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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION
DUE PROCESS HEARING
Name of Child: I.W.
ODR #14498/13-14 AS
Date of Birth:
[redacted]

Dates of Hearing:
December 17, 2013
April 25, 2014
November 11, 2014
CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Benjamin Hinerfeld, Esquire Michele Reichow, Esquire Law Offices of Benjamin J. Hinerfeld 2 Penn Center, Suite 1020 1500 JFK Blvd - Philadelphia, PA 19102 Sonja Kerr, Esquire PILCOP 1709 Benjamin Franklin Parkway, 2nd Floor Philadelphia, PA 19103
School District of Philadelphia Office of General Counsel 440 N. Broad Street, 3rd Floor Philadelphia, PA 19130	Brian Subers, Esquire Fox Rothschild, LLP 10 Sentry Parkway, Suite 200 P.O. Box 3001 Blue Bell, PA 19422-3001
Main Line Academy 124 Bryn Mawr Avenue Bala Cynwyd, PA 19004	Gabrielle Sereni Raffaele & Puppio 19 West Third Street Media, PA 19063
Date Record Closed: Date of Decision: Hearing Officer:	December 10, 2014 December 17, 2014 Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Procedural History

The Parent filed the complaint that is addressed in this decision on December 4, 2013 while another special education due process hearing [ODR #13887/12-13 AS] was in progress before another hearing officer. In order to avoid the possibility of differing conclusions on the same findings of fact, the evidentiary portion of this hearing was postponed until after a decision had been rendered in the earlier case. However, a first session was convened for the purpose of placing the parties' opening statements on the record. Although notice was given, there was no one from the private school [Private School] at this first session and the Private School's original attorney did not appear. After the decision regarding ODR #13887/12-13 AS was issued on March 13, 2014 a session was scheduled and held to begin the presentation of evidence in the instant matter. Prior to the convening of the following scheduled session the Parent through counsel indicated that the matter was likely settling and further sessions were not necessary; the parties requested and were granted a 60-Day Conditional Dismissal Order. However, the matter ultimately was not resolved, and a final session was convened. The parties chose to file written closing briefs and accordingly requested an extension of the decision due date.

Background

Student[1] is a teenaged student with a specific learning disability who has been identified as eligible for special education under the Individuals with Disabilities Education Act [IDEA] in accordance with Federal and State Standards.[2] Student resides in the District with Student's mother and siblings. Student currently attends a District vocational/technical high school [High School] full time, but previously had a split daily schedule: a half-day in the High School and the other half day in Private School, with the latter placement being funded through the District pursuant to an agreement with Student's Parent.

The Parent filed this due process complaint against both the District and the Private School, raising claims under Section 504 of the Rehabilitation Act of 1973,[3] and the Americans with Disabilities Act,[4] as well as the federal and state regulations implementing those statutes. The Parent alleges that the Private School and the District engaged in discriminatory and retaliatory acts against Student because the Parent had filed two previous due process complaints[5] which had asserted a denial of a free appropriate public education [FAPE] to Student under the IDEA.

I lack jurisdiction to consider claims under the ADA that are not directly related to allegations of denial of FAPE. My authority arises under the IDEA and the federal and

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[1] This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.
[2] 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii).
[3] 29 U.S.C. § 794.
[4] 42 U.S.C. §§ 12101 *et seq*.
[5] Prior to ODR #13887/12-13 AS noted above was ODR#3111/11-12 KE with HO Jake McElligott presiding and a Decision issued on June 18, 2012.

state regulations implementing that statute, as well as the state regulations implementing Section 504.[6] 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; or the provision of FAPE to a child, under the IDEA.[7] In Pennsylvania, they are also granted authority to decide FAPE and related issues under Section 504, including discrimination against a student based upon disability, in accordance with the procedures provided by the IDEA and Pennsylvania's Chapter 14.[8] The instant matter does not allege a denial of FAPE. I find nothing in 22 Pa. Code Sections 14.102(a)(1), 14.102(a)(2), or 15.1(a) that bestows jurisdiction over non FAPE-related claims arising under the Americans with Disabilities Act…(i)n particular…claims under regulations implementing Title II of the ADA 28 C.F.R. Section 35.160. Accordingly I will not make any findings or determinations related to claims under the Americans with Disabilities Act.

On December 11, 2013 the District through counsel filed a Motion to Dismiss arguing that the hearing officer lacked jurisdiction because hearing officers cannot award monetary damages, because at least one hearing officer has said that Parents may not have a due process hearing solely on discrimination-based claims, and that any denial of FAPE claims were already before another hearing officer in the IDEA Action. The Parent through Counsel responded to the District's Motion on December 12, 2013. I issued a ruling denying the District's Motion; the ruling[9] is attached to this Decision as Appendix One.

Several months after the initiation of these proceedings, and after the first hearing session, Private School through newly retained counsel filed a Motion to Dismiss; an Answer was filed on the Parent's behalf in a timely manner. For reasons amply put forth in the Parent's Answer with which I was in agreement I denied the Private School's Motion but did not grant the Parent's petition for summary judgment against the Private School, which Motion was based upon the Private School's failure to timely file an Answer to the due process Complaint.[10]

Issue[s]

Did Private School and/or the School District of Philadelphia [District], through its agent Private School, act in a discriminatory and retaliatory manner toward Student and Parent because the Parent had filed previous due process complaints against the District?

