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: 19368 16 17

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

Dates of Hearing:
8/30/2017, 10/23/2017, and 11/2/2017

Parents:
[redacted]

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D. **Date of Decision:** 12/2/2017

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)[1] is a late-teenaged young adult who previously was a student in the District (District). During Student's tenure in the District for the relevant time period, Student had a Section 504 Service Agreement.[2] After a disciplinary incident in the fall of 2016, Student completed high school in an online learning program but graduated with a District diploma in June 2017.

Student's Parents filed a Due Process Complaint against the District in June 2017 asserting that it violated its Child Find obligations to Student under the Individuals with Disabilities Education Act (IDEA),[3] and that it also denied Student a free, appropriate public education (FAPE) under that Act and/or Section 504 from the start of the 2015-16 school year through the end of the 2016-17 school year. The Parents further claimed that that the District discriminated against Student in violation of Section 504 and the Americans with Disabilities Act (ADA).[4] A hearing convened over three sessions,[5] with the Parents seeking to establish the above assertions and the District maintaining that its educational program was appropriate for Student and that no Child Find violation occurred.

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[1] In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifying information are omitted from the body of this decision to the extent possible. All personally identifiable information, including that appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

[2] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

[3] 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

[4] 42 U.S.C. §§ 12101-12213.

[5] Citations to the record will be as follows: Notes of Testimony (N.T.); Parent Exhibits (P-) followed by the exhibit number; School District Exhibits (S-) followed by the exhibit number; and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to duplicative exhibits may be to one or the other or both. The term Parents is used in the plural when it appears that one or the other Parent was acting on behalf of both.

For the reasons set forth below, one of the Parents' claims will be granted with respect to a portion of the time period at issue and all other claims will be denied.

ISSUES

1. Whether the District violated its Child Find obligations in its failure to identify Student as eligible for special education under the IDEA;

2. Whether the District failed to provide Student with an appropriate educational program, or FAPE, under the IDEA and/or Section 504, over the 2015-16 school year;

3. Whether the District failed to provide Student with an appropriate educational program, or FAPE, under the IDEA and/or Section 504, over the 2016-17 school year;

4. Whether the District violated its obligation to conduct a manifestation determination or similar process following the disciplinary incident in October 2016 and prior to Student's transition to an out-of-District setting;

5. If the District did fail to provide Student with FAPE for any of the relevant time period, should Student be awarded compensatory education;

6. If the District did fail to provide Student with FAPE, should the Parents be reimbursed for certain expenditures they incurred;

7. Did the District discriminate against Student and act with deliberate indifference toward Student on the basis of Student's disability?

FINDINGS OF FACT

1. Student is a late-teenaged student who resided within the District during the relevant time period through the end of the 2016-17 school year. (N.T. 40-41, 103-04, 177)

2. Student graduated from the District in June 2017 and currently attends a local university. (N.T. 104, 173, 411)

3. Student has been diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) and has been prescribed medication. Student exhibits impulsivity and has difficulty attending to tasks and remaining focused. (N.T. 104-05, 186, 349, 356; P-7, P-12)

4. Throughout the time period in question, the Parents helped Student after school to manage and complete homework, review material for classes, and study for tests.

Student was generally not able to complete homework without assistance from the Parents. (N.T 348, 351-52, 356, 360-61, 382)

EDUCATIONAL AND EVALUATION HISTORY

5. Student was initially assessed by the District in April 2009 based on concerns with Student's attention, concentration, and lack of focus in the classroom. A report of the assessments conducted referenced intelligence testing and the Conners Ratings Scales – Third Edition (Conners 3). (P-1; S-11)

    a. Cognitive assessment (Reynolds Intellectual Assessment Scale (RIAS)) yielded scores in the average range on both the Verbal and Nonverbal Indices as well as on the Composite Memory and Composite Intelligence Indices. (P-1; S-11)

    b. Conners 3 results were relatively consistent across the home and school environments, with three teachers providing rating scales in addition to the Parents. All raters reflected elevated or very elevated concerns with Inattention and Hyperactivity/Impulsivity, with several raters also indicating concerns with Learning Problems and Executive Functioning. The scales from teachers were more indicative of ADHD than those from home. (P-1; S-11)

6. Recommendations in the April 2009 assessment included "resource interventions" such as additional or repeated instruction and directions and monitoring Student's attention to task. (P-1 p. 4; S-11 p. 4)

7. In July 2009, based in part on a physician's note suggesting classroom modifications due to impulsive behaviors, a Section 504 Service Agreement (hereafter Service Agreement) was developed. The accommodations listed in that Service Agreement were preferential seating; repetition or review of directions before starting a task; checks for independent task completion; assistance with organization; chunking of assignments and planning for long projects; review of expectations for leaving seat; and small group testing when needed. (P-2, P-3; S-9, S-13)

