

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: 24281-20-21

Child's Name:

Z.M.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

Michael J. Connolly, Esquire
McAndrews, Mehalick, Connolly, Hulse, Ryan and Marone P.C.
30 Cassatt Avenue
Berwyn, PA 19312

Local Education Agency:

Upper Darby School District
4611 Bond Avenue
Drexel Hill, PA 19026

Counsel for LEA:

Heather Matejick, Esquire
Fox, Rothschild LLP
10 Sentry Parkway, Suite 200
P.O. Box 3001
Blue Bell, PA 19422-3001

Hearing Officer:

Cheryl Cutrona, J.D.

Date of Decision:

April 5, 2021

Introduction and Procedural History

The Student¹ is a 10th grader residing in the Upper Darby School District (hereinafter "District"). The Student attended schools in the District from Kindergarten through the 7th grade. The Student has attended an out-of-District private school since 8th grade.

During the 2019-2020 school year, the Student finished the 9th grade achieving a 3.71 GPA. Currently, the Student attends 10th grade regular education classes at the out-of-District private, high school placement.

On November 2, 2020, the Parent filed a due process complaint against the District contending that the Student has been denied a free and appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA")², Section 504 of the Rehabilitation Act of 1973 ("Section 504")³, and their corresponding regulations of the Pennsylvania Public School Code.

The case proceeded to a multi-session due process hearing convening virtually due to the COVID-19 pandemic and resulting school closures with the parties presenting evidence in support of their respective positions. The Parent sought to establish that the District failed to offer appropriate programming to the Student and demands reimbursement for tuition and related expenses for an out-of-District private school for the 2020-2021

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details 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 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).

³ 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).

school year. The District maintained that its educational programming was appropriate as offered, and that no remedy is due.

In reviewing the record, the testimony of all witnesses and the documents submitted as exhibits were thoroughly considered in issuing this decision, as were the parties' written closing statements.

For the reasons set forth below, following review of the record as a whole, the claims of the Parents must be denied.

Issues

1. Did the District meet its obligations to the student under IDEA?
2. Did the District meet its obligations to the student under Section 504?
3. If the answer to either question #1 or #2, or both of those questions, is/are answered in the negative, is the parent entitled to tuition reimbursement for the 2020-2021 school year?

Findings of Fact

1. The Student is a 10th grader residing in the District. (P-19)⁴ The Student attended school in the District from the time the Student entered Kindergarten during the 2010-2011 school year through 7th grade. (N.T. at 48-50) The Student has been attending an out-of-District private school since the student entered 8th grade. (N.T. at 48)
2. The District funded the out-of-District private high school placement during the 2019-2020 school year as part of a confidential Settlement Agreement reached on July 10, 2018.

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

3. During the 2019-2020 school year, the Student flourished during the 9th grade at the private out-of-District High School in a regular education program with no accommodations. The Student finished the school year achieving a 3.71 GPA. (S-11 at 1; P-19 at 2)
4. On February 27, 2020, the Parent emailed the District (S-3) requesting that it conduct an evaluation of the Student and offer the Student a program because the Parent was considering re-enrolling the Student in the District for the 2020-2021 school year. (N.T. at 59-62, 67-68, 256-258, P-6)
5. The Principal acknowledged the Parent's request (S-3); however, the District did not issue a Permission to Evaluate ("PTR") at that time.
6. On March 13, 2020, as per a statewide order, Pennsylvania schools were required to close due to the COVID-19 pandemic. Due to the shutdown, in-person testing would not have been able to be conducted. (N.T. at 189-190)
7. On June 26, 2020, the Parent's legal counsel sent a letter to the District noting that the Parent was seeking an "expedient resolution" and that she would be seeking tuition reimbursement for the out-of-District private school placement. (S-6; N.T. at 109)
8. On July 15, 2020, counsel for the District replied to counsel for the Parent informing him that proof of residency was needed by the District so that the District could begin the evaluation process. (S-7 at 2)
9. On August 11, 2020, the Parent submitted residency documentation. (S-8)
10. Three days later, on August 14, 2021, the Parent emailed the District indicating that she had "no other option" but to enroll the Student in the out-of-District private school and requesting that the District continue to fund the student's educational placement at an out-of-District private school. (N.T. at 67-68; P-9; S-10)

