This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.

Pennsylvania Special Education Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number:

21838-18-19

Child's Name:

C.C.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Charles W. Jelley Esq.

Date of Decision:

01/31/2020

BACKGROUND AND PROCEDURAL HISTORY

The Student is a rising ninth grader who, at the time of filing this complaint, resided with the Parents in the Owen J. Roberts School District (District).[1] In 2019, the Parents then acting *pro se*, now represented by counsel, filed the instant due process complaint contending the District's 2017 Individuals with Disabilities Education Act (IDEA) evaluation failed to evaluate the Student in all areas of suspected disability.[2] The Parents, next contend the District discriminated and/or retaliated against the Student and the mother in violation of Section 504 of the Rehabilitation Act (Section 504 or RA). Next, they contend the District failed to provide a free appropriate public education (FAPE) within the meaning of Section 504. Finally, [redacted]. To remedy the alleged violations, the Parents now seek compensatory education, a finding of discrimination, a finding of retaliation, attorney's fees and legal damages. Initially, the District offered to fund the IDEA IEE; however, once the Parents filed the instant complaint and before the Parents accepted the IEE offer, the District withdrew its offer to fund the IEE. Thereafter, the

[1] The Parents 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 §§ 14.101-14.163 (Chapter 14). [Redacted]. 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*. In 2019, while the hearing was ongoing the Parents moved out of the District. Despite the change in residence the action continued to a final judgement.

[2] After a sufficiency challenge was granted the Parents filed an Amended Complaint; once counsel joined the team the IDEA complaint was amended for a second time. The District requested, and the Parents filed a more definitive statement related to the [redacted]dispute.

District filed a due process complaint defending its IDEA evaluation.[3] This hearing officer, after taking evidence on the appropriateness of the District's IDEA evaluation, entered a final Order in favor of the District and against the Parents. The IEE Decision is found at ODR FILE #21295-1920 KE.[4] After untangling the Parents' and the Student's intertwined claims and the District's affirmative defenses and after conducting a fine-grained analysis of the relevant evidence, for all the reasons set forth below, I now agree with the District's assertions; therefore, the Parents' and the Student's individual claims are denied an appropriate Order in favor of the District follows.[5]

ISSUES

1. Whether the District unlawfully removed the Student's 504 plan? If so, did the District deny the Student a FAPE? Assuming a denial, what if any relief should the Student receive?

[3] Upon written motion of the Parties the Decision Due Date in both actions was extended for a good cause. References to the record throughout this decision will be to the Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Due to scheduling conflicts at times witnesses were taken out of order. The Parents submitted over 250 exhibits, the District on the other hand submitted 34 exhibits, one of which included some 982 pages.

[4] In distilling the record and due to the manner in which the Parents and the District described the events at issue, across multiple sessions; I will now depart from my usual manner of citation to the record. In this instance, at times, I will now use N.T. *passim* followed by the wittiness's affiliation, *i.e*. N.T. *passim,* Parent or N.T. *passim* District psychologist, for all record citations when the finding of fact appears taken as a whole throughout the witness's testimony. Other times, I will make targeted findings of fact with specific citations to specific exhibits and/or the transcript pages.

[5] The Findings of Fact and Conclusion of Law at ODR FILE #21295-1819 KE relevant here are incorporated by reference as though fully set forth at length herein.

2. Whether in both removing the Student's 504 plan and/or withdrawing the offer to fund an IEE, the District intentionally retaliated or discriminated against either the Student and/or the Parents? If so, what if any relief should the Student and/or the Parents receive?
3. [Redacted.]
4. Did the District discriminate against the Student in not providing one-on-one adult assistance and/or a one-on-one private duty nursing services in all classes and on all field trips? If so, what if any relief should the Student receive?
5. Did the District discriminate against the Student in not providing otherwise necessary homebound instruction? If so, what if any relief should the Student receive?
6. Did the District discriminate against in not providing necessary summer programing? If so, what if any relief should the Student receive?
7. Did the District fail to follow and/or otherwise discriminate against the Student, in providing or not providing the Student with an individual health plan (IHP) or an emergency care plan (ECP)? If so, what if any relief should the Student receive? (N.T. pp-12-32, Parents' Written Opening Statement, [redacted] and Parent's Written Closing Statement).

FINDINGS OF FACT

THE 7TH GRADE YEAR

1. This Decision incorporates by reference all Findings of Fact and Conclusions of Law, at ODR FILE #21895-18-19 KE, wherein this hearing officer concluded the District's IDEA evaluation of this Student was otherwise appropriate.
2. At the end of 6th grade, after earning passing grades, in all subjects, the Student was promoted to 7th grade (S-7).

3. On or about August 24, 2017, the District held a meeting to review, modify, and update the Student's Section 504 Agreement. Although the meeting was amicable, the Parents did not approve the proposed Section 504 agreement. On September 25, 2017, the District notified the Parents that it would continue to implement the March 13, 2017, Section 504 Agreement. The March 13, 2017, Section 504 Agreement included 18 accommodations ranging from use of an agenda book, verbal reminders, reducing visual distractions, prompt student to use dictation applications, provide opportunity to type assignments to a small group of statewide assessments, allow the Student to stand when completing work assignments, 504 case manager will schedule a transition meeting at the beginning of each school year, occupational therapy (OT) supports, provide think time, breaks during class, and extended time to complete assignments (P-12).
4. On or about September 7, 2017, the District and the Parents met to develop the Student's Individual Education Program (IEP) (P-71). The IDEA IEP notes the District provided the Parent with a copy of their procedural safeguards. The IEP includes measurable present levels that describe the Student's math skills, speech and language skills, sensory profile, the Parents' concerns for enhancing the Student's education, the Student's strengths, academic, developmental, and functional needs related to the Student's IDEA disability of autism (P-71).
5. The IEP includes measurable annual goals related to organizational skills, speech/language, literacy in science and technical subjects, and social skills. The literacy goals included short term objectives. Each goal notes that an additional baseline will be collected within 30-days of attendance (P-71).
6. The IEP included 43 SDIs, targeting sensory needs, speech and language needs, academic, writing accommodations, organizational

skills, classroom performance, OT supports, assessment accommodations, instructional accommodations and transition supports like IEP team meetings within two weeks of the start of the new school year to discuss the Student's IHP with all staff (P-71). The IEP includes related services like speech therapy and nursing services, along with supports for school personnel (P-71). Finally, the IEP notes the team at a future date would determine if the Student was otherwise eligible for extended school services (P-71).