8. The District obtained Conners rating scales from the Parents and two teachers in June 2010 at the request of the Parents. Teacher ratings were at the elevated or very elevated range with respect to Inattention, Hyperactivity/Impulsivity, Aggression, and Peer Relations. Parent ratings reflected concerns with Inattention, Hyperactivity, and the ADHD Index. This assessment included recommendations for potential revision of Student's Service Agreement to avoid behaviors that interfered with Student's learning or that of others. (P-4)

9. The Parents obtained a private neuropsychological evaluation of Student in August 2010. (P-5)

    a. Cognitive assessment (Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)) revealed variability among subtests; a relative strength in Working Memory and a relative weakness in Perceptual Reasoning were noted. Because of

Student's difficulties with attention and concentration, the Full Scale IQ (84) was considered to be a low estimate of Student's abilities.

b. Student attained low average to average range scores on select reading subtests of the Woodcock Johnson Tests of Achievement – Third Edition, with lower scores in reading comprehension and fluency. (P-5)

c. Assessment of executive functioning, attention, and concentration skills similarly revealed variability but memory functioning was generally average. Impulsivity was noted as a parental concern. (P-5)

d. The neuropsychologist recommended medication to manage Student's ADHD symptoms in addition to short-term cognitive behavioral therapy. Academic accommodations for reading weaknesses, such as small group work and audiobooks, were also suggested. (P-5)

10. Student's Service Agreement for the 2010-11 school year added prompting for on-task behavior and was otherwise unchanged from the previous year. The Parents approved the Service Agreement in September 2010. (P-6; S-7)

11. Student's Service Agreement for the 2011-12 school year was unchanged from the previous year. The Parents approved the Service Agreement in September 2011. (S-6)

12. The District evaluated Student in January 2012 with consent of the Parents, and issued an Evaluation Report (ER) that included "partial results" of the August 2010 neuropsychological evaluation (P-8 p. 1) after the Parents provided the District with a portion of that report. (N.T. 59, 74-77; P-8; S-14, S-15, S-18)

a. Educational history noted Student's basic or below basic scores on the reading section of the Pennsylvania System of School Assessment (PSSA) for several school years. Teacher input revealed concerns with attention and focus; reading, writing, and mathematics skills; homework completion occasionally; organizational skills; effort and motivation in a foreign language class; and impulsivity. Peer interactions were also noted to be distracting to Student at times. (P-8; S-15)

b. Cognitive assessment (Fifth Edition of the WISC) revealed overall average ability with some variability among subtests; Working Memory was a relative strength (94^{th} percentile). (P-8; S-15)

c. On the Wechsler Individual Achievement Test – Third Edition, Student attained average range scores on all subtests on the Reading and Mathematics Composites with the exception of a low average score on the Mathematics Problem Solving subtest. Select subtests of the Test of Written Language – Fourth Edition revealed average performance. (P-8; S-15)

d. Assessment of Student's executive functioning skills reflected difficulty maintaining attention and shifting between tasks, which was consistent with ADHD. (N.T. 64-65; P-8, S-15)

e. The team including the Parents determined that Student was not eligible for special education after completion of the January 2012 ER. (N.T. 76-77; P-8, P-10, P-11; S-15, S-16, S-17)

13. Student's Service Agreement was revised in February 2012 following the ER. One new accommodation for meeting with a Service Agreement monitor at least once per six-day cycle was added. The Parents approved the revised document. (P-13)

14. Student's Service Agreement for the 2012-13 school year was unchanged from the previous February 2012 revision. The Parents approved the Service Agreement in October 2012. (S-5)

15. During middle school and into eleventh grade, Student sustained several head traumas that appeared to the Parents to exacerbate Student's ADHD symptoms for a period of time. One of those traumas was diagnosed as a concussion. The District was aware of most of those traumas, but no restrictions were imposed by a physician in any instance. (N.T. 118, 120, 128-29, 136-38, 139-40, 309-11; P-7; P-21; P-40 p. 5)

EDUCATIONAL HISTORY – NINTH AND TENTH GRADES

16. At the District high school, the District's practice after ninth grade is to send a new copy of a student's Service Agreement to his or her parents in the fall with a letter. The letter asks the parents to approve the document as written, or request a meeting to discuss changes, or discontinue the services. (N.T. 72-73, 83, 89, 276-77; P-40 p. 28)

17. The Parents attended a meeting in September 2013, at the start of Student's ninth grade year, to discuss the Service Agreement with several District representatives. (N.T. 130, 275, 348-49; P-15)

18. Student's Service Agreement for the 2013-14 school year removed several accommodations, providing for preferential seating; checks for on-task behaviors; chunking of assignments and planning for long projects; small group testing when needed; and meeting with a Service Agreement monitor at least once per six-day cycle. The Parents approved the Service Agreement in September 2013. (P-15; S-4)

19. Also at the start of the ninth grade year, the Parents asked that they be contacted if Student exhibited problematic behavior that would result in discipline. (N.T. 132-33)