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[6] *See* 20 U.S.C. § 1415; 34 C.F.R. §§ 300.500-300.520; 22 Pa. Code §§ 14.162, 15.1, 15.8.
[7] 34 C.F.R. §§ 300.503, 300.507, 300.511.
[8] 22 Pa. Code §§ 15.1 - 15.11.
[9] Redacted in order to protect Student's privacy.
[10] At the second hearing session Parent's counsel renewed the Motion for summary judgment and it was again denied. [NT 65]

Stipulations

Private School and the District stipulate that Student is a qualified individual with a disability under Section 504 of the Rehabilitation Act.[11]

At all times relevant to this complaint, Private School received funds through the District.

Findings of Fact[12]

Background[13]

1. During the time period relevant to this matter Student was attending Private School, a licensed private academic school that serves students with disabilities. At the time of the hearing Private School had been in existence for about 30 years and had been founded by its current director.[14] [NT 123, 238, 405, 448, 502; MLA-5]

2. Private School received payments under its contracts with the District to educate Student during the 2012-2013 and 2013-2014 school years.[15] [NT 129-134]

3. Private School was providing educational services to Student on behalf of the District under the terms of a prior settlement agreement. [NT 72, 134]

4. The contract between Private School and the District provides that the District remains the Local Educational Agency [LEA] with respect to all students educated at Private School pursuant to the contract. [P- 2]

5. During the time period relevant to this matter, Student was participating in a split-day program, attending a District vocational/technical high school [High School] for [a trade] from approximately 7:50 a.m. until 9:30 a.m., depending on which of

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[11] Student is also an eligible student under the Individuals with Disabilities Education Act [IDEA]. This hearing does not address any issue related to a denial of FAPE under the IDEA.

[12] Exhibits are marked as follows: "MLA" is the Private School, "S" is the District and "P" is the Parent.

[13] During the hearing Parent's counsel sought to elicit testimony about events in the spring of 2013 that led to the Parent's filing the complaint that was presided over by another hearing officer between May 29, 2013 and January 28, 2014 with a decision issued on March 13, 2014. As the issue before me is whether the District and/or Private School retaliated against the Parent because she exercised advocacy for her child by filing complaints, that line of questioning was ruled inadmissible and testimony was limited to events after the complaints were filed. [NT 109-113] Nevertheless, in Parent's closing statement considerable detail was offered about earlier events that pursuant to my ruling are not part of the record in the instant matter [Parent's Closing Brief, Proposed Findings of Fact #31 through #65]. In writing this decision I did not weigh this information, as it is argument rather than evidence that was subject to cross examination. To the extent that the information was an offer of proof, I did review it, and here note that this additional material did not serve to alter my finding in this matter.

[14] However, on information and belief, Private School ceased academic operations following the 2013-14 school year. [Parent's Closing Brief]

[15] Student attended Private School as a full-time student during the 2008-2009, 2009-2010, 2010-2011 and 2011-2012 school years. [Parent's Closing Brief]

four schedules the High School was following that day, at which time Student would be transported by taxi[16] to Private School to receive the academic components of Student's program. [NT 85-86]

6. Student received direct instruction at Private School in literacy, mathematics, and transition planning as well as direct instruction in the vocabulary and specific mathematics necessary for Student's successful participation in the High School [trade] program. [NT 87, 236-237, 477-478]

7. The High School and the Private School worked cooperatively to coordinate Student's program, and, in particular, Private School's support for Student's participation in the High School vocational program. [NT 87, 394-395, 430-431, 437, 484-485, 507-508; MLA-8, MLA-10]

8. Academic support for Student's participation in the High School vocational program was a priority for Private School. [NT 507-508]

October 24, 2013

9. Given the shortened school day Student was not regularly scheduled to attend specials [art, physical education and music] at the Private School. Private School attempted to provide Student opportunities to participate in these specials as Student's and the teachers' schedules would allow, but only if the primary teachers were otherwise able to cover Student's academic needs, in particular, supporting assignments Student received from High School. [NT 295, 394-395, 484-485]

10. During the 2013-2014 school year, eight to nine students attended Private School which had a total of eight teachers, two full time and the rest part time. Private School tended to have few disciplinary issues with its students. [NT 105, 123-124, 250, 479-480]

11. At the beginning of the school year Student had been provided written materials regarding behavioral expectations which were reviewed with Student, as well as ongoing behavioral support regarding the daily transition from High School to Private School. [NT 478, 481-483; MLA-7]

12. Although Student exhibited a positive attitude and improved behavior at Private School at the start of the 2013-2014 school year, as the year progressed, Student started to get off track with what the expectations were at Private School. [NT 434-435, 483; MLA-8]

13. On October 24, 2013, Student's two principal teachers, both female, planned to meet with Student to review behavioral expectations, and to provide Student with a behavior plan. [NT 483-484; MLA-9]

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[16] I take judicial notice that according to MapQuest this is a distance of 21.4 miles and that given optimal traffic conditions travel time is about 30 minutes.

