This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: C.H.

Date of Birth: [redacted]

ODR No. 15342-14-15-AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
Central Dauphin School District 600 Rutherford Road Harrisburg, PA 17109-5227	Christopher J. Conrad, Esquire Marshall, Dennehey, Warner, Coleman & Goggin 100 Corporate Center Drive, Suite 201 Camp Hill, PA 17011

Dates of Hearing: September 22, 2014

Record Closed: September 22, 2014

Date of Decision: October 7, 2014

Hearing Officer: William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The student in this matter (Student)[1] is a child living within the respondent District who attends a District high school. (NT 8.) Student is identified as a child with a disability pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504) and Chapter 15 of the Pennsylvania Code, the state regulations implementing section 504[2]. Student's parent (Parent) asserts that the District discriminated against Student on the basis of disability, specifically by refusing to allow Student to [participate in an activity] on account of Student's [medical condition].

The hearing was completed in one session. I find that the District did not deny Student's request to [participate in an activity] because of Student's disability[3]. Thus, I conclude that the District's actions were not disability discrimination and did not violate section 504 or Chapter 15. Therefore, I deny the request for relief.[4]

ISSUES

1. Did the District discriminate against Student on the basis of Student's disability, contrary to section 504 and Chapter 15, by refusing Student's request to [participate in an activity]?
2. Should the hearing officer order the District to remedy any such discrimination?

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[1] Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.
[2] [Redacted.]
[3] The District concedes that Student's [medical condition] is a disability for purposes of section 504 and Chapter 15, and that it is a recipient of federal funds, obligated by those laws not to discriminate on the basis of disability. (NT 13.)
[4] Parent requested, among other things, that I order the District to terminate or discipline its personnel who were responsible for denying Student's request to [participate in an activity]. During the hearing, I considered and rejected this request because an administrative hearing officer lacks authority to order a district to take disciplinary action as such against its employees.

FINDINGS OF FACT

1. Student is [redacted] in high school. Student is a diagnosed with [a medical condition]. In previous academic years, Student had a section 504 service agreement, but this was discontinued in 2009. Student's school has provided Student with a medical management plan, which provides that the school nurse will monitor and support Student's management of Student's [medical condition]. (S 1-5.)

2. Student [participated in an activity] in Student's freshman year. [Redacted] [As] a sophomore, Student [participated in the activity]. (NT 24, 40, 94.)

3. Student did not [perform well in participating in the activity] in sophomore year in high school. Student's technical skill was either average or below average. (NT 44.)

4. In Student's sophomore year, Student did not take advantage of the opportunity to take an elective course entitled [redacted], in which Student would have received daily instruction [related to participating in the activity]. Student did enroll in the [redacted] course for Student's junior year. (NT 93-94; S 11.)

5. During Student's sophomore year, Student sat out of practice very frequently, and the [redacted] coordinator and Student believed that this was because of [physical symptom] due to Student's [medical condition]. Student's progress with technical skills was impeded due to these sitting out episodes. (NT 127-129.)

6. The coordinator made efforts to [ameliorate Student's symptoms]. The coordinator offered to provide additional instructional and practice time when Student's physical condition would enable Student to practice. (NT 128-131, 133, 139.)

7. During the Student's sophomore year, Student suffered from extreme fatigue and dehydration during a practice for [the activity]. Student left the area and lay down without being able to [redacted] address the problem, because Student did not have [necessary supplies] with Student at the practice. This caused considerable concern at the time. Student eventually recovered and continued [participating in the activity]. (NT 25-26.)

8. Student was returning to the [activity] in [the following] year as the only returning student who had [participated in the activity] previously. (NT 27.)

9. [There was] a three-day "mini-camp" in June, at which [students [participated in the activity]. (NT 98-99, 112-116; S 8, 10.)

10. On the second day of the mini-camp, the coordinator offered members, including Student, the opportunity to "try out" for the [activity]. Tryouts are required every year for the [activity] for all students, but only for placement purposes. All students are

accepted into the [activity], but they are placed according to skill levels and "best fit" for the [activity]. (NT 51-52, 89-90, 95; S 9.)

