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

ODR No. 22807

CLOSED HEARING

Child's Name:

S.H.

Date of Birth:

[redacted]

Parents:

[redacted]
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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

04/10/2020

Introduction

This matter concerns the educational rights of a student with disabilities (the Student).[1] For the period of time in question, the Student was enrolled in the School District of Philadelphia (the District). The parties agree that the Student is a child with a disability and that the District was the Student's local educational agency (LEA) as those terms are defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

The Student's parents (the Parents) allege that the Student was subjected to bullying and harassment by another student, that the Student suffered physical and psychological harm by the other student, and that the District failed to protect the Student. The other student is also a child with a disability. To avoid ambiguity and confusion, I will refer to the other student as the Schoolmate.

After careful consideration of the evidence and the parties' arguments, I find in favor of the District.

Procedural History

I write primarily for the parties, but the history of this matter provides important context.

On March 18, 2019, the Parents filed a complaint in the United States District Court for the Eastern District of Pennsylvania (the Court Complaint). The Parents named the District and one of its employees as defendants. The Court Complaint included 10 counts. Of those, eight were directed against the District.

The District moved to dismiss the Court Complaint arguing, *inter alia*, that the Parents had failed to exhaust administrative remedies available

[1] Except for the cover page, identifying information is omitted as much as possible.

under the IDEA. *See Memorandum re: Motion to Dismiss*, Case 2:19-cv-01115-MMB, Document 5 (*Court's Memo*).

On September 6, 2019, the Court issued a memorandum and order dismissing some of the counts of the Court Complaint with prejudice. *See Order re: Motion to Dismiss*, Case 2:19-cv-01115-MMB, Document 6 (*Court's Order*) at 1. Seven counts survived.

The court accepted the District's argument about administrative exhaustion and dismissed the seven remaining counts without prejudice for failing to exhaust administrative remedies. In doing so, the court held that "the history of the proceedings indicates that the gravamen of the claims against the District is the denial of a FAPE." *Memorandum re: Motion to Dismiss*, 2:19-cv-01115-MMB Document 5, citing *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 748–49 (2017). The court also instructed the Parents to initiate a special education due process hearing as the means by which to exhaust administrative proceedings. *Order re: Motion to Dismiss*, 2:19-cv-01115-MMB Document 6, Page 1.

The Parents did as the court ordered by requesting this due process hearing on October 3, 2019. The Parents' original due process complaint included verbatim the seven counts in the Court Complaint that were not dismissed with prejudice.[2] Those counts raised claims under Title IX of the Education Amendments Act of 1972, Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act as Amended (ADA), 42 U.S.C. § 12101 *et seq.*, Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*., and the Fourteenth Amendment pursuant to 42 U.S.C. § 1983.

Upon reviewing the original due process complaint, I had concerns about my jurisdiction. As the court noted, there is no reference to any

[2] The original due process complaint was the Court Complaint attached to a few other documents.

violation of the Student's right to a free, appropriate public education (FAPE) in the Court Complaint. The claims that I may hear all relate to the provision of FAPE regardless of what law they arise under. At the same time, the Court concluded that the gravamen of the Court Complaint was a denial of FAPE claim that is remediable through an IDEA due process hearing. I was, therefore, obligated to read an IDEA denial of FAPE claim into the original due process complaint despite the absence of any such language.

I explained this jurisdictional issue to the parties in a preliminary order on October 8, 2019. I further explained that I would hear the implied IDEA claim along with the Section 504 and ADA claims in the Court Complaint, but only to the extent that those claims related to an alleged FAPE violation. In an abundance of caution, I dismissed all other claims raised in the original due process complaint.

I also addressed remedies in the October 8, 2019 preliminary order. The only remedies demanded in the due process complaint that I have authority to award are compensatory education private placement.[3] I dismissed all other demands.

The District filed a response to the due process complaint on October 15, 2019. The District then filed a motion to dismiss, styled as a sufficiency challenge, on October 18, 2019. I resolved the District's motion, finding that the original due process complaint included claims that fall within my jurisdiction and, because of the court's order, must be read to include IDEA claims. The fact that IDEA claims were not actually pleaded made those claims vague. I gave the Parents leave to amend the original complaint to cure the vagueness.