14. The two teachers approached Student as Student entered Private School that morning and requested that Student meet with them, but Student failed to comply with repeated requests from the teachers to step into a classroom with them. [NT 484-486]

15. Hearing the commotion in the hallway, a male teacher, who at the time was teaching art class, stepped into the door frame of his classroom and looked into the hallway. The art teacher saw Student having an argument with the two female teachers, who were attempting to get Student to go into another classroom. [NT 313-315; MLA-11]

16. Student had been informally scheduled for art class at the time Student arrived. Student began moving toward the art teacher and tried to enter the art teacher's classroom. Student said "What's this? What's this?" to the art teacher. The art teacher signaled to Student not to go into his classroom, and Student began pushing the art teacher forcefully against his arm and chest to gain entrance to the classroom. [NT 315-318, 329-330, 485; MLA-11]

17. The art teacher received an abrasion to his hand. [NT 323; MLA-11, MLA-13]

18. During the altercation, the art teacher yelled to Student: "Whoa … you pushed me" in an attempt to focus Student on the inappropriate conduct and deescalate the situation.[17] [NT 313, 315-328, 487; MLA-11]

19. Student's two primary teachers and the art teacher immediately met with Student in a classroom to discuss the incident and the seriousness of Student's actions. Student did not deny physically pushing the art teacher, but did not acknowledge that this was wrong or apologize, despite being requested to do so. [NT 329, 376-378, 384, 399, 422-423, 456, 487-488; MLA-11]

20. The art teacher then reported the incident to the Private School's director. [NT 332; 333; MLA-11]

21. The art teacher considered this to be an extreme incident; although he has been threatened by other students in the past, no student has ever put his/her hands on him in a violent manner. [NT 349]

22. Student's physically engaging a teacher and causing an injury was deemed to be a serious offense, one that had not previously occurred with any student at Private School. There is zero tolerance for putting hands on a teacher at Private School. [NT 242-243, 346, 349, 401, 424, 439, 480, 492-493]

23. Student received a two-day suspension for the incident, the Parent was notified of such by letter, and the letter indicated that the Parent was required to come with

[17] At the hearing the teacher was asked to reenact his physical positions during the event and did so.

Student to school when Student was reinstated so that Student's behavior could be discussed. [NT 333, 357, 412-414, 457, 489, 497-498; MLA-5, MLA-8, MLA-11]

24. The suspension letter also noted that Student had to earn attendance at specials classes, and would lose privileges for "refusing to listen to directions and replying in a disrespectful manner." [NT 356-357; MLA-11]

25. The director also spoke directly with the Parent on the telephone on the day of the incident, with Student present in the office for the phone call at Parent's request. The director let the Parent know she wanted to meet with her to discuss the seriousness of the incident. [NT 182-184]

26. The Private School director recommended to the art teacher that he consider filing a record of the incident with the township police department, as no incidents of this type had ever happened with any pupil at Private School previously and as Student had previous conflicts with this teacher and had engaged in consistent inappropriate and disrespectful behavior that was disruptive to the learning environment. After discussing this with the director and other staff the art teacher decided that filing an incident report with the police was a reasonable course of action. [NT 203-204, 207, 214, 345-346, 348-349, 353, 356, 359-360, 375; MLA-11]

27. Private School records indicate that the art teacher's call to the township police department was intended to protect both Private School and Student. [MLA-8]

28. Private School did not notify the High School special education liaison of the incident or of its intention to contact or its having contacted the township police department. [NT 81, 143]

29. Following the art teacher's phone call to the township police department a police officer arrived and took a statement, but indicated that he did not think that the incident warranted further police action. The art teacher did not dispute this position or request further action by the police department. [NT 385, 397; MLA-8]

30. After the initial report to the police department, a detective later contacted the art teacher and reported that upon reviewing the matter the detective considered it possibly more serious than the initial responding police officer had. Sometime between October 28, 2013 and November 6, 2013 the detective requested that the art teacher meet with him at the police station and provide a further statement, and the art teacher complied with the detective's request and dictated a statement. However, in response to the detective's inquiry, the art teacher stated that he did not want to take the matter any further as his intent was to make Student understand the seriousness of Student's behavior, not to pursue legal avenues. [NT 353-355, 385-388, 392, 427; MLA-8, MLA-11]

31. Private School did not contact the District prior to the decision to suspend Student and Student was not suspended from the High School, nor precluded from attending the High School or participating in Student's educational program at the High School during the Private School suspension. Student's Private School suspension was not made a part of Student's District record.[18] [NT 90-91, 99-100, 262]

32. The High School special education liaison had no contact with the township police department and did not forward any information to the township police department. [NT 80-82]

33. The District learned of the incident and the filing of a police report through communications between counsel, subsequent to the detective's follow-up with Private School and the Parent. [NT 91-92; S-9]

34. Although the Parent did not meet with the staff or accompany Student to the reinstatement as requested verbally and by letter, Student was permitted to return to Private School after the two days of suspension. [NT 185, 390, 490, 498; S-3; S-4; S-5; S-6]

35. No person from Private School initiated any contact with the township police department subsequent to the detective's follow-up with the art teacher except for a teacher's calling the station for the purpose of obtaining the detective's name and contact information for the files. [NT 396-398, 400, 402-403, 424, 442-444, 472]

