

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:

26459-21-22

Child's Name:

W.N.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for the Parent:

Pro Se

Local Education Agency:

Haverford School District
50 E Eagle Road,
Havertown, PA 19083-3729

Counsel for the LEA

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Hearing Officer:

Charles W. Jelley, Esq.

Date of Decision:

12/26/2022

BACKGROUND AND PROCEDURAL HISTORY

The Student is a rising [high schooler] who resides with the filing Parent in the Haverford Area School District (District).¹ In May 2022, the filing Parent, acting *pro se*, initiated the due process complaint contending the District violated the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act when the District denied the Student a free appropriate education (FAPE). The filing Parent also makes FAPE claims that predate the 2022 filing date.² The filing Parent next alleges multiple standalone acts of disability-based intentional discrimination, including hostile environment peer-to-peer and teacher to Student acts of bullying and harassment. The filing Parent seeks a prospective placement at an unidentified school for an undefined period of time.

The District responds that at all times relevant, it complied with the substantive and procedural FAPE requirements of the IDEA, the ADA, and Section 504. After reviewing the entire record of more than 300 exhibits and participating in six (6) hearing sessions, I now agree with the District; therefore, the Parent's and the Student's FAPE, hostile environment, bullying/harassment, and intentional discrimination claims are denied.

¹ This dispute includes a somewhat novel procedural twist. One Parent agrees that the District's offered program and placement is appropriate; the other does not. To assist the Parties and future readers I will refer to the Parent who initiated the action as the "filing Parent," I will refer to the other as the "non-filing Parent" or "Parent." At times I will use the term "Parents" to explain that both adults were acting together.

² The Parent claims arise under 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, implementing the IDEA are set forth in 22 Pa. Code §§ 14.10114.163 (Chapter 14). The Section 504 of the Rehabilitation Act of 1973 requirements are found at 29 U.S.C § 794 and 34 C.F.R. §104 *et seq.*. Although I believe I do not have subject matter jurisdiction of the ADA claims, in the event that I do all findings and legal conclusions under Section 504 resolve all ADA claims.

STATEMENT OF THE ISSUES

1. Did the District fail to offer the Student a free appropriate public education within the meaning of the Individuals with Disabilities Education Act? If yes, what appropriate relief is appropriate?
2. Did the District fail to offer the Student a free appropriate public education within the meaning of Section 504 of the Rehabilitation Act? If yes, what appropriate relief is appropriate?
3. Did the District discriminate against the Student within the meaning of Section 504 of the Rehabilitation Act or the Americans with Disability Act? If yes, what appropriate relief is appropriate?
4. Did the District fail to investigate and remediate acts of peer-on-peer bullying/harassment against the Student within the meaning of Section 504 of the Rehabilitation Act or the Americans with Disability Act? If yes, what appropriate relief is appropriate?
5. Did the District fail to investigate and remediate acts of teacher bullying/harassment against the Student within the meaning of Section 504 of the Rehabilitation Act or the Americans with Disability Act? If yes, what appropriate relief is appropriate?

FINDINGS OF FACT

THE STUDENT IS IDENTIFIED AS A PERSON WITH A DISABILITY IN NEED OF SPECIALLY-DESIGNED INSTRUCTION

1. From 2013 through 2019, the Student was identified as a person with a specific learning disability who needed specially-designed instruction. (S##1-29). On or about March 29, 2019, the District issued, and the Parents reviewed an updated reevaluation report. (S#30).
2. During the meeting, the District members of the team concluded although the Student had a learning disability, the Student no longer required specially-designed instruction. The team recommended that the Student

should be exited from all IDEA services. At or about the same time, the District issued a Notice of Recommended Educational Placement (NOREP) recommending the Student exit IDEA services. (S#30). The Parents never returned the NOREP. *Id.*

3. On or about April 23, 2019, the District offered, and the Parents allowed, the Student to participate and receive Section 504 accommodations. On the same day, the District found the Student was a person with a disability otherwise eligible for a Section 504 Agreement. The Agreement included six (6) accommodations. The copy of the Agreement is not signed. (S##31, 32, S-33).
4. The Student's transcripts reflect that the Student earned passing grades and was promoted each year. (S#36).

THE [redacted] GRADE SCHOOL YEAR-2020-2021

5. When the 2020-2021 school year - [redacted] grade - started, the Student was identified as a person with a disability and eligible for a Section 504 Agreement. Although the Agreement was unsigned, the District implemented the Agreement. (NT p.191, S-42). The Agreement included modified seating assignments, regular check-ins for attention, time for independent reading assignments, extra time for tests, and extra time to complete work. (S-42). The high school schedules classes using a two-semester block scheduling format, and all classes last for 84 minutes. (S#)
6. On September 8, 2020, the filing Parent emailed the teacher to say that the Parents were separating. (P-35, NT p.265).
7. On October 23, 2020, the Student went to the pediatrician complaining of anxiety, depression, and stress. (P-37, NT p.266).
8. On November 11, 2020, the Student began teletherapy with a staff person at the local children's hospital. (NT pp.265-266).

