

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 Final Decision and Order

Closed Hearing

ODR File Number:

23151-1920AS

Child's Name:

M.B.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer

Cathy A. Skidmore, Esquire

Date of Decision

June 30, 2020

INTRODUCTION AND PROCEDURAL HISTORY

The student, M.B. (hereafter Student),¹ is a mid-teenaged student in the Central Valley School District (District) who is a protected handicapped student pursuant to Section 504 of the Rehabilitation Act of 1973² and Pennsylvania Chapter 15. Student has had a Section 504/Chapter 15 Accommodation Plan (Accommodation Plan) since October 2018 to address anxiety and related diagnoses that impact Student in the educational environment.

Student's Parent filed a Due Process Complaint against the District in December 2019, challenging its failure to identify Student as a protected handicapped student during the 2017-18 school year and into the start of the 2018-19 school year until implementation of the initial Accommodation Plan. The claims were limited to that specific time period only. The case proceeded to a due process hearing with two of the three sessions convening virtually by agreement of the parties.³ The Parent sought to establish that the District failed to provide Student with a free, appropriate public education (FAPE) throughout the time period in question. The District maintained that its educational program as implemented was appropriate for Student based on information available and that no remedy is due.

For the reasons set forth below, the claims of the Parent must be denied.

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A), 34 C.F.R. § 300.513(d)(2), and 15 Pa. Code § 15.8.

² 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

³ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. The term "Parent" in the singular refers to Student's mother who filed the Complaint. References to duplicate exhibits may not be to all.

ISSUES

1. Whether the District violated its obligation to identify Student as a protected handicapped student prior to October 2018; and
2. If the District did violate that obligation, should Student be awarded compensatory education?⁴

FINDINGS OF FACT

1. Student is a mid-teenaged student who resided in the District during the relevant time period and has attended its schools since kindergarten. Student is currently a protected handicapped student under Section 504. (N.T. 28-29, 194.)
2. Student has been diagnosed with Disruptive Mood Dysregulation Disorder and Post-Traumatic Stress Disorder for which Student takes medication. (S-14 at 3.)
3. In the spring of 2017, private family-based services began after Student engaged in some self-harming behavior. Student also had emergency services in the home for a period of thirty days so that a home safety plan could be developed. (N.T. 226-29; S-15.)

General District Programming

⁴ The Parent did seek to raise a claim under Title XI of the Education Amendments Act, 20 U.S.C. § 1681 *et seq.*, and the parties were invited to present legal argument on the jurisdiction of this hearing officer to decide such an issue. For reasons discussed *infra*, that claim will not be addressed on the merits.

4. The District provides an advisory program for all students in the middle school to provide support for social-emotional and developmental needs of children of middle-school age, including setting forth expectations. The advisory lessons are provided several times over the course of the school year. (N.T. 34-35, 93-94, 138, 151.)
5. The District has a Student Assistance Program (SAP) that provides additional support for students who are referred to it. Those services include mentoring by trained District professionals with meetings as needed and any necessary accommodations and interventions. These District professionals meet weekly to discuss students who are receiving SAP services. Students can also be referred to outside agencies for additional services when warranted. (N.T. 35, 91-93, 109-10, 113-15; P-12.)
6. The District has a cyber-school program available for its students that permits students to be in the building full time, or outside the building full time, or some combination of in-building and out-of-building educational services. Students can also seek and be provided teacher support as needed. (N.T. 65.)
7. The District records late arrivals, early dismissals, and absences for all students in its attendance records. (N.T. 260.)
8. Students who have a physician's determination that homebound services are necessary may participate in the District's cyber-school program so that the student works with the entire scope of the curriculum. (N.T. 57-58, 158-59.)

