguendo that the issue were properly before the hearing officer, however, it is apparent from the evidence in the record, and especially the unrebutted testimony of the school principal, that the school district never assigns mentors to any student for any reason. Given that the school district does not assign mentors to any student, it is difficult to determine why petitioner feels that the student should be assigned a mentor. Clearly the student has not been discriminated against; Student was treated the same as all other students in this regard. No evidence in the record supports this request for relief from the parent. Accordingly, the parent's request for relief in this regard is denied.

Issue No. 6: Whether the [redacted] disciplinary action should be removed from the student's school records based on the magistrate's judge decision that the student was not guilty of an offense.

IDEA provides protection for certain types of discipline which amount to a change of placement for a student with a disability and which are a manifestation of the child's disability. In this case, however, the parent has not proven that the student is eligible under either IDEA or §504. The discussion concerning Issues No. 1 and 2 is incorporated by reference herein. Accordingly, none of the discipline protections apply, and the parent's argument must be rejected.

However, even assuming arguendo that the disciplinary protections did apply, there is no allegation in this case that the [offense] by the student was a manifestation of Student's disability -concussions. In addition, there is no allegation that the suspension constituted a change of Student's educational placement. The parent's posthearing brief contains no legal argument to support removal of the disciplinary incident from the student's record other than the cursory allegation that these facts somehow constitute a violation of §504.

Although it may be possible that some other law may provide this type of relief to the student, it is not a special education issue that is properly before this hearing officer. Accordingly, the relief requested by the parent in this regard is denied.

ORDER

Based upon the foregoing, it is HEREBY ORDERED that all of the relief requested in the foregoing due process complaint is hereby denied.

ENTERED: March 17, 2014

James Gerl

James Gerl, Certified Hearing Official
Hearing Officer