9. On November 19, 2020, at the second teletherapy session, the Student reported physical symptoms of anxiety like sweaty hands, shaky, and vomiting before school. (P-38, NT p.267).
10. During [redacted] grade, the Student earned "C minus to A-plus" grades. The Student's [redacted]-grade schedule included biology, business law classes, foods for today, [redacted]-grade health, introduction to marketing, physical education, Spanish 3, and college-level world history. (S-124). The Student also took English [redacted] and Honors Geometry. The Student struggled in English [redacted] but passed with a "D." (S-124). The Student has yet to complete the Geometry class. (*Passim*).
11. Early in the second semester, the guidance counselor reached out to the Parent and the Student about the Student's performance in "Honors Geometry." (NT pp.201-202, S#47, S#48, S#50, S#51, S#55).
12. On February 11, 2021, and February 23, 2021, the Parent received truancy notices. (P-41, NT 269). Throughout February, the guidance counselor emailed the Parent and the Student to better understand the Student's circumstances. (S#47, S-#48).
13. On March 15, 2021, the Student participated in a student assistance intake session. (NT p.270, S#49). The student assistance intake did not provide a diagnosis or offer counseling services. (S#49).
14. On March 23, 2021, the school nurse completed a student assistance team referral. (P-43, NT p.269). The Student never attended any student assistance counseling sessions. *Id.*

THE GUIDANCE COUNSELOR RECOMMENDS CHANGING MATH CLASSES

15. In the Spring of [redacted] grade, on or about April 6, 2021, the guidance counselor contacted the Parent and recommended moving the Student from "Honors Geometry" to College preparation Geometry for [the next] grade. (P-44, NT p.270).

16. On April 15, 2021, the guidance counselor met with the Student to discuss changing from "Honors Geometry" to college preparatory geometry. The Parent was not invited to in school meeting. (NT p.270).
17. On April 16, 2021, the guidance counselor emailed the Parent with teacher input recommending a college-level math course. The Parents focusing on the Student's 1530 score on the state-wide math assessment, in the high proficient range, rejected the recommendation. (NT pp.272-272).
18. On May 11, 2021, the Student participated in a teleconference with a private therapist who recommended the family law court-appointed counseling. (NT p.273).
19. On May 31, 2021, the Student had a second teletherapy session. The Student reported feelings of sadness and nervousness outside of the home. (NT p.274-275, P-45, P-48).
20. During the Spring, Summer, and Fall of 2021, the Parents participated in a co-parenting class every week. (NT p.275).
21. On June 12, 2022, the Student met with the co-parenting counselor. The co-parenting counselor suspected that the Student might be experiencing social troubles. (NT p.277-278, P-48).
22. On June 25, 2021, the Parent completed a class "waiver" form rejecting the guidance counselor's [2021-2022 school year] math suggestion and instead placed the Student in "Honors Geometry. (NT p.275 S-58).
23. On June 28, 2022, the Student refused to participate in summer football activities. (P-50, NT. 277-279).
24. On August 9, 2021, the Student participated in a fourth teletherapy counseling session. (P-48).
25. On August 12, 2021, the Student had a follow-up appointment with the pediatrician. The report does not link depression or anxiety to bullying or harassment. (P-52, NT 279).

26. The medical notes, the tele-therapist testimony, and the teletherapy notes do not link harassment or bullying as a cause for anxiety and depression. (P-52).

THE [redacted] GRADE- SCHOOL YEAR- 2021-2022

27. On September 1, 2021, the family doctor administered a depression screening. The report does not identify any parent or patient concerns. (P-53 p.2). Although the report includes an interview question about bullying, no response from either the Parent or the Student is provided. (P-53 p.4). The physician's report does not identify any barriers to learning. (P-52 p.5). The report does not connect feelings of anxiety or depression to bullying or harassment. (NT pp.279-280, P-53).
28. On or about September 2, 2021, the District offered another Section 504 Agreement. The Agreement included accommodations included in earlier Agreements. (S#60).
29. In September 2021, the Student complained that the "Honors Geometry" teacher would not allow bathroom breaks. The teacher and the administrators replied that the Student was free to use the restroom as needed. The record notes the Student would go to the library rather than eat lunch with peers. (NT p.280-281).
30. Early in October 2021, during [redacted] grade, the guidance counselor contacted the Parent about the Student's progress in the "Honors Geometry" class. The Parent rejected the opportunity to change classes. (NT p.281 P-55).
31. On October 19, 2021, the Parent reported the Student's before-school vomiting to the guidance counselor. The guidance counselor reached out to the Student to talk about the vomiting. The interaction between the counselor and the Student caused hard feelings between the Parent and the counselor. The Parent believes that the counselor's interactions with the Student undermined the Student's trust in the Parent. (NT pp.282-283).

32. Beginning on or about November 1, 2021, the Student began to experience difficulty accessing and submitting geometry assignments using the online portal. (NT p.285 P-59, P-58, P-81, P-117, NT p.377).
33. The geometry teacher graded work not submitted electronically. (NT pp.580-582, S#81, S#86). The geometry teacher arranged to have another teacher tutor the Student during the school day. The Student never attended any tutoring sessions. (NT pp.520-523, NT pp.583-587, S#70, S#80, S#90).
34. On November 1, 2021, the District and the Parent met to review the Student's Section 504 Agreement. During the meeting, a disagreement was ensured when the Parent requested that bathroom and movement breaks be added as Section 504 accommodations. The Parent wanted the movement breaks to occur on an as-needed basis, like middle school. The Principal wanted to discuss the breaks with the Student, and the Parent objected to the Student's participation. The teachers and administrators at the meeting stated that the Student was free to use the bathroom anytime. The Parties did not reach a consensus. (NT pp.286-287, S#60).
35. On November 10, 2021, the Principal and the Parent spoke by phone about the Section 504 meeting. During the call, the Parent learned that the Principal talked with the Student about the bathroom and movement breaks. The Parent became frustrated and requested that bathroom and movement breaks be added as accommodations. The Parent then directed the Principal not to speak to the Student about the accommodations. The Parent also brings up, for the first time, the Student avoiding lunch and going to the library. (NT pp.287-290, S#74, S#84, S#85, S#94).
36. On November 15, 2021, the Parent requested copies of the Student's and sibling's school records. The Parent also requested records about an unrelated student in 4th grade. (NT p. 288). The District provided the Parent