2017-18 School Year

9. Student exhibited some concerning behaviors in the home at the start of the 2017-18 school year, and resisted going to school in the mornings due to anxiety. Student also engaged in some self-harming or dangerous behavior at that time. (N.T. 194-95, 199, 301.)
10. If Student or the Parent had reported Student's school resistance behaviors at the start of the 2017-18 school year to the middle school counselor, a log entry would have been created. There is no such entry. (N.T. 134-35; S-28.)
11. When Student began the 2017-18 school year, Student's participation in the SAP during the prior school year was continued. Student had regular check-ins and check-outs with the SAP Coordinator. (N.T. 110-12; S-12.)
12. A meeting also convened at the start of the 2017-18 school year that included the SAP team and Student's outside provider. (N.T. 118-19.)
13. In January 2018, Student's team of teachers concluded that due to Student's academic difficulties in social studies class, they should try to meet with the Parents. Several accommodations were to follow that meeting for additional regular education support for Student to be successful in that course. (N.T. 42; S-23; S-26 at 1-6.)
14. In late March 2018, Student told the Parent that a peer had touched Student inappropriately the previous summer. Student also told a peer. (N.T. 200-02.)
15. The Parent immediately shared the disclosure with Student's therapist. (N.T. 200-01.)
16. Word of the disclosure circulated quickly among students at the middle school. (N.T. 202; S-30 at 3.)
17. The next day, a school day, a peer approached the middle school principal with concerns about Student spreading rumors. The

principal had Student brought to the office with the peer to engage in peer mediation. During that mediation, Student alleged that the peer had inappropriately touched Student the previous summer outside of the school environment. (N.T. 45-47, 83, 107-09; S-28.)

18. After the March 2018 peer mediation, the Parent went to the middle school to speak with Student, and Student also spoke with the private therapist. The Parent that day told the middle school principal that Student had been receiving private family-based services. She also picked Student up early, and Student did not return to school for the remainder of the school year on recommendation of Student's private therapists because of Student's significant concerns with the reactions of peers. (N.T. 54, 205-07; S-3; S-11.)
19. Student's family-based services changed to some extent in March 2018 to address those recent events. The provider assisted with creating a safety plan for the home at that time. (N.T. 282-84, 287; S-15)
20. The middle school principal spoke with the Parent after the late March 2018 disclosure about options if Student would not return to school. Those options included the cyber school program. (N.T. 57-59.)
21. In early April 2018, the Parent provided consent for the District to communicate with the family-based service provider by providing certain information. (S-2.)
22. On a prescription dated April 9, 2018, Student's pediatrician recommended "home based schooling for the next 6 weeks." That prescription was extended in late May through June 1, 2018. (S-5; S-10.)
23. The District was not successful obtaining a teacher to provide homebound services for Student, and Student attended the cyber

school program after the March 2018 peer mediation through the end of the 2017-18 school year. (N.T. 59, 69-71, 75, 211; S-4.)

24. Student was evaluated by a provider of behavioral health services in April 2018. At that time, the family reported a history of self-injurious behaviors, mood dysregulation, and difficulties with socialization in addition to the recent disclosure, but no then-current suicidal ideation. (S-30 at 1-3.)
25. The behavioral health evaluation recommended family- and community-based services for a period of thirty-two weeks; school-related recommendations were for a plan to return to school. Diagnoses were for Disruptive Mood Dysregulation Disorder, School Anxiety Disorder, and Separation Anxiety Disorder. (S-30.)
26. Student did experience some difficulty with the cyber-school programming platform. When the District was alerted to those difficulties, teachers were again advised of the need for a homebound teacher. The suggestion was then made for Student to obtain support at the school building on Saturday mornings when teachers are available beginning in sixth grade to students who are identified as experiencing difficulties. (N.T. 236-37, 261-62; P-13; S-6; S-7; S-26 at 8-11.)
27. The District made a report to the appropriate county agency about the allegation of inappropriate touching on April 16, 2018 after discussion among District staff. (N.T. 50, 61-62; S-1.)
28. In mid-May 2018, the District sought permission to conduct an evaluation of Student at the request of the Parent, who gave consent. (S-31.)
29. In late May 2018, the Parent provided consent for the release of information from a private therapist to the District. (S-10.)

30. Student was absent for a total of fifteen days during the 2017-18 school year (before out of building instruction began), all between January and April 2018 and all but five following the disclosure. (S-4; S-11.)
31. Through the end of the third quarter of the 2017-18 school year, Student was attaining nearly all B- and C-range grades with the exception of a nearly failing grade in Library Science. Student's third quarter social studies grade was a B-. (P-2 at 4.)