7. On or about September 13, 2017, the District issued a Notice of Recommended Educational Placement/Prior Written Notice (NOREP/PWN) offering autistic support, nursing services, participation in regular education classes, including speech and language support (P-74).
8. On or about September 25, 2017, the special education supervisor notified the mother that if she did not approve the NOREP or the Section 504 Agreement, the District would deem the Student a regular education pupil and discontinue all Section 504 and not implement the IEP. Thereafter, the Mother asked and the District agreed to extend the time to review and or approve either the IEP or the Section 504 Agreement (P-79, P-82, and P-83).
9. On or about October 3, 2017, and again on October 11, 2017, the supervisor of special education notified the Parents, in writing, that the Parents' rejection of the IDEA IEP and refusal to consent to a new Section 504 Agreement would result in a discontinuation of the Student's Section 504 Agreement (S-23). The letter included a copy of the Parents' procedural safeguards (S-23).
10. On or about October 12, 2017, the parties met to discuss the Student's needs, during the meeting the mother shared concerns about the Student's academics, requested daily communications and

requested frequent breaks during class (S-23). The District agreed to each request (N.T. *passim).*

11. Sometime after October 18, 2017, the Parent provided the District with a letter indicating that the Student was admitted to Children Hospital of Philadelphia (CHOPs) from October 12, 2017, through October 18, 2017. The medical update stated that the Student was later transferred to an outside facility for care and treatment. The letter requested another extension of time to review the documents and the District acquiesced (P-84).
12. On October 18, 2017, the staff at CHOP provided the District with a letter describing medically necessary services to address the Student's Qualitative Platelet Function Disorder. The CHOP's letter invited the school nurse to call CHOPs in the event the Student suffered a significant head trauma (P-85). The letter did not discuss the hospitalization (P-85).
13. On or about October 24, 2017, the parties met to develop a revised IHP. The IHP included detailed protocols on how to medically manage the Student's Qualitative Platelet Disorder, Asthma, directions on how to use the epi-pen, a schedule when to administer medications, a direction to monitor and encourage fluid intake, a direction to take frequent bathroom breaks along with a list of emergency contact phone numbers (P-88). The IHP did not address the recent hospitalization (N.T. *passim*).
14. On October 24, 2017, the mother conferred with the staff at CHOP about the Student's health care needs, homework strategies, the Student's contact with a private treating psychiatrist, the Student recent inpatient hospitalization, the Section 504 agreement, the District's offer of an IEP, and the Student's emerging behavioral health care needs (P-89).

15. On October 25, 2017, the Mother again provided the District with a letter stating that the Student was hospitalized at an acute can behavioral health care facility for seven days. The letter instructed the District staff to direct all requests for the Student inpatient records and/or discharge plans to the Parents (P-90). The letter did not state the basis for the hospitalization, treatment received, or discharge instruction (-90).
16. On October 26, 2017, the staff at CHOP sent a letter directing the school nurse to follow a series of concussion protocols (P-91). The two-sentence letter did not explain the basis for the directions or identify a new Section 504 disability (P-91).
17. On or about October 27, 2017, the mother disapproved the NOREP rejecting all SDI's, and the related services of speech/language support and school nursing (P-74). Rather than approve the proposed Section 504 Agreement, the Parent's asked the District to reinstate and update the Student's March 2017 Section 504 Agreement (P-75, P-79, P-92).
18. From October 31, 2017, through November 5, 2017, the mother and the Student's math teacher regularly emailed about the Student's then-current classroom performance and homework assignments (P-93).
19. Sometime in November 2017, the Parents file a complaint with the Office of Civil Rights alleged discrimination, retaliation and a denial of a FAPE (N.T. *passim* mother, S-34).
20. On or about November 1, 2017, the school team met to devise a plan to support the Student during swim class (S-23).
21. On November 2, 2017, the Parties met and conferred about updating the IHP (P-94, P-95, P-96, and P-117).
22. On November 3, 2017, the District sent the mother an invitation to participate in a November 9, 2017, IEP meeting (P-98).

23. On November 6, 2017, the Mother emailed the special education supervisor, indicating that she now agreed with the District's offer to provide speech support. At the same time, she disagreed with the offer of pull out autistic support and instead requested push-in support (P-103).
24. On November 6, 2017, the staff at CHOP provided the District with updated medical protocols to address the Student's bee sting allergy treatment needs (P-99).
25. Throughout the month of November 2017, and continuing to the present the school nurse and the mother regularly communicated about the IHP (P-100, P-102, P-104, P-105, P-107, P-108, P-109, P-110, P-113, P-116, P-119, P-121, P-122, P-123, P-124, P-125, S-33, S-34, S-37).
26. On November 9, 2017, in anticipation of an IEP meeting, the special education supervisor asked the mother to complete a parent IEP input form (P-101).
27. On November 9, 2017, the mother returned the Parent input from describing her reservations with the proposed speech and language supports, the OT supports, testing accommodations, organizational goals, SDIs, and the Student's participation in regular education (P-103).
28. From November 21, 2017, through November 27, 2017, the mother regularly communicated with the staff about the Student's medical, educational and health needs in the regular education classroom (P- 12, P-114).
29. On November 28, 2017, the mother and the special education supervisor exchanged a series of emails about the Parents' IEP input and how to request a facilitated IEP conference (P-115).
30. On December 6, 2017, the Staff at CHOP forwarded a letter to the District stating the Student had a history of multiple concussions. The

letter suggested a series of academic accommodations like pre-printed teacher notes, enlarged materials, extended time to take tests, a one hour limit on all homework assignments, suggested that the Student be allowed to leave class early, suggested close supervisor during unstructured activities, along with frequent water breaks (P-120). The letter did not identify a basis for the history of multiple concussions as a disability (N.T. *passim* Parent and District record as a whole).