11. On August 20, 2020, the District issued a PTR. (P-10) The Parent signed and returned it the following day. (N.T. at 67-68; P-10)
12. On September 3, 2020, the Parent and the District met virtually to review a proposed Section 504 Plan to be implemented at the District's High School, pending the outcome of the evaluation. (P-13; S-12) The Parent rejected the 504 Plan. (S-14, 1)
13. In October 2020, the District completed an Evaluation Report ("ER") (S-18; P-16) that includes input from the Parent, the student's teachers, the Student, results of the tests that had been administered as part of the evaluation, and a Functional Behavioral Assessment ("FBA") (P-15).
14. While many of the questions were left blank, the Parent's input includes comments characterize the Student as "withdrawn," "distracted," and "doesn't handle stress well." (S-18 at 5) The Parent has concerns about the Student being bullied/victimized, "panic attacks, a special phobia, vocal and motor tics." (S-18 at 21) The Parent noted that the Student's behaviors "very often impact [Student's] academic and home lives and often impact [Student's] social life." (S018 at 22)
15. Teachers' input includes comments such as the Student's "behaviors never impact" the Student's "academics or social life" (S-18 at 22); the Student is "very social" with classmates," has "positive relationships" with most other students; "is a joy to have in class"; "social skills are typical" for that age range. (S-18 at 1, 8, 9, 10)
16. The Student self-reported as being "average" and did not include any significant anxiety or depressive symptoms. (S-18 at 22) The Student believes others view the Student as "funny, logical, chill," and that friendships are "great" and "they are always there for me." (S-18 at 12-13)
17. The District-contracted BCBA who conducted the FBA of the Student concluded that the Student's behaviors were "minimal" during the five

virtual classroom observations. The BCBA reported zero instances of aggression and only three instances of brief interruptions. (S-17 at 17) The BCBA concluded that the Student's overall level of need was "low" and that the Student does not require a Positive Support Plan. (S-17 at 20)

18. The ER confirmed the Student's diagnoses of ADHD and Anxiety and concluded that the Student did not need specially designed instruction and, therefore, was ineligible for an Individual Education Plan (IEP). (S-18, 31-33)
19. On December 8, 2020, the District revised the 504 Plan (S-22) following the ER and reconvened the 504 Team. The Parent rejected the 504 Plan as revised (N.T. at 80-81; 82-82; P-13 at 3; S-23).
20. On November 2, 2020, the Parent filed a Due Process Complaint seeking a finding of eligibility under the Individuals with Disabilities Education Act ("IDEA") and tuition reimbursement for the out-of-District private school where the Student has been attending. (P-17)
21. As of the due process hearing, the Student was attending a 10th grade regular education class at the out-of-District private school placement. (P-19 at 2) Because of the COVID-19 pandemic, it appears that the Student receives no accommodations and primarily attends virtually.
22. The private school is a Middle States Accredited high school that provides a curriculum that challenges the Student's cognitive ability levels. At that school the Student receives individualized attention and has services available at the Intermediate Unit ("IU") if the Student chooses to access them.
23. The Student did not access the tutoring available through Intermediate Unit, which is available through self-referral, during the last school year. (N.T. at 318)