with the Student's and the sibling's records and refused to provide information about other students. (S#68).

37. During the first semester – August to January- the Student regularly vomited before school. (NT p.289).
38. On November 23, 2021, the Parent told District staff that the Student's peers were bullying the Student. (P-63, P-67).
39. On November 24, 2021, the parties exchanged emails about homework concerns, bullying, class participation, and tutoring services. (NT p.291-292, P- 61 through 66).
40. On December 1, 2021, staff met with the Student to discuss bullying. The Parent reports that after that meeting, the frequency of vomiting increased. (NT p.292-293 P-68, P-72).
41. Also, on December 1, 2021, the Principal informed the Parents that the district could not corroborate the bullying complaints after interviewing the peers and the teachers. The Parent did not take the news well and suggested that the investigation was mishandled. (P-71, P-72, P-73)
42. On December 6, 2021, the Student vomited before school and decided to stay home. (P-71, NT p.292-295).
43. On December 7, 2021, the chemistry teacher emailed the Parent about the Student's poor grades. (P-74, NT 296-297).
44. On December 7, 2021, the Parent filed written charges of bullying and harassment. (P-75, S-77).
45. On December 8, 2021, the Student vomited in school and was dismissed early. (NT p.301-303).
46. On December 8, 2021, the Parent took the Student to the family doctor. The doctor's notes do not link the vomiting to bullying. (P-81, NT 304).
47. On December 9, 2021, the Student complained to the Parent that the teacher gave the Student a lower grade than others on a group math project. (S-83 NT pp.308-311).

48. On or about December 9, 2021, the Parent emailed the Principal about the alleged motivation for the peer-on-peer bullying. The District's form asks the complaining party to associate the bullying acts with a protected category like race, religion, or disability. Rather than identify a protected category, the Parent responded, "certainly intimidation." The Student's biological Parents continued to disagree about what the District could do to return the Student to school. (S#87, P-77NT 3pp.10-314. NT pp.623-629, P-75).
49. The Principal re-interviewed the alleged perpetrators and the teachers and wanted to re-interview the Student; however, the Principal was not permitted to re-interview the Student. (P-75, NT pp.627-630).
50. On December 8, 2021, the Student had an office visit with the pediatrician. The physician's records do not link the Student's repeated appointments to the bullying. The physician's notes indicate the Parent complained of bullying, and the Student denied bullying. (P-80 p.3).
51. On December 8, 2021, the Honors geometry teacher informed the Parent that the Student needed to make up three tests and several assignments. The geometry teacher offered after-school tutoring and also offered help from another staff person. The Student did not attend any of the after-school sessions. (P-81 p.1). The Parent did not respond to the offer and turned in several assignments. *Id.*
52. On December 12, 2021, the District staff informed the Parent that the investigation was ongoing. (P-87, NT pp.358-359, NT pp.631-638).
53. In mid-December 2021, parents, several administrators, and someone from the athletic department met to review the claims that the Student's peers were interfering with Student's participation in the District's sports offerings. (NT pp.356-364, NT pp. 613-618, NT pp.651-655, P- 83, 84, 85, 86, 87, 88).

54. On December 10, 2021, the honors geometry teacher emailed the Parent, stating that the Student was missing 12 out of 17 assignments. (P-89 p.3).
55. On December 13, 2021, the guidance counselor reported that the District had reached out to the Student's private counselors. (P-88 p.1).
56. On December 13 and 14, 2021, the Parent forwarded the Honors Geometry teacher multiple homework packets. (P-89 p.1).
57. On December 14, 2021, the Parent confirmed that the Principal reviewed allegations of discriminatory grading and treatment in "Honors" geometry and English. (NT pp-359-360, P-89, NT pp.631-638).
58. On December 16, 2021, the Student did not go to school. On December 17, 2021, the Principal and the guidance counselor again recommended that the Student transfer into college preparation geometry.
59. On December 17, 2021, the Principal offered to have the Student skip the Third Period class and work on geometry. (P-91 p.4).
60. On December 20, 2021, the Parent emailed the geometry teacher ten (10) or more completed lessons. (P-91).
61. The Student did not attend school on December 20, 2021, December 22, 2021, and December 23, 2021. (NT 364-368, P-93, P-94).
62. On December 23, 2021, the District informed the Parent that it could not confirm allegations of harassment or bullying. (NT pp.623-627, P).
63. On December 23, 2021, the District also issued the fourth request to reevaluate the Student. (S#93).
64. When school restarted in January 2022, the Student refused to attend school. To keep the Student on track, the Parent offered to provide a private geometry tutor. Although the Parties exchanged multiple emails, the Parties were not able to reach an agreement on how to provide private tutoring. (NT pp.368-372, P-102, P-103, P-104, P-96).
65. On January 6, 2022, the geometry teacher gave the parents a unit-by-unit breakdown of the outstanding work. (P-96 p.1).