20. Student's Service Agreement for the 2014-15 school year was unchanged from the previous year. (P-18; S-3)

21. Student was disciplined on several occasions over the course of the ninth and tenth grade school years. In ninth grade (2013-14), Student had one day of in-school and one day of

out-of-school suspension. In tenth grade (2014-15), Student missed no days of school due to discipline. (N.T. 212-14, 217-20, 222; P-16, P-17, P-19, P-20)

22. By the start of the tenth grade school year and through Student's graduation, the Parents were frustrated with the District based on their view that it failed to implement Student's Service Agreements and to provide necessary accommodations. (N.T. 135-36, 139, 143, 150, 152-53, 166-67, 349)

2015-16 SCHOOL YEAR – ELEVENTH GRADE

23. Student's Service Agreement for the 2015-16 school year was unchanged from the previous year, continuing to provide for preferential seating; checks for on-task behavior during lectures and independent work; chunking of assignments and planning for long projects; small group testing when needed; and meeting with a Service Agreement monitor at least once per six-day cycle for organization and test preparation. The Parents approved the Service Agreement in September 2015. (P-22; S-2, S-12 p. 1)

24. During the 2015-16 school year, Student was disciplined on a number of occasions. Five referrals were in the first semester, and six occurred the second semester. The referrals were for disrespectful or disruptive behavior (five instances, four of which were largely undescribed), leaving class without permission (two instances), violating the dress code (one instance), a parking/driving violation (one instance), violating the electronic use policy (one instance), and possessing tobacco (one instance). In addition to verbal warnings and detention, Student received three days of in-school and one day of out-of-school suspension over the course of that school year, and a citation was issued for the tobacco possession. (N.T. 226; P-23, P-24, P-29)

25. One of the disrespectful or disruptive behavior disciplinary incidents occurred in March 2016, after Student did poorly on a test in a particular class. Student [redacted]. (N.T. 321-22; P-40 p. 19; S-35)

26. Also in March 2016, Student reported to a teacher that he/she was permitted extra time for tests, and the Parents asked about Student receiving that accommodation. No meeting convened at that time and that accommodation was not added to Student's Service Agreement. (N.T. 142-43, 296-97, 313, 320; P-40 pp. 12, 17, 24)

27. At the request of the Parents in February 2016, and following a March 2016 informal hearing after the [redacted] incident, Student's schedule was modified so that Student was assigned to the resource center, which is available to all students for tutoring and other assistance as needed. Assignment to the resource center was also expected to help Student avoid unstructured times when Student sometimes engaged in problematic behaviors that could result in discipline. The high school principal offered to make himself available to Student if Student needed to talk to someone. The Parents later asked that Student be removed from the resource room assignment. (N.T. 146-47, 261-62, 287-89, 318-20; P-25, P-40 pp. 7, 11; S-31)

28. Another meeting of the Parents and high school principal was held in April 2016 to discuss the Parents' concerns with Student's behavior for which discipline was imposed. The Parents believed that District administrators were overreacting to minor behaviors. Student attended a portion of that meeting. As a result of the discussion, the school counselor would meet with Student when disciplinary matters arose rather than an assistant principal. (N.T. 350, 445-49, 476-77; P-40 p. 35)

29. A meeting to review Student's Service Agreement convened in May 2016 at the Parents' request. The team also discussed Student's disciplinary infractions. The Parents asked, and the District agreed, that the school counselor be assigned to meet with Student when disciplinary matters arose; and, the counselor would also contact the Parents. (N.T. 91, 93-95, 152, 258-59, 302-04, 314-15, 324, 477)

30. Student's grades for the 2015-16 school year were C or better for all classes. (P-41; S-19)

2016-17 SCHOOL YEAR – TWELFTH GRADE – IN DISTRICT

31. In the fall of 2016 prior to the first day of school, a District school psychologist provided Student's Service Agreement to Student's teachers and met with them to review its terms. (N.T. 44)

32. Student's Service Agreement for the 2016-17 school year was unchanged from the previous spring. The Parents approved the document in September 2016 but there was no meeting with them to review its terms. (N.T. 71, 73-74; P-26, P-27; S-1, S-12 p. 2)

33. Student's schedule was modified for the 2016-17 school year to permit Student to leave school early to avoid unstructured time. (N.T. 333-34; P-41 p. 45)

34. The District permits students to be dismissed early from school, particularly those who are seniors, for reasons such as employment. (N.T. 334)

35. Student engaged in unidentified disruptive behavior at the very start of the 2016-17 school year for which discipline was not imposed. One teacher who reported this behavior was advised to make a disciplinary referral. Another teacher reported Student to be "a major problem" and suggested that Student be permitted to leave school even earlier than previously determined. (P-40 pp. 39-40, 44-45)

36. Over a period of one month at the start of the 2016-17 school year, Student was disciplined for disruptive behavior on three occasions. On the first occasion, Student [redacted]. On the second occasion, Student and other students [redacted]; on Student's return to that classroom, Student [redacted]. On the third occasion, Student was asked about [redacted]. Student was issued a verbal warning for one incident and served detention for the others. (N.T. 244; P-30, P-40 pp. 41-42)

