

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 Gifted Education & Chapter 15

Due Process Hearing Officer

Final Decision and Order

Open Hearing

ODR No. 27766-22-23

Child's Name

L.M.

Date of Birth

[redacted]

Parents

[redacted]

Pro Se

[redacted]

Pro Se

Local Educational Agency

Steel Valley School District
220 East Oliver Road
Munhall, PA 15120

Counsel for LEA

Andrew Evankovich, Esquire
1500 Ardmore Boulevard – Suite 506
Pittsburgh, PA 15221

Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

06/14/2023

Introduction

This hearing process concerns two aspects of educational programming for L.M. ("student"), a student who resides in the Steel Valley School District ("District"). One, the parents filed a complaint which is grounded largely in the handling of issues related to gifted education.¹ Two, the complaint also contains issues related to the District's response to alleged bullying of the student; given a prior autism diagnosis, the issue was broadly construed to be a potential claim against the District for discrimination related to the student's disability under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").²

¹ 22 PA Code §§16.1-16.65 ("Chapter 16").

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 ("Chapter 15").

Parents' complaint is wide-ranging, containing dozens of numbered paragraphs encompassing a wide chronology of events/communications and series of claims (a complaint which parents indicated was being utilized for a variety of claims in front of multiple tribunals). Initially, it appeared that the complaint might contain claims under the Individual with Disabilities in Education Improvement Act of 2004 ("IDEIA", additionally discussed in the record under the term "Chapter 14", reflecting 22 PA Code §14.101, *et. seq.*, Pennsylvania's special education regulations).

A lengthy conference call with the parties clarified that the student at one time had an individualized education program ("IEP") under IDEIA but had been exited from special education, by the agreement of the parties, from special education services. The conference call— held to make the details of hearing planning concrete—focused almost exclusively on Chapter 16 issues. The parties' preparations for evidence also centered almost exclusively on Chapter 16. As the hearing unfolded, early on the hearing officer clarified that, given the complaint, the hearing planning, and evidence as it was being developed by the parties, he considered any claim under IDEIA not to be at issue in the hearing and that a subsequent complaint, which would clearly spell out claims under IDEIA/Chapter 14 related to the identification of, evaluation of, placement of and/or provision of a free appropriate special education ("FAPE") to the student (see 22 PA Code §14.162(a)) would need to be filed to take up such claims. (Notes of Testimony ["NT"] at 260-276, 441-443, 553-565).

Taken as a whole, the complaint and the record in this matter were not geared to substantive fact-finding or determinations as to potential claims under IDEIA/Chapter 14 or the FAPE provisions of Section 504. There is fact-finding related

The parents seek a number of remedies, primarily an order for a private placement outside of the District and/or compensatory education remedy for alleged denial of an appropriate gifted education, as well as a finding that the District discriminated against the student on the basis of disability.³

The District counters that it met its obligations to the student for gifted education under Chapter 16 and did not discriminate against the student on the basis of disability.

Issues

1. Did the District provide the student with appropriate gifted education services?
2. Did the District discriminate against the student on the basis of the student's disability?

Witness Credibility

to processes under IDEIA/Chapter 14, but this fact-finding is geared merely toward context and providing a foundation for the parents' Section 504 discrimination claim. Accordingly, substantive fact-finding, determinations, and claims under IDEIA/Chapter 14 are not addressed in this decision. The student's father disagreed with this view and the nature of the dispute in terms of IDEIA/Chapter 14. (NT at 788-791).

³ Many of the remedies requested by the parents lie outside the authority of a gifted education hearing officer, or a Chapter 15 hearing officer.

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. The heaviest weight was accorded to the gifted education teacher, the current District special education director, and the former special education director at the District. A medium degree of weight was accorded to the school psychologist, the student's classroom teachers [redacted], the elementary school building principal, and the school counselor at the student's elementary school.

