

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: M.M.

Date of Birth: [redacted]

CLOSED HEARING

ODR File No. 16762-15-16 AS

Parties to the Hearing:

Parents

Parent[s]

Representative:

Parent Attorney

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Dates of Hearing:

11/4/2015, 1/6/2016

Date Record Closed:

January 25, 2016

Date of Decision:

February 10, 2016

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is an early elementary school-aged student who formerly resided in the Laurel Highlands School District (District). Student qualifies as a Protected Handicapped Child under Section 504 of the Rehabilitation Act of 1973 and Pennsylvania Chapter 15.² Student's Parent filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) in its implementation of Student's Section 504 Service Agreement during the 2014-15 school year, and further that the District engaged in harassment and discrimination against Student on the basis of Student's disability in that same time period.

The case proceeded to a due process hearing convening over two sessions at which the parties presented evidence in support of their respective positions.³ The Parent sought to establish that the District denied FAPE specifically by failing to consistently provide Student's one-on-one aide, and that it engaged in discrimination against Student that caused additional anxiety to Student. The District maintained that its education program was properly implemented and that it did not discriminate against Student.

For the reasons set forth below, I find in favor of the Parent on the FAPE claim, and in favor of the District on the discrimination/harassment claim.

ISSUES

1. Whether the District properly implemented Student's Section 504 Service Agreement though its provision of a one-on-one aide during the 2014-15 school

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

² 29 U.S.C. § 794; 22 Pa. Code §§ 15.1 – 15.11.

³ References to the record will be to the Notes of Testimony (N.T.), Parent Exhibits (P-), and School District Exhibits (S-). Citations to duplicate exhibits may be to that of one or the other party or both.

year;

2. If the District did not properly implement Student's Section 504 Service Agreement, is Student entitled to compensatory education and, if so, in what form and amount;
3. Whether the District discriminated against Student on the basis of Student's disability during the 2014-15 school year and, if so, what remedy should be ordered?

FINDINGS OF FACT

1. Student is an early elementary school-aged student who resided in the District during the 2014-15 school year and was a Protected Handicapped Student under Section 504 and Chapter 15. (N.T. 21-22)
2. The District is a recipient of federal funds as provided by Section 504. (N.T. 22)
3. Student was diagnosed with Oppositional Defiant Disorder and Attention Deficit Hyperactivity Disorder at the age of five (kindergarten year). Toward the end of that school year, Student began taking medication for those diagnoses. Student was subsequently diagnosed with Disruptive Mood Dysregulation Disorder. (N.T. 60-62, 63; P-11)
4. Student was provided behavioral health services from an outside agency through a behavioral specialist consultant (BSC) beginning before Student's enrolling in the District. The BSC provided services at home and at school, with the time at school one or two times per month. Student also had a therapeutic staff support worker and a mobile therapist who did not provide services at school. (N.T. 23-25, 31, 38-40, 6; P-72)
5. The Parent elected to take Student to and from school each day, and walked Student into the building on arrival. (N.T. 69, 71, 89-90, 330)
6. When Student was in kindergarten (2013-14 school year), Student exhibited problematic behavior and difficulty with attention and focus at school. Student also demonstrated lack of organizational skills. (N.T. 25, 356)
7. The BSC conducted a functional behavioral assessment (FBA) in April 2014, and determined that the function of Student's difficult behaviors (verbal and physical aggression, defiance) was attention seeking. (N.T. 25; P-11 p. 3)
8. Toward the end of the kindergarten school year, a Section 504 Service Agreement was developed. Student was assigned a one-on-one aide to assist Student with organization, attention, and focus through redirection, cues, and prompts. Additional accommodations were frequent breaks with physical activity, social skills group, Student monitoring of

behavior, and Student providing the teacher with one positive statement about Student's self each day. The Parent approved the Agreement. (N.T. 25, 63-64, 151; S-23)