37. An incident occurred on October13, 2016 when Student [redacted]. An informal hearing followed that incident and the Parents attended with Student. (N.T. 156, 247, 263-65, 388, 453, 455-57, 462-64; P-30, P-31; S-23 p. 1)

38. The school counselor did not have an opportunity to meet with Student on the date of the October 2016 incident or the next day, but the two did have a conversation the following school day. (N.T. 324, 456-57)

39. The District considered the incident to be a significant violation of the Code of Student Conduct for which expulsion was warranted. Administrators completed an Alternative Education for Disruptive Youth referral form. (N.T. 461, 487-88; P-40 pp. 52-56)

40. The District and Parents discussed two options for educational programming for Student after the October 2016 incident: an online learning program operated by the local Intermediate Unit (IU), or an alternative education setting in a neighboring school district. (N.T. 157, 250, 264-65, 268-69, 327, 466)

41. A citation for Disorderly Conduct was filed as a result of the October 2016 incident. (P-32, P-33)

42. A three-day out-of-school suspension was imposed prior to the informal hearing. Student ultimately served nine days of out-of-school suspension for the incident. (N.T. 247, 263, 461-62; P-28)

43. On October 24, 2016, the District sent a letter to the Parents with a summary of the informal hearing. In pertinent part, the letter stated that Student would serve a total of five days of out-of-school suspension but that the suspension would continue for a period of no more than ten days while the Parents explored the options discussed for an alternative education setting, and that the parties would execute a formal agreement of behavioral conditions. (P-34; S-23 p. 2)

44. On October 25, 2016, the Parents contacted the District and asked whether Student should return to school while they explored the options discussed. The Parents indicated that they did not know Student was still under suspension in that communication. (P-40 p. 57)

45. District administrators responded to the Parents on October 25, 2016 by telephone and email, noting that Student's suspension would continue until the alternative placement was determined. (P-40 p. 59)

46. Student was not permitted to participate in extracurricular activities during the period of suspension in October 2016. (N.T. 485-86)

2016-17 SCHOOL YEAR – TWELFTH GRADE – OUT OF DISTRICT

47. The Parents elected to have Student attend the online learning program, and Student was enrolled within ten school days of the October incident. (N.T. 160, 165, 328, 398)

48. The Parents were represented by counsel at the time of the October 2016 informal hearing and continuing through execution of an agreement in January 2017. (N.T. 149-50, 162, 496-506

49. Had the parties not reached an agreement over an alternate program for Student following the October 2016 incident, the District was prepared to proceed with formal disciplinary proceedings to include a manifestation determination review. (N.T. 487-88; P-40 pp. 52-56)

50. Student's schedule at the online learning program was determined by the credits Student needed to graduate. (N.T. 332-34)

51. Neither the District nor the online learning program generally provides laptop computers to students. (N.T. 329, 401)

52. The Parents purchased a laptop for Student to use for the online learning program in October 2016. Student also had access to one of the Parent's computers for the same purpose. (N.T. 167-68, 401-02; P-35)

53. The District provided the most recent Service Agreement to the online learning program, but recognized that its accommodations were "aimed at classroom management for [ADHD] and not very applicable for an online course." (N.T. 336, 341; P-40 p. 68)

54. The online learning program had tutoring available to students and the teachers were available to provide support. Those (N.T. 330-31)

55. Student had difficulty with some of the online classes, and the Parents arranged for private tutoring services to assist Student. (N.T. 168-69, 361-62, 399, 400, 403; P-44)

56. The Parents conveyed to the District that Student was having difficulty with a mathematics class. The high school counselor then communicated with Student's assigned mathematics teacher to determine whether Student was being adequately supported in that class. (N.T. 331-32, 337-38)

57. The parties executed the agreement on January 25, 2017 after some revisions to its terms were made. (N.T. 496-506; P-37; S-24)

58. Student was permitted to participate in activities within the District, such as playing on a sports team and attending special events, upon execution of an agreement, but not before. (N.T. 170, 197, 409-11, 420, 474-75, 482-85, 487; S-33 pp. 17-19, S-34 p. 54)

59. Student committed several violations of the code of conduct for the sports team in March 2017. The District indefinitely suspended Student from the team on the same date that the Parents notified the District that Student would no longer be a team member. (S-30)

60. In late March 2017, the Parents requested that Student be provided with a laptop by the District in order to complete the online learning program because of a change in access to

the one Parent's computer. The District responded with a laptop for Student within a matter of days. (N.T. 328-29, 401-02; S-33 pp. 30-34)

61. Student achieved final grades of 67% (in one class) or better (approximately 75% in three classes) in the online learning program. (S-20 p. 1)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

The burden of proof generally consists of two elements: the burden of production and the burden of persuasion. In an administrative hearing such as this, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who filed the Due Process Complaint and requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise;" the outcome is much more frequently determined by the preponderance of the evidence, as is the case here on all issues. There were no concerns raised at the hearing regarding the burden of production, with all witnesses testifying only once with thorough questioning by both parties.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses to be generally credible, testifying to the best of his or her recollection and from his or her own perspective. With few exceptions, the testimony of all witnesses was accorded essentially the same weight. The relatively few contradictions in the testimony that

were important to resolve for purposes of the issues presented related to who made the decision that Student would leave the District in October 2016; and, that evidence is discussed further below.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision.

