

*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 Due Process Hearing Officer**

### **Final Decision And Order**

#### **Closed Hearing**

**ODR No. 28086-22-23**

**Child's Name:**

S.K.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents:**

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**Hearing Officer:**

Cheryl Cutrona, J.D.

**Date of Decision**

October 17, 2023

## **INTRODUCTION AND PROCEDURAL HISTORY**

S.K. (hereafter, the Student),<sup>1</sup> resides with Parents and two siblings within the boundaries of the Norwin School District (hereafter, the District).

On May 19, 2023, the Parents filed a Complaint with the Office for Dispute Resolution (ODR) claiming that the District failed to provide timely and appropriate accommodations during the pandemic and thereafter to protect the Student and the family based on their medical issues. More specifically, the Complaint alleged that the District violated Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA) by: (1) Denying the Mother the ability to attend school board meetings virtually and to provide live public comment using a remote platform; (2) Failing to provide the Mother with a reasonable accommodation to permit her to attend the Student's upcoming high school commencement ceremony; (3) Discriminating and retaliating against the Mother and the Student after the Mother exercised rights enjoyed and protected under Section 504 and the ADA; (4) Failing to identify the Student as a student with a disability in need of a Section 504 Service Agreement; and (5) Failing to appropriately implement the Student's Section 504 Service Agreement and failing to provide the Student with the appropriate supports and services. As a result of these alleged violations, Parents sought the provision of reasonable accommodations for the Mother and the Student, compensatory education commensurate with the alleged denial of FAPE, and a finding of deliberate indifference.

On May 31, 2023, the District submitted a Motion to Dismiss. The Hearing Officer advised the Parents to submit their response on or before

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<sup>1</sup> In the interest of confidentiality and privacy, the Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including the details on the cover page, will be redacted prior to the decision's 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) and 34 C.F.R. § 300.513(d)(2).

June 8, 2023. On June 8, 2023, Parents filed their response opposing the District's Motion to Dismiss. On June 13, 2023, the Hearing Officer issued a ruling on the District's Motion to Dismiss. The Hearing Officer dismissed all claims raised on behalf of the Mother based on a lack of jurisdiction, and retained jurisdiction to hear claims regarding the provision of FAPE and claims for accommodations for the Student. In regard to the Parents' deliberate indifference or retaliation claims, the Hearing Officer retained jurisdiction only to issue a finding on those issues.

The Complaint proceeded to a three-day, closed, due process hearing that was convened via video conference on August 16, 2023; September 6, 2023; and September 25, 2023.<sup>2</sup>

All evidence including the exhibits admitted to the record and transcripts of the testimony was considered by the Hearing Officer. The only findings of fact cited herein are those needed by the Hearing Officer to explain the ruling. All exhibits and aspects of each witness's testimony are not explicitly referenced below.

For the reasons set forth below, the Parent's claims are denied.

### **ISSUES**

1. Did the District violate its Child Find Obligation by failing to timely and comprehensively evaluate the Student within the meaning of Section 504 of the Rehabilitation Act of 1973?
2. Did the District fail to offer the Student a FAPE from August of 2021 to October of 2022 by not accommodating the Student's needs?
3. Did the District act with deliberate indifference?
4. If the answer is "yes" to any of these questions, what remedies are appropriate?

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<sup>2</sup> References to the record throughout this decision will be to the Notes of Testimony (NT), School Exhibit (S-) and/or Parent Exhibit (P-) followed by the Exhibit number and page number, and Hearing Officer Exhibits (HO) followed by the exhibit number.