36. By correspondence dated February 28, 2014, the art teacher was contacted by the County Juvenile Probation Department [Juvenile Probation] and requested to complete and return a comment form in conjunction with an intake conference for Student at Juvenile Probation. [NT 388, 398; MLA-13]

37. After reviewing this request with fellow Private School staff, the art teacher, with editing assistance from another teacher, prepared a response to Juvenile Probation and sent it on March 10, 2014. [NT 400, 416-417, 465-468; MLA-11, MLA-13]

38. Information provided to Juvenile Probation noted the Parent's failure to support the Private School's disciplinary procedures in Student's presence and indicated a concern about Student's ability to cooperate with any interviews in mother's presence. [NT 248-249; MLA-13]

39. The Private School team believed that the purpose of Juvenile Probation's February 2014 request that the art teacher complete additional paperwork,

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[18] Student was not a discipline problem at High School. Student was compliant and followed directions, with the exception of homework completion. Student was well-liked by the [trade] teacher. [NT 84, 88-89, 98]

including a victim impact statement, was not for purposes of a criminal prosecution, but rather to ascertain how to assist Student. [NT 470-471]

40. Student's two-day suspension for the incident, the subsequent report to the township police department, and the response to Juvenile Probation's request for information were not related to the Parent's filing of due process complaints against the District or any ill-will among Parent, Student, Private School and/or the District. [NT 92, 244, 401, 406-407, 410, 493-494]

November 15, 2013

41. On November 15, 2013, after receiving a phone call from the Parent, Student asked to use the restroom. After ten minutes had passed and Student had not returned to class one of the primary teachers went to check on Student and found Student had left the Private School building. [NT 421, 462-464, 495; MLA-8]

42. After repeatedly attempting to reach the Parent, the teacher called the High School's special education liaison to report the child missing and inform her of the intent to contact the township police department for assistance.[19] As soon as this conversation ended the teacher did hear from mother and was told there had been a family emergency, so the police were not called. [NT 421, 462-464, 494-495; MLA-8, MLA-10]

43. Any of the Private School staff was authorized to contact police if a situation warranted such action. [NT 115]

44. At some unspecified point Private School's director called the High School special education liaison to determine if there had been any changes to a District policy that the police should be called when a student leaves a school building without permission. She was advised that the policy was still in place. [NT 157, 159, 262-263]

45. Calling the police when a student leaves the school building without permission, whereabouts unknown, is done to fulfill the District's and the Private School's responsibility to ensure the safety of the student. [NT 194, 245, 263-267]

November 21, 2013

46. On November 21, 2013 Student complained to one of the primary teachers that Student's heart was racing and asked to go to the restroom. The teacher offered to contact the school nurse, but Student declined. After five minutes, this teacher went to check on Student but Student was not in the building. The teacher immediately [around 10:40 am] contacted Parent. Parent stated that she didn't know where [Student] was, but "thought [Student] was fine … [Student] was probably at [Student's] grandmother's house and that she would call the police if

[19] I take notice that according to MapQuest the exact distance between Private School and Student's home is 20.2 miles. See also HO-1. Given this distance the Private School had additional reason to be concerned as Student did not live nearby.

she was still concerned". The teacher told the Parent that she would apprise the director of the incident. [NT 460-462, 495-496, 499-500; MLA-8]

47. Because the Parent had said she did not know where Student was, and given the need to ensure that the students were always safe, the director contacted the police herself. [NT 222, 227, 229-230, 245, 267, 440-441, 496]

48. The police arrived at Private School at approximately 10:50 am and after several attempts the officer was able to reach the Parent by telephone. The phone conversation between the officer and the Parent ended when one or the other hung up the phone abruptly. The police officer advised the Private School staff that Parent refused to cooperate and that the township police would not further investigate the matter. At approximately 11:24 am, after the police had been called and after the officer had spoken to the Parent, the Parent sent the teacher an e-mail indicating that Student had contacted Parent and that Student was safe; she did not disclose Student's whereabouts. [NT 231, 462, 472, 495-499-500; MLA-8, MLA-10]

49. The police came back to Private School later that afternoon and reported that they still had not located Student. [NT 232]

50. The Private School director sent a letter to the Parent late on the afternoon of this incident noting that when a student leaves a school building without permission police are contacted for the safety of the student. The director requested that the Parent speak with Student about the seriousness of this behavior and indicated the likelihood that further elopement incidents would also require police notification, which the Private School would like to avoid. The director again asked the Parent to meet to discuss concerns and asked for the Parent's schedule to set up a meeting. The Parent did not provide her schedule. [NT 121-123; S-14, P-17]

51. The sole reason for Private School's contacting the police on the date of this incident was related to Student's safety. [NT 440]