[3] I interpreted the Parents' demand for "continued treatment" to be a demand for a particular form of compensatory education. I did so without resolving my authority to order that particular form of compensatory education. Very recently, the relief available to remedy IDEA FAPE violations was discussed in the context of a Rule 12(b)(6) motion in *Moynihan v. W. Chester Area Sch. Dist.*, No. 19-648, 2020 U.S. Dist. LEXIS 59731 (E.D. Pa. Apr. 6, 2020).

On October 31, 2019, the Parents filed an amended due process complaint. The Parents incorporated by reference the facts alleged in the Court Compliant and the ADA and Section 504 claims. The Parents also explicitly raised IDEA claims in the amended due process complaint for the first time.

No other pre-hearing motions were filed. The hearing then convened over multiple session from January 23, 2020 through March 5, 2020. The evidentiary record closed with the conclusion of the final hearing session. The parties submitted written closing briefs/summations in lieu of oral closing statements on March 30, 2020.

Issues

The issues presented for adjudication are:

1. Did the District actions and inactions result in a substantive denial of FAPE to the Student in violation of the IDEA?
2. Did the District actions and inactions result in a substantive denial of FAPE to the Student in violation of Section 504?
3. Did the District actions and inactions result in a substantive volition of the Student's rights under the ADA?

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

I find that none of the witnesses who testified in this matter were deceitful in the sense that all believed what they were saying. Those witnesses who expressed emotion did so genuinely – especially the Parents. However, I do not weigh the testimony of all witnesses equally.

Several factors diminish the weight that I assign to the testimony from both of the Parents. First, a very large quantity of their testimony was hearsay. Second, the Parents drew no distinction between events that they witnessed and events that they did not witness, presenting first, second, and third hand reports with equal conviction.[4] Third, when confronted with contradictory evidence about events for which they were not present, both Parents doubled down, dismissing testimony of first-hand witnesses as lies and contemporaneously drafted documents as fraudulent. Fourth, the Parents testified with remarkable certainty about the Schoolmate's motivation despite the fact that all such testimony was pure speculation. The Parents' inability to separate speculation and second-hand accounts from their first-hand observations diminishes the weight of their testimony.[5]

To the extent that the Parents testified as fact witnesses, relaying their first-hand observations, I accept that testimony as credible and give it the weight that it is due in light of the foregoing.

[4] To the extent that the Parents' understanding of events comes from the Student, the Parents do not satisfactorily explain how their belief in the Student's reports squares with their concerns about the Student's occasional lying. *See* S-3.
[5] For clarity, I make the same determination for both Parents.

I apply the same logic to all of the witnesses. Almost all witnesses gave hearsay testimony and I disregard all hearsay. I assign appropriate weight to each witnesses' non-hearsay testimony based on their recollection of events, and how their recollection squares with undisputed, contemporaneously drafted records.

Hearsay is admissible in special education due process hearings but cannot be used to form the basis of the decision. The record of this case as a whole may form a sufficient basis to reconsider that standard.

In my experience, it is rare to find a disputed material fact in a special education due process hearing. The parties almost always agree about what happened and when – but see the facts differently and reach different conclusions about what the law requires. This matter falls into that highly unusual sub-set of cases that include a genuine factual dispute. Specifically, the Parents allege five incidents in which the Student was subject to bullying and harassment by the Schoolmate (10/09/2018, 10/15/2018, 10/19/2018, 10/22/2018, and 10/26/2018). The District does not characterize any of those incidents as bullying or harassment and acknowledges only four such incidents (all but 10/15/2018). Resolution of this factual dispute hinges in part on testimony.

Below, I find that there was an incident that occurred between the incident on October 9 and October 19, 2018, bringing the total number of incidents to five. In doing so, I do not rely upon either parent's testimony.

