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

Pennsylvania Special Education Hearing Officer

Final Decision and Order

CLOSED HEARING
ODR File Number: 18822 16 17

Child's Name: M. S. **Date of Birth**: [redacted]

Dates of Hearing:[1]
04/11/17, 09/06/17

Parent:
Parent[s]

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Hearing Officer: Michael J. McElligott, Esquire **Date of Decision: 09/25/17**

[1] The initial hearing session was held in April 2017, which led to an interim ruling, based on evidence, as to the scope/nature of the parent's claim. Thereafter, counsel were hopeful that a resolution between the parties could be reached. This effort did not bear fruit, so a second session to conclude the hearing was scheduled in September 2017.

INTRODUCTION

[The Student] ("student")[2] is [an early teenaged] student who resides in the McGuffey School District ("District"). The student's status as a student who qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")[3] is not currently disputed between the parties. As set forth more fully below, the dispute between the parties centered on whether the District had timely identified the student as a student with a disability under the terms of IDEIA, and whether the District discriminated against the student and/or retaliated against the family in violation of the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").[4]

Parent claims that the student was denied a free appropriate public education ("FAPE") due to the District's alleged failure to identify the student as a student with a specific learning disability in mathematics. Parent also claims that the District wrongfully discontinued implementation of the student's Section 504 plan/Chapter 15 agreement, discriminated against the student on the basis of disability, particularly as related to an inadvertently recorded conversation amongst District educators, and retaliated against the student and family following this conversation.

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[2] The generic use of "student", rather than a name or gender-specific pronouns, is employed to protect the confidentiality of the student.

[3] It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 ("Chapter 14").

[4] It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 ("Chapter 15").

The District counters that it did not deny the student FAPE under its obligations to the student under IDEIA. Furthermore, the District asserts that it did have the permission of one parent to discontinue the Section 504 plan/Chapter 15 agreement, that it did not discriminate against the student, and that it did not retaliate against the student or family.

As part of an interim ruling, the IDEIA failure-to-identify issue was found not to be an issue in the hearing. (See the *Procedural Background* section below.)

For the reasons set forth below, I find in favor of each party on various aspects of the remaining Section 504 claims. I find in favor of the District in that it did not wrongfully discontinue the Section 504 plan/Chapter 15 agreement and did not retaliate against the student and family. I find in favor of the student that the District discriminated against the student in violation of Section 504.

PROCEDURAL BACKGROUND

A. In February 2017, the parent filed the complaint which led to the proceedings in this matter. (Hearing Officer Exhibit ["HO"]-1).

B. The District responded to the complaint, lodging formal objections as to the timeliness and nature of the claims raised in parent's complaint. (HO-2).

C. On April 11, 2017, following a conference call with counsel and an exchange of offers of proof submitted by the parties in March 2017, an evidentiary session was held to allow the undersigned hearing officer to rule on the nature and scope of the evidentiary record. (HO-3, HO-4, HO-5; Notes of Testimony at 1-222).

D. In May 2017, the hearing officer issued an interim ruling, finding (1) that the Section 504 discrimination/retaliation claims were *prima facie* timely filed, (2) that the parent's Section 504 claims related to the allegedly wrongful termination of the Section 504 plan/Chapter 15 agreement would be an evidentiary issue in the hearing, but (3) that the IDEIA claims related to an alleged omission on the part of the District to identify the student with a specific learning disability in mathematics prior to November 2015 would not proceed as the record did not support a conclusion that either party—either the parent or the District—knew or should have known that the student was eligible under IDEIA. (HO-6).

E. The September 2017 hearing session concluded the evidentiary record. (NT at 225-448).

ISSUES

Did the District wrongfully terminate
the student's Section 504 plan?

Did the District discriminate against the student
on the basis of disability?

Did the District retaliate against the student and family?

FINDINGS OF FACT

1. In May 2011, the spring of the student's 1st grade year, the student was identified as a student with speech/language deficits. An individualized education program ("IEP") was developed to address the student's needs. (School District Exhibit ["S"]-1, S-2, S-3, S-4, S-5, S-6, S-7, S-8, S-18).