11. [P]lacements are based upon a student's skills with the [activity], as well as the "fit" of the member for the [activity participants]. (NT 90, 105-106; S 9, 10.)

12. Student participated in the first two days of the three-day "mini-camp". During the "mini-camp", Student was able to perform [the activity] in the presence of the coordinator. (NT 51-52, 98-99, 112-118; S 8, 10.)

13. Student struggled with learning the exercise on which the [members were] practicing during the first two days of the "mini-camp". (NT 119-121.)

14. After a three-hour practice on the second day of the "mini-camp", the coordinator asked members to indicate whether they wanted an individual audition. Student raised Student's hand and indicated that Student wanted an individual audition. (NT 53-54.)

15. After the practice, the coordinator and [an activity] director met with Student. The coordinator told Student that it had been decided that Student would not [participate in the activity] during the coming season. (NT 53-56, 123.)

16. During the conversation, the coordinator mentioned both Student's deficits in technical skills [redacted] and the fact that Student had been sitting out frequently in the previous year. Student noted that sitting out was because Student had [medical condition] and there was some discussion of this. (NT 63-64, 68-69, 102, 120-127, 133-138.)

17. The District's coordinator offered Student a position in [a similar activity]. (NT 23-25, 65, 122-123.)

18. The District's coordinator also offered Student a [second similar activity]. (NT 24-25, 65, 122-123.)

19. The [similar activities] were considered among students to be the [lower] positions. (NT 24.)

20. Student refused to [participate in the similar activities]. (NT 66, 102.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion,

which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[5] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[6] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)[7]

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent's claim, or if the evidence is in "equipoise", the Parent cannot prevail under section 504 or the federal and state regulations that implement section 504 in Pennsylvania.

APPLICATION OF SECTION 504 AND CHAPTER 15

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[5] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[6] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

[7] Although Parent brings this matter solely under section 504, the Supreme Court's analysis in Schaffer was based upon basic principles in the common law and in administrative law. I see no reason to deviate from this analysis under section 504. Moreover, the Third Circuit Court of Appeals has recognized that the two statutes are unusually similar with regard to the rights that they protect, and that at least one procedural requirement of the IDEA should be applied in section 504 cases. P.P. v. West Chester Area School District, 585 F.3d 727, 736 (3d Cir. 2009)(applying the IDEA statutory limitation of actions to section 504 cases). I conclude that the reasoning in these cases is applicable to section 504 cases; thus, I follow those cases here.

The Rehabilitation Act of 1973, section 504, provides:

> No otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance … .

29 U.S.C. §794. Federal regulations implement this prohibition in school districts receiving federal financial assistance. 34 C.F.R. §104 et seq. The regulations define discrimination to include denying a qualified person with a disability the opportunity to participate in or benefit from the state-provided aid, benefit, or service, 34 C.F.R. §104.4(b)(i); affording benefits or services that are not equal to those afforded others, 34 C.F.R. §104.4(b)(ii); or providing services or benefits that are not as effective as those provided to others, 34 C.F.R. §104.4(b)(iii).

Here, all agree that the District did not exclude Student from [participating in the activity]; rather, Student was not given the opportunity to [participate in the activity according to] Student's choice. Thus, the Parent is really asserting that the District failed to provide Student with an equal opportunity to participate or benefit from the instruction and achievement offered through the [the activity of Student's choice]. 34 C.F.R. §104.4(b)(i); 22 Pa. Code §15.3.

The law as quoted above requires a school district to provide such equal opportunity to "otherwise qualified" individuals with disabilities. See also, 22 Pa. Code §§ 15.3 (requiring districts to provide aids, services or accommodations needed to afford equal opportunity to the maximum extent "appropriate to the student's abilities.") As the United States Supreme Court said in its seminal ruling on the meaning of disability discrimination under section 504, "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." Southeastern Community College v. Davis, 442 U.S. 397, 405, 99 S. Ct. 2361, 2366,60 L. Ed. 2d 980, 988, (U.S.1979).