31. On or about December 7, 2017, the guidance counselor sent an email to the teachers about the December 6, 2017, concussion protocols (S-23).
32. On or about March 12, 2017, the guidance counselor emailed the mother requesting a date certain for a face-to-face meeting. On March 14, 2017, the mother replied, stating she was unable and asked the guidance counselor for other dates (S-23).
33. Sometime in February 2018, the District filed its response to the OCR complaint (S-34).
34. On March 12, 2018, the staff at CHOP updated the protocols to address the Student's gastro-intestinal school health needs. The March 2018 letter listed 22 medical conditions; the March 2018, CHOP's letter did not list traumatic brain or recurring concussions as a medical condition (P-129).
35. In March 2018, the mother and the math teacher restarted communications about the Student's participation in math class (P-130).
36. [Redacted] (S-25 p.40).
37. On March 26, 2018, the staff at CHOP forwarded a letter to the District stating that the Student's medical conditions made it difficult for the Student to adapt to or transition to new situations or environments. The letter further stated the Student would benefit from advanced notice of schedule changes like fire drills or changes in the classroom routine. The

CHOP's letter did not state which of the Student's medical condition or disability made it difficult for the Student to make transitions (P-133).

38. On March 26, 2018, the staff at CHOP sent another letter repeating the request to implement the Student's CHOP's concussion protocols. This time the letter called for the District to provide occupational therapy and physical therapy (PT). The letter did not link the OT or PT recommendations to any specific medical condition, disability, or assessment data (P-134).
39. On April 2, 2018, the staff at CHOP forwarded a letter to the District requesting the nurse provide the Student with regular support to address the Student's [hygienic] needs (P-135).
40. On or about April 4, 2018, the mother and the District staff met to discuss the Student's school-based IHP nursing services (P-137). The Parties did not reach an agreement on the IHP updates; however, the nurse agreed to support the Student's [hygienic] needs (P-137).
41. On April 11, 2018, the staff at CHOP resent a previous letter describing the Student's Qualitative Platelet Dysfunction Disorder (P-140).
42. On April 12, 2018, the mother initiated communications with the math teacher about the Student's participation in regular education honors math (P-142).
43. On April 13, 2018, the mother emailed the building principal requesting an IDEA evaluation to determine if the Student was a person with an IDEA disability of an "other health impairment" (OHI). On the same day, the building principal forwarded the request to the psychologist and the special education supervisor requesting the staff issue a permission to evaluate (PTE) (P-143).
44. On April 20, 2018, the special education supervisor, after receiving a forwarded email from the nurse, emailed the mother directing her to make all requests for academic accommodations to the supervisor's

attention (P-144). The email included a copy of the 2017 IEP and NOREP (P-144, P-145).

45. On April 23, 2018, the mother provided the nurse with written input regarding the contents of the IHP and the concussion protocols. Contrary to the previous March 2, 2018, CHOP letter listing of 22 medical conditions, the mother's input now listed "traumatic brain injury" as a then-current medical condition (P-138, P-139).
46. On April 24, 2018, the parties discussed revisions to the Student's IHP (P-147).
47. On May 2, 2018, the Parties reviewed the IHP (P-150, P-151).
48. On or about May 5, 2018, the District reinstated the Student's written Section 504 Agreement (S-23).
49. On May 10, 2018, the staff at CHOPs set a letter to the District about the Student's vestibular/oculomotor dysfunction disorder and autism spectrum disorder. The May 10, 2018, letter was the first time staff at CHOP listed vestibular/oculomotor dysfunction as a medical diagnosis. The CHOP's letter also reported that the Student needed and the mother agreed to have the Student receive an updated neuropsychological assessment over the summer (P-161, S-8).
50. On May 10, 2018, the mother emailed the nurse and the math teacher about the Student's math class (P-165, P-166).
51. On May 16, 2018, the District and the Office of Civil Rights (OCR) entered into a resolution agreement, wherein the District agreed to reinstate the Student's last agreed-upon 504 plan and implement the Student's May 2, 2018 IHP. The OCR Agreement called for the District and the Parents to meet and consider whether the Student has a disability based on any physical or mental impairments resulting from the multiple concussions. The OCR Agreement requires the Parties to ensure that the group of knowledgeable persons, following the Section

504 evaluation and placements regulations found at 34 C.F.R. §§104.35 104, meet and confer about the Student's Section 504 eligibility and needs. The OCR Agreement also called for the District to reissue the Section 504 procedural safeguards found at 34 C.F.R. § 104.34 (P-167). Finally, the District agreed to provide the Parents with copes of all occupational therapy reports from the 2016-2017 and the 2017-2018 school years (P-167).

52. On May 16, 2018, the nurse informed the mother that a substitute nurse would accompany and support the Student during an upcoming field trip (P-168).
53. On May 16, 2018, the math teacher emailed the mother about accommodations used during the class and the upcoming Keystone prep class and exam (P-169).
54. On May 16, 2018, the nurse emailed the mother, stating that she was not the point of contact for Section 504 requests for accommodations or IDEA IEP goals and SDIs (P-173).
55. On May 18, 2018, the mother emailed the District requesting a meeting to review the Section 504 plan (P-170).
56. On May 23, 2018, the supervisor of special education emailed the mother about scheduling a Section 504 meeting (P-171).
57. On May 29, 2018, the mother emailed the special education supervisor requesting testing accommodations (P-172).
58. On or about May 31, 2018, the mother emailed the school and requested a Section 504 meeting on June 1, 2018 (S-23).
59. On or about June 7, 2018, the parties participated in a joint conference call about the Parent's then-pending OCR complainant (S-23).
60. On or about June 11, 2018, as the Student's 8th-grade math class would take place at the high school, the mother, the junior high nurse, the senior high nurse, the director of pupil services, a person from the

BrainSteps concussion program and the Student's outside case manager met to introduce the high school nurse to the Parents (S-23).

61. On July 6, 2018, the mother and the District exchanged emails about the possibility that the Student could attend summer school (P-176, P-177, and P-178).
62. On or about July 25, 2018, the guidance counselor emailed the mother to schedule a review of the Student's Section 504 agreement with all of the 8th-grade teachers (S-23).
63. At the end of the 2017-2018 school year, the Student earned "Distinguished Honors" status achieving grades of 92% or higher. The Student's report card grades ranged from a low of 96% to a high of 100% (S-22).