2. In September 2012, in response to needs related to anxiety, work refusal in school, and difficulty with swallowing food, the student was provided with a Section 504 plan/Chapter 15 agreement to address these needs. The student was given a health plan, including monitoring by the nurse and food services staff, as well as group counseling intervention by a school counselor. (S-19, S-20, S-21).

3. Approximately four months later, in January 2013, a meeting took place between school-based members of the Chapter 15/Section 504 team and [one of] the student's [parents]. (Parent Exhibit ["P"]-3; S-22).

4. District witnesses testified that [one of the student's parents] had agreed to a termination of the Section 504 plan/Chapter 15 agreement. (NT at 126-128).

5. [One of t]he student's parents passed away in March 2016 so [his/her] testimony could not be part of the hearing. The student's [other parent] testified that the student's [deceased parent] did not share [ ] any indication that the Section 504 plan/Chapter 15 agreement had been terminated and that termination of the plan/agreement was something that [the deceased parent] would have shared with [the parent who filed the complaint]. (NT at 164-166).

6. The elementary school principal's contemporaneous notes from the January 2013 Section 504/Chapter 15 meeting indicate: "January 9, 2013. Met with [a parent]. Eating issues have ceased….Doing well in the classroom. Removed accommodations for *eating/health plan. Revised* Chapter 15, leaving breaks when needed and reducing problems." (P-3 at page 5, emphases added.)

7. In February 2013, the District school counselor documented in a re-evaluation input form for another District employee that the student no longer required the health plan for eating or lunch in the nurse's office and that "difficulty with eating has improved". The input further related that "Doing well in the classroom. Anxiety at school has decreased." (S-23).

8. Two months later, in April 2013, the principal's contemporaneous notes indicate: "April 23, 2013. Speech IEP. Elimination of Chapter 15 since IEP in place. No additional accommodations at this time were identified." (P-3 at page 5).

9. In January 2014, the family and the District agreed that the student should be exited from speech and language services. (S-9, S-10).

10. Over January 2014 – January 2015 (the latter half of 4th grade and first half of 5th grade), the student did not have an IEP and did not have a Section 504 plan/Chapter 15 agreement.

11. In January 2015, the student underwent a social service evaluation at the children's therapy center of a local hospital ("hospital evaluation"). (P-4).

12. The January 2015 hospital evaluation referenced the Section 504 plan/Chapter 15 agreement, including the accommodations, but made

no mention that parents indicated that the plan/agreement was no longer in effect. (P-4 at page 3).

13. The January 2015 hospital evaluation included two teachers' ratings on a behavior rating scale. These were the student's 5th grade mathematics and 5th grade language arts teachers. Both teachers rated the student as markedly or moderately atypical—and therefore indicating a "significant problem"—for inattention, hyperactivity/impulsivity, learning problems/executive functioning, and peer relations. The student's 5th grade language arts teacher rated the student as markedly atypical for defiance/aggression. (P-4 at page 3, P-8).

14. The January 2015 hospital evaluation included a diagnosis of anxiety, along with identified problems with socialization, difficulties in mathematics, and learning. The evaluator recommended an additional psychological evaluation and an occupational therapy evaluation, as well as "consultation to school staff (sic) after evaluation with psychologist to discuss a meeting to revise the 504 plan or to request a multidisciplinary school evaluation for an IEP". (P-4 at page 4).

15. In February 2015, as recommended in the hospital evaluation, the student underwent an occupational therapy evaluation. The occupational therapy evaluation found visual-perceptive skills to be an area of moderate deficit and ocular-motor skills to be an area of mild deficit and recommended therapeutic activities in both areas. (P-2).

16. In February 2015, as recommended in the hospital evaluation, the student underwent a psychological evaluation. (P-5).

17. In the February 2015 psychological evaluation, in the "school/vocational" section, the evaluator notes that the student has a section 504 plan/Chapter 15 agreement. (P-5 at a page 5).