66. On January 7, 2022, the geometry teacher received several missing assignments. (P-96 p.1).
67. On January 10, 2022, the District sent the Parent a truancy notice. (S#98).
68. On January 10, 2022, the Parent refused to consent to the reevaluation. (S-96). The other Parent consented. *Id.*
69. On January 12, 2022, the Parent's lawyer wrote to the principal expressing criticism of the bullying investigation and asked for additional accommodations for the 2nd semester. The Parents, through counsel, notified the District that the Parents filed cross petitions for an emergency custody hearing. (S#98, P-99).
70. On January 27, 2022, the District emailed the Parent suggesting several options to transition the Student back to campus. (NT p.369, NT pp.614-620 P-104).
71. Throughout January 2022, the Parent and the geometry teacher exchanged multiple emails with attachments exchanging homework. (P-105, P-106, S-99).
72. On February 1, 2022, the Parent and the District meet to develop an attendance improvement plan. (NT p.370 P-106). The truancy plan incorporates elements from the Section 504 Agreement. (NT p.370 P-107). The return to school plan included several options, like a full-time return to the high school, with in-person and online instruction at another building or in-home online instruction. *Id.* The Parent rejected all options school participation options.
73. From February 1, 2022, through February 3, 2022, the parties exchanged other proposals to start private in-home tutoring. (NT p.372, P-110).
74. On February 2, 2022, the chemistry teacher communicated with the Parent about the Student's low grades. (S#101).
75. On February 8, 2022, the guidance counselor emailed the Parent about the return to school options. (S#102).

76. On February 18, 2022, the District notified the Parent that the second private tutor's credentials did not meet local standards. Due to scheduling issues, the Parent found another tutor on or about February 9, 2022. (NT pp.371-376, S#104).
77. On February 28, 2022, the District sent both Parents a Notice of intent to Reevaluation the Student. After consulting with counsel, the Parent consented to the reevaluation. (NT pp.375-380, S#105).
78. On March 8, 2022, the Student refused to participate in the reevaluation. The Parent and the psychologist agree to retest at a later date. (NT p.376 S-105).
79. On March 15, 2022, per the attendance agreement, the Student continued working on the English and Geometry coursework from the first semester. At the same time, the Student worked on Chemistry and History on the District's Pearson online remote learning platform during the second semester. (NT pp. 376-380).
80. By March 22, 2022, during the second semester, the chemistry teacher contacted the Parent about missing assignments and grades. (NT p.379).
81. On April 2, 2022, the District forwarded a copy of the completed reevaluation to both Parents. On April 27, 2022, the Parties meet to review the results. The evaluation team found the Student was eligible for IDEA services as a person with a specific learning disability. The evaluation team recommended specially-designed instruction and Itinerant support for a small part of the day in a learning support classroom. (S-109).
82. Throughout April 2022, the Parties went back and forth, exchanging emails rehashing the bullying investigation. (NT pp.382-386).
83. The record does not describe the alleged peer-to-peer acts of bullying, harassment, or otherwise connected to the Student's disability status harassment. The Parent did, however, testify that the Student was called a "sweat." In this District, the term is demeaning and implies a lack of athletic

ability. The record does not describe the frequency, location, duration, or who was present when the alleged bullying and harassment occurred. The medical and counseling records do not connect the alleged bullying to anxiety or depression. (NT pp.444-450).

THE DISTRICT'S OFFER OF AN IEP AND A FAPE

84. The April 2022 IEP included measurable goals and present descriptive levels. The IEP included a progress monitoring schedule and multiple forms of specially designed instruction and support. The IEP called for the Student to receive learning support each day. The IEP offered online and in-person instruction to assist the Student in returning to school. (P.468-469, S-109, (NT pp.631-638). The IEP offered in-person instruction from the special education teacher at the high school or an off-site building in the District, with teacher assistance or online instruction. (NT pp.467-469). The IEP included a detailed online computer-based transition from high school to college activities and support. (NT pp.639-642).
85. The filing Parent rejected the IEP and the placement. (S#113). The non-filing Parent agreed to the offer of a FAPE and signed the NOREP. (S#112).
86. To complete the [2021-2022 school year] coursework, on June 24, 2022, the District offered to provide online credit recovery services using. (S-132). The Student and the Parent did not take advantage of the offer. *Id.*
87. The Student must complete the [2021-2022 school year] coursework and take nine (9) credits to graduate. (NT pp.638-642, S#134, S#137, S#138). The District offered, and the Student did not fully participate in the [redacted]-grade credit recovery option during the Fall 2022 semester. The refusal to participate in the credit recovery program makes graduation in May 2023 unlikely. *Id.* (S#135, S#136, S#137, S#138).
88. When the Student did not return to school in September 2022, the District made a Motion requesting an Interim Ruling establishing the Student's "stay put" placement. On September 23, 2022, this hearing officer entered an

Interim Ruling finding that the location of the last agreed placement was at the high school. The hearing officer also found the last agreed to program of education called for placement in a regular education classroom with accommodations found in the Section 504 Agreement. Shortly after that Ruling, the District offered a revised Section 504 Agreement, a revised IEP, and updated the school attendance improvement plan. (S#152, S#153, S#154, S-157, S-159).