THE 2018-2019 SCHOOL YEAR

64. On August 15, 2018, the staff at CHOPs, resent an earlier letter describing a protocol about how to address the Student's gastroenterology/intestinal needs during the school day (P-184).
65. On or about August 20, 2018, the guidance counselor sent the Student's then-current March 2017 Service Agreement to the 8th-grade teachers and the OT (S-23).
66. On or about August 22, 2018, the Parents and the building team reviewed the Service Agreement. At the meeting, the Parents shared updated medical information and the then-current medication list and dosing schedule (S-23).
67. On September 4, 2018, the District provided the Parents with an updated draft IHP. The updated IHP targeted the Student's platelet disorder, asthma, bee sting/allergy-related needs, gastroenterology needs, signs of hypoglycemia, frequent communication, administration of daily and emergency medications during the school day (P-185).

68. On or about September 6, 2018, the parties met to develop a revised Section 504 Agreement. The proposed Section 504 Agreement, included 17 accommodations, like study guides, extended time to take tests, frequent breaks during writing, enlarged materials, extended time to complete missing assignments. The Section 504 agreement notes the District agreed to provide the Student with a Chromebook and an extra set of musical instruments (P-190). Although the parties did not reach a consensus on the content of the Section 504 Agreement, the parties did agree to meet on September 17, 2018, to finalize the Section 504 Agreement (S-23).
69. On September 13, 2018, the District provided the Parents with a copy of a draft Section 504 Agreement, a copy of the September 2017 IEP, including the September 2017 NOREP and procedural safeguards (P-191, N.T. *passim* mother, N.T. *passim* District).
70. To help with completing assignments, on or about September 17, 2018, the District agreed to provide the Student a Chromebook laptop. The team, including the Parents, decided that the Chromebook would allow the Student to enlarge the font size and organize assignments. The District also provided the mother with the OT contact information. The team also decided that Chromebook should come equipped with dictation software (S-23).
71. On September 18, 2018, the staff at CHOPs resent a letter describing the Student in school [hygiene] health care protocols (P-192).
72. On or about September 21, 2018, the guidance counselor emailed the mother with instructions and links on how to access the teacher's website and how to access the Google classroom (S-23).
73. Throughout the month of September 2018, the mother and the nurse exchanged multiple emails about how the nurse was implementing and monitoring the Student's IHP and the [hygiene] IHP protocol (P-193).

74. On September 21, 2018, the District provided the Parents with a draft of an Emergency Care Plan (ECP). The ECP repeated many of the protocols in the IHP. The ECP also included the emergency contact phone numbers for the medical staff at CHOPS (P-194).
75. On or about September 24, 2018, the guidance counselor and the Student met to review how to use the Chromebook and the dictation option. Thereafter, the mother emailed the counselor asking her not to overwhelm the Student with new information. The guidance counselor then emailed the teachers about encouraging the Student to use the Chromebook (S-23).
76. On October 2, 2018, the District denied the Parent's request to provide the Student with a one-on-one aide or one-on-one personal nursing services as part of the Student's IHP. The denial letter also included copies of the September 2017 NOREP, the September 2017 IEP offer of a FAPE, a Permission to Reevaluate, a release of records and a copy of the IDEA procedural safeguards (P-195). The letter also stated that based upon observations and beliefs the services suggested by the staff at CHOP were not needed to provide a FAPE (N.T. *passim, mother, P-195, N.T. passim* special education supervisor*)*.
77. On October 11, 2018, the staff at CHOPs resent a previous letter about the suggested concussion protocols. The letter mirrored previous CHOP requests to provide close supervision during unstructured activities, transitions and field trip activities (P-198). This time the CHOP letter did not call for one-on-one nursing or a one-on-one aid (N.T. *passim, mother,* P-198).
78. On October 11, 2018, the staff at CHOP provided updated autism spectrum disorder testing data. The CHOP's report states the examiner administered and scored one assessment. The Adaptive Behavior Assessment Scales, Third Edition Parent Form, was completed by the

mother. The report notes two Very Low scores and eight Extremely Low scores and one Average Score. Based upon this single measure, the examiner stated the Student should receive daily instruction on living skills, social skills and occupational awareness and exploration. Based on the mother's sole input, the examiner then recommended 40 hours a week of community-based in-home applied behavioral analysis (ABA) training (P-199). While the letter notes that the ABA program demonstrated success for persons with autism under the age of five, the examiner encouraged the Parents to initiate the ABA in-home supports (N.T. *passim* mother, P-199).

79. On or about October 18, 2018, the guidance counselor resent the teachers the CHOP concussion protocols (S-23).
80. During the month of October 2018, the mother emailed the District staff on multiple occasions requesting information about the implementation of various academic concussion supports, the Student's health-related needs and /or accommodations (P-200, P-201).
81. On November 16, 2018, the staff at CHOP forwarded an updated letter to the District, suggesting updates to the Student's IHP asthma care plan (P-202). The nurse accepted and implemented the updates (N.T. *passim* nurse).
82. On November 18, 2018, the mother emailed the District's psychologist, the nurse and the supervisor of special education about the implementation of the IHP and modifications to the Student's daily and emergency medication administration chart (P-203).
83. On December 12, 2018, the CHOP's staff forwarded a letter suggesting updates to the Student's asthma IHP protocol (P-205). The nurse implemented the updates (N.T. *passim* nurse).
84. On December 21, 2018, the mother emailed the District expressing concerns about the Student's IHP and Section 504 Agreement. For the

first time, the mother's email reported the Student was receiving private out-patient PT services (P-206).

85. On January 23, 2019, the District staff called the mother to report the Student was injured during gym class (P-208, P-209. P-210). As called for in the IHP, the Student went to the nurse and then returned to class (N.T. *passim* nurse).

86. Frustrated with the news of another accident, on January 29, 2018, the mother emailed the school complaining about the Student's four head injuries over two school years (P-211, P-212).