IDEA CHILD FIND/ELIGIBILITY PRINCIPLES

The first issue is whether the District complied with its obligations under the IDEA in its failure to identify Student as eligible for special education, commonly called "Child Find." The IDEA and its implementing state and federal regulations require local educational agencies (LEAs) to locate, identify, and evaluate children with disabilities who are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. LEAs are required to fulfill that Child Find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, LEAs are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests that a disability may exist. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). LEAs are not, however, required to identify a disability "at the earliest possible moment." *Id*. (citation omitted).

A "child with a disability" is defined by the statute to mean a child who has been evaluated and identified with one or more of a number of specific disability classifications, and "by reason thereof" needs to be provided with special education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8(a). The IDEA classifications or categories for purposes of this definition are "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance

(referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a). As is particularly relevant here, an "[o]ther health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that [i]s due to chronic or acute health problems" such as ADHD. 34 C.F.R. § 300.9.

Here, there is no question that Student has ADHD and manifests symptoms that impacted Student's alertness (attention and focus), including distractibility and impulsivity, which satisfies the definition of an "other health impairment" under the IDEA. Merely having an identified disability, however, does not automatically mean that a child is eligible for special education, since that is merely one prong of the two-part test. The other step to IDEA eligibility is a determination that the child needs special education because of that disability. And, "special education" means specially designed instruction which is designed to meet the child's individual learning needs. 34 C.F.R. § 300.39(a). More specifically,

> *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—
>
> (i) To address the unique needs of the child that result from the child's disability; and
>
> (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

The Parents contend that, because teachers had expressed concerns about Student's lack of attention and focus at the time of the 2012 ER and further because Student continued to engage in impulsive and disruptive behaviors before and during the school years in question,

Student required special education. However, the only suggestions of special education as a need for Student during the relevant time period was the Parents' belief that Student should have had an Individualized Education Program (IEP) in order to receive "more services" (N.T. 110, 122), and a teacher's singular query to an administrator at the very start of the 2015-16 school year asking if Student had ever been evaluated for such services (P-40 p. 1). Student had been evaluated in 2012 and found not eligible under the IDEA. Following that evaluation and through the start of the 2016-17 school year, the evidence of Student's actual functioning at school is remarkably scant, and is wholly insufficient to lead to the conclusion that, as a result of Student's disability, special education rather than reasonable accommodations in a Service Agreement was required to address Student's needs. Student successfully passed Student's classes with overall average grades, and some better than average, until leaving the high school in October 2016.[6] Quite simply, there is insufficient evidence in the record to suggest that the District should have suspected that Student needed specially designed instruction.

To the extent that Student's several head traumas and the District's lack of response to them may be considered part of the Child Find claim, it is noteworthy that no restrictions were ever placed on Student due to those traumas. Moreover, the Parents' subjective belief, no matter how sincerely held, that Student's memory was affected by those injuries over time cannot substitute for any objective indication that Student required special education, or even additional accommodations, particularly in light of the evidence that the exacerbation of some of Student's ADHD symptoms was only temporary.

In support of their Child Find argument, the Parents cite to the decision of the former Pennsylvania Appeals Panel in *E.H. v. Unionville-Chadds Ford School District,* Spec. Ed. Op.

[6] There is insufficient evidence in the record of Student's academic performance at the District high school in the fall of 2016, likely because the first quarter had not yet been completed by the time of the October incident.

1838 (2007), where the panel concluded that the student should have been determined to be eligible under the IDEA after the Section 504 Plan was revised for the fourth time over a short seven-month period despite a progressively increasing number and level of supports, interventions, and accommodations (many of which were actually specially designed instruction). That decision is clearly factually distinguishable from the circumstances presented here and, thus, unpersuasive. In addition, while the Parents further point to the inclusion in the May 2016 Service Agreement a provision that Student would be provided with counseling with any discipline and describe that accommodation as a "nexus" between Student's disability and behavioral manifestations at school (Parents' Closing at 7), there is no reason that, if warranted, behavioral accommodations, including a behavior plan, cannot be made part of a Service Agreement without a finding of IDEA eligibility and development of an IEP. Indeed, the federal regulations implementing Section 504 specifically identify counseling services as available for handicapped students. 34 C.F.R. § 104.37.

In sum, and for all of the foregoing reasons, the claim of Student's eligibility under the IDEA has not been established on this record.