89. On September 29, 2022, the District invited the Parents and the Student to attend an [redacted] grade IEP meeting and Section 504 Agreement meeting. (S#152, #153, #154). The Parents attended the Student did not. *Id.*
90. At the September 29, 2022, IEP conference, the District explained the updated return-to-school options. The first option included accommodations through a Section 504 Agreement at the high school. (S#157). The next option included specially-designed instruction, along with IEPs. The record indicates the District reissued prior written notice and procedural safeguards. (S#159). Understanding that the Student was reluctant to return to the high school, the District offered to implement the IEP or the Agreement using a combination of in-person or online services.
91. To address the truancy concern, the District provided the Parents with an updated regular education school attendance improvement plan. (NT pp.476-479, NT pp.523-533, NT pp.593-600).
92. From September 30, 2022, through October 3, 2022, the Parties exchanged multiple emails about the overall return to school options, the credit recovery plan for [the previous] grade, and the [current] grade educational supports. Awaiting this Final Decision and Order, the filing Parent rejected all interim FAPE or return-to-school offers. The non-filing Parent agreed to the IEP and the Section 504 services. (S# 160, S#161, S#162, S#163,

S#164, S#165, S#166, #167, S#168, S#169, S#170, S#171, S#172, S#173).

93. The Fall 2022 [redacted] grade return to school IEP included multiple forms of specially-designed instruction, measurable goals, progress monitoring strategies, descriptive present levels, a transition plan, and counseling support. The Section 504 Agreement included 13 or more accommodations. The [redacted] grade IEP offered personalized teaching support and counseling services. As designed and offered, either option could be implemented in-person or online. (S# 160, S#161, S#162, S#163, S#164, S#165, S#166, #167, S#168, S#169, S#170, S#171, S#172, S#173).

APPLICABLE LEGAL STANDARDS

CREDIBILITY

The burden of proof in an IDEA, Section 504, and in ADA disputes is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the essential consideration is the burden of persuasion, which determines which of the two contending parties must bear the risk of failing to convince the finder of fact. In *Schaffer v. Weast*, 546 U.S. 49 (2005), the court held that the burden of persuasion is on the party that requests relief; in this case, the Parents. Fact finders in IDEA disputes apply a "preponderance" of the evidence standard. The "preponderance" standard requires the moving party to present a quantity or weight of evidence greater than the quantity or weight of evidence produced by the opposing party.³ This hearing officer applied a preponderance of evidence standard when reviewing all claims of a denial of FAPE, denial of a Section 504 FAPE, and all remaining claims under Section 504 and the ADA. Whenever the evidence is preponderant (i.e., there is

³ *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. *Id.*

PERSUASIVENESS OF THE WITNESSES' TESTIMONY

During a due process hearing, the hearing officer is also responsible for judging, weighing evidence, assessing the persuasiveness of the witnesses' testimony, and, then, rendering a decision incorporating findings of fact, discussion, and conclusions of law. In the course of doing so, hearing officers have the plenary responsibility to make express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.⁴ Thus, all of the above findings are based on a careful and thoughtful review of the transcripts and a review of the non-testimonial and extrinsic evidence. While some of the helpful evidence is circumstantial, this hearing officer now finds he can derive inferences of fact from the witnesses' testimony, and the record as a whole is preponderant. On balance, the hearing officer found that each witness testified to the best of their recollection and perspective about the actions taken or not taken by the team in evaluating, instructing, and designing the Student's program. That said, I will give more or less persuasive weight to the testimony of certain witnesses when the witness either offered or failed to provide clear, cogent, and convincing explanations of facts and their limited role. Over the District's objection, I allowed the filing Parent to present evidence that fueled the ongoing dispute. Now that the record is closed absent corroboration, I now conclude that much of the Parent's evidence about the circumstances that fueled the dispute was not corroborated, persuasive or preponderant.

⁴ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *A.S. v. Office for Dispute Resolution*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact); 22 Pa Code §14.162 (requiring findings of fact).

IDEA FAPE PRINCIPLES

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through the development and implementation of IEPs, which must be "reasonably calculated" to enable the child to receive 'meaningful educational benefits in light of the student's 'intellectual potential.'"⁵ The IEP must be responsive to each child's educational needs.⁶ The United States Supreme Court confirmed this long-standing Third Circuit standard *Andrew F. v Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). In *Rowley*, the Court found that an LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits."⁷ Historically the Third Circuit has interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential.⁸ LEAs are not required to maximize a child's opportunity; they must provide a basic floor of opportunity.⁹ The meaningful benefit standard requires LEAs to provide more than "trivial" or "de minimis" benefits.¹⁰ It is well-established that an eligible student is not entitled to the best possible program, or the type of program preferred by a parent, or to a guaranteed outcome in terms of a

⁵ *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 US 176, 206-07, 102 S.Ct. 3034 (1982), *Mary Courtney T., v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

⁶ 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.18

⁷ *Rowley* at 3015

⁸ *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000), *Ridgewood Bd. of Education v. NE*, 172 F.3d 238 (3rd Cir. 1999); *SH v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

⁹ *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.1988).