9. The BSC made suggestions for the one-on-one aide to assist Student with difficult behaviors at school. (N.T. 33, 42)

2014-15 School Year

10. The same Section 504 Service Agreement was implemented at the start of the 2014-15 school year. (S-24)
11. Student was diagnosed with Anxiety at the beginning of that school year for which Student began taking medication. At the time, Student was exhibiting difficulty with attention and focus, was anxious about school, and began picking at Student's skin and lips. Student continued to exhibit difficulty sitting still even on medication. (N.T. 28-30, 70, 75, 115-16, 135-36, 205, 209, 217-18; P-12, P-13)
12. That school year, Student demonstrated resistance to attending school at night and in the morning, sometimes exhibiting aggressive behavior. Student often left school at the end of the day upset with the teacher. (N.T. 40, 74-75, 87, 123, 204, 207, 211-12)
13. The Section 504 team met in October 2014 and revised the Section 504 Service Agreement. Newly added were Student keeping a journal with the daily positive self-statements and permitting Student to stand while working productively. The Parent approved the Agreement. (S-25, S-26)
14. The one-on-one aide walked Student to the classroom in the morning during first grade because Student did not want to walk there alone. After January 2015, a peer began walking Student to the classroom. (N.T. 66-68)
15. Student required redirection and prompting in the classroom in first grade, usually by the aide who had a desk next to Student's desk. Student's teacher sometimes redirected and prompted Student, including when the one-on-one aide was not available. (N.T. 169, 216, 263, 283-84)
16. An Occupational Therapy evaluation conducted in the fall of 2014 revealed no need for those services. (S-23 pp. 3-4, S-30)
17. Student had difficulty getting along with peers at school, particularly during unstructured times. (N.T. 54, 57, 70, 123, 225-30, 252-54, 291-93)
18. Student's physician wrote two notes for Student, one to be able to go to the nurse whenever Student asked, and one for access to an ice pack for chronic pain Student had. Student was never denied access to the nurse for an ice pack following the notes. (N.T. 75-77, 258-59; P-4; S-9, S-10)
19. Student frequently went to the nurse during the school day for a variety of reasons including escaping tasks. The one-on-one aide did not typically accompany Student to

- the nurse or restroom. (N.T. 161, 166-67, 168, 216-17, 233, 238, 254-56, 258-59, 293; P-6; S-11)
20. Student often had to wait for the one-on-one aide to walk Student to the classroom because the aide had bus duty, but the school day began at the time the aide's bus duty ended in the morning and ended at the time the afternoon bus duty began. (N.T. 68-69, 73, 119, 128, 172-73, 269, 332; P-8; S-7)
 21. Student had a different aide (hereafter substitute aide) at the beginning of first grade because the first one-on-one aide was on medical leave in September and October 2014. The role of the aides was the same as in kindergarten, but Student exhibited more anxiety and problematic behaviors than in the prior school year. (N.T. 64, 151-52, 234, 254, 288-89, 294)
 22. The substitute aide sometimes worked with another student during the daily 35-minute Response to Intervention (RTI) period. (N.T. 250-51, 291-92)
 23. The substitute aide occasionally covered classrooms or substituted for the school secretary. (N.T. 294-95)
 24. The one-on-one aide did not accompany Student to special classes (35 minutes per day) with rare exceptions. The aide had cafeteria duty when Student had lunch, and did not go with Student to recess, but Student did not have a need for redirection at lunchtime or recess. (N.T. 55, 126, 129, 163-65, 170-71, 181-82, 270-71, 349; P-8 p. 2; S-6)
 25. Student's one-on-one aide was often not attentive to Student, instead focusing on the aide's cell phone or magazines, and leaving the classroom on breaks. (N.T. 239-41, 243-44, 262-63, 308-09)
 26. Student's one-on-one aide frequently performed other duties at school instead of assisting Student, such as putting up bulletin boards throughout the building, providing instruction to other students including during the RTI period, acting as a secretary who was absent, and monitoring classrooms when a teacher was not present. These other tasks at times took up more than minor periods in the school day. (N.T. 152-56, 159-60, 164, 177-78, 234-36, 265-66, 269, 285, 311)
 27. An FBA was conducted in January 2015 with the targeted behaviors of being off task (talking with peers, not following teacher directions, making sounds). The hypothesis of the function of those behaviors was to gain attention from peers and/or adults, and they were noticed to occur most frequently during transitions, testing, and small group activities. A Positive Behavior Support Plan was developed with a goal for Student to require prompts and redirection no more than 15 times per day. (S-33, S-34)
 28. The Section 504 team met again in January 2015. The Section 504 Service Agreement was revised to add a peer to accompany Student to the classroom at the start of the school day. The Parent approved the Agreement. (S-31)