## **FINDINGS OF FACT**

1. The District is a local educational agency (LEA) within the meaning of 20 USC § 1401(15), 34 CFR § 300.28, 22 Pa. Code 14.102(a) (2)(vii) and a recipient of federal funds within the meaning of the IDEA, 20 USC § 1401 and Section 504, 29 USC § 794(b)(2)(B).
2. The Student has attended school in the District since [redacted].
3. Prior to high school, the Student was a “straight-A” Student, participated in extracurricular activities such as Orchestra, the National Junior Honor Society, Girl Scouts, and [redacted] (NT, at 323-324; P-2, p. 4). The Student took a rigorous courseload (P-2, p. 2). For example, the Student took [redacted] geometry and high school algebra simultaneously (NT, at 322; P-2, pp. 3-4) and participated in the Math Counts Competition and the PA Math League Contest achieving the second highest score in the school (P-2, p. 4).
4. The Mother has suffered from a medical condition limiting her life activities and causing her to be immunocompromised. When masking became optional, the Parents requested District-wide masking (NT, 30). The District-wide policy was not changed.
5. The Student’s first year of [redacted] coincided with the pandemic, online learning, and hybrid scheduling. In the Spring of 2021, during the Student’s second semester of [redacted], these challenging transitions started to take their toll. The 2020-2021 school year was a “hybrid year,” when students attended the brick-and-mortar school every other day (NT, at 213). The Student’s attendance record between January 11 to May 21, 2021 lists 18.5 absences, more than in any other school year (P-1, p. 8). During that time, the Student was carrying a full courseload that included Advanced Placement (AP), honors courses, and Orchestra. The Student’s grade point average (GPA) dropped from 99.467 in the first term, to

69.000 in the fourth term resulting in a cumulative 89.429 GPA for the school year (NT, at 85-86, 226; P-1, p. 8).

6. On March 16, 2021, the Student's English Teacher emailed the Parents to report that she had observed the Student crying, noticed the Student had not been submitting assignments, and that the Student's grades were declining. The English Teacher also mentioned her concerns about the Student's well-being [redacted] (P-22, p. 1).
7. On April 12, 2021, the Mother emailed the School to say that she took the Student to the pediatrician who indicated that the cause may be stress-related. However, the Mother stated that she had her own thoughts based on her own medical condition and would be taking the Student to specialists for diagnosis (P-22, p. 2-3).
8. The Mother alerted the School about the Student's symptoms — headaches, stomach aches, fatigue — during the Spring of 2021 (NT, at 231-232; SD-1).
9. In April of 2021, the School received a Headache Action Plan from the Student's neurologist (SD-19), for which the School developed a health care plan (NT 31, 92, 372-373; SD-19). There were no academic accommodations recommended in the plan (NT, 374; SD-20).
10. On August 25, 2021, the Mother emailed the School trying to reach the School Nurse to discuss accommodations for the Student's medical condition and its corresponding documentation confirming the diagnosis of orthostatic intolerance that was allegedly sent to the School (SD-3, p. 3).
11. On August 27, 2021, the Mother emailed the School stating [redacted] that the Student had expressed a desire to graduate [redacted] early and wanted an accelerated course load, which would mean taking courses through the District's online academy, (P-22, p. 8; NT, at 216) an asynchronous platform that the students can access on their own time

(NT, at 240). The School District complied despite the School Counselor's advice (SD-6, p. 1).

12. In August 2021, the Parents decided it was medically necessary to enroll [the Student] in the online academy out of a concern with the District's optional mask policy that could potentially expose the family to COVID-19 (SD-2, p. 1-2; SD-10, p. 1; SD-11, p. 1; P-22, p. 5).
13. In an August 30, 2021 email to the Principal of the online academy, the Mother suggested the Student's medical condition was orthostatic intolerance (SD-2, p.1). No medical documentation was provided at that time.
14. On October 11, 2021, the School Nurse emailed the High School Counselor and the Director of Special Education Services asking if either one of them had seen medical documentation for the Student (SD-3, p. 1). The Director of Special Education checked with the School Nurse, and the [redacted]Counselor and was told that they had not received any medical documentation about the Student, informed the Mother that medical documentation was required to develop a Section 504 Service Agreement, and that the District had not received any documentation from her for the Student (NT, at 419).
15. In January of 2022, the [redacted]Counselor and the Mother had a telephone conversation during which he became aware that a 504 Service Agreement had been requested (NT, at 255).
16. Around the same time, the Mother expressed concerns that the Student was overwhelmed after over-scheduling to graduate [redacted] early (SD-7, p. 1; SD-10, p. 3).
17. On January 26, 2022, the Mother emailed the School indicating that the medical documentation had been faxed to the School by the "doctor at Children's" after a follow-up visit on September 20, 2020 (SD-13, p. 5). The Mother sent three "snapshots" of medical records to the School

on that day: (1) A Cardiology "Patient Summary" dated April 22, 2021 has a diagnosis of an "autoimmune dysfunction" with "dizziness" and "migraines" (P-13, p. 9-10); (2) A Neurology "Patient Summary" dated August 27, 2021 that includes a diagnosis of "disrupted sleep cycle," "migraines," "low iron," and "dizziness" (SD-13, p. 7-8); and (3) a second Cardiology Patient Summary dated September 7, 2021 that includes a diagnosis of "autonomic dysfunction" and "dizziness" most likely consistent with "orthostatic hypotension" (SD-13, p. 7-10). None of the documentation was dated in 2020.