24. The private school's full-time school psychologist reviews the IEPs and Section 504 Plans for the school's students and provides an "accommodation plan" which is shared with the students. Other supports the students can access include reading and math specialists who meet with the students after school, an academic track with smaller classes, counselors that provide assistance with executive functioning and other organizational supports. The Director of Achievement is responsible for monitoring (similar to progress monitoring in the public-school setting) students who have an IEP or a Section 504 Plan. (N.T. 293-294, 291-301) These supports have enabled the Student to make meaningful progress in school and achieve an overall 3.71 GPA in the 2019-2020 school year and the student continues to do well this school year. (N.T. 89-90, 303-306; P-19). Based on educational performance, the private high school was considering elevating the Student to honors level courses. (N.T. at 316)
25. The private school has 830 students currently enrolled. (N.T. at 306)
26. The District high school has around 3,800 students enrolled, including 300 in the cyber school. (N.T. at 253)
27. At the private high school, the class size when there are no COVID restrictions can be up to 34 students, with an average of about 27. The current, smaller in-person class size of about 17 is based on COVID restrictions and the hybrid schedule. (N.T. 323)
28. The District high school class sizes, depending on the subject, are "roughly an average of 25 to 28 in a class." (N.T. at 251)

The Parent's Claims

The Parent alleges that, pursuant to IDEA and Section 504 of the Rehabilitation Act, the District failed to provide the Student with FAPE, and as such, the Parent is entitled to tuition reimbursement and related costs for

the 2020-2021 school year and until the District develops an appropriate placement for the student.

The Parent believes that the Student meets the criteria under the Specific Learning Disability ("SLD") and Other Health Impaired ("OHI") classifications and should have an IEP rather than a 504 Plan. The Parent claims that the October 2020 ER (P-16) conducted by the District erroneously concludes that the Student is not eligible for an IEP despite weaknesses in academic performance, executive functioning, and social/emotional concerns reported by the Parent. The Parent points out that excellent grades does not disqualify a student for eligibility under the IDEA. *G."J."D. v. Wissahickon SD*, 832 F.Supp.2d 455 (ED. Pa. 2011)

The Parent also claims that, even if the Student is not found to be eligible for an IEP under IDEA, the untimely 504 Plans offered by the District are not appropriate because (1) they were offered after the beginning of the 2020-2021 school year; and (2) the plans offered were inappropriate, providing accommodations that are little more than what all students in the regular education setting are offered.

Furthermore, the Parent argues that the out-of-District private high school provides the Student with the small, structured, and supportive educational environment that the Student requires. (N.T. at 79-80, 85-91, 293-296, 291-301)

Furthermore, the Parent argues that tuition reimbursement is an available remedy under Section 504 as well as IDEA, and that it has met its burden of proving all three prongs of the tuition reimbursement analysis. The Parent contends that (1) the untimely Section 504 Plan offered by the District is not appropriate, (2) the out-of-District private high school selected by the Parent provides the appropriate supports and services necessary for the Student to benefit from [Student's] education, and (3) the equities in

this case do not favor a reduction or denial of tuition reimbursement, as evidenced by [Student's] grades.

The Parent claims that the equities in this case favor tuition reimbursement for the out-of-District school because the Parent (1) provided the District with written (email) notice of their intent to place the Student in private school and request reimbursement (P-9); (2) cooperated with the District's evaluation as requested; and (3) acted reasonably by participating in both the evaluation and 504 processes.

District's Claims

The District contends that the Student is not eligible for an IEP and that its 504 Plan(s) are appropriate. Therefore, the District urges that the Parent's request for tuition reimbursement be denied.

The District argues that because of the Spring 2020 COVID-19 school shut down, it was not able to conduct the in-person cognitive assessment or the academic achievement assessment of the Student necessary to complete an evaluation. The District began issuing Permissions to Evaluate around August 31, 2020. Therefore, the ER was completed "right around the same time," in October 2020, that it would have been completed even though the initial email request was received on February 27, 2020. (N.T. at 189-191)

The District avers the Parent's testimony lacks credibility and should not be relied upon. The information provided by the Parent is in "stark contrast" with input provided by the Student's private school teachers. The District points out that several of the ratings scales in the ER must be "interpreted with caution" because the Parent's own answers to similar items were inconsistent. (S-18 at 21, 22, 26)

The District posits that while the Parent disagrees with the District's assessment of the Student, the Parent did not present any conflicting

evaluations, medical reports, expert testimony and/or other evidence to support that assertion.