87. On February 1, 2019, the staff at CHOP forwarded a letter to the District requesting the District continue all academic adjustments pending further evaluations by the neuropsychology department at CHOP (P-214). The record is unclear if the neuropsychology follow-up ever occurred (N.T. *passim mother*).

88. On February 7, 2018, the mother requested and the District agreed to allow the mother to observe the Student during physical education class (P-213, P-214).

89. On February 8, 2019, the staff at CHOP forwarded a letter to the District, reiterating the importance of creating a transition from junior to senior high plan prior to the Student entering the high school. The letter goes on to request the District provide the Student with an "IEP" with behavioral supports (P-216). At the time of the February 8, 2018, letter the Parents did not approve the District's 2017 offer of FAPE and IEP (N.T. *passim mother).*

90. On February 14, 2019, the mother emailed the District requesting an independent educational evaluation (P-217).

91. On February 19, 2019, the staff at CHOP forwarded a letter to the District, stating the Student no longer exhibited signs of a concussion. The CHOP's examiner then states as follows "Please follow prior letter

regarding school recommendations for head injury prevention and accommodations." (P-219). The record is unclear what specific "prevention and accommodations" should continue (N.T. *passim*).

92. On February 22, 2019, the staff at CHOP repeated their concerns that the Student may need some form of "learning support" to make up missed classroom and homework assignments (P-221). At the time of the letter, the Student was not receiving "learning support." (N.T. *passim* mother, N.T. passim District).
93. On February 22, 2019, the District agreed to the Parent's request for an IEE (P-222).
94. On February 23, 2019, the mother filed the instant due process complaint (S-1)**.** Thereafter, prior to the Mother accepting the District's IEE offer, on February 25, 2019, after learning of the due process complaint, the District withdrew the offer to fund the IEE, (P-223, N.T. *passim* mother, N.T. *passim* special education supervisor). The District made the IEE offer hoping to avoid litigation, confronted with the instant complaint the District withdrew the offer prior to the Parents' acceptance and filed its own due process complaint defending its 2017 IDEA evaluation (N.T. pp.171-175).
95. On March 1, 2019, the staff at CHOP again reiterated their request that the District provide the Student with an opportunity to visit the high school prior to the school year. The CHOP staff suggested that the supports be described in the Student's "IEP" (P-226). The record is clear; the Student never had an IEP (N.T. *passim* mother, N.T. *passim* District).
96. [Redacted] (P-229, S-25, and N.T. pp.400-408).
97. On or about March 12, 2019, the mother emailed the District requesting a Section 504 meeting to discuss the Student's transition to the high school. That same day the special education supervisor replied

and suggested that in order to effectively coordinate the delivery of supports, the meeting should take place later in the Spring (P-230).

98. On or about March 12, 2019, the mother emailed the school requesting immediate in-home after school and summer academic tutoring in math (P-231). Later on the same day, the special education supervisor responded and directed the mother to the Student's guidance counselor for information about private math tutoring support. As for summer academic tutoring in math, the special education supervisor directed the mother to review the District's online listing of summer school classes (P-237). The Student never enrolled in any of the available summer school classes (N.T. *passim* mother).

99. On or about March 20, 2019, the guidance counselor emailed the teachers about the CHOP's request that the teacher not penalize *a.k.a* "no count" the Student for missing homework or classwork (S-23). The teachers then adjusted homework and testing requirements (N.T. *passim* mother, N.T. *passim* District).

100. On March 26, 2019, the staff at CHOP forwarded a doctor's statement indicating that the Student was experiencing a gastrointestinal flair and should be excused from attending school for one week (P-238).

101. On April 2, 2019, the mother emailed the District stating that the Student was very sick and made a request for immediate in-home tutoring (P-239, P-240, and P-241).

102. On April 3, 2019, and again on April 17, 2019, the parties met to review the Student's IHP and discuss the Student's transition to the high school. Although the parties met on multiple occasions, they were not able to reach an agreement about the content of the IHP or how the Student would transition to the high school (P-242).

103. On April 8, 2019, the staff at CHOP forwarded a letter to the District requesting "intermittent homebound instruction"; the letter invited the

District staff to call the doctor to discuss any questions or concerns (P-244). The letter did not identify the basis for the request or an underlying medical condition (P-244).

104. On April 8, 2019, the staff at CHOP, sent another letter stating that the Student was now diagnosed with gastroesophageal reflux disease (GERD) and esophageal dysmotility with complications caused by a vascular malformation of the stomach. The letter goes on to say that it "would be extremely helpful for [redacted] to have a one to one skilled nurse with [redacted] at school to help with meals and snacks." (P-245).

105. On April 9, 2019, the mother, on her own, forwarded the CHOP request for medical homebound instruction and the request for a one-to-one skilled nurse to the District (P-248, P-250). Since the Student was not in school, the District delayed responding to the in-school one-on-one request (N.T. pp. *passim* mother, N.T. *passim* District).

106. On or about April 12, 2019, the District approved up to five hours a week of homebound instruction (S-23). The guidance counselor emailed the teachers and the Parents and asked all staff to coordinate dates, assignments and times for instruction (S-23).

107. On or about April 16, 2019, the guidance counselor emailed the Parents with proposed dates for a tour of the high school (S-23).

108. On April 17, 2019, the Honors Algebra 2 math teacher emailed the mother to schedule a date and time to begin the homebound medical instruction (P-254).

109. On or about April 23, 2019, the nurse emailed the mother notifying her of three different high school tour dates. The email further states that the high school nurse would provide any needed IHP supports during the tour (P-256).