¹⁰ *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995).

specific level of achievement.¹¹ All the IDEA guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" ¹²

SECTION 504 FAPE REQUIREMENTS

Section 504 requires that districts "provide a free appropriate public education to each qualified handicapped person in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 CFR 104.33(a). Section 504 defines an appropriate education as the provision of regular or special education and related aids and services that: (1) Are designed to meet individual educational needs of disabled persons as adequately as the needs of non-handicapped persons are met. (2) Are based upon adherence to procedures that satisfy the requirements of 34 CFR 104.34 educational setting; 34 CFR 104.35 evaluation and placement; and (3) are offered in conformance with the procedural safeguards found at 34 CFR 104.36. FAPE under the IDEA is an affirmative duty to provide an appropriate program of personalized instruction, whereas FAPE under Section 504 is a negative prohibition against failing to provide an equal opportunity to access the same benefits as non-disabled peers.¹³ Courts within this circuit have rejected the argument that student's asserting a FAPE violation of Section 504 must establish more than a denial of a FAPE.¹⁴ For Section 504 eligible only students, the Third Circuit held in *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012) that fact finders must apply a "reasonable accommodation. *Id.* The *Ridley* court further held that Section 504 "accommodation" must offer the opportunity for "significant

¹¹ *J.L. v. North Penn School District*, 2011 WL 601621 (ED Pa. 2011). Thus

¹² *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

¹³ *C.G. v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 IDELR 41(3d Cir. 2013).

¹⁴ *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 488, 489 n.10 (E.D. Pa. 2011) (rejecting the argument that to prevail under Section 504, a plaintiff must prove not only a denial of a FAPE but also that the denial was "solely on the basis of disability"), *Neena S. ex rel. Robert S. v. Sch. Dist. of Philadelphia*, 2008 U.S. Dist. LEXIS 102841, 2008 WL 5273546, at *14 (E.D. Pa. Dec. 19, 2008).

learning" and "meaningful benefit."¹⁵ Following *Ridley*, the Third Circuit Court found in *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104 (3d Cir. 2018), that courts use the terms "reasonable modifications" and "reasonable accommodations" as "interchangeable" phrases in judging whether a district failed to offer a FAPE.¹⁶ The same, however, does not hold true for claims of intentional discrimination or retaliation.¹⁷ Therefore, I will follow this analysis.

SECTION 504 DISCRIMINATION

Section 504 proscribes discrimination based on an individual's disability status. 29 U.S.C. § 794(a). To make out a discrimination claim under Section 504, the Student and/or the Parents must show: (1) the student has a disability; (2) the student was otherwise qualified to participate in a school program; and (3) the student was denied the benefits of the program or was otherwise subject to discrimination because of their disability. *Chambers v. School Dist. of Phila.*, 587 F.3d 176, 189 (3d Cir. 2009). To prove a denial of benefits, parents must establish the district's actions were intentional; therefore, in this instance, Parents can meet that burden by establishing deliberate indifference.¹⁸ Deliberate indifference requires proof of "(1) knowledge that a federally protected right is substantially likely to be violated, and (2) *failure* to act despite that knowledge." *id* at 265. Deliberate indifference must be a deliberate choice, rather than negligence or bureaucratic inaction." *Id.* at 263.

¹⁵ *K.K. ex rel. L.K. v. Pittsburgh Pub. Sch.*, 590 F. App'x 148, 154 (3d Cir. 2014)(not precedential), *T.F. v. Fox Chapel Area Sch. Dist.*, 589 F. App'x 594, 600 (3d Cir. 2014), and *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010), *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000), *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010).

¹⁶ *Berardelli*, citing *McElwee v. County of Orange*, 700 F.3d 635, 640 n.2 (2d Cir. 2012).

¹⁷ *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262 (3d Cir. 2013).

¹⁸ *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262 (3d Cir. 2013).

To meet the burden of persuasion, Parents must work through the traditional burden-shifting model.¹⁹ Although the case law is grounded in employment law, the same model holds true for school-based discrimination claims.²⁰

In short, the parent's burden of persuasion in the context of discrimination requires proof of a prima facie case, combined with the rejection of the district's proffered justification/explanations, followed by additional evidence from the parent (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse action."²¹

BULLYING, HARASSMENT, AND DISCRIMINATION ARE NOT THE SAME

In a *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013), the U.S. Education Department advised districts that bullying can include verbal or physical aggression or negative statements used within the peer-to-peer relationship where the aggressor has real or perceived power over the target. The *Letter* warns that bullying includes verbal or physical aggression based on sex, natural origin, or disability.

On the other hand, disability-based harassment under Section 504 and Title II of the ADA includes acts that deny a qualified person with a disability equal access to the same benefits available to all others. Harassment can include words, intimidation, threats, or other abusive behavior toward a student based on the student's disability. Once parents establish predicate acts like verbal abuse, physical violence, intimidation, or coercion, based on disability status,

¹⁹ See, *Stapleton v. Penns Valley Area Sch. Dist.*, No. 4:15-cv-2323, 2017 U.S. Dist. LEXIS 204143 (M.D. Pa. Dec. 12, 2017) citing with approval *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

²⁰ *E.F. v. Napoleon Cmty. Sch.*, 2019 U.S. Dist. LEXIS 164075 (E.D. Mich. Sep. 25, 2019).