The testimony of the student's father was heartfelt and clearly showed his concern for his child's education and was accorded a medium degree of weight, in line with the latter grouping of witnesses.

Findings of Fact

All evidence in the record, both exhibits and testimony, was considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

Prior Educational History

1. By history, the student was diagnosed with autism spectrum disorder in November 2017. (School District Exhibit ["S"]-2 at page 4).
2. In May 2018, [redacted], the student underwent a psychological evaluation by a community-based mental health group. Parents were

attempting to qualify for services based on aggressive and self-injurious behaviors. At times, the student exhibited sensitivity to crowds or noise. (S-1).

3. The student exhibited consistent expressive language delays and, by report, was receiving hospital-based speech and language ("S&L") services. (S-1).
4. In the May 2018 report, the evaluator diagnosed the student with autism spectrum disorder and recommended community-based supports. (S-1).
5. As of August 2019, the student was receiving early intervention services through a neighboring school district. (S-2, S-3).
6. In August 2019, the student was re-evaluated in early intervention programming. The student did not show any needs in the cognitive domain and was academically strong. (S-2 at page 9).
7. In the communication domain, in expressive language the student demonstrated intelligibility 88% of the time and the need for support in various sound productions. S&L programming was recommended for articulation needs. (S-2 at page 10).
8. In the social/emotional domain, the student socialized well with peers and adults and did not exhibit any needs in these areas. Neither educators nor parents noted any of the aggression, socialization, or

sensory needs noted in the May 2018 psychological evaluation. (S-1, S-2 generally and at page 12).

9. The August 2019 re-evaluation report indicated no needs in the physical or adaptive development domains. (S-2 at pages 12-13).
10. The August 2019 re-evaluation report recommended supports in S&L for articulation but found no need for academic, social/emotional/behavioral, or other supports. (S-2 at page 17).
11. In August 2019, the student's early intervention IEP contained one goal in S&L articulation. (S-3).

2020-2021[School Year]

12. In March 2020, the parties undertook planning for the student's transition [redacted] at the District, with the District seeking permission to re-evaluate the student to continue special education services at the District. Parents provided permission in August 2020. (S-4; NT at 14-96).
13. In August 2020, as the [school] year began, the student's parents requested an evaluation for gifted education. The elementary school principal indicated he would consult with the director of special

education regarding the student's adjustment to the District. (Parents Exhibit ["P"]-1 at pages 1-3).⁴

14. In the fall of 2020, the student began [the school year] in the District.
15. In October 2020, the District issued its re-evaluation report. (S-6; NT at 14-96).
16. The October 2020 re-evaluation report contained cognitive and academic assessment, as well as the results of a S&L assessment. (S-5, S-6).
17. Cognitive assessment in the October 2020 re-evaluation indicated a standard score of 92 in verbal intelligence, 107 in nonverbal intelligence, and 100 in composite intelligence. (S-6 at pages 4-5).
18. Achievement assessment in the October 2020 re-evaluation indicated a standard score of 110 in early reading skills, 125 in spelling, and 116 in math problem-solving. (S-6 at pages 5-6).
19. The S&L assessment recommended that the student continue to receive S&L services for articulation. (S-5, S-6 at page 6).
20. In October 2020, the student's IEP team developed an IEP. The October 2020 IEP contained one S&L goal in articulation with S&L

⁴ Although not made a matter of testimony, as a result of the COVID-19 pandemic, apparently instruction in the District was fully remote until November 2020, whereupon the District moved to a hybrid schedule involving some remote instruction and some in-person instruction. (P-1 at page 6).

services to support the student 30 minutes per week in a small group setting. (S-8 generally and at pages 13-18).

21. Over October 2020 – February 2021, the parents may or may not have communicated with the District regarding their request for a gifted evaluation. (P-1 at pages 55, 58, 59, 61).⁵
22. In the 2020-2021 school year, [redacted], the student achieved at the proficient or advanced level in English/language arts and mathematics. (S-22 at pages 1-2).
23. The director of special education at the District during the 2020-2021 school year retired after the school year. (NT at 678-743).