18. The District responded by drafting a Section 504 Service Agreement that was sent to the Parents by email on February 10, 2022 (SD-13, p. 3). It was signed and returned by the Parent on February 16, 2022. The Section 504 Service Agreement included the following accommodations: (1) Extended time on assessments (50%); (2) Increase prompts for assignment completion; (3) Extended time (one day) on instructional assignments without grade reduction; and (4) Provide benchmarks for periodic check-ins on long term assignments (SD-23).
19. After receiving additional medical documentation from the Parents, the 504 Service Agreement was subsequently modified on March 18, 2022 (SD-26), October 20, 2022, and October 31, 2022 (SD-25).
20. The Student's grades improved between terms two and three of the 2021-2022 school year following the implementation of the Section 504 Service Agreement (P-1, p. 9).
21. The Mother complained that some online courses had "no teachers" assigned. The Principal of the online academy responded to the Mother's allegation explaining that although the courses had been listed as having "no teachers" assigned, they actually did have teachers provided through a vendor, a learning management system (NT, at 150-151; SD-15, p. 9; P-22, p. 13-14).

22. The District provided accommodations so the Student could participate in extracurricular activities and designed specific accommodations so the family could attend the Student's graduation ceremony (NT, p. 109-110; 406-409; P-22, p. 9).
23. In Spring of 2023, the Student graduated [early] after doubling up on classes, many of which were AP and Honors courses. The Student's GPA at graduation was YTD, 98.300 and cumulative 92.429 (P-1, p.10).

### **Parents Claim**

The Parents claim that the District failed to initiate a timely evaluation for a Section 504 Service Agreement despite ample notice of behaviors and health conditions likely to indicate a disability. The Parents argue that while an official medical diagnosis may support the need for a Section 504 evaluation, it is not absolutely required where there are other signs an evaluation is needed [See *A.B. v. Great Valley School District*, ODR No. 27474-22-23, Hearing Officer Jelley, June 28, 2023, finding the District should have evaluated the student even if it did not have an official medical diagnosis of the student's disability].

As a result of the District's failure to initiate a Section 504 evaluation, the Parents contend that the District denied the Student access to FAPE beginning in the August of 2021.

When a Section 504 Service Agreement was implemented in the Spring of 2022, the Parents allege that the accommodations were inappropriate and inadequate, thereby denying the Student access to education. The Parents also claim, that the Section 504 Service Agreement implemented in the Spring of 2022 was not revised to provide appropriate academic supports despite knowledge that the Student was struggling in the online environment.



The Parents allege that from August of 2021 to October of 2022, the Student was denied the ability to access available academic and extracurricular services and activities because the School failed to provide the appropriate supports. The Parents argue that the Student had difficulty accessing education using the online academy, and as a result was unable to keep up with assignments, missed instruction, and fell behind in courses. The Parents allege that by enrolling in the online academy's "no teacher" courses, the Student was provided only five minutes of recorded instruction. As a result, the Student was denied meaningful participation in educational activities and denied meaningful access to educational benefits. Therefore, the Parents contend the Student is entitled to compensatory education to remedy the District's denial of FAPE from August of 2021 to October of 2022.

Furthermore, the Parents argue that the District acted with deliberate indifference by failing to initiate an evaluation and implement appropriate accommodations despite knowledge of the Student's disability and academic needs.

### **District's Claim**

The District claims that the Parents failed to meet their burden of proving that the District discriminated against the Student based on disability under Section 504. The District contends that the Parents provided no evidence of medical documentation being sent to the District prior to January 26, 2022, after which the District responded promptly by implementing a Section 504 Service Agreement by February 10, 2022. Once the Section 504 Service Agreement was in place, records indicate the Student's grades demonstrated a marked improvement.