52. Although Student would have been permitted to return to Private School after leaving the building on November 21, 2013, Student did not return and thereafter began attending High School on a full-time basis pursuant to an agreement between Parent and the District developed by their respective attorneys during the course of the hearing that was ongoing before another hearing officer in the fall of 2013. [NT 83, 101, 103, 502-503; S-16]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *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 United States Court of Appeals for the Third Circuit has applied the same burden to a case involving Section 504. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In the instant matter the Parent asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to 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); *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). Neither the Parent nor the Student testified at the hearing, although the Parent attended all three sessions and Student attended the second session. Testimony was provided by staff employed at the Private School at the time period relevant to this matter, including the director, the art teacher, and the two primary teachers. The District High School's special education liaison also testified. All witnesses appeared to be testifying truthfully, answering questions completely and to the best of their recollections. Two witnesses merit additional credibility consideration. The art teacher testified at the second and the third hearing dates as his testimony was not finished after the second session. He is related to the director and works at several of the schools she has founded. He holds an undergraduate degree in fine art animation from the University of the Arts and is working on his Master's Degree in art education at Arcadia University [NT 282]; he has been a teacher for about 17 years. He presented as a candid witness who gave every indication of being fully cooperative with the hearing process. Despite his having been the teacher involved in the October 24, 2013 incident, in his demeanor and in his testimony over two hearing sessions and several hours of detailed direct and vigorous cross examination he evidenced no animus toward Student or the Parent and conveyed in his responses and his tone that he wished Student to receive help. The director, who holds an earned doctorate in school administration [NT 175] and in years gone by had been placed in a series of key administrative positions in the District, demonstrated memory difficulties which did not

appear to be feigned[20] some of which may have been related to pain medication following a fall and/or to a head injury from that fall, and/or to advancing age [NT 106, 135-142]. While these difficulties made her testimony less reliable in terms of dates and times, in areas that directly addressed the issue in this case her testimony was corroborated by other witnesses. Relevant to finding support for the credibility of the director's testimony by other witnesses is the fact that all witnesses had been sequestered at the request of Parent's counsel. On one point, related to who at Private School had authorization to contact police, her testimony apparently differed from what was proffered as having been testimony from another Private School staff person in the previous hearing before another hearing officer. I find the director's testimony to be highly credible in this regard and give it more weight than the teacher's testimony as it is highly unlikely that an experienced administrator of programs for children would limit contacting the police to one person who may or may not be on the scene of a safety-related situation on any given day.

IDEA, Section 504 and Pennsylvania Chapter 15: In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to FAPE. The drafters of Section 504 were not only concerned with [a student] receiving a FAPE [as is the case with the IDEA] but also that a federally funded program does not treat a student differently because he or she is disabled. *Chavez v. Tularosa Municipal Schools,* 2008 WL 4816992 at *14 (D.N.M. 2008), quoting *Ellenberg v. N.M. Military Inst.,* 478 F.3d 1262, 1281-82 n. 22 (10th Cir.2007)(quoting C. Walker, Note, Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School, 58 Stan. L.Rev. 1563, 1589 (2006). Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). Since the January 2009 effective date of the ADA Amendments Act of 2008, which expanded the definitions of both "substantial impairment" and "major life activity" under §504 as well as the ADA, specific learning disability is explicitly included within the definition of a substantial impairment. Both reading and learning are explicitly included in the definition of major life activity. See 34 C.F.R. §104.3j(2)(i), (ii). See also, Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, found on the Office of Civil Rights (OCR) website.

The Commonwealth of Pennsylvania protects a student's right to be free from discrimination on the basis of handicap or disability, through Chapter 15 of the Pennsylvania Code, part of the regulations implementing the educational statutes of the Commonwealth. 22 Pa. Code Chapter 15. Similar to Section 504, Pennsylvania's Chapter 15 regulations require a substantial limitation with respect to education, defining a "protected handicapped student" as: A student who meets the following conditions: Is of an age at which public education is offered in that school district; has a physical or mental disability which substantially limits or prohibits participation in or access to an

[20] At one point in the director's testimony, I called a private conference with counsel to discuss the witness's memory issues. [NT 135]

aspect of the student's school program; is not eligible as defined by Chapter 14 [relating to special education services and programs]; or who is eligible but is raising a claim of discrimination under §15.10 [relating to discrimination claims]. 22 Pa. Code §15.2. Chapter 15 by its terms is intended to implement students' rights under section 504, and it does not expand or limit those rights. 22 Pa. Code §15.11(c).

Several court decisions in Pennsylvania and elsewhere establish that IDEA eligible students may pursue a separate claim for discrimination under §504, notwithstanding IDEA eligibility. *See, e.g., J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 13451 (E.D. Pa. 2008); *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008), *Chavez v. Tularosa Municipal Schools*, 2008 WL 4816992 (D.N.M. 2008); *Brenneise v. San Diego Unified School District*, 2009 WL 1308757 (S.D. Cal. 2009). *See, also*, 22 Pa. Code §15.10: Notwithstanding other provisions of this chapter, an eligible or noneligible student under Chapter 14 (relating to special education services and programs) may use the procedures for requesting assistance under §15.8(a) (relating to procedural safeguards) to raise claims regarding denial of access, equal treatment or discrimination based on handicap. A student filing a claim of discrimination need not exhaust the procedures in this chapter prior to initiating a court action under Section 504. Recently the Third Circuit held that plaintiffs bringing claims under the ADA and §504 may establish intentional discrimination with a showing of "deliberate indifference." *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263 (3d Cir. 2013).