²¹ *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994), *Waddell v. Small Tube Prod. Inc.*, 799 F.2d 69, 73 (3d Cir. 1986), 34 C.F.R. § 104.61.

fact finders can infer a hostile environment which can then become the basis for a denial of a FAPE. *Id.* The same predicate acts can establish a denial of participation in or receipt of benefits, services, or opportunities in the district's program.²² Section 504 and, by inference Title II of the ADA requires districts, once on notice of possible disability-based harassment, to take prompt and practical steps to investigate and remediate all allegations. The investigation should determine what occurred and if the alleged actions caused a denial of benefits or a hostile environment. If the investigator finds a violation, the district must take immediate action to prevent further violations or harassment from recurring.²³

DISCUSSION, CONCLUSION OF LAW, AND ANALYSIS

CLAIMS TWO YEARS BEFORE THE FILING OF THE COMPLAINT ARE TIMED BARRED

A due process complaint filed under the IDEA must be filed within two years of the date that the Parent or agency knew or should have known of the alleged action that forms the basis of the complaint.²⁴ Although Section 504 of the Rehabilitation Act does not have its own statute of limitations, the Third Circuit

²² *Dear Colleague Letter*, 111 LRP 45106 (OCR/OSERS 07/25/00).

²³ *Westfield (MA) Pub. Schs.*, 53 IDELR 132 (OCR 2009), and *Dear Colleague Letter*, 55 IDELR 174 (OCR 2010). The Office of Civil Rights (OCR) the agency charged with enforcing Section 504 and Title II tells us that disability-based harassment occurs when: (1) A student is bullied based on a disability;(2) The bullying is sufficiently serious to create a hostile environment; (3) the school officials know or should have known about the bullying; and, (3) The school fails to respond appropriately. *Dear Colleague Letter: Responding to Bullying of Students with Disabilities*, 64 IDELR 115 (OCR 2014). *K.M. v. Hyde Park. Cent. School District*, 381 F. Supp. 2d 343 (S.D. N.Y. 2005). (To sustain a Section 504 harassment claim parents must show that (1) the victim was harassed on the basis of the disability; (2) the alleged harassment was so severe, pervasive and objectively offensive that it altered the condition of education; (3) the school district had actual notice about the disability-based harassment and (4) the school district was deliberately indifferent to the harassment.)

²⁴ 34 C.F.R. § 300.511(.e); 34 C.F.R. § 300.507(a)(2), 300.507(a)(2), IDEA § 615(b)(6) and (f)(3), *GL by Mr. G.L and Mrs. E.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 66 IDELR 91 (3d Cir. 2015), *D.K. by Steven K. and Lisa K. v. Abington School District*, 696 F. 3d 233, 59 IDELR 271 (3d Cir. 2012).

has held that IDEA's two-year statute of limitations applies to claims made under Section 504.²⁵

The first threshold consideration is whether the school district has proven that the statute of limitations bars some of the Parent's claims. The school district contends that some of the alleged violations are barred by the two-year statute of limitations under IDEA. The complaint in this matter was filed in May 2022. The school district contends that claims before May 2020 are barred by the statute of limitations and should not be considered.

The Parent asserts that the allegations in the complaint were timely filed because the Parent was unaware that the Student had unmet academic needs until 2022. The Parent's testimony refutes the Parent's contention. The Parent received prior written notice of the IDEA reevaluation, was aware that the Student was tested, and received a copy of the reevaluation. After reviewing the reevaluation, the filing Parent checked the box accepting the conclusion that while the Student was a person with a specific learning disability, the Student no longer needed specially-designed instruction. After the reevaluation meeting, the District issued prior written notice twice, and the Parents did not respond. The District then prepared, and the Parents allowed the Student to participate in regular education with a Section 504 Agreement. I now find that the Parents agreed to exit the Student from IDEA services and also agreed to the Section 504 Agreement. The record is preponderant that the Parent was aware that with the accommodation, the Student earned passing grades and was promoted yearly. Therefore, I now conclude that on or about March 29, 2019, the Parent either knew or should have known of the action forming the

²⁵ *P.P. ex rel. Michael P. v. Westchester Area School District*, 585 F. 3d 727, 53 IDELR 109 (3d Cir. 2009).

basis for a due process complaint. Accordingly, claims before May 2022 are time-barred.²⁶

THE PARENT'S SECTION 504 BULLYING CLAIMS

The filing Parent claims that the Student's peers bullied and harassed the Student to the point that the Student refused to participate in sports and go to school. Next, the filing Parent asserts that several teachers and administrators harassed or discriminated against the Student. I will address each claim separately.

Although the filing Parent is passionate in their conviction that the District failed to take appropriate action to stop the harassment or bullying, I don't see it this way. The record does not include persuasive proof that the alleged negative peer interactions were related to the Student's disability status. The evidence does not establish that whatever happened was "solely based" on the Student's disability. When asked to describe details about what the peers did, the Parent could not identify the dates, times, and locations - i.e., in the classroom -in the hallways - during lunch- on the bus, - or in the locker room when the alleged acts occurred. Although the Parent repeatedly stated that something happened at the school drop-off, the record as developed does describe the interaction and does not link up whatever happened that day with preponderant proof of peer-to-peer disability-based discrimination.