Furthermore, the District argues that it appropriately implemented and met all accommodations of the Section 504 Service Agreement through its

online academy and provided the Student with appropriate supports and services.

The District contends that the Parents failed to put forward any allegations whatsoever in support of their deliberate indifference claim aside from conclusory assertions. The District maintains that the record demonstrates that it worked diligently with the Parents to ensure the Student's meaningful participation in educational activities and meaningful access to educational benefits as required under *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012). The District purports that, in accordance with this standard, it provided the Student with meaningful access through the online academy program.

The District requests that the Parents' Complaint be dismissed.

## **GENERAL LEGAL PRINCIPLES**

### **Burden of Proof**

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. Here, it should be recognized that the burden of persuasion lies with the party seeking relief: the Parents. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

The burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

This rule can decide the issue when neither side produces a preponderance of evidence (i.e., when the evidence on each side has equal weight), which the Supreme Court in *Schaffer* called "equipoise." On the

other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See *Schaffer*, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who filed the Complaint. In essence, the Parents must prove by a preponderance of the evidence that the District violated its Child Find obligation by failing to timely and comprehensively evaluate the Student within the meaning of Section 504 of the Rehabilitation Act of 1973, failed to offer the Student a FAPE from August of 2021 to October of 2022 by not accommodating the Student's needs, and did so with deliberate indifference.

The Parents have failed to meet their burden of proof by a preponderance of evidence.

### **Witness Credibility**

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at 28 (2003). One purpose of an explicit credibility determination is to give courts the information they need in the event of judicial review. [See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014). "[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area*

*School District*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017)].

During this hearing, the Hearing Officer finds that the witnesses testified credibly and candidly to the best of their recollections. The School witnesses clearly did not remember or have evidence showing that it received any medical documentation, other than the Headache Plan, prior to January 2022. Without intending to deceive during her testimony, the Mother insisted that the documentation was sent in 2020, however, when she did send it, there was no medical documentation earlier than 2021. The Hearing Officer finds that honest mistakes happen that could be the result of miscommunication, reliance on others, and clerical or technological errors. In any case, the Hearing Officer believes that the witnesses did their best to present the truth as they perceive it.

### **Child Find Obligation**

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and its implementing regulations prohibit discrimination on the basis of disability by recipients of federal financial assistance. Pursuant to Section 504, schools receiving federal funds must “provide a free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction regardless of the nature or severity of the person’s handicap.” 34 C.F.R. § 104.33(a).

Like the Individuals with Disabilities Education Act (IDEA), Section 504 has its own Child Find and FAPE requirements. The Section 504 Child Find obligation requires school districts to evaluate any student who needs or is believed to need special education or related services due to a disability. 34 C.F.R. § 104.35(a). The Third Circuit Court of Appeals requires that LEAs identify disabled children “within a reasonable time after school officials are

on notice of behavior that is likely to indicate a disability." See *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012).

Pennsylvania codifies these obligations under 22 Pa. Code § 15.5 and requires a written "Service Agreement."

### **FAPE Under Section 504**

In deciding Section 504 FAPE claims, courts apply a "reasonable accommodation" analysis. [See *Ridley* at 280; See also, *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 490 (E.D. Pa. 2011) holding that to determine whether the student "was afforded an appropriate education," the court should consider "whether [the student] was provided significant learning and conferred a meaningful benefit"].

An "appropriate education" is defined as "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 104.34, 104.35, and 104.36." 34 C.F.R. §104.33(b). An "appropriate education" under Section 504 means "a school district must reasonably accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits." See *Ridley*, at 280.

Pennsylvania law provides that "School districts are required to provide disabled students with the aids, services, and accommodations that are designed to meet the educational needs of protected handicapped students as adequately as the needs of nonhandicapped students are met." 22 Pa. Code 15.1(b). Chapter 15 of the Pennsylvania Public School Code Regulations also states that for parent-initiated evaluations and provision of services under Section 504, "[t]he parents should include available relevant

medical records along with their written request for the provision of services." 22 Pa. Code § 15.6.