29. On one occasion in the spring of 2015, Student's one-on-one aide worked in the nurse's office because the nurse was absent. Student had arrived late to school that day, and the Parent picked up Student and removed Student from school because the aide was not available to Student. (N.T. 84-86, 153-54, 175-77, 310-11, 337-38, 367; P-6 p. 76)
30. There was an incident in the cafeteria involving Student and spilled milk. Student's first grade teacher spoke with Student and the other students involved about the incident, and Student was penalized ten minutes of recess time because Student was not truthful with the teacher. (N.T. 132-33, 225-27)
31. The team discussed fading the one-on-one aide assistance but did not ultimately make that a part of any revised Section 504 Agreement. (N.T. 248-49)
32. The District promptly responded to each of the Parent's concerns as they arose. (N.T. 220-22, 264, 304-06)
33. Student missed a number of school days for medical appointments, accumulating 44 absences over the 2014-15 school year. In addition, Student was tardy on 39 days and dismissed early from school on 7 days. (P-2, P-9; S-4)
34. After Student's one-on-one aide concluded the medical leave, she was absent on 8 days. Student attended school on each of those days but arrived late on one of them. The District had a shortage of substitute aides. (N.T. 340-41; S-8, S-14)
35. Student achieved final grades ranging from B- to A-, and no unsatisfactory marks, over the 2014-15 school year. (S-17)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible regarding events that are important to understand in addressing the issues, testifying to the best of their recollection. The testimony of the two aides regarding the time that they devoted to tasks beyond supporting Student was credited over the more generalized testimony of the administrators who lacked specific memory of what those aides were assigned to do and when.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' Closing Arguments.

Section 504

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood v. Board of Education, 172 F.3d 238, 253 (3d Cir. 1995). “In addition, the plaintiff must demonstrate that defendants know or should be reasonably expected to know of his

disability.” *Id.*

Pennsylvania makes provision for school districts to comply with Section 504 in the Pennsylvania Code. Specifically, Chapter 15 provides that school district as a public educational agency must “ensure that [protected handicapped] students have equal opportunity to participate in the school program” by providing aids, services, and accommodations that “meet the educational needs of protected handicapped students as adequately as the needs of nonhandicapped students are met.” 22 Pa. Code § 15.2(b). School-age students who have a disability that substantially limits the child’s access to or participation in a school program are protected handicapped children. 22 Pa. Code § 15.2.

In the context of education, Section 504 and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood, supra*, at 253 (citation and quotation marks omitted); *see also* 34 C.F.R. § 104.33(a). Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36.” 34 C.F.R. § 104.33(b). “There are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002).

Implementation of Student’s Section 504 Service Agreement

The first issue is whether the District properly implemented Student’s Section 504 Service Agreement by consistently providing Student with the one-on-one aide during the 2014-

15 school year. The aide was an element of each of Student's Section 504 Service Agreements, and had the general obligation to redirect and prompt Student throughout the school day. By January 2015, Student had a goal to require redirection no more than 15 times per day, reflecting that Student's behavioral difficulties were frequent and rather significant, and occurred at any time during the school day.

The record convincingly demonstrates that Student's one-on-one aide was frequently inattentive to Student, and was at times asked to perform other duties including working with small groups in the classroom and substituting for other District employees who were absent. The substitute aide similarly performed other tasks at times. The aides did not accompany Student to special classes that were held each day, or during many periods of transition that were, according to the January 2015 FBA, times when Student tended to exhibit difficult behaviors. While the classroom teacher testified credibly that she also provided prompts and redirection to Student, she could not possibly afford Student the level of support set forth in the Section 504 Service Agreement, particularly outside of her classroom.