The parties in essence are disagreeing on this requirement of the law. They have presented one basic fact issue for me to decide: did the District's coordinator and director refuse to assign Student to [participation in the activity] because of Student's [medical condition], or because Student's technical skills needed development before Student could succeed in [the activity]? In other words, was Student "otherwise qualified" to [participate in the activity] at the time of the "mini-camp"? If so, then excluding Student from that opportunity may have been disability discrimination contrary to law. If not, then the District's decision to preclude Student from that opportunity was not discrimination as defined by the above laws.

Two witnesses, Student and Student's [sibling], testified that the coordinator essentially admitted that the decision was due to Student's [medical condition]. Two witnesses, the coordinator and the director, testified that the decision was based upon Student's skill levels in [the activity].

I must assess the weight of this testimony in order to make a decision in this matter. Since the quantity of evidence on this point is equal, I must assess credibility and reliability in order to determine which party's evidence is more convincing, or whether or not the parties' evidence is in equipoise, as defined above. It is the special responsibility of the administrative hearing officer to make such determinations.

There was ample and preponderant evidence that the Student's technical skills were still developing. The coordinator and the director both testified that the Student was not ready to [participate in the activity of Student's choice], because Student was still learning [skills]. Even Student agreed, to Student's credit for fair mindedness, that Student's technical skills needed improvement – although the Student understandably was sure that Student could perform appropriately if given the chance.

Nevertheless, Student asserted that the District's decision to deny the opportunity to [participate in the activity] was really based upon Student's [medical condition]. The Student was clear and unwavering that the coordinator brought up Student's [medical condition] in the course of explaining that Student would not be assigned to [the activity]. Student's [sibling] indicated that [he/she] heard considerable discussion of Student's [medical condition] during the part of the conversation that the [sibling] heard.

However, this testimony, while credible, presented with weaknesses that reduce its weight. The Student repeatedly, and frankly, indicated that Student's memory of the conversation – especially of the beginning of the conversation - was imprecise. (NT 44, 54-55, 63-64, 67-68 60.) While Student insisted that it was the coordinator who brought up the subject of the previous year's incident, I must consider this in light of the Student's forthright admission of an unclear memory – specifically about the beginning of the conversation.[8]

Student forthrightly agreed that the coordinator did not say directly that the decision was because of Student's [medical condition]; rather, the evidence shows that it was Student's impression that this was the reason because the coordinator raised the subject of Student's [medical condition] while explaining the decision not to assign Student to [the activity]. Based upon the testimony of all witnesses, it is likely that the coordinator brought up Student's sitting out in the previous year. However, this is not enough evidence to enable me to find that the coordinator's decision was based solely upon Student's [medical condition].

[8] In this context, I must compliment Student on Student's careful honesty about the limits of Student's memory, as well as Student's very admirable modesty about Student's technical skills. It is clear to me that Student knows that the truth is far more important than merely winning an argument, and I find this insistence upon principled behavior, no matter what the result, to be most edifying.

On the contrary, the one witness who was not involved directly in the conversation, and who witnessed the entire conversation[9], contradicted Student's impression of what the coordinator said. This witness, the director, stated unequivocally that the coordinator attributed his decision to Student's need for further improvement of technical skills, not to Student's [medical condition]. As the director explained it from his recollection, the coordinator began the conversation by attributing the decision to Student's technical skills. Student repeatedly asked for more information about the reason for the decision, and at some point the coordinator mentioned that Student had been sitting out frequently during the previous year. The director testified that the Student then brought up [medical condition] as a reason for Student sitting out frequently during the previous year[10].