Findings of Fact

I carefully considered the record, weeding out the hearsay. I make findings only as necessary to resolve the issues before me. I find as follows:

1. The Student carries a number of educational and medical diagnoses including [redacted]. NT *passim.*

2. The Student is physically fragile as a result of these conditions and at an elevated risk of stroke. The Student's physical activities must be restricted to mitigate the risk of injury. NT *passim*.
3. The Parents enrolled the Student in the District starting in the 2017-18 school year [redacted]. The Student previously attended an out-of-state parochial school. S-40.
4. The Student started the 2018-19 [redacted] school year under an IEP dated May 14, 2018 (the IEP). S-15, S-18. The IEP set goals for the Student's oral reading fluency, word identification, sentence organization (drafted as a speech and language goal), and math skills. S-15.
5. The IEP was developed using an evaluation report (ER) that the District completed on May 7, 2018. The ER was based in large part on an evaluation completed by a nationally renowned children's hospital. S-14.
6. The Parents do not allege that the ER or IEP were inappropriate at the time that they were drafted. In the absence of such an allegation, I find that both documents were appropriate at the time they were drafted.
7. Under the IEP, the Student received all academic instruction in the regular education setting and 75 minutes per month of group speech therapy. S-15.
8. The Student and the Schoolmate were placed in the same classroom. *Passim.*
9. On October 9, 2018, the Schoolmate made physical contact with the Student.
10. The Schoolmate was assigned a one-to-one (1:1) aide. The Schoolmate's aide was present during the October 9, 2018 incident and I accept the aide's description of events as follows (NT at 306):

a. The Student walked by the Schoolmate on the way to get a laptop computer for a lesson.
b. The Schoolmate grabbed the Student around the waist, startling the Student.
c. The Schoolmate's aide immediately removed the Schoolmate's hands.
d. The Student retrieved the computer and returned to the lesson.
e. The Schoolmate's aide addressed the incident with the Schoolmate outside of the classroom.

11. The incident was reported to the building Principal. The Principal informed the Parents of the incident. *See, e.g.* NT at 806.

12. Both parties agree that there was an incident on October 9, 2018. The parties do not agree that there was an incident between October 9 and 19, 2018. I find that such an incident occurred although there is no preponderant evidence of the exact date. I reach this conclusion because District witnesses recall two distinct incidents as the "first" incident. Some recall the first incident as the October 9 incident. Others describe a different incident occurring before October 19.

13. Regardless of the date, the second incident again involved the Schoolmate making physical contact with the Student. As both students were lining up to transition to a math class in a different classroom, the Schoolmate pulled the Student to the floor. The Schoolmate's aide intervened again, removing the Schoolmate first from the Student and then from the classroom. *See, e.g.* NT at 62.

14. There is preponderant evidence in the record that the Student was startled by the Schoolmate during the second incident. *Id*. There is no preponderant evidence that the Student was physically injured during the second incident.

15. A third incident occurred on October 19, 2018. This incident occurred in the music classroom. The music teacher broke the class into groups. The Student was sitting on the carpet with a group. The Schoolmate was assigned to a different group but sat near the Student. The music teacher instructed the Schoolmate to go to the assigned group. The Schoolmate did not comply and instead shoved the Student over. The Schoolmate's aide intervened and removed the Schoolmate. S-27 at 1.
16. District personnel asked the Student if the Student wanted to see the nurse immediately following the incident. The Student declined but saw the nurse the next day. The nurse found no injury. P-4, S-11.
17. District personnel promptly informed the Principal and the Parents of the October 19 incident. P-4, S-11.
18. As a result of the October 19, 2018 incident, the Principal assigned the Schoolmate to a different classroom. *See, e.g.* NT at 770-771.
19. The Student and the Schoolmate were both scheduled to go on a field trip on October 22, 2018. The Principal requested that the Parents and the Schoolmate's parents come as additional chaperones. The Parents declined that request. *See, e.g.* NT at 663. Despite some ambiguity in the record, I find that the Schoolmate's parents also declined that request.
20. The Student and the Schoolmate participated in the field trip without incident until returning to school grounds. Upon returning to school, the Student and Schoolmate were with each other in the schoolyard.[6]
21. While in the schoolyard on October 22, 2018, the Schoolmate grabbed the Student in a headlock and pulled the Student to the ground. The

[6] There is no dispute that the Student and the Schoolmate were with each other in the schoolyard on October 22, 2018. Several school witnesses testified that the Student and the Schoolmate were with each other in the schoolyard only because the Student disobeyed an instruction to come into the school building. These witnesses also testified that the Student's demeanor towards the Schoolmate was playful. I find this testimony was credible but ultimately not relevant to the disposition of this matter.

Student's homeroom teacher and the Schoolmate's aide intervened, separating the children. The Student's teacher escorted the Student back to class. S-27 at 2, 3.