2021-2022[School Year]

24. In the 2021-2022 school year, the student entered [redacted] at the District.
25. A new director of special education came into the position for the 2021-2022 school year. The parents did not communicate with this person during the 2021-2022 school year. (NT at 678-743).

⁵ The emails at P-1, pages 55, 58, 59, and 61, are contested in terms of their authenticity and provenance. Upon review of those pages, involving emails with the elementary school principal ostensibly regarding parents' request for a gifted evaluation in November 2020, January 2021, February 2021, the elementary principal testified that he had no recollection of receiving these emails and, on this record, there is no response by him or anyone else at the District to the emails. Having seen these emails in the preparation of the exhibits, the principal testified that a forensic investigation was undertaken by the District, performed by an outside agency, to document the receipt and provenance of the emails. He testified that no such emails were found to have existed on District email servers. (NT at 497-507).

26. In October 2021, the student's IEP met to revise the student's IEP. (P-1 at pages 63, 68; S-11).
27. Input from the student's [redacted] teacher in the October 2021 IEP indicated "(the student) is exactly where (the student) needs to be for this point in the year academically". (S-11 at page 7).
28. The October 2021 IEP contained one S&L goal in articulation with S&L services to support the student 30 minutes per week in a small group setting. (S-11 generally and at pages 13-18).
29. In October 2021, as a result of the parents' requests for potential giftedness, the school counselor at the student's school administered an intelligence assessment as a screening instrument. The assessment indicated a standard score of 117 in verbal intelligence, 104 in nonverbal intelligence, and 113 in composite intelligence. (P-10; S-21 at page 3; NT at 192-260).
30. The screening for giftedness also included a rating completed by the student's teacher across 48 learning/classroom metrics. (S-21 at pages 5-6).⁶
31. The student's [redacted] teacher rated the student as displaying certain behaviors/skills most of the time or all of the time in seventeen of the metrics. (S-21 at pages 5-6).

⁶ The scoring in one of the metrics is illegible because of a three-hole punch from preparation of the exhibit obscuring the rating (metric #30). Therefore, 47 scores are available for review. See S-21 at page 6.

32. The student's [redacted] teacher rated the student as displaying certain behaviors/skills inconsistently in nine of the metrics. (S-21 at pages 5-6).
33. The student's [redacted] teacher rated the student as not displaying behaviors/skills, or developing the behaviors/skills, in nineteen of the metrics. (S-21 at pages 5-6).
34. Parent input in the screening for giftedness was provided by both students. (S-21 at pages 7-10).
35. Both parents opined that they thought the student qualified for gifted education. (S-21 at pages 8, 10).
36. The screening for giftedness also included a rating completed by each parent across 20 learning/personal metrics. The student's father rated the student as exhibiting the behaviors/skills as considerably or almost always in nineteen of the metrics (the metric for "superior writing ability" was rated as occasionally), for a total of 95 out of 100. The student's mother rated the student as exhibiting the behaviors/skills as considerably or almost always in sixteen of the metrics (the metric for "engages in self-initiated activity", "creates or produces elaborate detail", and independently "reads a great deal" were rated as occasionally; "superior writing ability" was rated as developing), for a total of 82 out of 100. (S-21 at pages 7-10).

37. Based on the screening for giftedness, the District did not recommend the student for a comprehensive gifted evaluation.] (S-21 at page 2; NT at 192-260).⁷
38. In February 2022, the parents may or may not have communicated with the District regarding a request for a gifted evaluation. (P-1 at page 85).⁸
39. The student's [redacted] grade teacher testified credibly that during the student's [redacted] grade year, she did not feel that the student exhibited attributes for giftedness. (NT at 287-356).
40. In May 2022, the student was re-evaluated with a view toward an exit from special education services for S&L. (S-12).
41. The May 2022 re-evaluation report noted that the results of the screening process for giftedness from October 2021. (S-12 at page 2).
42. The May 2022 re-evaluation report noted the student's prior diagnosis of autism. (S-12 at page 2).
43. The May 2022 re-evaluation recommended that the student be exited from special education services. (S-12).