The District argues that the Parent's allegation that the Student has a history of social and emotional struggles, including with peer relationships and conflicts related to [Student's] anxiety disorder demonstrates that the Student needs specially designed instruction. (N.T. at 24) is not backed up with evidence and, in fact, the preponderance of the evidence is in direct contradiction to the Parent's allegation.

Furthermore, the District discounts the Parent's claims that the private school is appropriate for the Student because when asked she lacked an understanding of the Student's classes, grades, or that the Student had taken standardized tests (N.T. 123), been in contact with teachers, and erroneously assumed that the Student was accessing the tutoring offered through the I.U. (N.T. 118, 119)

The District argues that the Parent failed to meet her burden of proof in this case because there was no specific evidence to support the allegation that the Student is eligible for an IEP other than that she wants the Student to have one. Furthermore, the District claims, the Parent did not provide any evidence to support the position that the 504 Plan offered by the District is not appropriate. In fact, the District contends that the Parent's input and testimony was completely contradictory to the evidence on the record, both testimonial and documentary.

Discussion and Conclusions of Law

Legal Principles

Burden of Proof

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. Here, it should be

recognized that the burden of persuasion lies with the party seeking relief: the Parents. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

The burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

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

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent’s claims, or if the evidence is in “equipoise,” the Parent cannot prevail.

Credibility Determinations

Special education hearing officers, in the role of fact-finders, are 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 the Parent's testimony and rating scales to be inconsistent with the testimony and the rating scales presented by the educators. Because the testimony given by the school-based witnesses was consistent, the hearing officer could not find the Parent's testimony to be as persuasive as the others. The hearing officer did not, however, deem the Parent's testimony to be intentionally deceptive. Rather, the hearing officer finds that the Parent testified to the best of her recollection.⁵ Therefore, the hearing officer accorded some of the District's testimony to be more persuasive and reliable concerning the issues to be decided.

Eligibility under IDEA

The IDEA requires the provision of a "free appropriate public education" ("FAPE") to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v.*

⁵ The Parent appears to be a busy, working parent who has other children in the District. (N.T. at 61, 101) As such, the Parent testified, she is "always in the middle of something," and has to "multi-task." In fact, she testified that she thinks she filled out the Parent rating scales for the Evaluation while she was driving. (N.T. at 121)

Doe, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency ("LEA") representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." Id. § 1414(d)(1)(A)(i). A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." Id. § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D)

To be eligible for special education services under IDEA, the student must (1) meet the requirements of one or more of the disability categories identified in the regulation and (2) require specially designed instruction to benefit from that instruction.

The Parent argues that the Student meets both prongs of the eligibility requirements. The District disagrees.

At the request of the Parent, the District conducted an evaluation (S-18; P-16) to determine the Student's need for special education. (N.T. at 148) The specific IDEA classifications looked at were: SLD, OHI and emotional disturbance.

Evaluation

In conducting an evaluation or reevaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information

about the child is obtained, including a variety of assessment tools for gathering relevant data about the child's functional, developmental, and academic strengths and weaknesses. 34 C.F.R. §§ 300.304(b); see also 34 C.F.R. § 303(a). The evaluation must assess the child "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]" 34 C.F.R. § 304(c)(4); see also 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services' needs, whether or not commonly linked to the disability category in which the child has been classified," and utilize "[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]" 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3).

In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b).

Upon completion of all appropriate assessments, "[a] group of qualified professionals and the parent of the child Page 15 of 21 determines whether the child is a child with a disability ... and the educational needs of the child[.]" 34 C.F.R. § 300.306(a)(1). The U.S. Department of Education has explained that, although "[t]he eligibility group should work toward consensus, under §300.306, the public agency has the ultimate responsibility to determine whether the child is a child with a disability." 71 *Fed. Reg.* 46661 (August 14, 2006).