22. The fifth and final incident occurred on October 26, 2018. This incident occurred on school grounds just prior to the start of the school day. One of the Student's parents accompanied the Student to school to purchase tickets for a school event. The Schoolmate also came to the school with a parent. Upon seeing the Student, the Schoolmate ran to the Student and grabbed the Student around the neck. S-27 at 4, 5.
23. The Student's Parent and a District employee intervened, separating the children. This incident resulted in a verbal altercation between the Student's parent and the Schoolmate's parent. The Student's parent then called the police. The police came to the school and took a report. S-27 at 4.
24. After the fifth incident, the Student went to school with the Parents' consent and attended the remainder of the school day without incident. *See, e.g.* NT 681.
25. Although there is some ambiguity as to the date, the District transferred the Schoolmate to a different school building sometime after the fifth incident. *Passim*.
26. The Parents retained an attorney sometime before November 20, 2018. The attorney was not the same attorney who represented the Parents in this matter. The attorney wrote a letter to the District expressing the Parent's concern about the incidents and requesting a copy of the Student's educational records. S-30.
27. On November 26, 2018, the District and Parents met. The Parents brought their former attorney to the meeting. The District and Parents drafted an Individual Safety Support Plan for the Student (the Safety Plan). The Safety Plan called for an adult to escort the Student during

all transitions and trips to the bathroom and monitor the Student during lunch. S-31.

28. On January 8, 2019, the District revised the Safety Plan to say that the Student has a stroke risk, and to include signs of a stroke. The substantive services that the District provided under the Safety Plan remained the same. S-35.

29. The Parents requested homebound instruction on February 4, 2019. The District responded to the request the same day, providing forms and requesting documentation. The District followed up on February 22, 2019, when the Parents did not return the paperwork or provide medical documentation. S-11 at 26.

30. On February 26, 2019, the Student enrolled in a cyber charter school. The cyber charter school became the Student's LEA immediately upon enrollment, terminating the District's ongoing IDEA obligations to the Student.[7]

31. The Student's attendance record, report cards, and IEP progress monitoring reports were presented as evidence. S-33, S-36, S-39. The accuracy of the attendance record was not disputed.

Discussion

The issues presented are broad, categorial allegations arising under the IDEA, Section 504, and the ADA. Under the facts of this case, resolution of the IDEA claims also resolves the Section 504 claims and impacts upon my ADA jurisdiction. Therefore, I will examine the IDEA claims first.

[7] The evidentiary record does not reveal the exact date that the Student enrolled in the cyber charter school. I accept the averment made in the Parents' summation as to the date of the enrollment.

IDEA Legal Standards

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision in no different.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See, Lachman v. Illinois State Bd. of Educ*., 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light

of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

The Parents' IDEA Claims

The Parents amended due process complaint describes five ways in which the District violated the Student's rights under the IDEA. Those five arguments are tracked in the Parents' summation:

1. The District denied the Student a FAPE by denying the Parents' request for a one-to-one (1:1) aide. The Parents aver that a 1:1 would have protected the Student from the Schoolmate.
2. The District failed to notify the Parents when the Student was subject to "violent, serious bodily injury attacks Student suffered on school property and that Student needed medical attention." *See* Parents' Closing at 2.
3. The District failed to adequately address the Parents' bullying reports.
4. The District failed to "report the violent serious bodily injury attacks on [the Student] to local law enforcement authorities and allowed [the Schoolmate] to continue to have access to [the Student] without appropriate supervision by [the Schoolmate's] one-to-one aide and school personnel." *Id*.

5. The District "[c]ontinues to fail to make reasonable accommodations for Student based on [Student's] emotional and psychological inability to attend the local public school in [Student's] area … including, but not limited to, assigning [Student] a personal one-to-one aide, assuring [the Schoolmate's] aide was present at all times … and failing to suspend [the Schoolmate] pursuit to state and federal statutes." *Id*. I will address each alleged basis of the IDEA violation in sequence.

Assignment of a 1:1 Aide to the Student

There is no evidence that the Parents requested a 1:1 aide as a special education accommodation. Rather, all evidence is consistent with the Parents' assertion that they asked the District to provide a 1:1 aide to protect the Student from the Schoolmate.