Retaliation: The 3rd Circuit recently joined the 1st and 11th U.S. Circuit Courts of Appeal in holding that parents must exhaust their administrative remedies before bringing retaliation claims that relate to the enforcement of IDEA rights. *Batchelor ex rel. R.B. v. Rose Tree Media Sch. Dist*., 63 IDELR 212 (3d Cir. 2014)*;* See also *Rose v. Yeaw*, 32 IDELR 199 (1st Cir. 2000); *M.T.V. v. DeKalb County Sch. Dist.*, 45 IDELR 177 (11th Cir. 2006).

Filing a Due Process complaint under §504 or the IDEA is "protected activity" for purposes of a §504 retaliation claim. *See* 34 C.F.R. 104.61 [incorporating the anti-retaliation regulation of Title VI of the Civil Rights Act of 1964, 34 C.F.R. §100.7(e), providing, in pertinent part: "No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part."]. When parents engage in the process of seeking educational services for students with disabilities, including utilizing litigation if necessary, they should do so secure in the knowledge that engaging in those processes will not be held against them by the school district and that they will not be penalized for engaging in those processes.

To establish whether a school district has retaliated against a Parent for engaging in the processes under IDEA/Section 504, a three-part test has been elucidated, namely: (1) did the parents engage in protected activities, (2) was the school district's retaliatory action sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3)

was there a causal connection between the protected activity and the retaliation. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3d Cir. 2007). To prove a "causal connection" in a retaliation case a plaintiff may prove "either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link." *Burger v. Sec'y of Revenue*, 575 Fed. App'x 65, 68 (3d Cir. 2014) (citing *Lauren W.*, 480 F.3d at 267).

The District may be held liable under § 504 for providing "significant assistance" to Private School if Private School retaliated against Petitioners. The implementing regulations for §504 provide, in pertinent part: A recipient [of federal funds], in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap: Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity.34 C.F.R. §104.4(b)(1)(v) The appendix to the Code of Federal Regulations, 34 C.F.R. § 104.4(b)(1)(v) clarifies the meaning of "significant assistance": Section 104.4(b) (1) (v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. *See Adam C. v. Scranton Sch. Dist.*, No. 3:07-CV-532, 2011 U.S. Dist. LEXIS 27423 (M.D. Pa. Mar. 17 2011) (denying private school's summary judgment motion where private school provided "significant assistance" to school district).

Discussion

As framed in the Parent's Closing Brief: "This is a case of retaliation against [Student] and [Student's] parent, [Parent] ("Petitioners") by two entities, [Private School] a private school for children with special needs, and the School District (the "District," together with [Private School], "Co-Defendants")."

As noted earlier, the three-part test for a successful retaliation claim under Section 504 in this circuit is contained in *Lauren W:* a protected activity, retaliatory behavior[s] acting sufficient to act as a deterrent to exercising the protected activity, and a causal connection between them, the causal connection being an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or a pattern of antagonism coupled with timing to establish a causal link Private School and/or the District may defeat the claim of retaliation by showing that it would have taken the same action even if Parent had not engaged in the protected activity.

Did the Parent engage in a protected activity? Here, the protected activity is the Parent's advocacy for Student's rights under the IDEA, specifically her retaining an attorney to assist in IEP meetings and through counsel filing two due process complaints against the District. The first of these complaints was adjudicated in June 2012, and the second was being litigated from late May 2013 through late January 2014 with a final adjudication in mid-March 2014. There is no dispute that the Parent engaged in a protected activity.

Did Private School, in conjunction with or significantly assisted by the District engage in retaliatory action[s] sufficient to deter a person of ordinary firmness from exercising his or her rights? The alleged retaliatory behavior is the Private School's calling the police on two occasions and the District's allegedly condoning or supporting the Private School's actions. In the instant matter it is first necessary to determine whether Private School's actions were reasonable or retaliatory with respect to Student's behaviors. There is no question that first and foremost schools must be committed to maintaining a safe atmosphere in the learning community for the welfare of students and staff. Only when a school is safe is the environment conducive to learning. During the time period relevant to this decision, Private School was a very small educational setting serving eight or nine students with two full time teachers, several part time teachers and the director. Private School teaching staff who were employed during the time relevant to this decision had not ever experienced any incidents of a student putting his/her hands on them in a forceful manner, and had never incurred any injuries resulting from a physical confrontation with a student. Moreover, in the thirty year history of the school there had been no instances of a student engaging in physical aggression. The art teacher testified that at times students had been verbally threatening, but no student had ever been physically aggressive. It is in this context that we must view Private School's determination that the October 24th incident was a serious incident and that issuing a two-day suspension[21] and notifying the police was a correct course of action. The Parent claims that the Private School's response was out of proportion to the severity of the incident. I must respectfully disagree. While student-on-student violence, and student-on-staff violence, and perhaps at times even staff-on-student violence is not an unheard of occurrence in large public urban and suburban schools, and likely also present at times in large private or parochial schools, violence was not part of the experience of students or staff at Private School, an intimate learning community. Private School had every right to preserve safety within its walls, and while calling the police and filing an incident report might be thought to be an "over reaction" to a "minor incident" in a different setting, it was a justifiable response by the Private School. Indeed and significantly, a police detective, upon review and further consideration, deemed Student's actions to be serious, supporting the premise that the Private School's action was not an "over-reaction"; in fact the police detective acting on his own judgment initiated a case in Juvenile Probation. I do not find that by filing a police report regarding the October 24th incident the Private School acted in a retaliatory manner in response to the Parent's vigorous advocacy on

[21] To the extent that Parent may argue that there should have been a manifestation determination meeting, such was not required. A two day suspension of a Student who does not have an intellectual disability and who has not accumulated 15 days of suspension or experienced a pattern of suspensions is not a change in placement and does not require a manifestation determination.

behalf of her child. As to any complicity on the District's part, even if I had found that the Private School acted unreasonably, or even in a retaliatory manner, which I do not, the District had no involvement in the Private School's decision-making process around the October 24th incident and its support of Private School through tuition payments under contract is much too tenuous a connection to establish complicity.