The results of the evaluation are presented here in regard to whether or not the Student is eligible for an IEP under the classifications of SLD or OHI.

Specific Learning Disability ("SLD")

The Parent argues that the Student is eligible for special education because the Student meets the requirements of the SLD and the OHI classifications.

IDEA defines SLD as “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” 34 *C.F.R.* §300.8(c)(10).

The criteria for determining the presence of an SLD is as follows: “The child does not achieve adequately for the child’s age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or State-approved grade-level standards:

- i. Oral expression.
- ii. Listening comprehension.
- iii. Written expression.
- iv. Basic reading skill.
- v. Reading fluency skills.
- vi. Reading comprehension.
- vii. Mathematics calculation.
- viii. Mathematics problem solving.” 34 *C.F.R.* §300.309(a)(1).

The Parent claims that the District should have identified the Student as eligible under the classification of SLD because there are significant discrepancies between the Student’s intellectual ability and academic achievement in mathematics calculation. The Parent alleges that comparing the Student’s average cognitive ability (GAI of 98 and a FSIQ of 93) to the Student’s academic achievement scores (standard score of 76, which is in the 5th percentile/low range) and written expression scores (a standard

score of 86, which is in the 18th percentile/low average range) reveals a statistically significant discrepancy. (S-18; P-16)

The District's school psychologist who conducted the Evaluation of the Student testified that the Student's composite scores were primarily in the average and high-average range. The standardized testing conducted during the evaluation includes a low score in the area of math computation (S-18; P-16) and concludes that a low score in only one subtest, especially when considered with all of the other data, does not equate to a qualification of disability. (N.T. at 218)

Other Health Impairment ("OHI")

IDEA defines OHI as "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 is (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) Adversely affects a child's educational performance." 34 C.F.R. § 300.8 (c) (9)

The Parent and the District agree that the Student was medically diagnosed in 2016 as having ADHD, which is listed under the IDEA OHI classification. However, the District concluded that the Student is not eligible for an IEP because the Student does not need specially designed instruction to benefit from [Student's] education.

Specially Designed Instruction ("SDI")

IDEA defines SDI as "(3) 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 hearing officer finds that the Parent did not meet the burden of proving that the Student is eligible for an IEP under IDEA. The Parent failed to present any evidence as to why the Student requires SDI that would indicate eligibility for special education under the IDEA other than her desire for the Student to have an IEP.

The testimony of the District’s witnesses and the Parent’s witnesses differed greatly from the Parent’s characterization of the Student. The District’s School Psychologist testified that the Parent’s input on the Evaluation’s rating scales was inconsistent with the other raters and data to the point that it was “interpreted with caution” due to the inconsistency of the Parent’s own responses to similar items. As such, the District’s School Psychologist avers that it is, “more difficult to give it weight.” (N.T. at 219) The hearing officer deems the School Psychologist’s testimony to be persuasive and probative.

The District’s 2020 ER was appropriate, albeit delayed by the COVID shutdown in Pennsylvania which made it impossible to conduct in person testing until the shutdown was lifted. The District was caught in a tricky situation, as were other districts around the Commonwealth, and put forth its best efforts in light of the latitude it had available to it at the time the evaluation needed to be conducted.

A variety of assessment tools and strategies was used to gather relevant functional and developmental information about Student, including information provided by the parent and teachers. The Cognitive Assessment was based on 10 subtests using the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) (S-18 at 15). The Student was administered subtests to assess intellectual functioning in five cognitive areas: verbal comprehension, visual spatial, fluid reasoning, working memory, and

processing speed. The Student's Full Scale Intellectual Quotient (FSIQ) composite score was determined using a standard score metric.