The District's alleged failure to assign a 1:1 aide for the purpose of protecting the Student from the Schoolmate is not a cognizable issue under the IDEA. If a child with a disability requires an aide in order to receive a FAPE, then the child's LEA is obligated to provide an aide though the child's IEP. In this case, the Parents present no link between their demand for a 1:1 aide and the Student's *educational* needs.

Aides and personal care assistants are not assigned to provide instruction to children with disabilities. Rather, they are provided to give a multitude of different kinds of educational supports that enable children to benefit from instruction. In this case, there is no evidence that the Student required educational supports from a 1:1 aide in order to receive a FAPE. There is no evidence that the Student was not able to learn and make educational progress as a direct result of the District's refusal to assign a 1:1 aide.

Ironically, this lack of evidence is consistent with the Parents' overarching argument and their original Court Complaint. The Parents never demanded an aide to provide educational services. They demanded an aide

to protect the Student. Therefore, under the facts of this case, the District's refusal to provide a 1:1 aide goes to the Student's safety in school as opposed to the Student's educational needs.

I find that the District's refusal of the Parents' request to provide a 1:1 aide to physically protect the Student from the Schoolmate does not violate the IDEA. There is no evidence establishing that a 1:1 aide was necessary component of FAPE for the Student under IDEA standards.[8]

Failure to Notify the Parents of Incidents

The facts above establish that the District appropriately informed the Parents of all incidents except for the incident that occurred between October 9 and 19, 2018. This analysis, therefore, primarily concerns the District's communications with the Parent concerning the second incident. However, as with the District's refusal to provide a 1:1 aide, it is not clear how any failure on the District's part to inform the Parents of incidents between the Student and the Schoolmate violates the IDEA. The fact that the Parents were dissatisfied with the District's communications does not substantiate an IDEA violation.

The IDEA requires schools to send notices to parents in certain circumstances. For example, schools must send prior written notice (a Notice of Recommended Educational Placement or NOREP in Pennsylvania) before changing a child's IEP. *See* 20 U.S.C. § 1415(b)(3). None of the IDEA's statutorily mandated notices are implicated in the Parents' claim.

In addition to notices, the IDEA requires schools to send periodic progress monitoring reports to parents. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(III). Decisions about what those reports must contain and how frequently those reports are sent are made for each student by IEP

[8] As discussed below, my holding about the need for an aide under IDEA standards also resolves the same issue under the portions of Section 504 that fall within my jurisdiction. I make no determination as to whether an aide was required under any of the other statutes or portions of Section 504 cited in the Court Complaint.

teams. *See id*. Nothing in the Student's IEP required the District to send notice to the Parents about the incidents.

The Student's Safety Plan was not part of the Student's IEP. Regardless, nothing in the Student's Safety Plan (original or revised) required the District to notify the Parents about the incidents.

In sum, nothing in the IDEA itself required the District to notify the Parents of the incidents between the Student and the Schoolmate. The same is true for the Student's IEP and Safety Plan. I find, therefore, that any deficiencies in the District's communications with the Parents about the incidents do not violate the IDEA.[9]

Failure to Respond to the Parents' Bullying Reports

Bullying can be an IDEA issue when a child's victimization hinders his or her ability to obtain a FAPE. *See, e.g. Shore Reg'l High Sch. Bd. of Educ. v. P.S.,* 381 F.3d 194 (3d Cir. 2004). The *Short Regional* case shows that a child's "legitimate and real fear" of an educational placement caused by bullying can render that placement inappropriate. *See id* at 197. The same case also provides an example of the type of evidence used to establish a legitimate and real fear. Documentation of persistent abuse, documentation of psychological diagnoses that are directly attributable to that abuse, and expert testimony directly linking the child's mental state to the provision of FAPE are the hallmarks of such claims. No such evidence was presented in this due process hearing.

A direct link between bullying and a child's receipt of FAPE is necessary to pursue bullying as an IDEA claim. The fact that a child was bullied does not constitute an IDEA violation unless the bullying prevented the child from

[9] As discussed below, my holding about the District's communications under IDEA standards also resolves the same issue under the portions of Section 504 that fall within my jurisdiction. I make no determination as to whether the District's communications violated any of the other statutes or portions of Section 504 cited in the Court Complaint.

deriving a meaningful benefit from his or her education See*, e.g., J.E. v. Boyertown Area Sch. Dist.,* 834 F. Supp. 2d 240 (E.D. Pa. 2011).