Although it is not unreasonable that there would be occasions when Student's one-on-one aide was unavailable to Student,⁴ I find that the failure to consistently provide the attention of the paraprofessional during the time period in question was contrary to the Section 504 Service Agreements, was not *de minimis*, and constitutes a substantive denial of FAPE. What is difficult to discern, however, is the extent to which the aide was not providing the individualized support Student needed pursuant to the Section 504 Service Agreements, since recollections varied and were less than crystal clear. The task of quantifying the deprivation is further complicated by the number of Student's absences and late arrivals, some of which were triggered by Student's

⁴ While I am not unsympathetic to the District's lack of sufficient substitute personnel, the amount of time Student was without an attentive one-on-one aide goes well beyond a rare and temporary occurrence.

resistance to attending school.

It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriately addressing his or her disability, or that the child is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this “hour for hour” approach, some courts have endorsed a scheme that awards the “amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district’s failure to provide a FAPE.” *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.”)). Our Third Circuit has endorsed this manner of awarding compensatory education “to whatever extent necessary to make up for the child’s lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation.” *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

There was no evidence from which to derive a remedy designed to place Student in the same place Student would be if there were no FAPE denial; thus, I will use the hour for hour

principle. As a matter of equity, I will award one hour of compensatory education for each day that Student attended school for at least part of the day during the 2014-15 school year. This estimate accounts for the variations in both the one-on-one aide's responsibilities each day and the aide's attendance, while also recognizing that Student was without the aide support for some period of time nearly every day. There is no reduction for a period of reasonable rectification as the support was a continuation of that provided at the end of the previous school year. Thus, the one hour per day award for days Student was present is intended to provide a sufficient remedy that is not out of proportion to the FAPE denial.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's social/emotional/behavioral needs and skills. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the public school through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age twelve (12).

There are financial limits on the parents' discretion in selecting the compensatory education; the costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the average of the hourly salaries and fringe benefits that would have been paid to the District paraprofessionals who provided those services to Student during the relevant time period.

Harassment and Discrimination

The next issue is whether the District intentionally discriminated against Student on the basis of Student's disability resulting in anxiety for Student. Intentional discrimination requires a showing of deliberate indifference, which may be met by establishing "both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge." *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). In this matter, the Parent asserts that Student's teacher engaged in harassment of Student that ultimately caused Student to become anxious. (Parent Closing at 12; N.T. 13-14) The record does suggest that Student and the first grade teacher did not enjoy the best relationship (N.T. 78-79, 277-78), and it is likely that Student went to the nurse's office at times in order to escape the classroom. Nevertheless, when the District became aware of Student's feelings toward the first grade teacher, it added a new accommodation to the Section 504 Service Agreement to enable Student and that teacher to foster a better and more positive relationship. There has been no suggestion that that accommodation is inappropriate, and I find it was properly responsive to the concern. Moreover, the other instances about which the Parent was concerned, such as the spilled milk incident, at best reflect a misunderstanding on the part of Student and/or the Parent of what occurred. Taken singly or together, the incidents that the Parent claims amount to harassment of Student simply do not demonstrate deliberate indifference.⁵ Accordingly, this claim must fail.

⁵ Even assuming, for the sake of argument, that any of those incidents could be considered undue harsh treatment of Student, which I do not, the record establishes that Student was diagnosed with Anxiety very early in the 2014-15 school year, and clearly not as a result of any actions taken by the first grade teacher over the course of that year. In any event, the District promptly and appropriately responded to the Parent's concerns in this regard on a regular basis.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, I conclude that Student was denied FAPE and must be provided compensatory education. I also conclude that the District did not otherwise discriminate against Student or engage in disability-based harassment.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District failed in its FAPE obligations to Student.
2. The District shall provide Student with one hour of compensatory education to address Student's social/emotional/behavioral needs, for every day that Student attended all or part of the school day during the 2014-15 school year, subject to the conditions and limitations set forth above.
3. The District did not otherwise discriminate against or engage in harassment against Student.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

February 10, 2016