Ancillary subtests were also administered to provide additional information about the Student's cognitive profile, including nonverbal, general and cognitive proficiency. The Student's Cognitive Profile Index (CPI) was assessed to be in the Average range in the service of learning, problem solving, and higher order reasoning.

The Academic Measure used was the Kaufman Test of Educational Achievement-3rd Edition (KTEA-III). Reading, decoding, reading fluency, reading comprehension, written expression, and math achievement were assessed. The Student was described as falling from the low level in math computation to above average in silent reading fluency.

Social-emotional functioning was assessed by amassing observations from the parent and teachers, and a self-assessments completed by the Student using the Connors Comprehensive Behavior Rating Scale Rating scales, the Multidimensional Anxiety Scale for Children (2nd Edition), and the Executive Functioning Comprehensive Executive Function Inventory (CEFI).

No single procedure was used as the sole criterion for determining an appropriate educational program for the child.

The assessment tools used by the District are technically sound instruments that provided relevant information in determining Student's educational needs and social-emotional needs. The ER concluded that, at that time, the Student did not present with any academic needs that require specialized instruction. Thus, the hearing officer finds that the District has shown by a preponderance of evidence that its evaluation was comprehensive, identified the Student's needs and were conducted by applicable procedure.

In conclusion, although the Student has medical diagnoses of ADHD and Anxiety, the evidence is insufficient to lead to a conclusion that Student requires adaptations of the content, methodology, or delivery of instruction because of a disability. IDEA eligibility is a two-part test, and the existence of a disability standing alone does not satisfy both prongs. The hearing officer finds that the Student does not meet the second prong because the preponderance of the evidence fails to prove that the Student needs specially designed instruction to benefit from [Student's] education. As such, the Student does not meet the eligibility criteria under the IDEA.

General Section 504

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 *U.S.C.* § 794. A person has a handicap if the Student 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).

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 is 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 the requirements of" the related

subsections of that chapter, 34 C.F.R. §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood*, supra, 172 F.3d at 253; see also *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005).

In order to establish a violation of § 504 of the Rehabilitation Act, the filing party must prove that: (1) the Student is “disabled” as defined by the Act; (2) the Student is “otherwise qualified” to participate in school activities; (3) The school or the board of education receives federal financial assistance; and (4) the Student was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

In Pennsylvania, 22 Pa. Code § 15 (Chapter 15) governs the implementation of Section 504 in schools. Chapter 15 prohibits discrimination against children who are “protected handicapped students.” Chapter 15 defines a “protected handicapped student” as a student who: (1) is of an age at which public education is offered in that school district; and (2) has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program; and (3) is not IDEA eligible. See 22 Pa. Code §15.2. Section 504 and Chapter 15 prohibit schools from denying protected handicapped students’ participation in, or the benefit of, regular education. See 34 C.F.R. Part 104.4(a).

Unlike IDEA, which requires schools to provide an IEP including SDI to qualifying students with disabilities, Section 504 requires schools to provide a 504 Service Agreement describing the *accommodations* needed by the students with disabilities so that they can access and benefit from *regular education*.

Chapter 15 defines a service agreement as a “written agreement executed by a student’s parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected

handicapped student.” 22 Pa. Code § 15.2. Service agreements become operative when parents and schools agree to the written document; oral agreements are prohibited. 22 Pa. Code § 15.7(a).

Section 504 Service Agreements or “504 Plans” are how school districts “shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student’s abilities.” 22 Pa. Code § 15.3.

Students are evaluated to determine what related aids, services, or accommodations that a student needs. Chapter 15 includes for conducting such evaluations. 22 Pa. Code §§ 15.5, 15.6.