2018-19 School Year

32. In the fall of 2018, at parental request, Student was placed on one of two teams for that grade level that included Student's friends. (N.T. 73.)
33. Student was referred to the SAP again in August 2018 to prepare for Student's return to school. Student's family-based service providers attended a meeting and advised at that time that the private services would be ending in October. A safety plan was also developed for the transition. (N.T. 118-19, 168-69, 213-14, 243-46, 248-50, 291-92; S-13 at 1-2; S-14; S-17 at 1-2; S-32; S-33.)
34. Student returned to school at the start of the 2018-19 school year. (N.T. 214.)
35. Beginning at the start of the 2018-19 school year, the middle school counselor conducted check-ins with Student at least two days each week. There were few instances indicating anxiety or other difficulty for Student. (N.T. 123-25, 128, 132; S-20.)
36. Student discontinued social skills group in early October 2018 because Student was experiencing anxiety in connection with that group. (N.T. 132-33, 252.)

37. Student's [redacted] social studies teacher met individually with Student whenever Student was uncertain about or frustrated over assignments. (N.T. 147-48.)
38. The District was not provided the behavioral health evaluation report until October 2018. (N.T. 164-65.)
39. A meeting convened in October 2018 prior to cessation of the family-based services and before the Evaluation Report (ER) was completed. (N.T. 168-69, 252-53, 292, 314; S-16; S-17 at 2-3.)
40. The District's ER was completed in mid-October 2018 and provided a summary of the outside evaluation, including mental health diagnoses. (S-18.)
41. Teacher input into the ER reflected Student's occasional need for redirection, distractibility, and a few missing assignments. (S-18 at 6-7.)
42. Cognitive assessment for the ER yielded average range scores across Composites with the exception of Fluid Reasoning (high average range). (S-18 at 14-16.)
43. Student's performance on an assessment of academic achievement for the ER (Wechsler Individual Achievement Test – Third Edition) was solidly in the average range across subtests and Composites, except Oral Reading Fluency where Student earned a below average range score due to a slower reading rate. However, scores on the Gray Oral Reading Tests – Fifth Edition were all in the average range. (S-18 at 16-19.)
44. Social/emotional functioning for the ER (Behavior Assessment System for Children – Third Edition) included rating scales by Student, the Parent, and teachers as a team. The Parent's scales reflected clinically significant scores for anxiety, depression, somatization, withdrawal, emotional self-control, and negative emotionality; and at-

risk scores in adaptability, leadership, and developmental social disorders. The teachers' scales yielded no clinically significant concerns but at-risk scores for attention problems, leadership skills, functional communication, and resiliency. Student's scales did not reflect any concerns. (S-18 at 19-24.)

45. On the Scales for Assessing Emotional Disturbance – Second Edition, the Parent rated two areas as indicative of emotional disturbance (relationship problems, unhappiness or depression) while the teacher's results were not indicative of emotional disturbance in any area. (S-18 at 24-25.)
46. The conclusion of the ER was that Student had a disability but did not demonstrate a need for specially designed instruction. An Accommodation Plan was recommended to address self-regulation and coping skills: a structured learning environment, available identified adult when feeling anxious, check-ins/check-outs, positive reinforcement, prompting as needed, checks for understanding and of emotional status, wait time, multisensory presentation, test and assignment accommodations, and preferential seating. (S-18 at 28-29.)
47. A meeting convened to review the ER. (S-27.)
48. An Accommodation Plan was developed following completion of the ER. All of the recommendations from the ER were made part of the Accommodation Plan. (P-4.)
49. The middle school counselor's notes from the SAP Program during the 2018-19 school year reflected that Student was not experiencing difficulty. (S-19.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. It should be recognized 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 must rest with the Parent who filed the Due Process Complaint.

Application of this principle determines which party prevails, however, only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of 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 who testified to be generally credible, that is, without intending to deceive. And, with one notable exception, the relatively few inconsistencies in the testimony did not materially impact resolution of the issues. Some testimony was more probative and relevant to deciding the issues; merely because witness testimony is credible does not mean all such evidence was accorded equal weight, particularly where, as here, memories had to be supplemented by documentary evidence. The lone exception for credibility and reliability purposes relates to whether the Parent told District professionals in the fall of 2017 about the extent of the concerning behaviors Student exhibited at home relating to school resistance. Here, the

testimony of the District representatives was credited over that of the Parent not only because of the demeanor of the witnesses and their ability to recollect events and when they occurred, but also due to the absence of any documentary evidence to support the assertion that the District was alerted to specific details about Student's school resistance in the fall of 2017. In addition, the behavioral health evaluation in April 2018 makes no mention of school resistance prior to the disclosure; on the contrary, that report reflects good attendance until March 2018. The Parent also, quite understandably, noted her concern with sharing information about Student with people outside of the family. For these reasons, a conclusion simply cannot be reached on this record that the District ignored information at the start of the 2017-18 school year related to Student's school resistance.