## **DISCUSSION**

Districts are required to fulfill their Child Find obligation within a reasonable time after notice of behavior that is likely to indicate a disability. See *Ridley* at 271-272. Such reasonableness must be assessed on a case-by-case basis, in light of the information and resources possessed by the District at a given point of time. *Id.*

The crux of the matter here seems to be the Parent's argument that they did not need to provide medical documentation for the School to evaluate the Student because Districts are required to evaluate students within a reasonable time after suspecting that the Student may have or are on notice of behavior that is likely to indicate a disability. Determining whether or not the School had reason to suspect that the Student was disabled is therefore important.

The state regulations indicate that parents *should* include medical records along with their written request for services; not that they *must* submit it to trigger a Section 504 Service Agreement (22 Pa. Code § 15.6).

The Parents cite *A.B. v. Great Valley School District*, ODR No. 27474-22-23 (Hearing Officer Jelley, June 28, 2023) which concludes that the District should have evaluated the student even if it did not have an official medical diagnosis of the student's disability. That case differs dramatically from this situation. *A.B.* involved a student who had been hospitalized multiple times and engaged in self-harm yet the LEA failed to evaluate for over two years.

Each situation is unique. In this case, the Parents emailed and spoke with the School multiple times to discuss the Student's headaches, stomach aches and fatigue. At that time, the Parent had provided the School with

medical documentation for headaches, and a health plan was already in place for that symptom. Given the point in time in this case, during the pandemic and its aftermath, missing assignments and absences were not sufficient to raise a suspicion of disability.

If anything, the Parents' requests sent a mixed message to the School. On the one hand, in Spring 2021, the Mother stated that the Student was experiencing symptoms that were adversely impacting attendance and grades. On the other hand, in Summer 2021, the Mother requested that the Student's courseload be accelerated to graduate early. The School complied with those requests, despite the School Counselor's advice, by permitting the Student to register for an extremely rigorous courseload and enrolling the Student in the online academy. The asynchronous platform allowed the Student to access the courses necessary to graduate at the Student's pace. This accommodation satisfied the Student's need to perform school work only when the Student was feeling well enough.

The Parents' complaints about the confusing transition to the online academy and the courses that were taught by outside vendors were adequately addressed by the Principal of the online academy and its teachers. The Mother admitted that the Student was overwhelmed and freezing up attempting to carry a rigorous courseload and sought accommodations to help the Student manage the educational plan. The School agreed and provided accommodations such as accepting assignments past the due date.

The Hearing Officer finds that the evidence produced by the Parents is far from preponderant, did not establish a suspicion of a disability during the time in question, and the Child Find claim is dismissed.

The District at all times offered the Student FAPE. The School provided everything requested to help the Student accomplish the goal of graduating [redacted] early. The School cooperated with the Parents and the Student

and offered an appropriate asynchronous online education and the supports necessary to accommodate the Student's disability even before the Section 504 Service Agreement was in place.

The evidence here demonstrates that when the School did receive medical documentation in January 2022 indicating the Student's disability, it immediately took action and created a Section 504 Service Agreement with additional supports and services to reasonably accommodate the Student's needs, to ensure meaningful participation in educational activities, and access to educational benefits.

The Parents bear the burden of establishing a showing of disability discrimination under Section 504. In January 2022, the Parents demonstrated by medical documentation that the Student is a "handicapped individual" or "otherwise qualified" for a Section 504 Service Agreement. However, Parents did not demonstrate that the Student was "denied the benefits of" or "subject to discrimination" under Section 504. At all times, the District responded to the Parents' requests, provided the Student with access to an appropriate educational program, and immediately upon receiving the medical documentation took reasonable steps to provide additional accommodations. The District did not discriminate against the Student on the basis of disability, so there can be no finding of deliberate indifference.

## **CONCLUSION**

1. The District did not violate its Child Find Obligation by failing to timely and comprehensively evaluate the Student.
2. The District accommodated the Student's needs and did not fail to offer the Student a FAPE from August of 2021 to October of 2022.
3. No legal or equitable relief or remedy is appropriate, and the Student's Section 504 intentional discrimination claims are now exhausted.



## **ORDER**

AND NOW, this 17th day of October 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parents' claims are DENIED. It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is relinquished.

*Cheryl Cutrona*

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Cheryl Cutrona, J.D.  
Hearing Officer

Date of Decision: October 17, 2023

ODR 28086-22-23