Turning to the incidents of November 15th and November 21st, I find the Private School's actions eminently reasonable, justified, and necessary. When a child is at school the school is acting in the place of the parent[s] and has the duty to protect the child. As the director and her staff all testified, the school was responsible for Student's safety. When it was discovered that Student had eloped from the school, after offering a pretext for leaving class, it was incumbent upon the Private School to initiate the District's standard protocol, which it also had to follow, of notifying the police that a child was missing. Notably, on November 15th school staff initially tried unsuccessfully to reach the Parent to see if she could account for Student's having left. Fortunately, just before the police were about to be notified the Parent called and assured the staff that Student was safe and had left because of a family emergency. This situation could easily have been avoided had the Parent contacted the school before asking Student to leave. On November 21st, a week later, when Student eloped after complaining of a racing heart, the school did reach the Parent. However, the Parent said that she did not know where Student was but "thought [Student] was all right". I cannot imagine a responsible school staff failing to act to locate a student when a parent admits that she does not know for sure where her child is. We do not have to go any further than recent news headlines to imagine a scenario where a student leaves school without permission, the parent states she does not know where child is but "thinks" the child is alright, the school fails to take further action to locate the child and the child suffers a pedestrian or vehicle accident, or abduction, or serious harm or even death. Under those circumstances a parent surely and justifiably would file a lawsuit of a very different kind against a school.

Was there a causal connection between the Parent's engaging in a protected activity and the actions taken by the Private School? The issue of causation is usually the most difficult element to prove in a retaliation claim. There is no dispute that the Parent engaged in a protected activity or that Private School engaged in the conduct that Parent ascribes to it. However, there is no evidence of a causal relationship between the two, and furthermore the evidence clearly establishes that Private School would have taken the same actions even if Parent had not engaged in the protected activity. I heed the 3rd Circuit Court's caution in *Lauren W*:

> "[a] court must be diligent in enforcing these causation requirements because otherwise a public actor cognizant of the possibility that litigation might be filed against him, particularly, in his individual capacity, could be chilled from taking action that he deemed appropriate, and, in fact, was appropriate."

After careful review of the evidence before me I find no causal connection between the actions of Private School and the Parent's prior requests for due process. I find that the Private School acted prudently and in a manner consistent with the culture of the school

and its duty to protect its students. Further, examining the components of causality, the Parent's allegations would fail both with regard to unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, and a pattern of antagonism coupled with timing.

With regard to temporal proximity, the due process proceeding ODR#3111/11-12 KE that concluded on June 18, 2012 was so remote in time as to render any allegation of temporal proximity unsupportable. Further, the proceeding ODR #13887/12-13 AS was initiated on May 15, 2013 whereas the first alleged retaliatory action occurred on October 24, 2013. During the period between May 2013 and late October 2013 Private School actively supported Student's participation in the High School vocational program through providing academic instruction and through close collaboration with the High School. Of additional note, neither due process complaint was filed against Private School.

With regard to a pattern of antagonism coupled with timing, I find no evidence in testimony, in witness demeanor, or in documents to support this allegation. The Private School witnesses were each highly credible as they explained that Private School's actions in question were in the first instance related solely to Student's serious breach in the school's expectations and experiences regarding physical aggression, and in the second and third instances related solely, for Student's own safety, to the need to determine this teenage Student's whereabouts in the community during the hours of the day when it would be expected that a person Student's age would be in school. In contrast to any pattern of antagonism, the witnesses furthermore established that Private School staff was highly involved in supporting Student's success in the academic requirements of Student's High School vocational program in which Student was apparently excelling.

Conclusion

The testimony of every witness, and the content of each exhibit, was considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. The parties' closing briefs were also carefully considered. The Parent failed to meet her burden of proof that Private School acted in a discriminatory or retaliatory manner toward Student or herself. Further, as the Parent adduced no evidence to support her claim that the District directly retaliated against herself or Student, the Parent's claims against the District relying solely on an agency theory, said claims must be denied.

Order

It is hereby ordered that:

Neither the District, through its agent Private School, nor the Private School, acted in a discriminatory and/or retaliatory manner toward Student and/or Student's Parent because the Parent had filed previous due process complaints.

Any claims not specifically addressed by this decision and order are denied and dismissed.

December 17, 2014
Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official

APPENDIX ONE

Ruling on Motion to Dismiss

Case Name: Student v. School District of Philadelphia and Private School
ODR #: 14498/13-14-AS
Date: December 13, 2013

Background:
On December 4, 2013 the Parent through counsel filed a due process complaint alleging that the School District of Philadelphia [District] and its agent [Private School] had violated Student's rights under Section 504 of the Rehabilitation Act of 1973 [Section 504], PA Chapter 15 [Chapter 15] and the Americans with Disabilities Act [ADA] by engaging in discriminatory and retaliatory acts against Student.