SECTION 504 FAPE

The next claim is whether the District provided an appropriate program under Section 504 and the ADA. In the context of education, Section 504 and its implementing regulations "require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, an "appropriate education" means "the provision of regular or special education and related aids

and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy" all of the requirements of each of the related subsections of that chapter: §§ 104.34, 104.35, and 104.36. *See* 34 C.F.R. § 104.33(b). The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit". *Ridgewood, supr*a, 172 F.3d at 247. Significantly, "[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not." *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002).

With respect to the ADA, the substantive standards for evaluating claims under that statute and Section 504 are essentially the same. *See, e.g., Ridley School District. v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012; *Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011)*; Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, the discussion below serves as a final determination of all Section 504 and ADA claims which will be considered together in this matter, although Section 504 will be the primary reference.

Section 504 further 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). "Major life activities" include learning. 34 C.F.R. § 104.3(j)(2)(ii). The *Ridgewood* Court also explained the elements of a Section 504 violation as proof that:

> (1) [the claimant] is "disabled" as defined by the Act; (2) [the claimant] is "otherwise qualified" to participate in school activities; (3) the school or the board

> of education receives federal financial assistance; and (4) [the claimant] was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood, 172 F.3d at 253.

2015-16 SCHOOL YEAR

Student's Service Agreement for eleventh grade provided for preferential seating; checks for on-task behavior during lectures and independent work; chunking of assignments and planning for long projects; small group testing when needed; and a meeting with a Service Agreement monitor at least once per six-day cycle for organization and test preparation. These accommodations were directly and reasonably responsive to the needs Student had exhibited at school with respect to attentional difficulties, impulsivity, and lack of organization. There is no indication in the record that the Service Agreement was improperly or inadequately implemented. Student achieved final grades of C or better in all classes, indicating average or better than average performance, and a District school psychologist provided persuasive testimony that Student's functioning was commensurate with Student's potential (N.T. 100-01). Although the Parents expressed disagreement with the District's weighting of classwork and homework along with tests and similar assessments for grading purposes (N.T. 360, 369, 373, 376, 383), especially since they assisted Student with homework on a daily basis, this hearing officer cannot conclude that the District denied Student FAPE as a result of its system of assigning grades to its student body.

Student did incur a number of disciplinary referrals during the eleventh grade year, an increase over the prior two school years, but the nature of most lacked any detail. More specifically, there is no evidence that those incidents were related either to Student's disability or to any flaw in the creation or implementation of the current Service Agreement. Moreover, the

discipline imposed was limited to three days of in-school suspension and one day of out-of-school suspension, well below the threshold for a change in placement. Furthermore, after several incidents of concern in the spring of 2016, the Parents and District representatives met on more than one occasion to ensure that Student's behaviors would not impact academic performance, and agreed it would benefit Student to provide for less unstructured time during Student's school day.

Based on the foregoing, this hearing officer concludes that the program implemented for Student during the 2015-16 school year was appropriately designed to meet Student's individual educational needs as adequately as those of Student's nondisabled peers, and that it was designed to and did confer meaningful benefit to Student. The evidence simply does not support any other conclusion for that year.

2016-17 SCHOOL YEAR

In contrast to eleventh grade, the start of Student's senior year was a difficult one for both Student and District staff. Almost immediately, Student's teachers reported disruptive behavior by Student, and described Student as a "major problem." Although Student already had a shortened school day, that same teacher suggested that Student spend even less time at school as a result of the behavioral disruptions. Student was also disciplined for three noteworthy incidents of disruptive behavior and, in mid-October, engaged in the conduct that resulted in a period of out-of-school suspension and then a move out of the District to the IU online learning program. Thus, Student received disciplinary referrals for four significant incidents before the first quarter of the school year, which was in stark contrast to the limited discipline in ninth and tenth grade and a marked increase from the five referrals over the course of the entire first semester in eleventh grade. Also at the start of the 2016-17 school year, Student's Service

Agreement as recently revised after a spring 2016 meeting included a provision for counseling that clearly was not effective. For these reasons, this hearing officer concludes that the District was on notice within one month of the start of the 2016-17 school year that Student's program was not appropriate and that, at the very least, a meeting was necessary to revisit the Service Agreement to make changes that would address Student's continuing but escalating impulsivity and exhibition of serious behaviors, with consideration of a Functional Behavioral Assessment. Since Student did not remain in a District program, however, the opportunity to take such steps was lost.[7]

In addition, as Student transitioned to the online learning program, Student's Service Agreement that had limited application to such an environment was not revised despite Student's history of difficulty with attention, lack of focus, remaining on task, planning projects and assignments, organization, and studying for tests. It is not at all surprising that Student required daily tutoring assistance in order to succeed in a program where Student was physically isolated from any adult support and specifically the accommodations in the existing Service Agreement. Moreover, District administrators were made aware that Student was having difficulties with classes, but took few steps to address them, including consideration of whether some revision to the Service Agreement was necessary. Thus, Student's educational program for the period of time that Student attended the online learning program was not appropriate, denied Student meaningful educational opportunity, and amounted to a denial of FAPE under Section 504.