This is not evidence that the decision was based upon Student's [medical condition]; rather, at most it shows that the decision was based upon Student's technical performance in the previous year. Although this in part was due to Student's unavailability for practice, which the Student asserted to be due to Student's [medical condition], the evidence falls far short of showing that the decision was an assumption of inability to function based solely upon knowledge of Student's disability, Davis, 442 U.S., above. This is evidenced by the fact, discussed below, that the District's coordinator made reasonable attempts to accommodate the Student's [medical condition symptoms] so as to enable Student to make sufficient progress in technical skills.

Student's [sibling] testified to [his/her] perceptions of the conversation between Student and the coordinator. However, as Student's [sibling] made clear, [he/she] witnessed only part of the conversation, and specifically did not witness how the conversation began. (NT 20-21, 34,

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[9] I find no reason in the record doubt the credibility of this witness, the director.
[10] It was only after this point in the conversation, according to the director, that Student's [sibling] became present to the conversation.

50, 104.) Thus, some of what the [sibling] heard may have been out of context, and the possibility of misinterpretation reduces the weight that I can accord to [his/her] testimony on the question of the coordinator's motives for not assigning Student to the [activity].

I also consider that the Student's [sibling] seemed to contradict [his/her] own testimony. While [the sibling] made certain explicit statements about what [he/she] heard the coordinator say, on cross-examination [the sibling] admitted frankly that [he/she] did not remember exactly what the coordinator had said. (NT 33.)

The record shows that the Student's technical skills were insufficient to qualify Student to [participate in the activity]. Thus, the Parent's claim must fail on each of two alternate bases: 1) the evidence is not preponderant that the coordinator's decision was based upon Student's [medical condition]; and 2) the Student was not "otherwise qualified" to [participate in the activity] at the time at which the decision was made. I therefore conclude that the District's decision did not violate section 504.

REASONABLE ACCOMMODATIONS

A recipient of federal funds is required to accommodate a disability to a reasonable extent. Davis, 442 U.S., above. Section 504 does not require a recipient of federal funds to simply ignore a person's disability. Ibid. Rather, a school district must reasonably accommodate a student's disabilities so as to assure the student meaningful participation in activities and meaningful access to educational benefits. Blunt v. Lower Merion Sch. Dist.,2014 U.S. App. LEXIS 17629 (3d Cir., Sept. 12, 2014). See also, 22 Pa. Code §§ 15.3 (requiring districts to provide aids, services or accommodations needed to afford equal opportunity to the maximum extent "appropriate to the student's abilities.") To the extent that Student's "sitting out" of

practices was because of [medical condition], the District was not required to ignore the technical requirements of [the activity] in order to accommodate the Student's need to "sit out."[11] Rather, it was required to make reasonable efforts to enable Student to succeed in spite of Student's disability.

The record is preponderant that the District did make such reasonable efforts. The record shows that the coordinator [brought supports to practice]; allowed Student to sit out but listen to and observe the instruction; offered to meet with Student at other times for individual practice and instruction; provided digital instruction materials for the "mini-camp" to be reviewed at home; and offered to work individually with [some] members, including Student, during the days of the "mini-camp". Student took advantage of few of these opportunities. I conclude that the District provided reasonable accommodations.

To the extent that accommodations cannot overcome a person's disabilities sufficiently to enable the person to participate in the activity, the federal funds recipient is not required to alter its programs fundamentally[12]. Davis, 442 U.S., above. Here, some practice with the [other members] was required due to the fundamental nature of [the activity]. Moreover, here, an accommodation was available for those with developing skills: Student was offered the opportunity to [participate in a similar activity]; Student declined this offer as well. I conclude that the District offered Student all the services that the law requires in order to benefit from participating in the [activity].

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[11] From Student's presentation at the hearing, I do not believe that Student would want the District to do any such thing, anyway.
[12] Again, I do not believe that Student would want this.

CONCLUSION

I conclude that the District did not fail to comply with section 504 and Chapter 15. I find that the District did not discriminate against Student based upon disability within the meaning of those laws. Therefore I will not order the District to provide any remedial relief.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Parent's requests for relief are hereby **DENIED** and **DISMISSED**. It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

October 7, 2014