⁷ The parents took concrete umbrage at the fact that the letter setting forth the decision not to engage in a comprehensive gifted evaluation was a template letter which was not personalized for the student (i.e., the standard template fields were not filled in). (S-21 at page 2; NT at 752-834).

⁸ See note 5. The elementary school principal testified similarly to the email at P-1, page 85. (NT at 519-520).

44. In May 2022, the District recommended, and the parents approved, an exit from special education. (P-1 at pages 97, 110; S-13).⁹

45. In the 2021-2022 school year, [redacted], the student achieved at the proficient or advanced level in English/language arts, spelling/phonics, mathematics, and science. (S-22 at pages 3-4).

2022-2023 [School Year]

46. In the 2022-2023 school year, the student entered [redacted] at the District.

47. In August 2022, a new director of special education—the third director in three years— had come into the role. (NT at 574-659).

48. In October 2022, parents reiterated a request for a comprehensive gifted evaluation. The elementary school counselor told parents that the student could not be screened for gifted education because the student had been screened in October 2021. This was erroneous, and the director of special education communicated with

⁹ The notice of recommended educational placement (“NOREP”) was signed by both parents on May 4, 2022. The student’s father confirmed his signature on the NOREP but could not confirm the signature of the student’s mother. (NT at NT at 830-834). [The student’s mother was not present at the hearing session where the hearing officer questioned the student’s father regarding the signatures. See NT at 666-670.] A comparison of the mother’s signature on other documents in the record— see S-4 at page 3, S-6 at page 13, S-8 at pages 22-24, S-12 at page 8, S-17 at page 5, S-18 at page 5— clearly supports a finding that she also signed the May 2022 NOREP.

parents about initiating a comprehensive gifted evaluation. (P-1 at pages 113-123, 126-127, 132-135, 137; NT at 192-260, 574-659).

49. The District requested permission to evaluate the student, permission which the parents granted approximately three weeks later, in early November 2022. (S-14).
50. In January 2023, the District issued a gifted written report ("GWR"), accompanied by a notice of procedural safeguards. (S-16, S-17; NT at 14-96).
51. The January 2023 GWR contained parent input and rating scales (the same scales utilized during the October 2021 screening). (S-14, S-17).
52. The father's rating scales were 96 out of 100; the mother's rating scales were 95 out of 100. (S-14).
53. The January 2023 GWR contained an updated cognitive assessment, with a standard score of 118 in verbal comprehension, 126 in fluid reasoning, and 129 in full-scale IQ. (S-17 at page 2).
54. The January 2023 GWR contained an updated academic achievement assessment, with a standard score of 123 in word reading, 126 in reading comprehension, 107 in numerical operations, and 118 in math problem-solving. (S-17 at page 3).
55. The January 2023 GWR contained the results of a gifted scale completed by the [redacted] grade teacher, indicating that the student

“comprehends what (the student) sees, hears, or reads at all times, and applies information learned in one situation to new situation most of the time.” The teacher also rated the student across 48 learning/classroom metrics. The teacher rated the student as consistently demonstrating at all times behaviors/skills in 34 of the 48 metrics; the teacher rated the student as demonstrating the remaining fourteen behaviors/skills most of the time. (S-17 at page 3).