[7] The issues surrounding Student's transfer to the IU program are discussed in detail below.

TRANSITION TO ONLINE PROGRAM AND ABSENCE OF MANIFESTATION DETERMINATION REVIEW

This hearing officer does not disagree that, if an LEA makes a decision to change the placement of a student who is a protected handicapped student under Section 504 and Chapter 15, the LEA must ensure that the student is afforded procedural safeguards, such as may be provided by a manifestation determination that follows an evaluation. *Centennial School District v. Phil L.*, 559 F.Supp.2d 634 (E.D. Pa. 2008); 34 C.F.R. §§ 104.35(a) and (c); *Springfield School District # 186*, 55 IDELR 206 (OCR 2006); *Barnstable Public Schools*, 111 LRP 48728 (SEA MA 2011). The applicable federal regulations implementing Section 504 expressly require that an evaluation shall be conducted "before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 C.F.R. § 104.35. Pennsylvania's Chapter 15 regulations contain similar protections. 22 Pa. Code §§ 15.5, 15.6.

Here, the District recognized its obligation to conduct a manifestation determination review in the event that it proceeded with a referral for disciplinary placement after the October 2016 incident, and was prepared to do so. Although the Parents testified at the hearing that they were not involved in the decision to seek an out-of-district placement for Student at that time, but instead were told of that determination, the contrary and forthright testimony of the District representatives was credited as more plausible from a less emotional perspective, particularly since the Parents had admittedly been quite frustrated with the District, including its implementation of accommodations for Student, since at least the start of the 2014-15 school year. The Parents had also been concerned that District administrators tended to overreact when Student engaged in minor non-exemplary conduct. In addition, they were understandably very focused on whatever arrangements would permit Student to participate in extracurricular

activities and attend graduation. While District administrators may have taken and conveyed a position that they had a firm basis to have Student moved to an alternative education setting whether or not the Parents agreed, that is not the same as having predetermined the outcome of the October 2016 incident. Quite significantly, the Parents also signed an agreement in January 2017 that explicitly acknowledged their "agree[ment] to resolve th[e] matter without proceeding to an alternative placement" which would have triggered procedural safeguards including a manifestation determination review. This hearing officer concludes that the Parents did not disagree with Student's removal from the District, and that their recollection and understanding of portions of the meeting held a year ago is simply not wholly accurate. That conclusion is further reinforced by the testimony of one of the Parents that directly contradicted other specific language in that signed agreement, reflecting that they perhaps did not fully understand all of its terms (N.T. 171-72), despite the fact that they had retained counsel.

It is important to note here that a special education hearing officer may decide if an enforceable agreement exists. *I.K. v. School District of Haverford*, 2011 U.S. Dist. LEXIS 28866 (E.D. Pa. Mar. 21, 2011); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 263 (Pa. Commw. 2014); *see also Lyons v. Lower Merion School District*, 2010 U.S. Dist. LEXIS 142268, 2010 WL 8913276 (E.D. Pa. Dec. 14, 2010). However, case law is also clear that hearing officers are not permitted to enforce settlement agreements.

> Enforcement of a settlement agreement may determine if parents have waived certain rights under the IDEA, or whether an LEA has contracted to provide certain benefits above those that the IDEA requires, but it is not related to the fundamental question of whether a 'child received a free appropriate public education.' Enforcing a settlement agreement thus appears to exceed the authority that the IDEA confers upon a hearing officer.

J.K. v. Council Rock School District, 833 F. Supp. 2d 436, 448-49 (E.D. Pa. 2011); *see also Lyons, supra; West Chester School District v. A.M.*, 164 A.3d 620 (Pa. Commw. 2017).

Although the District has made an argument that the Parents waived the claim regarding the manifestation determination review because of the January 2017 Agreement, the District is essentially asking this hearing officer to interpret, and give effect to and thus enforce, specific terms therein. That is something that the courts in this jurisdiction have agreed this hearing officer may not do. *See, e.g., J.K., supra,* 833 F.Supp.2d at 448-49; *A.M., supra,* 164 A.3d at 631-32. Thus, the above conclusion that the parties agreed to proceed outside of the Section 504/Chapter 15 procedural safeguards is based upon a determination that there was an agreement, and not as a means of enforcing its terms.[8]

DELIBERATE INDIFFERENCE UNDER SECTION 504

Intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met by establishing "both (1) knowledge that a federally protected right is substantially likely to be violated … and (2) failure to act despite that knowledge." *S.H. v. Lower Merion School District,* 729 F.3d 248, 265 (3d Cir. 2013). However, "deliberate choice, rather than negligence or bureaucratic inaction" is required. *Id.* at 263.