18. In the February 2015 psychological evaluation, in the "school/vocational" section, the student's 5th grade language arts teacher completed the same behavior rating scales with the evaluator noting "rather pronounced elevations in inattention, impulsivity, executive functioning, and degree of defiance, and some struggles with peers. (P-5 at page 5).[5]

[5] It is unclear whether the psychological evaluator was replicating the 5th grade language arts teacher's behavior ratings from the January 2015 hospital evaluation, or whether the behavior ratings in the February 2015 psychological evaluation were a separate set of ratings as part of that evaluation process. There is no mention in the psychological evaluation of behavior ratings by the 5th grade mathematics teacher.

19. The February 2015 psychological evaluation diagnosed the student with obsessive/compulsive disorder, generalized anxiety disorder, persistent depressive disorder, and attention-deficit/hyperactivity disorder (inattentive type) ("ADHD"). (P-5 at page 7).

20. There were no explicit educational recommendations in the February 2015 psychological evaluation. (P-5).

21. On February 10, 2015, nearly contemporaneously with the issuance of the occupational therapy evaluation (evaluation date February 11th, signed February 12th) and the psychological evaluation (dated February 11th), three educators gathered to consider educational concerns related to students. (NT at 332, 358).

22. The educators were the student's mathematics teacher, language arts teacher (each of whom had provided behavior ratings in January 2015 as part of the hospital evaluation), and a third 5th grade teacher. (P-1, P-11; NT at 358).

23. The educators utilized a speakerphone and called the cell phone of the student's [parent]. The student's [parent] did not take the call so the educators left a voicemail. (P-11; NT at 262-263).[6]

24. The voicemail begins as follows: "Hi, [Mr./Mrs.] ---- (redacted to protect student confidentiality). This is Mr. ---- (redacted to protect student confidentiality)[7], (the student's) teacher. Mrs. ---- (redacted to protect student confidentiality)[8] and I were wondering if there was some time in the near future we could talk to you about some concerns that we have for (the student). If you could give us a call sometime or tell us a good time that we could call you. The best time for us is either at 2:00 or 3:00 o'clock. So—or 1:20. Excuse me. 1:20 to 2:00 o'clock or at 3:00 o'clock. So we – we had just some concerns. (The student) is sort of backtracking, and we want to see if there is anything happening or something that we can help with or see what we can do. So thank you and take care. Bye." (P-11 at page 2).

25. The educators, at that point, ostensibly assumed that the call had ended. But the speakerphone had not been hung up, and the conversation among the three educators continued, being inadvertently recorded on the voicemail.

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[6] The parties stipulated to a transcript of the call. (P-11). At the hearing, the recording of the call was played once—with a limited number of hearing attendees in the room—and the recording itself is an evidentiary artifact of record at P-1. (NT at 251-262).

[7] Mr. ---- was the student's 5th grade mathematics teacher.

[8] Mrs. ---- was the student's 5th grade language arts teacher.

26. The mathematics teacher then says another student's name. (P-11 at page 2).

27. Thereafter, the educators then discuss aspects of the students' performance in mathematics, classroom behavior, and affect. (P-11 at pages 2-6).

28. The educators mock the students' mathematics ability, physical appearance, and classroom behavior, punctuating these crass comments with derisive laughter. (P-1, P-11).

29. In the midst of the conversation, the other student's name is again repeated, this time by the language arts teacher. (P-11 at page 4).

30. It is unclear whether the recording ended because the group of educators successfully hung up the speakerphone, or the voicemail message reached its recording capacity. (P-1, P-11).

31. Immediately, however, the group of educators realized that their conversation had been inadvertently recorded and shared this fact with a school counselor who happened to come into the room at that point. (NT at 382-383).

32. That day, the teachers consulted with the elementary school assistant principal about the call and recording. (NT at 360-361).

33. The next day, February 11, 2015, having retrieved the voicemail message, the student's [parent] contacted the District and met with the school principal. The District contends that, while recognizing the deeply unprofessional conduct of the educators, the student's [parent] was informed by the principal that the conversation was centered on another student—the student whose name appears twice in the conversation—and not the student in the instant case. The student's [parent] contends that the conversation centered on both students and that this understanding was never refuted or corrected by District personnel in the communications with District personnel until matters had taken a turn toward legal processes. The [parent's] testimony is credited. (NT at 262-281, 357-359, 423-425).