For purposes of this decision, I will assume that the incidents between the Student and the Schoolmate constitute bullying.[10] With that assumption, I find that there is no preponderant evidence that the District's response to the Parents' bullying reports resulted in a substantive denial of FAPE for the Student.

The Parents argue that the incidents caused physical and psychological trauma for the Student. There is no preponderance of evidence that the Student suffered physical trauma as a result of any of the incidents. Given the Student's disabilities and history of medical treatment, the absence of documentary evidence from medical providers supporting the Parent's allegations of serious bodily injury subverts their claim.

Moreover, the Parents assert that the Student suffered a serious bodily injury. The IDEA incorporates the definition of serious bodily injury found at 18 U.S.C. §1365(h)(3). "Serious bodily injury" means bodily injury which involves: a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

The incidents between the Student and the Schoolmate may have placed the Student at risk of serious bodily injury. I reject the Parents' claim that the Student actually suffered a serious bodily injury. Given the Student's circumstances, the Parents' assertion that the Student actually suffered a serious bodily injury in the absence of contemporaneously drafted supporting medical documentation is shocking and borders disingenuity.

[10] I make no conclusion as to whether the incidents constitute bullying because doing so is not necessary to resolve this case. Nevertheless, the *Shore Regional* case, *supra*, is instructive because it provides a clear example of the type and severity of bullying that has IDEA implications, and of the type of evidence linking bullying to a denial of FAPE. The evidence presented in this case is quite different.

Regarding psychological trauma, the Parents point to the Student's absenteeism. The Student missed two days of school during the first marking period of the 2018-19 school year and eight days of school during the second marking period. In contrast, the Student missed 22 days of school in the third marking period before withdrawing and enrolling in a cyber charter school.

Examining the Student's attendance relative to the incidents informs the analysis. All five incidents occurred during the first marking period. The Student's attendance did not decline until the third marking period. I find, therefore, that the Student's attendance does not constitute preponderant evidence that any psychological trauma resulting from the incidents with the Schoolmate impaired the Student's ability to attend school or derive an educational benefit from that attendance.

A more granular analysis does not change this conclusion. Between the start of the school year and the first incident on October 9, 2018, the Student missed no school. October 9, 2018 was a Tuesday. The Student then went to school for the rest of that week and all of the next week except for Friday, October 12, 2018. The Student then attended school every day that the District was in session between October 13 and October 22, 2018. This includes the second and third incidents. The fourth incident occurred on Monday, October 22, 2018. The Student was out of school the next day, October 23, 2018. The Student then returned to school on Wednesday, October 24, 2018 and attended school every day through November 5, 2018. This overlaps the fifth incident on Friday, October 26, 2018.

Looking to other contemporaneously drafted documents also does not change the analysis. The Parents requested homebound instruction in February 2019 when the Student's absenteeism escalated.[11] The District

[11] It is important to not conflate "homebound instruction" with "instruction in the home." Homebound instruction is an exception to Pennsylvania's truancy laws that enables schools to provide temporary, regular education services to students who cannot come to school for

responded the same day and followed up when the Parents did not return the paperwork or provide medical documentation. Under Pennsylvania law, the District could not provide homebound instruction because the Parents never returned the supporting documents that the District requested. *See* PA School Code § 13.1329. Instead, the Parents enrolled the Student in the cyber charter school four days later.

Looking beyond the Student's attendance does not change the analysis either. IDEA requires LEAs to offer IEPs that are reasonably calculated to provide a meaningful education. A child's actual progress is a good way to determine the accuracy of the IEP team's calculation when all other factors are equal. When progress tracks expected outcomes, the calculation is correct. Progress that lags behind expectations often signals a need for change. In this case, the Student's actual progress tracked IEP goals and the Student's report card grades were strong on the whole.