110. On April 26, 2019, the Parents filed an Amended Due Process Complaint (S-2).
111. On April 30, 2019, the physician who requested the homebound instruction and the one-to-one nurse sent another letter to a District compiling a list of the Student's then-current medical conditions; while the list notes 18 medical conditions, contrary to the Parent's testimony, the list does not include GERD, traumatic brain injury, severe concussions, or post-concussion syndrome, as a "Patient Active Problem" (P-257).
112. On April 30, 2019, the District sent a confirming letter to the mother noting the April 29, 2019, School Board approval of homebound services. The letter notes that on that same date, the School Board approved homebound instruction for four other students (P-238).
113. On or about May 3, 2019, in the presence of the District homebound teacher, the Student had a behavioral incident at home. Prior to the homebound lesson, while the teacher was in the house, the Student began to pour liquids like milk, witch hazel, and dish liquid on the floor, after which the teacher reported the Student began to smear the liquids on the floor. When the mother asked the Student to stop, the Student threw a remote at the teacher. After being hit with the remote, the teacher left the Student's home and refused to return. Thereafter, on or about May 7, 2019, the District offered to provide homebound instruction at a different location (P-261-P-262).
114. On or about May 14, 2019, a different teacher emailed the mother about scheduling time, after school, to provide homebound instruction. The mother responded that she preferred to have instruction occur during the evening hours on Monday or Friday. The guidance counselor emailed the mother that the teacher would be available on Friday

evening; however, the instruction should take place at an agreed-upon location (P-267).

115. On May 21, 2019, while the Student was on homebound, the staff at CHOPs forwarded a letter stating that the Student was medically approved for a one-on-one nurse during school hours. The letter went on to outline how the one-on-one nurse would monitor the Student's eating and snacking during the school day (P-269).

116. On May 24, 2019, the mother emailed the District stating the Student had a medical appointment, and therefore, would not be able to attend the previously scheduled high school orientation session (P-271). As the school year was coming to a close, the session would take place prior to the start of the new school year (P-271).

117. Sometime prior to the end of May 2019, the Student returned to school with a private one-on-one nurse (N.T. *passim, mother, N.T. passim* special education supervisor*).*

118. After arriving at the school with the nurse, a disagreement occurred about whether the nurse had proper state-mandated Department of Human Services Child Abuse History Clearance, Pennsylvania State Police Request for Criminal Records clearance and the Federal Criminal History Record Information (CHRI) clearance. When the nursing agency could not provide any documentation of proper clearances, the District asked the nurse to remain in the office while another district funded nurse would support the Student (P-273, P-275).

119. On May 28, 2019, the special education supervisor emailed the mother with the news that the District would provide a district funded one-on-one nurse during the school day (P-273 p.5, P-278).

120. On May 30, 2019, the mother emailed the school nurse expressing grave concern about how the District would provide the Student nursing services on a preplanned field trip. The email noted that the night

before the trip, the Student had two nose bleeds lasting up to 10 minutes total. The message went on to say the nose bleeds were not severe. Later that same day, while on the field trip, the nurse emailed the mother stating that after eating lunch, the Student [redacted] (P-274).

121. After receiving the nurse's email, the mother contacted CHOP, someone at CHOP, as the record is unclear, directed the mother to instruct the nurse to administer the Student's Tranexamic Acid. [Redacted] (P-274). The CHOP's records provided do not corroborate the mother's statements (N.T. *passim* mother, N.T. *passim* District).
122. Later on May 30, 2019, the mother emailed the nurse complaining that the nurse did not follow the IHP; the nurse disagreed and noted that [redacted].
123. [Redacted].

THE START OF NINTH GRADE

124. On June 27, 2019, after going on the record, the Parties asked and the hearing officer granted a 60-Day Order, after which the file was closed and the session was canceled, subject to the approval of a final settlement agreement. (N.T. pp 1-6). Thereafter, the Parents' counsel informed the hearing officer that the Parties were not able to reduce the settlement to a writing and requested the action be reinstated.
125. At the next due process session, this hearing officer learned that after attending five days of school, with a private duty nurse selected by the Parents, the Student stopped attending on or about September 9, 2019. On or about September 9, 2019, the private duty day time nursing services abruptly ended in the school and the home (N.T. pp.517-534). When the District offered to provide a one-on-one nurse, the Parents' refused to send the Student to school absent assurances that the District funded one-on-one school nurse was adequately

trained to implement the IHP (N.T. pp.497-520). The Student never returned to school. *id.*

126. On or about September 9, 2019, the mother directed the nursing agency to stop providing services during daylight hours. Nursing services continued in the evening hours (N.T.pp.497-520).
127. The supervisor of the private duty nursing agency that supported the Student in the home and at school, regularly communicated with the mother, the staff at CHOPS, and for a short time, with the District staff. While in the home, the private duty one-on-one nurse, like the District nurse, administered medications and monitored the Student's overall health. The nursing agency records, like the District's records, indicate the Student was able to perform all basic activities of daily living like dressing, following directions and taking medication. (N.T. pp.514-517)**.**
128. The nursing records further note that the Student was also receiving some form of in-home behavioral therapy (N.T. pp.531-534). The staff at the in-home nursing agency did not know of who supervised the Student at home during the school day (N.T. pp.497-530).
129. On or about September 13, 2019, the District began to reach out to the Parents to discuss the Student's absences. Although letters were sent to the home and calls were made the District was unable to clearly learn the basis for the absences (S-37)
130. On or about October 9, 2019, the District received a letter from a behavioral support specialist describing emotional concerns; the letter went on to request homebound instruction. On or about the same time, the District also received a letter from CHOP doctor requesting homebound. The CHOP request including a notation that the staff at CHOP were not authorized to discuss the basis for the request and directed all future communication to the Parents (N.T. pp. 839-844).

After reviewing the then existing data, the District formed an opinion that the absences were not related to a medical condition or a disability. After holding an internal team meeting, the District denied the homebound request. Thereafter, the District informed the Parents of the denial and stated that the Student was truant (N.T. pp.842-846)

131. As early as September 17, 2019, consistent with school policy, the District began to issues truancy notices and contacted the Parents to develop a truancy elimination plan. The Parents refused to participate in any meetings or discussions about the Student's attendance (S-37, N.T. pp.828-840).

THE STUDENT ENROLLS IN ANOTHER DISTRICT

132. On or about November 1, 2019, prior to the last hearing session, the Student and the Parents moved out of the District. As per school policy, the nurse transferred the Student's school health file to the new district. Thereafter, the nurse learned the Student attended school with a one-on-one nurse N.T. pp.815-828).