34. On the afternoon of February 11, 2015, the day after the voicemail recording, the mathematics teacher and the language arts teacher again utilized a speakerphone to call the student's [parent]. The student's [parent] testified that during the conversation the language arts teacher attempted to defend her role in the conversation by saying "Have you ever had one of those days?" In her testimony, the teacher denies having

made that statement. The [parent's] testimony is credited. (NT at 276-277, 340).

35. In the follow-up conversation of February 11, 2015, the teachers did not indicate that the voicemail recording was a conversation centered on another student. (NT at 358-359).

36. On February 18, 2015, in an email sent to the parents by the language arts teacher, the teacher lauds the student and implicitly pleads for understanding on the part of the student's parents. The email makes no mention that the conversation centered on another student. (P-3 at page 1).

37. At the hearing, the language arts teacher's testimony about the student's behavior in her class ("[The student] did very well.…was well-behaved.…was polite.…loved to help in the classroom.…got along well with…peers") was distinctly at odds with the contemporaneous behavior ratings provided for the January 2015 hospital evaluation and February 2015 psychological evaluation. (P-4, P-5, P-8; NT at 326).

38. The testimony by District witnesses about the conversation exclusively centering on another student, and not on the student in the instant case, are self-serving and are not contemporaneously documented in any way, either externally or in communications to the student's [parent].

39. A document that forms the basis for input of teachers for an evaluation process for the other student mentioned in the voicemail recording was brought into evidence at the hearing. It appears to correspond, at points, with the discussion recorded on the voicemail message. (S-34; NT at 341-354).

40. After hearing the voicemail, the student's parents did not return the student to the District, withdrew the student from the District, and enrolled the student in a cyber charter school. (S-13; NT at 296).

41. Upon requesting a copy of the student's Section 504 plan/Chapter 15 agreement so it could be provided to the cyber charter school, parents learned for the first time that the District had discontinued the Section 504 plan/Chapter 15 agreement. (P-3 at pages 3-5, P-7; NT at 232-235).

42. The cyber charter school implemented a Section 504 plan/Chapter 15 agreement shortly after the student's enrollment, including frequent breaks from online learning experiences upon request, extended time to submit assignments, and Title I support in mathematics for spatial and math reasoning. (S-24).

43. The student finished 5th grade, the 2014-2015 school year, in the cyber charter school. (NT at 296).

44. The student returned to the District for the 2015-2016 school year, the student's 6th grade year. (NT at 296).

45. In August 2015, the District implemented a Section 504 plan/Chapter 15 agreement upon the student's return. In September 2015, the District requested, and parents provided, permission to evaluate the student. In November 2015, the District issued an evaluation report, identifying the student with health impairments related to ADHD, anxiety, and depression, as well as a specific learning disability in mathematics. In December 2015, the student began to receive special education and related services through an IEP. (S-25, S-26, S-27, S-28, S-30, S-33).

46. In March 2016, [one of] the student's [parents] passed away. (NT at 31, 234).

47. In February 2017, the student's [other parent] filed the complaint which led to these proceedings. (HO-1).

WITNESS CREDIBILITY

Heavy weight was accorded to the testimony of the student's [parent]. The testimony of the student's 5th grade language arts teacher was accorded very little weight. The testimony of other witnesses was accorded a medium degree of weight.

DISCUSSION AND CONCLUSIONS OF LAW

Discontinuation of the Section 504 Plan/Chapter 15 Agreement

Section 504 and Chapter 15 require that children with disabilities in Pennsylvania schools be provided with a free appropriate public education

("FAPE"). (34 C.F.R. §104.33; 22 PA Code §15.1).[9] The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally* P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009)).

Additionally, the provisions of Section 504 bar a school district from discriminating against a student on the basis of disability. (34 C.F.R. §104.4). A student with a disability who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise discriminated against, has been discriminated against in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion School District, 729 F. 3d 248 (3d Cir. 2013)). A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district. (S.H., *infra*).

Here, parent's claims regarding the discontinuation of the Section 504 plan/Chapter 15 agreement can be viewed as claims that sound in both aspects of Section 504 protections. Under either scenario, though,— Section

[9] Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks.