This hearing officer cannot conclude from this record that the District was deliberately indifferent to Student because of Student's disability. As discussed above, the only period of time which this hearing officer has concluded that the District denied Student FAPE was that Student spent attending the online learning program without appropriate supports for Student's disability. The failure to revise Student's Service Agreement in the fall of 2016, however,

[8] Notably, there is no language in the Settlement Agreement of January 25, 2017 reflecting any waiver. (P-37; S-24) In any event, to the extent that the Parents' Motion in Limine based on the parol evidence rule requires further discussion, none of the challenged testimony sought to "explain or vary the terms" of the parties' agreement, *Green Valley Dry Cleaners, Inc. v. Westmoreland County Industrial Development Corporation*, 832 A.2d 1145, 1154 (Pa. Commw. 2003), including any purported waiver. (HO-1) Thus, the Motion in Limine is denied.

amounted merely to inaction on the part of the District, rather than a deliberate choice to violate a protected right. Thus, the claim of deliberate indifference must fail.

REMEDIES

As one remedy, the Parents seek compensatory education, which is an appropriate form of relief where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to resolve the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). A compensatory education award is designed to remedy the deprivation of educational services, excluding the time reasonably required for the LEA to correct the deficiency. *Id*.

The Parents also seek reimbursement for certain expenditures including tutoring services they obtained during the period of time that Student attended the online learning program. The parties do not appear to dispute that the test for reimbursement for such parentally-provided services rests upon a traditional private school tuition reimbursement analysis, and includes three separate inquiries: first, a finding must be made that the LEA's program did not provide FAPE; second, it must be determined that the private placement or services are proper; and third, equitable considerations may operate to reduce or deny reimbursement. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009).

Having found a denial of FAPE for the failure to appropriately revise Student's Service Agreement to provide accommodations in the online learning environment during the 2016-17 school year, the next question is what remedy is warranted. This hearing officer concludes that it would be inequitable to award both compensatory education and reimbursement for tutoring; and

that the tutoring services, although privately obtained, enabled Student to receive a meaningful education from the online learning program that was sufficient for Student to graduate with a District diploma. Thus, the tutoring services were appropriate for Student, and thereby obviated any basis for compensatory education for that time period. The final prong of the reimbursement test, equitable considerations, requires consideration of any factors that might lead to a reduction or denial of the claim. Although the District points out that the IU makes tutoring available to students in the online learning program, the record lacks any clarity on whether those services would have been sufficiently supportive on an ongoing and individualized daily schedule to enable Student to succeed. This hearing officer therefore concludes that the equities do not compel any reduction in the reimbursement for the parentally-obtained tutoring. Accordingly, the Parents will be awarded reimbursement for the tutoring services they arranged, and that Student actually attended, from the end of October 2016 through the date of Student's graduation from the District.[9]

The Parents also claim reimbursement for the laptop computer they purchased for Student to use for the online learning program. However, the parties agreed to, and the Parents elected, that setting in the fall of 2016. Neither the IU nor the District typically provides computers to students who attend there. Furthermore, there is no evidence that the District refused to provide Student with a computer and, in fact, promptly did so when asked in the spring of 2017.

Finally, the Parents seek other financial relief in the form of attorney fees incurred as a result of criminal citations filed against Student and heard by the local Magisterial District Judge. Much of the Parents' frustration with the District appears to be related to those criminal citations,

[9] The itemized invoice at P-44 appears to reflect charges only for dates that Student was actually provided with tutoring services; however, because there was occasionally some delay in providing a credit for sessions that Student missed, in the event there is any question on the accuracy in the actual amount of those charges, the District may seek a new invoice from the service provider.

some stemming from conduct that pre-date the relevant time period. However, this hearing officer lacks any authority to award attorney fees, and similarly has no jurisdiction over proceedings in that forum. Accordingly, this claim must be denied.

CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that the District denied Student FAPE for a portion of the time period claimed, and that the Parents are entitled to reimbursement for private tutoring services for the period of time that Student attended the online learning program. All other demands for relief must be denied.

ORDER

AND NOW, this 2nd day of December, 2017, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not improperly fail to identify Student as eligible under the IDEA and the Child Find claim is DENIED.

2. The District did not deny Student FAPE during the 2015-16 school year.

3. The District did deny Student FAPE during the 2016-17 school year in failing to revise Student's Service Agreement to provide appropriate accommodations in the online learning environment.

4. Within ten calendar days of the date of this Order, the District shall reimburse the Parents for total cost of the privately obtained tutoring services they obtained for Student during the period of time Student attended the online learning program through the date of graduation as reflected in P-44. If the District requires a new itemized invoice from the service provider, it shall request same within six calendar days of the date of this decision and provide reimbursement to the Parents within ten calendar days of receipt of the new invoice.

5. The Parents' claims for reimbursement for the laptop computer and attorney fees is DENIED.

6. The District did not act with deliberate indifference toward Student.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Cathy A. Skidmore

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Cathy A. Skidmore
HEARING OFFICER
ODR File No. 19368-1617KE