56. The January 2023 GWR indicated that the student qualified for gifted education. (S-17).
57. In January 2023, the student’s mother approved a notice of recommended assignment for a gifted IEP (“GIEP”). The student’s father was not initially included in the GIEP meeting but participated by telephone. (P-1 at pages 141, 144-145, 149-150; P-6, P-7; NT at 98-188).
58. The January 2023 GIEP contained one goal for the enhancement of reading comprehension, grammar, and writing skills. (P-7 at page 4).
59. The January 2023 GIEP included short-term objectives related to these areas of reading and language arts, written for 90% mastery of skills at the 2nd grade level for the remainder of [redacted] grade (January – June 2023). Additional short-term objectives related to these areas were written for 90% mastery of skills at the 3rd grade

level for the upcoming school year (August 2023 – January 2024). (P-7 at page 5).

60. The student began to attend a weekly gifted education class, transported to the District middle school and grouped with fellow [redacted], students. (P-7 at page 6, P-9; NT at 98-188).¹⁰
61. Parents were interested in gifted programming for mathematics in addition to English/language arts. The gifted teacher testified credibly that, with relatively lower achievement in mathematics as opposed to English/language arts, she wished to gauge the student's work in mathematics before including a mathematics goal in the GIEP. (NT at 752-834).
62. In February 2023, the gifted teacher found the student's achievement in mathematics supported the inclusion of a mathematics goal in the GIEP. (P-1 at page 153; S-19 at pages 9-10; NT at 98-188).
63. The February 2023 GIEP revisions contained one goal for the development and enhancement of logic, computational, and problem-solving skills. (S-19 at page 9).

¹⁰ Parents claim that intra-District transportation of the student, along with others, from the student's elementary school to the middle school was unsafe. This decision takes no position on the assertion as evidence in that regard was not deeply developed and, to the extent that it is an issue between the parties, the assertion lies within the jurisdiction of some other body. (P-1 at pages 154-156, 167; NT at 452-552, 574-659).

64. The February 2023 GIEP revisions included short-term objectives related to these areas of mathematics, written for 90% mastery of skills at the 2nd grade level for the remainder of [redacted] grade (January – June 2023). Additional short-term objectives related to these areas were written for 90% mastery of skills at the 3rd grade level for the upcoming school year (August 2023 – January 2024). (S-19 at page 9).
65. In February 2023 and continuing into March 2023, the student's parents communicated regarding frustration with the District in a number of areas related specifically to the student's gifted programming and generally to District policies/procedures. The District, through senior administration, responded to those communications. (P-1 at pages 157, 159, 163, 166, 168-172, 184-185; P-11; NT at 574-659).
66. Curriculum-based assessment in the student's [redacted] grade year showed that the student was exceeding academic benchmarks in English/language arts and mathematics (more so for the former than the latter), in some cases markedly so. (S-20).
67. In the 2022-2023 school year [redacted], the student achieved at the proficient or advanced level in English/language arts, spelling/phonics, mathematics, and science. In the first three quarters of [redacted] grade in English/language arts, the student received

overall grades of 97%, 97%, and 97%. In the first three quarters of [redacted] grade in spelling/phonics, the student received overall grades of 99%, 99%, and 99%. In the first three quarters of [redacted] grade in mathematics, the student received overall grades of 98%, 98%, and 98%. (S-22 at page 6).

68. In mid-March 2023, parents filed the complaint which led to these proceedings.

Bullying

69. Prior to February 2023, no educator had any concerns for the student's socialization or peer interaction and did not observe or have any indication of bullying. (NT at 98-188, 192-260, 287-356, 452-552).
70. The student attends an after-school care program physically located at the student's elementary school but supervised and administered by a community-based agency. (NT at 359-441, 452-552).
71. In February 2023, classmates of the students were engaging in problematic behavior during lunch, including arguing, stealing food, profanity, and competitive bravado. The student's teacher sent a group message to parents in the class indicating that this type of behavior would not be tolerated and addressed the class as a group.

The building principal, along with the [redacted] teacher, was involved in addressing the situation. (P-1 at page 160; NT at 359-441).