504 denial-of-FAPE and Section 504 discrimination—parent and student do not prevail.

Before examining the contours of parent's claims under each aspect of Section 504, it is a finding of fact that the District discontinued the Section 504 plan/Chapter 15 agreement in its entirety, at the latest, as of April 2013. The contemporaneous evidence at the time indicates that the aspects of the Section 504 plan/Chapter 15 agreement that addressed the student's needs in eating/swallowing were definitively discontinued in January 2013. The other aspects of the Section 504 plan/Chapter 15 agreement related to anxiety and attention, however, were not at that time noted as being discontinued. This is supported by the school counselor's notes of February 2013 and, ultimately, in the principal's notes of April 2013 where the Section 504 plan/Chapter 15 agreement are referred to as "eliminated".

This factual finding is further supported by an entirely consistent record that parents informed the evaluator in the January 2015 hospital evaluation, the evaluator in the February 2015 occupational therapy evaluation, and the psychologist in the February 2015 psychological evaluation that the student had a Section 504 plan/Chapter 15 agreement. In March 2015, when the student was enrolled in the cyber charter school, parents informed the cyber charter school that the student had a Section 504 plan/Chapter 15 agreement. Only when a copy of the plan/agreement was requested from the District at that time did parents learn that the District had discontinued the plan/agreement nearly two years earlier. The District's contention that the

parents agreed to discontinue the Section 504 plan/Chapter 15 agreement at the January 2013 meeting is erroneous. This unilateral discontinuation of the Section 504 plan/Chapter 15 agreement did not, however, amount to a denial of FAPE or to Section 504 discrimination, as set forth in the paragraphs below.

Section 504 Denial of FAPE. As to Section 504 denial-of-FAPE, even though the Section 504 plan/Chapter 15 agreement was unilaterally discontinued by the District, the record does not support the view that lack of services under the Section 504 plan/Chapter 15 agreement amounted to a denial of FAPE. Although it is only a surmise due to the lack of [one parent's] testimony (the parent who participated in the January 2013 meeting), this hearing officer believes the evidence supports a conclusion that the student's difficulties with eating/swallowing had subsided over the period September 2012-January 2013, that this fact was shared at the meeting in January 2013, and that this portion of the Section 504 plan/Chapter 15 agreement may well have been discontinued with parent's consent. Nothing in the record, though, supports the assertion by the District that the entire Section 504 plan/Chapter 15 agreement was to be discontinued. Still, the testimony of teachers who worked with the student in the spring of 2013 (3rd grade) and the 2013-2014 school year (4th grade) and parent's own testimony do not support a conclusion that issues of anxiety or attention presented problematic concerns in the school environment.

By the fall of 2014 and winter of 2015 (5th grade), however, the student's behavior changed to the point that (1) the parents, on their own, undertook multiple evaluation processes related to the student's behavior and learning, (2) those evaluation processes revealed significant behavioral and learning concerns in the school environment, to the point that (3) the student's 5th grade mathematics and language arts teachers independently initiated the February 10, 2015 phone call to parents with concerns about the student. Ostensibly, it is at this point in the chronology—the December 2014 – February 2015 period—that formal services to the student under a Section 504 plan/Chapter 15 agreement could have become an issue related to FAPE. The February 10th phone call, however, sent things on a definitively new trajectory because the student was dis-enrolled at that time. Taken as a whole, though, this record cannot support a conclusion that the District's unilateral discontinuation of the Section 504 plan/Chapter 15 agreement denied the student a FAPE over the period January 2013 – February 2015.