In any event, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' closing statements. The documentary evidence was particularly relevant and useful for purposes of this decision.

Section 504 Principles

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 Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); see also *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 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). The Third

Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit”. *Ridgewood, supra*, 172 F.3d at 247. Significantly, “[t]here 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).

Section 504 further 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, supra, 172 F.3d at 253.

The applicable federal regulations implementing Section 504 require that an evaluation shall be conducted “before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 C.F.R. § 104.35. An initial evaluation under Section 504 must assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id.* The evaluation is conducted by a local educational agency (LEA) such as a school district.

Pennsylvania's Chapter 15 regulations similarly obligate the LEA to obtain sufficient information in order to determine whether a child is a "protected handicapped student" and to involve the parents in that process. 22 Pa. Code §§ 15.5, 15.6. Additionally, a parent must be given an opportunity to meet with school district representatives to discuss any evaluations and accommodations, and be notified of the procedural safeguards that attach. *Id.*

The obligation to identify students suspected as having a disability is commonly referred to as "child find." LEAs are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). More specifically, LEAs are required to consider evaluation for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability "at the earliest possible moment." *Id.* (citation omitted).

The Parent's Claims

The first issue is whether the District failed in its obligation to suspect Student of having a disability over the course of the 2017-18 school year and proceed with an evaluation. At least until the end of March 2018, the evidence simply is not preponderant that the District should have considered an evaluation of Student for a suspected disability.

The 2017-18 school year was overall rather unremarkable from an educational standpoint until the end of March 2018. The evidence that Student was in danger of earning a poor or even failing grade in one or two classes is not, in and of itself, suggestive of a disability. Here, the evidence is not preponderant that Student's education was meaningfully impacted in any respect such that the District had reasons to initiate an evaluation.

The late March 2018 disclosure, of course, changed the circumstances significantly. At that point, the District was on notice of Student's behavioral

health services, and Student's subsequent inability to attend school based on private therapists' recommendations certainly pointed to a need to evaluate. And, in mid-May 2018, the District sought to evaluate Student. Under all of the attendant circumstances, this hearing officer cannot conclude that the District should have acted sooner than it did. Even if one would determine that the District ought to have done so perhaps in April 2018, the sixty day timeline for an evaluation⁵ would have provided for a final ER sometime in September 2018 followed by a reasonable period of time to then proceed to develop an Accommodation Plan. That is exactly what occurred here.

For all of these reasons, this hearing officer is compelled to conclude that the Parent has failed to establish by a preponderance of the evidence that the District violated any obligations to Student under Section 504 and Chapter 15. Thus, there is no basis to turn to the claim for compensatory education.

The final issue is whether this hearing officer has jurisdiction over the Parent's claim under Title IX. In a case such as this, a special education hearing officer's authority arises under Section 504 and the federal and state regulations implementing that statute. More particularly, special education due process hearing officers have authority to decide issues relating to a proposed or refused initiation of or change in the child's identification, evaluation, or educational placement of, or the provision of FAPE to, a child under the Individuals with Disabilities Education Act (IDEA).⁶ 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.503, 300.507, 300.511; 22 Pa. Code §§ 14.101 – 14.163. Claims under Section 504 and Chapter 15 are also addressed through these proceedings. 22 Pa. Code §§ 15.8, 16.63. Special education hearing officers are limited to deciding claims within these parameters. The

⁵ Reports of evaluations such as the one conducted here must be provided within sixty calendar days of consent (excluding summers) that must be sought promptly. 22 Pa. Code §§ 14.123(b), 14.124(b).

⁶ 20 U.S.C. §§ 1400-1482.

Parent has not offered any citation to any authority for this hearing officer to adjudicate this claim, and she declines to do so.

CONCLUSION

The Parent has failed to establish on this record any violation by the District under Section 504 and Chapter 15 for the time period in question.

ORDER

AND NOW, this 30th day of June, 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parent's claims are DENIED in their entirety.

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, M.Ed., J.D., C.H.O.
HEARING OFFICER
ODR File No. 23151-1920AS