WITNESSES' BACKGROUND, TRAINING AND EXPERIENCE

133. The mother has 20 years' experience as a guidance counselor in public education (N.T. pp.61-63).

134. The Student's school nurse holds a certified school nursing degree and is completing course work to obtain a master's degree in education. Prior to coming to the District, the nurse served in the military with the rank of a captain, worked at combat support hospital and then at Walter Reed hospital in Washington D.C. While at Walter Reed, the nurse worked on a medical-surgical floor (N.T. 745-782).

135. The nurse regularly met with and communicated with the mother to update the IHP. The nurse also trained the teachers on all aspects of the IHP (S-35, N.T. pp.745-782, P-100, P-102, P-104, P-105, P-107, P-

108, P-109, P-110, P-113, P-116, P-119, P-121, P-122, P-123, P-124, P-125, S-25, and S-34).

136. The nurse implemented all of the agreed-upon protocols/requirements in the Student's IHP, including but not limited to, administering, daily medications, administering emergency medications, monitoring the Student's [hygienic] needs (S-34, N.T. pp.745-782).
137. The Student's 7th-grade language arts teacher, at the middle school, has a Bachelor of Arts in English and a master's degree in special education. The language arts teacher has 15 years of teaching experience (N.T. pp.680-692).
138. At all times relevant, including the time the District formally discontinued the written Section 504 Agreement, the language arts teacher was aware of and followed the IHP. At the same time, the language arts teacher implemented the accommodation in the then-current and/or discontinued Section 504 Agreement (N.T. *passim language arts teacher*).
139. [Redacted] (N.T.pp.588-611, [redacted] teacher).
140. [Redacted]. (N.T. *passim* [redacted] teacher).
141. The Student's Algebra-2 teacher is the chairman of the math department and has 10 years of experience teaching math. The Algebra -2 teacher provided the Student with one-on-one tutoring during the summer months, implemented the enlarged materials, reduced the length of homework assignments, was aware of and followed the IHP, and implemented the then-current Section 504 Agreement (N.T. pp.240-280, algebra teacher).

APPLICABLE LEGAL STANDARDS

CREDIBILITY AND PERSUASIVENSS OF THE WITNESSES' TESTIMONY

The burden of proof in an IDEA, Section 504, and in [redacted] 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 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. 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. See, *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992). This hearing officer applied the preponderance of evidence standard when reviewing all claims of a denial of [redacted] FAPE, denial of a Section 504 FAPE, discrimination, associational discrimination and retaliation. 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. *Id*. During a due process hearing, the hearing officer is also charged with the responsibility of judging the credibility of witnesses, weighing evidence, assessing the persuasiveness of the witnesses' testimony and, accordingly, 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.[6] Thus, all of the above findings are based on a careful and

[6] *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

thoughtful review of the transcripts, the non-testimonial and extrinsic evidence, along with a careful reading of all of the exhibits. While some of the material 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 all of the witnesses' testimony represents their complete recollection and understanding of the events. This hearing officer also found all of the witnesses who testified to be credible. Each witness testified to the best of his or her recollection from his or her perspective about the actions taken or not taken by the team in evaluating, instructing and designing the Student's program. That said, I will, however, as explained below when and if necessary, give more or less persuasive weight to the testimony of certain witnesses when the witness either failed to or in the alternative provided a clear, cogent and convincing explanation of how he/she provided and/or participated and/or implemented the [redacted], the Section 504 Agreement, the CHOP's letters and the IHP. I found the testimony of the school nurse, both math teachers, the physical education teacher, and the [redacted] teacher particularly persuasive. Each witness had detailed knowledge of the Student's disability, health concerns, the essential elements of the IHP, [redacted], and/or the Section 504 plan. Second, as for the Parents' reliance on the multiple CHOP's letters, absent corroborating testimony explaining the documents, I will now give the CHOP's recommendations about academic accommodations little to medium persuasive weight as they relate to the denial of a FAPE, discrimination or retaliation claims.[7] At the same time, I will, however, give the CHOP's

order to make the required findings of fact); 22 Pa Code §14.162 (requiring findings of fact).

[7] It is a well settled practice that a finding fact based upon generally uncorroborated unobjected statements, cannot satisfy moving parties contentions, burden of production or

documents persuasive weight as to the nurse's role in overseeing and providing the IHP medical services like administering medications.[8] Accordingly, I now find when the record is viewed as a whole, I can now conclude that I can derive facts and inferences of fact from the testimony needed to make an impartial decision.

SECTION 504 FAPE REQUIREMENTS

A recipient of federal funds that operates a public elementary or secondary education program "shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 34 C.F.R. § 104.37(a)(1).[9] Section 504 requires that districts "provide a free appropriate public education to each qualified handicapped person who is 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

persuasion. *See .A.Y. v. Dep't of Pub. Welfare*, 537 Pa. 116, 641 A.2d 1148 (Pa. 1994), J.S. v. Manheim Twp. Sch. Dist., No. CM 8-04246, 2019 Pa. Dist. & Cnty. Dec. LEXIS 2346 (C.P. Feb. 25, 2019).

[8] See, *Marshall Joint School District No. 2 v. CD by Brian and Traci D.,* 616 F.3d 632, 54 IDELR 307 (7th Cir. 2010)(decisions about SDIs, goals, related services, aids, accommodations, or supplemental aids are best left to a team of knowledge persons); *District of Columbia Public Schools,* 111 L.R.P. 76506 (SEA D.C. 2011).

[9] Pennsylvania decided to implement the statutory and regulatory requirements of § 504 at the state level through the enactment of Chapter 15. *K.K. ex rel. L.K. v. Pittsburgh Pub. Sch.*, 590 F. App'x 148, 153 n.3 (3d Cir. 2014) (quoting 22 Pa. Code § 15.1).Because Chapter 15 does not preempt or expand the rights and liabilities under Section 504 courts treat Chapter 15 as coextensive with Section 504. *A.W. ex rel. H.W. v. Middletown Area Sch. Dist.*, 2015 U.S. Dist. LEXIS 9774, 2015 WL 390864, at *15 (M.D. Pa. Jan. 28, 2015);See, *K.K.*, 590 F. App'x at 153 n.3.

education as the provision of regular or special education and related aids and services that: (1) Are designed to meet individual educational needs of handicapped 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. C*.G. v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 IDELR 41(3d Cir. 2013). Courts within this circuit have rejected the argument that a Plaintiff asserting a FAPE violation of Section 504 must establish more than a denial of a FAPE. See *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). The same, however, does not hold true for claims of discrimination or retaliation.