Section 504 Discrimination. As to Section 504 discrimination, the District did not act with deliberate indifference in discontinuing the Section 504 plan/Chapter 15 agreement. Discontinuing the Section 504 plan/Chapter 15 agreement was a unilateral decision but one that was based, in the eyes of this hearing officer, on a semantic misunderstanding. Again, it cannot be known with certainty, but the record supports the surmise that, for parents, the eating/swallowing portion of the Section 504 plan/Chapter 15 agreement was

removed with permission but the other elements of the plan/agreement were still thought to be in place. The District clearly thought that the student did not require any of the explicit supports/accommodations in the Section 504 plan/Chapter 15 agreement, and so the entire plan/agreement was discontinued. The contemporaneous documentary evidence in the form of the principal's notes and the parents' information provided in the January/February 2015 evaluation reports, as well as the testimony from each party's perspective in the hearing all support the surmise that, ultimately, discontinuation of the Section 504 plan/Chapter 15 agreement was rooted in a mis-communication. And a good-faith mis-communication cannot be the basis for a finding of deliberate indifference on the part of the District.

Accordingly, the District did not fail in its Section 504 obligations to the student, as to either denial of FAPE or discrimination, in the unilateral discontinuation of the Section 504 plan/Chapter 15 agreement.

The February 10th Voicemail Recording

The District, through the acts and omissions of its employees (specifically, the student's 5th grade mathematics and language arts teachers) in the February 10, 2015 voicemail recording, acted with deliberate indifference toward the student on the basis of the student's disabilities. This deliberately indifferent animus led to the student's exclusion from the student's school district of residence (following the parents' understandable decision to dis-enroll the student from the District). Thereby, the student was denied

participation in District programming, denied the benefits of District programming, and discriminated against by the District, particularly in being denied the enjoyment of right, privilege, advantage, and/or opportunity enjoyed by other non-disabled students who reside in the District. (34 C.F.R. §104.4(a)(b)).

The mockery, laughter, and derision voiced by the three educators in the voicemail recording is unconscionable. As the student's [parent], [area of employment redacted], testified powerfully and accurately when describing [the] conversation with the 5th grade mathematics and language arts teachers in the follow-up phone call the next day, on February 11th: "I referenced the fact that I worked [in an office in a field related to services for children]. We see over 100 children a day. Fifteen of us work and I never one time in the [redacted] years that I've been here heard any of them refer to children in such a demeaning, degrading way, especially coming from a teacher who I trusted with my child." (NT at 277). Anyone listening to the voicemail recording would agree—it is nearly unfathomable, and frankly heart-breaking, to gauge that the speakers on that recording are educators working with [elementary school age] children, and are particularly discussing some of those children who clearly have significant disabilities.

The District will be accorded a scintilla of credit for recognizing that the conversation among the teachers is entirely unwarranted and unprofessional. It could not respond otherwise and, to be clear, the District has never taken a position to defend the recording, for the teachers' conversation is indefensible.

Here, though, the District's position that the unconscionable conversation centered around another student, and not the student in the instant case, must be addressed.

There is evidence that the conversation ostensibly involved another student. That student is named in the course of the conversation, and there is evidence that the three teachers may have been considering their input related to an evaluation process involving the other student's ability in mathematics and in-class behaviors. But is this evidence entirely dispositive that the teachers were not discussing both students? It is the considered opinion of this hearing officer that it is not entirely dispositive.

First, the District asserts that after those teachers thought they had hung up the speakerphone after leaving the voicemail for the student's [parent], they specifically named the other student—"Sally Jones" (P-11 at page 2, lines 16-17).[10] They did. But mysteriously and without explanation, either on the recording itself or in testimony of the language arts teacher at the hearing, the student's name is interjected again in the midst of the conversation by the language arts teacher. As parent's counsel posited in the course of the examination of the language arts teacher, why in the course of a conversation purportedly about "Sally Jones"—specifically named at the outset of the conversation—, did the language arts teacher state, without any context or explanation, "Sally Jones had no problem."? (P-11 at page 4, line 25). Again,

[10] Not the other student's real name. A fictional, substitute name is utilized to explore the point.

no explanation or context is offered for the statement. This lends credence to the parent's assertion that both students were the subject of the teachers' conversation.

Second, the content of the conversation mirrors to a degree the evaluation input that the teachers were working on for the other student. But the substance of the conversation just as easily reflects behaviors and needs exhibited by the student, namely mathematics and problematic in-class behaviors, some of which both the mathematics teacher and the language arts teacher endorsed in their behavior ratings for the student only a few weeks prior to the phone call, in the January 2015 hospital evaluation and the February 2015 psychological evaluation.