72. The student appeared to respond emotionally to the issue as it was addressed with the class. The [redacted] teacher engaged with the student, asking if the student was experiencing any of these behaviors personally. The student indicated that to the extent that there were issues involving classmates, it was taking place in the after-school program and not during school hours. The testimony of the [redacted] teacher is credited as to these interactions and her testimony in that regard. (NT at 359-441).

73. Where discipline was necessary for in-school matters, the elementary school principal responded. Where events occurred during the after-school program, the elementary principal advised the leadership of the after-school program. (NT at 359-441, 452-552).

74. In March 2023, outside of school and school hours, classmates of the student placed prank phone calls to the student's father. Guardians of the students were advised of the inappropriate conduct. (P-1 at 186, 189-190; NT at 359-441, 452-552, 752-834).

75. Nearly contemporaneously with the filing of the complaint and the undertaking of the hearing process, the family shared journal entries with the District that indicated that the student might have a negative self-view and be contemplating self-harm. The District

engaged its student assistance program to offer the student and family supports for the student's mental/emotional health and well-being. As of the conclusion of the hearing, the family had not engaged with the District's student assistance program. (NT at 192-260, 452-552, 574-659, 752-834).

Discussion

Gifted Education

The provision of gifted education to students with disabilities is governed by Pennsylvania law. (22 PA Code §§16.1-16.65). There are two aspects to parents' claims regarding gifted programming. The first claim relates to the identification/evaluation process for gifted education prior to January 2023. The second claim relates to the appropriateness of gifted programming in place as of January 2023. Each will be considered in turn.

Identification/Evaluation for Giftedness. To assure that a child receives an appropriate gifted education, Pennsylvania school districts must have procedures and programs in place to identify and evaluate students for potential giftedness. (22 PA Code §§16.2, 16. 21). Where a parent requests an evaluation for giftedness, a school district must seek permission to evaluate the student utilizing a gifted multi-disciplinary team process to perform a comprehensive evaluation of the student. (22 PA Code §16.22,

generally and at §16.22(c)). Parents are entitled to one gifted evaluation annually. (22 PA Code §§16.22(c)).

This record clearly supports a finding that the District did not respond to the parents' request for a gifted evaluation in the [redacted] year (2020-2021). Notwithstanding this procedural flaw, it did not lead to a denial of a gifted education because the re-evaluation process under IDEIA/Chapter 14, undertaken in October 2020, included updated cognitive and achievement testing, and neither of those instruments give any indication that the student had a cognitive/achievement profile supporting giftedness. (Findings of Fact 17, 18). Nor was there any indication that the student was a year or more above grade level, had levels of acquisition/retention that reflect gifted ability, demonstrated outsized achievement/performance/expertise, or demonstrated early and measured use of skills in thinking, creativity, leadership, or other academic areas. (22 PA Code §§16.21(d)). This was bolstered by the assessments and data contained in the early intervention programming. (Finding of Fact 6 and early intervention documentation generally). None of this is to say that the student was not, as [redacted], seemingly bright and academically progressing. But the totality of the record supports a finding that the District's procedural flaw in not evaluating the student for giftedness—and it was a flaw—was the basis of a denial of an appropriate gifted education.

In the [redacted] grade year (2021-2022), the student was screened for giftedness. Here, the District responded affirmatively and directly to parents' requests for a gifted evaluation by performing its standard screening utilizing cognitive assessment, parent input, and teacher input. The cognitive assessment, like the cognitive assessment from the year prior, did not support a finding that concrete cognitive testing supported qualification for giftedness. Here, too, the testimony of the [redacted] grade teacher was credited that the student—again, clearly bright and adjusting well to post-[redacted] instruction— did not exhibit the markers of giftedness one might expect. (Findings of Fact 27, 29-36, 39). And, furthermore, the gifted screening was wide-ranging, providing enough data and input to make a reasoned, supportable decision about giftedness. Was it a gifted "evaluation"? Perhaps not. But does it provide a defensible basis and indicia for the District's position that the student did not qualify for gifted education? The considered judgment of this hearing officer is that it did.