While the record includes testimony that the Student on multiple days was nauseous, the record does not include evidence linking nausea to acts of discrimination, bullying, or harassment. The record includes other evidence of actions that may have caused or contributed to the Student's behavioral health

²⁶ To the extent that the testimony of the Parent conflicts with the testimony of the school district staff concerning this issue, I now conclude that the testimony of the Parent is less persuasive than the testimony of the school district staff.

troubles. Accordingly, the Parent has not cleared the causation threshold standard; therefore, the peer harassment and bullying claims are denied

As for the straight discrimination claim, the Parent contends that the school mishandled the bullying investigation. I disagree. In late November 2020, the Parent made the initial bullying complaint; the administrators interviewed the Student, the alleged perpetrators, and the teaching staff. After Thanksgiving break, the Parent put the bullying complaint in writing. The filing Parent refused to allow the administrators, alone or in their presence, to re-interview the Student. This choice limited the scope of the investigation.

When the administrators could not corroborate the allegations, they promptly informed the Parent, in writing, about the inconclusive results. This series of events leads me to conclude that the District staff responded promptly and appropriately once on notice.²⁷ Accordingly, failure to investigate the bullying or harassment claims is denied.

Intertwined with the bullying and harassment claims, the filing Parent asserts that the investigation took too long and was untimely. The Parent made the initial allegations before the Thanksgiving break, and the written report about the investigations was provided to the Parent in mid-December. After carefully reviewing the testimony and the exhibits, I now conclude that the District staff acted promptly to investigate all allegations.

THE STUDENT STOPS ATTENDING SCHOOL, AND THE REEVALUATION

When Christmas break ended in [the 2020-2021 school year], the Student refused to attend school. With truancy proceedings swirling in the background, the District offered to complete a comprehensive IDEA assessment. While one Parent agreed, and the other refused to consent. It seems like the testing disagreement caused the Parents to file cross-custody petitions in family court.

²⁷ See, *Dear Colleague Letter: Responding to Bullying of Students with Disabilities*, 64 IDELR 115 (OCR 2014).

After several telephone calls, the Parents resolved the disagreement without a family court hearing. After that, the filing Parent consented to the IDEA evaluation. This back-and-forth between the Parents and the District delayed the evaluation by several months. All the while, the Student was at home.

A review of the evaluation indicates the evaluation complied with all substantive and procedural requirements of the IDEA and Section 504. A timely evaluation report was shared with both Parents; one Parent agreed to the recommendations, and one did not. After reviewing the content of the reevaluation, I now conclude the reevaluation was a complete individual comprehensive evaluation in all areas of suspected disability. The evaluation team concluded that the Student was a person with a learning disability who also needed specially-designed instruction in writing and social support.

Both Parents and District staff then participated in a timely IEP meeting. The IEP included descriptive present levels, measurable goals, and a progress monitoring schedule. As the transition from school to work or college was a topic for discussion, the District invited the Student to the meeting. One Parent thought the Student should attend; the other did not. One Parent agreed to the IEP, and one did not. The IEP team accepted the evaluation team's recommendation and recommended placement in a Learning Support class with specially-designed instruction. Accordingly, I now find the District included the Parents in all facets of the reevaluation process.

After reviewing the IEP and the transition plan, I now find the IEP, when offered, was otherwise appropriate. I also find that the IEP goals were measurable, placement at the high school was the least restrictive setting and the specially-designed instruction was appropriate. When the Student did not return to school, the District cobbled together several interim options to reengage the Student. The Parent did not accept, and the Student did not

participate in any options that would have allowed the Student to complete the [2021-2022 school year].

THE 2022-2023 SCHOOL YEAR

As the 2022-2023 school began, the District requested an Interim Ruling about "Stay Put." The Ruling declared that the last agreed to placement was [the previous]-grade regular education with accommodations. For the most part, the Ruling directed the District to provide the necessary support to enable the Student to complete the [previous] grade. To accomplish the "Stay Put" Ruling, the District offered the Student a revised IEP. The District also offered a revised Section 504 Agreement; the filing Parent rejected both options.

After reviewing the 2022-2023 FAPE offer, I now find that the IEP was appropriate. The goals were measurable, the specially-designed instruction was personalized, and related services supported participation in the least restrictive setting. The IEP, as offered, was otherwise appropriate.

I also find the Section 504 Agreement offered the Student an equally effective opportunity to participate and receive a meaningful benefit. Finally, I conclude the record is clear that the teaching staff, at all times relevant, accommodated, modified, and provided the Student with the equal opportunity to benefit from the proffered Section 504 Agreement supports. Accordingly, an appropriate Order in favor of the District denying all claims follows. Any other claims or defenses not otherwise addressed are dismissed with prejudice.

ORDER

And now, this 26th day of December 2022, it is hereby **ORDERED** as follows:

1. I now find in favor of the District and against the filing Parent on the claims of discrimination, bullying, or harassment on all claims for all school years in issue.

2. I now find in favor of the District and against the filing Parent on the claims that the District failed to provide a FAPE within the meaning of Section 504 for all school years in issue.
3. I now find in favor of the District and against the filing Parent on the claims that the District failed to provide a FAPE within the meaning of the IDEA for all school years in issue.
4. All other claims for appropriate relief are dismissed with prejudice for all school years in issue. Likewise, all affirmative defenses are dismissed with prejudice.
5. The District's Motion to Limit the Scope of the claims is **GRANTED**.

Date: December 26, 2022 s/ Charles W. Jelley, Esq. LL.M.
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