Third, the three teachers on the recording were the student's mathematics teacher, the student's language arts teacher, and another mathematics teacher. The third teacher definitively did not teach the student mathematics. Yet both mathematics teachers were providing input in the conversation about mathematics instruction/learning. Perhaps both mathematics teachers taught the other student—that is not clear on the record. What is clear, though, is that both mathematics teachers were opining about a student's, or both students', needs in mathematics. Again, nothing in the conversation would explain or indicate that the student's mathematics teacher wasn't opining about the student.

Fourth, and the point to which this hearing officer attaches the most weight, the contemporaneous interactions in February 2015 of the student's

[parent] and District personnel in the aftermath of the phone call do not at all support the District's contention that, crass as the conversation was, it centered solely on another student. The language arts teacher and the principal testified that this was made clear to the student's [parent], but the credibility of these witnesses leads this hearing officer to credit [the parent's] testimony that this was not explicit or consistent information shared by the District. There is no documentation or writing where the student's [parent] was informed that [he/she] was mistaken, that the conversation was not about the student. On February 11th, in the follow-up phone call, the day after the voicemail recording was left, the language arts teacher testified that she definitively did not tell the student's [parent] that the conversation was centered on another student, and not the [parent's] child. And a week later, in an email sent to the parents, the language arts teacher lauds the student, and implicitly pleads with the parents for understanding but makes no mention that the recorded conversation was centered on another student and not the parents' child. Indeed, at every point where the District could have documented and/or made clear to parents that they labored under a misperception, that their understanding was inaccurate, or that their child was not any part of that conversation, such evidence is non-existent or the opposite is true and such information was explicitly not relayed to parents. In short, parent's testimony is credited, and the District's testimony is discounted, where parent asserts that [his/her] understanding at the time of the incident and thereafter that [his/her]

child was at least partly the basis of the educators' unconscionable conversation was never contradicted by the District.

Therefore, the District's position that the unconscionable conversation centered entirely around another student, and did not involve the student in the instant case, is rejected. Accordingly, as set forth above, the District failed in its obligations to the student by discriminating against the student on the basis of disability, treating the student with deliberate indifference in the acts and omissions of the 5th grade mathematics and language arts teachers [on] February 10, 2015, acts and omissions which ultimately denied the student participation in District programming, denied the student the benefits of District programming, and amounted to discrimination, particularly in a denial to the student of the enjoyment of right, privilege, advantage, and/or opportunity enjoyed by other non-disabled students who reside in the District.

Retaliation by the District against the Student & Parents

Where a family engages in the process for educating students with disabilities under Section 504, it 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 that a school district has retaliated against a family for engaging the processes outlined in 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).

Here, parent's claim that the District retaliated against the student and family, parent asserts that the District delayed the evaluation process for the student upon the student's return from cyber school to the District for the 2015-2016 school year (the student's 6th grade year). The record cannot support a finding that the District retaliated against the student upon the student's return to the District. In August 2015, at the outset of the school year, the District implemented a second Section 504 plan/Chapter 15 agreement. In September 2015, it sought permission to evaluate the student for potential services under IDEIA. By November 2015, the District had issued its evaluation report, identifying the student's needs, and an IEP was in place in December 2015. Again, nothing in this course of events is evidence that the District was dilatory in its obligations under Section 504/Chapter 15 or IDEIA, nor did the District retaliate against the student in any way regarding these processes.

Accordingly, parent's claim that the District retaliated against the student is denied.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District discriminated against the student on the basis of disability through the deliberately indifferent acts and omissions of its employees, as set forth above, leading to the dis-enrollment and exclusion of the student from the student's school district of residence.

While the unilateral termination of the Section 504 plan/Chapter 15 agreement in January 2013 was wrongful, it did not result in a denial of a free appropriate public education to the student and it was not terminated with deliberate indifference toward the student. Therefore, parent's claims against the School District related to discontinuation of the Section 504 plan/Chapter 15 agreement are denied.

The School District did not retaliate against the student and family.

Any claim not specifically addressed in this decision and order is denied.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

September 25, 2017