The Parents do not challenge the appropriateness of the IEP at the time it was drafted. A generous reading of their argument is that the incidents with the Schoolmate changed the Student's circumstances such that IEP revisions were required to ensure the provision of FAPE, and that an appropriate response to the Parents' reports of bullying would have included IEP revisions.[12] The record does not support this claim. Rather, the record shows that the Student was able to attend school, obtain good grades, and make progress towards IEP goals during the school term in which the incidents occurred and in the following term. The Student's attendance then sharply declined in the third school term before the Parents withdrew the

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a short period of time. Instruction in the home is a special education placement that is part of the IDEA's continuum of services, provided through IEPs, that enable the provision of FAPE to children who cannot attend school on a long-term basis as a result of a disability.

[12] The Parents do not actually make this argument, but it is fairly well implied in their closing summation. The Parents also point to the Student's poor performance on a single math assessment administered shortly after one of the incidents to support their claim. Poor performance on one benchmark assessment does not establish a denial of FAPE. The Student earned a "B" in math during the first school term.

Student. I find, therefore, that the District's responses to the Parents' bullying reports did not violate the Student's rights under the IDEA.[13]

Failure to Report to Law Enforcement / Failure to Consistently Provide a 1:1 Aide to the Schoolmate

Nothing in the IDEA or any other law within my jurisdiction requires LEAs to report behavioral incidents to law enforcement, and so I will not consider this argument.

The Parents have no standing to bring claims concerning the District's provision of an aide to the Schoolmate. Under the IDEA, parents may request a due process hearing concerning the provision of special education to their own children. 20 U.S.C. § 1415 (b)(6)(A). Nothing in the IDEA permits parents to request a due process hearing concerning the provision of special education to someone else's child. I will, therefore, not consider this argument either.

Failure to Suspend the Schoolmate

The Parents fifth argument that the District violated the Student's rights under the IDEA rehashes arguments about providing a 1:1 aide to the Student and failing to consistently provide a 1:1 aide to the Schoolmate. Above, I address the argument about failing to provide a 1:1 aide for the Student above. Above, I refuse to consider the argument about consistently providing a 1:1 aide to the Schoolmate.

The Parents' fifth argument also includes an allegation that the District failed to make accommodations so that the Student could attend school. Above, I find that the record does not substantiate the Parents' claim that the incidents with the Schoolmate in the first school term were the cause of

[13] As discussed below, my holding about the District's response to the Parents' bullying reports under IDEA standards also resolves the same issue under the portions of Section 504 that fall within my jurisdiction. I make no determination as to whether the District's response to the Parents' bullying reports violated any of the other statutes or portions of Section 504 cited in the Court Complaint.

the Student's attendance issues in the third term. Above, I also address the Parents' related argument about homebound instruction.

The remaining aspect of the Parents' fifth argument is that the District violated the Student's IDEA rights by failing to suspend the Schoolmate. There is no preponderant evidence in the record as to whether the District disciplined the Schoolmate. Moreover, as with the provision of FAPE to other students, the Parents have no standing to challenge the District's disciplinary actions against other children under the IDEA or any other law that falls within my jurisdiction. Beyond discipline, the record shows that the District removed the Schoolmate from the Student's classroom and then moved the Schoolmate to a different school. Even if the Parents had standing to challenge those actions, there is no preponderant evidence in the record establishing educational harm to the Student as a result of those actions.

Summary of IDEA Claims

After careful review of the record, I find no preponderant evidence supporting any of the Parents' arguments that the District violated any of the Student's rights under the IDEA. The Parents did not meet their burden to prove that the Student's poor attendance during the third school term is linked to the incidents with the Schoolmate during the first term. Moreover, the record is contrary to the Parents' position. In response to the incidents, the District developed a safety plan and removed the Schoolmate first from the Student's class and then from the Student's school. All the while, the Student's academic performance was strong, and the Student made progress towards IEP goals. The Parents do not challenge the appropriateness of those goals. In the absence of such a challenge, the Student's actual progress establishes the provision of FAPE.

Upon consideration of the record of this case, I find that the District provided a FAPE to the Student in compliance with IDEA mandates.

Section 504 Claims

Section 504 protects "handicapped persons," a term that is defined at 34 CFR § 104.3(j)(1):

> Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

"Eligibility" under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504.

Pennsylvania has adopted regulations at 22 Pa. Code § 15 (Chapter 15) to implement Section 504 in schools. Chapter 15 prohibits disability-based discrimination against children who are "protected handicapped students." Chapter 15 defines a "protected handicapped student" as a student who:

1. Is of an age at which public education is offered in that school district; and
2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and
3. Is not IDEA eligible.