In accordance with the prescribed timelines, a hearing was scheduled for December 17, 2013, within the 30-day window from the date of the filing of the complaint. Unlike due process cases filed under the IDEA which have a Decision Due Date [DDD] identified from the outset [Footnote: The DDD can be extended for good cause at the request of either party, for example to allow for additional hearing dates or to accommodate a schedule for closing briefs], with Section 504 cases there is not a specific DDD set initially; rather, the decision is due 15 days after the record is closed, either through receipt of the final transcript or receipt of written closing briefs, whichever is later.

The Parent asserts that the alleged discrimination/retaliation is related to her filing and pursuing due process complaints against the same defendants asserting denial of FAPE. An earlier complaint, ODR# 3111-11-12, was adjudicated before Hearing Officer Jake McElligott and a final Order was issued on June 18, 2011. Another matter, ODR#13887/12-13 [hereinafter IDEA Action] was filed on May 15, 2013 and is currently pending before Hearing Officer Anne Carroll; testimony has been taken in that matter and additional witnesses are expected to appear.

On December 11, 2013 the District through counsel filed a Motion to Dismiss, arguing that the hearing officer lacks jurisdiction because hearing

officers cannot award monetary damages, because at least one hearing officer has said that Parents may not have a due process hearing solely on discrimination-based claims, and that any denial of FAPE claims are already before Hearing Officer Carroll in the IDEA Action.

The Parent through Counsel responded to the District's Motion on December 12, 2013. The Parent argues that hearing officers in this jurisdiction have adjudicated Section 504/Chapter 15 claims, that hearing officers in this jurisdiction have adjudicated claims involving ADA/504 claims that are both FAPE and discrimination based, and that the issues currently before Hearing Officer Carroll in the IDEA Action are not the same as the issues in the hearing before me.

In order to give full consideration to the Motion and the Response, I again reviewed the complaint filed in the matter before me and also requested from counsel and reviewed a copy of the due process complaint in the IDEA Action before Hearing Officer Carroll.

Discussion:
Damages: It is clear that hearing officers do not have the authority to award compensatory money damages for Section 504 issues, for ADA issues, for IDEA issues or for any other issues. Likewise, we do not award attorney fees.

Jurisdiction: I have not found any source of authority granting special education hearing officers jurisdiction over ADA-only claims. However, 22 Pa. Code Sections 14.102(a)(1), 14.102(a)(2), and 15.1(a) bestow broad jurisdiction over complaints brought under the IDEA and under Section 504 and I read these as including complaints about discrimination/retaliation. [Footnote: What is not clear, and what I will expect counsel to brief, is what authority if any is afforded to me to adjudicate claims against a private school such as [Private School] in any way that is separate from the LEA who by virtue of a student's residence is responsible for providing or procuring the student's special education services.] While there is no requirement to exhaust administrative remedies when bringing non-FAPE related 504 claims, neither is there any prohibition against choosing a due process hearing.

Pendency of a Prior Action: The District argues that any denial of FAPE allegations contained in the 504 complaint are already subject to the

jurisdiction of Special Education Hearing Officer Anne Carroll in the IDEA Action and therefore precluded under the doctrine of pendency of a prior action. There is no question that if there are overlapping identical claims in both complaints, I am precluded from addressing those specific claims.

In reading and comparing the IDEA Action complaint and the 504 complaint, I find that the precise issue in the 504 complaint, as put forth at numbers 28 through 44, is based on events occurring after the complaint in the IDEA Action was filed and is separate from the issues in the IDEA Action. The description of FAPE-related information in the 504 complaint [specifically numbers 9 through 27 and number 45] is background information only and not directly germane to discrimination/retaliation.

Unfortunately, a clear instance of overlap enters the picture, as item number 46 of the 504 complaint reads: "*On November 27, 2013 the Due Process Hearing* [IDEA Action] *continued. [Private School] staff member, [Ms. C., testified during the due process hearing that 1) only [Dr. B] has the authority to call the police; 2) Mr. H is a relative of B.*" This item clearly relates to the fact finding that will be necessary in the 504 hearing. Additionally, although it is a vague assertion as to which factual allegations are referenced, I must take seriously the District's contention in its Motion that "*In fact, the factual allegations underlying Petitioners' Complaint were the subject of extensive examination of District witnesses by Parent's counsel in the proceedings before Hearing Officer Carroll*."

Conclusion:
I am denying the District's Motion to Dismiss. However, given that there has already been testimony in the IDEA hearing that squarely addresses content pertinent to the 504 hearing, and in order to prevent the possibility of two hearing officers finding disparate facts based on the same evidence, we will proceed as follows: The 504 hearing will convene as scheduled on December 17, 2013 at 1:30 pm. at which time I will enter the customary preliminary remarks into the record. Following my remarks counsel will be invited to present their opening statements which, given the circumstances, may be more detailed than usual. We will then adjourn the hearing and reconvene only after the hearing pending under Hearing Officer Carroll has concluded and she has filed her decision.

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer

NAHO Certified Hearing Official