By [redacted] grade, the parents' request of October 2022, with permission granted in November 2022, yielded a qualification for gifted education in January 2023. Whether or not the gifted programming that resulted is appropriate is addressed below. But taken in its entirety, the record supports a conclusion that neither the procedural flaws related to the lack of a gifted evaluation in [redacted] nor the results of the gifted screening in [redacted] grade support parents' claim for remedy. The

student was timely identified for gifted education in the midst of [redacted] grade. Therefore, the District met its Chapter 16 obligations to the student regarding identification and evaluation of the student for gifted education.

Gifted Programming. The January 2023 GIEP, as revised in February 2023, is not appropriate. The requisite elements of the GIEP are mostly present (22 PA Code §§16.32(d)). A fatal omission, however, is the lack of “objective criteria, (or) assessment procedures” as to whether there is progress on the two goals and short-term learning outcomes. (Findings of Fact 58, 59, 63, 64). Certainly, the instruction provided by the gifted education teacher and resulting design artifact is outstanding, and the student did well in that aspect of gifted programming. (NT at 98-188). But the GIEP calls for enrichment within the academic instruction of the classroom, and the record does not support that acceleration through, or modification of, that instruction is taking place. Furthermore, both goals call for the student to achieve—in grade-level curriculum—at the 90% level when the student’s report cards clearly show that the student consistently achieved at the 97% level in English/language arts and 99% in mathematics. (Findings of Fact 59, 64, 67). In short, the goals in the GIEP are not robust enough.

Accordingly, as set forth below, compensatory education will be awarded.

Section 504/Discrimination

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

Here, the District did not act with deliberate indifference toward the student. First, the fact-finding and conclusions herein are made out of an abundance of caution that Section 504 discrimination claims are weighed and adjudicated. On this record, it is an open question whether the student's affect and interactions with peers are impacted by the autism diagnosis, such that disability-based discrimination may not even be at issue. In effect, the issue is mooted because of the findings further in this paragraph, but this is a necessary upfront observation. Second, there is the factual background that any problematic peer interactions were centered on the after-school program and not during school hours or programming; it seems

that some of those interactions may have informed interactions during school hours and when that happened, the District responded appropriately. But by and large, any problematic issues between the student and peers are the result of independent, community-based, after-school programming and not District programming. Third and most importantly, at all times over the period February – March 2023 when events that might be construed as bullying occurred, the District was not only not indifferent but diligently and appropriately responsive.

Accordingly, there is no finding that the District discriminated against the student on the basis of disability.

Compensatory Education

Compensatory education is an available remedy where a school district has denied a student an appropriate gifted education. Centennial School District v. Pennsylvania Department of Education, 539 A.2d 785 (1988).

Here, the student was denied an appropriate gifted education as set forth above. Having found that, the student is making excellent progress through the District's curriculum, and the gifted class itself was an enormous success for the student. Therefore, it is the considered opinion of this hearing officer that the student will be awarded one hour per week for each school week that the GIEP was in place (approximately twenty weeks for the English/language arts goal and approximately sixteen weeks for the

mathematics goal). Thus, a total of thirty-six hours of compensatory education will be awarded.

The provision of compensatory education must be provided within the District's programming, curriculum or other already-scheduled academic/extra-curricular offerings, although its use is under the control of the parent. The compensatory education may be used for services during already-scheduled after-school District programs and/or during District summer programs. (Centennial School District, *infra.*)

•

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Steel Valley School District denied the student an appropriate gifted education. The student is awarded 36 hours of compensatory education. Within 20 calendar days of the date of this order, the GIEP team is ordered meet to discuss revisions to the goals and short-term objectives in the student's GIEP.

The Steel Valley School District did not discriminate against the student on the basis of disability.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Gifted Hearing Officer
Chapter 15 Hearing Officer

06/14/2023