See22 Pa. Code §15.2.

Section 504 and Chapter 15 prohibit schools from denying protected handicapped students' participation in, or the benefit of, regular education. See 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from regular education.

To accomplish this, a "school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities." 22 Pa Code § 15.3.

Students are evaluated to determine what related aids, services, or accommodations that a student needs. Chapter 15 includes for conducting such evaluations. 22 Pa. Code §§ 15.5, 15.6.

The related aids, services or accommodations required by Chapter 15 are drafted into a service agreement. Chapter 15 defines a service agreement as a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student." 22 Pa. Code § 15.2. Service agreements become operative when parents and schools agree to the written document; oral agreements are prohibited. 22 Pa Code § 15.7(a).

For IDEA-eligible students, the substance of service agreements is incorporated into IEPs. Such students do not receive separate service agreements. Moreover, as noted above, Chapter 15 explicitly excludes children who are IDEA eligible. Complying with the IDEA's procedural and substantive mandates completely discharges and LEA's obligations to a child under Section 504 as well.

Above, I find that the District provided a FAPE to the Student. Consequently, I dismiss the Student's claims under Section 504.

Section 504 is a broad, disability-based antidiscrimination law. My jurisdiction does not encompass the entirety of Section 504. Rather, as applied in Pennsylvania, I may determine whether an LEA complied with

Chapter 15 and (arguably) whether an LEA's IDEA violations also constitute deliberate indifference in violation of Section 504.

Chapter 15 does not apply to this case because the Student is a child with a disability as defined by the IDEA. I do not consider whether the District acted with deliberate indifference because, above, I find that the District complied with IDEA mandates. That compliance requires me to find that the District also discharged its obligations under the portions of Section 504 over which I have jurisdiction.[14]

ADA Claims

The authority for ODR Hearing Officers to resolve ADA claims does not come directly from any statute or regulation. Rather, in the Third Circuit, when injuries are educational in nature and implicate services within the purview of the IDEA, administrative remedies must be exhausted (as illustrated by this case). *See also, S.D. v. Haddon Heights Bd. of Educ.*, 2016 U.S. App. LEXIS 15172 (3d Cir. N.J. Aug. 18, 2016).

To be clear, under current case law, I have authority to hear an ADA claim only when the alleged violation could have been brought under and completely remediated by the IDEA. *See Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 274-275 (3d Cir. Pa. 2014). Indeed, under current Third Circuit precedent, the ultimate question concerns whether the "alleged [ADA] injuries could be remedied through the IDEA administrative process because they relate to the "the identification, evaluation, or educational placement" of a child or to "the provision of a free appropriate public education to such child," as defined by the IDEA," *S.D. v. Haddon Heights Bd. of Educ.*, 2016 U.S. App. LEXIS 15172, *16, 3d Cir. N.J. Aug. 18, 2016 *citing* 20 U.S.C. § 1415(b)(6)(A).

[14] During the due process hearing, I excluded testimony concerning the underlying motivation for the District's actions. The remedies in the Court Complaint arising out of the District's deliberate indifference are remedies that I cannot award. Consequently, even if the District had violated the IDEA, I would still not consider whether the District acted with deliberate indifference because doing so would alter the Student's relief in any way.

In sum, my authority to hear ADA claims exists only when IDEA claims and ADA claims arise out of the same facts, and the ADA claims are completely remediated by IDEA remedies. Above, I find that the Student is not entitled to IDEA remedies. Under current precedent, my IDEA holding terminates whatever ADA jurisdiction I have. In the absence of an IDEA violation for which a remedy is owed, I have no authority to resolve ADA issues.

Conclusions

As discussed above, I find that the District offered a FAPE to the Student at all times pertinent to this matter in compliance with the IDEA. That holding necessarily requires a finding that the District also satisfied its educational obligations to the Student under Section 504 and divests my limited authority to resolve any part of an ADA claim.

The order below represents the final administrative order in this matter. The Parents have now exhausted their efforts to obtain administrative remedies.

ORDER

And now, April 10, 2020, it is hereby ORDERED that the Parents' claims are **DENIED** and **DISMISSED.**

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is DENIED and DISMISSED.

/s/ Brian Jason Ford

HEARING OFFICER