The Parent alleges that the 504 Plan offered by the District was neither timely nor appropriate. Despite the fact that on February 27, 2020 the Parent emailed the District high school principal requesting an evaluation and noting that the Parent was considering returning the Student to the District high school for the 2020-2021 school year (N.T. 59-62; 67-68, 256-258; P-6; S-3), the District did not have a Section 504 Plan in place with enough time for the Parent to decide where to send the Student for the 2020-2021 school year. Furthermore, the District had not even completed the ER necessary to develop the Section 504 Plan. So on August 14, 2020, a few weeks before the new school year was about to begin, having not received either a PTE or invite to a 504-Plan meeting, the Parent provided the District with written notice of intent to continue the Student’s placement at the out-of-District school. (N.T., at 67- 68; P-9). On September 3, 2020, the District offered the Parent a 504 Plan. The evaluation had not started at that point. Following the ER, the 504 Plan was revised on December 8, 2020. The Parent rejected the 504 Plan claiming that it is substantively

inappropriate, merely offering the Student accommodations that are available to all regular education students in the District (e.g., preferential seating, reminders to stay on task and act appropriately, and the opportunity to seek out support from a counselor or a social worker, as needed).

The District counters that the 504 Plan is appropriate and that there is no evidence on the record proving that it is not. The District argues that it should not be ordered to pay tuition for a regular education program. Pointing out that the out-of-District high school where the Student is enrolled is not legally required to follow an IEP or a Section 504 Plan, the District contends that this case is an “unusual” tuition reimbursement case because tuition reimbursement is typically ordered when the parent is seeking *more* supports than the public school can offer, not *less*. In this situation, the Parent is seeking tuition reimbursement to send her child to a school that offers less supports than the public school is prepared to offer. Therefore, the District concludes that the 504 Plan it offered is appropriate and the Complaint should be denied in its entirety.

The Parent states that because the first draft of the Section 504 Plan was offered by the District on September 2, 2020, after the first full day of school at the District high school (August 31, 2020), she did not have sufficient time to decide where to send her child to school for the 2020-2021 school year. The first day of school at the out-of-District high school was September 9, 2020.

While the hearing officer understands the Parent’s position that this was insufficient time for her to weigh the pros and cons of keeping her child in the private high school or returning her child to the District where the Student had not attended for several years, the hearing officer concludes that the District met its obligation to provide the Student with a timely Section 504 Plan to the best of its ability in light of the mandatory COVID-

related school closures and its resulting inability to conduct the face-to-face assessments required to provide a comprehensive ER. The evidence demonstrates that the District put forth its best efforts to do what it is required to do by law without putting the Student, teachers, or staff at risk of exposure to COVID-19 based on the knowledge it had at the time.

The hearing officer also finds that, based on the preponderance of the evidence, the Section 504 Plan offered by District is substantively appropriate. The Evaluation included a variety of assessment tools for gathering relevant data about the child's functional, developmental, and academic strengths and weaknesses; was sufficiently comprehensive to assess the Student; and provided sufficient and relevant information that directly assisted the 504 Team in determining the accommodations necessary for the Student to access and benefit from regular education. Furthermore, the 504 Team met as required to present, explain and discuss the 504 Plan to the Parent.

The only clear difference between the District high school, with 3,800 students, and the private high school, with 830 students, appears to be their size. The class sizes appear to be relatively similar. The Parent's opinion was presented stating that her child needs the smaller size to flourish, but there was no evidence to correlate the size of the school to anxiety levels or school phobia.

The District and the Parent both strongly believe that their positions should prevail, however, without a preponderance of the evidence demonstrating that the 504 Plan offered by the District is inappropriate, the hearing officer must rule in favor of the District.

Having found no violations of the IDEA or Section 504, there is no need to consider the demand for tuition reimbursement.

CONCLUSION

The District did not fail to comply with its obligations to Student under the IDEA or Section 504, and no remedy is due or ordered.

ORDER

AND NOW, this 5th day of April, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parent's claims are DENIED in their entirety. It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is relinquished.

Cheryl Cutrona

Cheryl Cutrona, J.D.
Hearing Officer

Date of Decision
April 5, 2021
ODR 24781-20-21