SECTION 504 DISCRIMINATION

Section 504 proscribes discrimination on the basis of an individual's disability status. 29 U.S.C. § 794(a). *See, Ridley Sch. Dist. v. M.R., 680 F.3d 260, 282-83 (3d Cir. 2012)*. 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 his or her 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. *S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 262 (3d Cir. 2013)*.

To establish deliberate indifference, a parent must meet a two-part standard, which requires: "(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 (quoting *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 276 (2d Cir. 2009). To meet this burden of persuasion in establishing preponderant proofs, the Parents must work through the traditional burden-shifting model. 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).

THE BURDEN SHIFTING MODEL

The manner in which the Parents and the Student establish discrimination or retaliation requires the Parent or Student to establish a prima facie case of discrimination, after which, the district must then offer a legitimate, nondiscriminatory reason for its' challenged action. Thereafter, once the district does so and its burden is merely one of production, not persuasion, the parents must then present affirmative evidence allowing a fact finder to conclude that the district's explanation is a pretext for unlawful discrimination'" *E.F. v. Napoleon Cmty. Sch.*, 2019 U.S. Dist. LEXIS 164075 (E.D. Mich. Sep. 25, 2019). Parents can demonstrate pretext "by either (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 **c**ause of the adverse

action." *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. For example, the parent can meet the pretext burden challenge by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Fuentes*, 32 F.3d at 765. Although the case law is grounded in the employment context, the same model holds true for school-based discrimination and retaliation claims. See, *E.F. v. Napoleon Cmty. Sch.*, 2019 U.S. Dist. LEXIS 164075 (E.D. Mich. Sep. 25, 2019), *Stapleton v. Penns Valley Area Sch. Dist*., 2017 U.S. Dist. LEXIS 204143 (M.D. Pa. Dec. 12, 2017). If a parent can discredit the district's stated justifications, the parent need not produce additional evidence of discrimination. In short, the parent's burden of persuasion in the context of discrimination and retaliation requires proof of a prima facie case, combined with the rejection of the district's proffered justification/explanations, which, at times, can be enough to infer the alleged discrimination. *Sempier v. Johnson & Higgins*, 45 F.3d 724, 730-731 (3d Cir. 1995).

SECTION 504 RETALIATION

"No recipient or other person shall intimidate threaten, coerce, or discriminate against any individual for the purposes of interfering with any right or privilege secured by [Section 504], or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing." 34 C.F.R. § 100.7(e). In *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007), the court held that the elements of a retaliation claim under Section 504 "are the same" as claims under 42 U.S.C. § 1983 predicated on the First Amendment." Thus, to make out a viable Section 504 retaliation claim the Parents and the Student

must show that (1) each engaged in protected activity, (2) the district's alleged retaliatory action was sufficient to deter a person of ordinary firmness from exercising her rights, [an adverse action], and (3) that there was a causal connection between the protected activity and the retaliatory act. *Id.* A trier of fact cannot simply "draw an inference" that the District engaged in retaliatory conduct. *Id.* at 270. "A defendant [district] may defeat the claim of retaliation by showing that it would have taken the same action even if the plaintiff [parent or student] had not engaged in the protected activity." *Id.* at 267. Retaliation claims like discrimination claims follow the same three-step burden-shifting analysis described above. 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) (in the absence of direct evidence of retaliation, the analysis proceeds under the familiar three-step burden-shifting framework).

SECTION 504 ASSOCIATIONAL DISCRIMINATION CLAIMS

A parent may assert an associational discrimination claim against a school if the school discriminates against the parent/guardian because of his or her association with a disabled child. *See, Doe v. Cty. of Center Pa*., 242 F.3d 437 (3d Cir. 2001); *K.K. v. N. Allegheny Sch. Dist.*, No. CV14-218, 2017 U.S. Dist. LEXIS 98949 (W.D. Pa. June 27, 2017). Generally, to invoke associational standing, a parent must show: (1) a logical and significant association with an individual with disabilities; (2) that a public entity knew of that association; (3) that the public entity discriminated against the parent because of that association; and (4) the parent suffered a direct injury as a result of the discrimination. K.K., 2017 U.S. Dist. LEXIS 98949, 2017 WL 2780582, at *12 (citing *Schneider v. Cnty. of Will, State of Ill.*, 190 F. Supp. 2d 1082, 1091-92 (N.D. Ill. Mar. 14, 2002)). "[T]he threshold for associational standing under Section 504 requires preponderant proof that the non-disabled persons have standing to seek relief under either statute

only if they allege that they were personally excluded, personally denied benefits, or personally discriminated against because of their association with a disabled person." *Souders v. Sch. Dist. of Phila.*, No. 18-2167, 2018 U.S. Dist. LEXIS 180041 (E.D. Pa. Oct. 19, 2018) citing *McCullum v. Orlando Reg'l Healthcare Sys.,* 768 F.3d 1143 (11th Cir. 2014). With these general legal principles in mind, I will now review the multiple claims.

DISCUSSION, CONCLUSION OF LAW AND ANALYSIS

The District's Unilateral Decision to Discontinue Section 504 Agreement was a Procedural Violation

Following C*.G. v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 IDELR 41(3d Cir. 2013) and using substantive and procedural analysis grounded in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) as an analytical tool I now find for all of the following reasons the Parents' procedural and/or substantive Section 504 FAPE claims are misplaced. I reach this conclusion after giving due weight to the mother's passionate testimony juxtaposed against the persuasive testimony of all of the teachers. Granted, while I agree with the Parents that the unilateral discontinuation of the Section 504 agreement, was a procedural violation, the record, as developed here is preponderant; that the Parents failed to establish the Student was excluded "from" or "suffered a loss" or a "denial of benefits" from participation as a result of the procedural violation. First, neither the text of Section 504 nor the 504 regulations require a written document. Second, while Chapter 15.7 requires a written document, at the same time, it states that it does not enlarge or expand the Student's rights beyond those set forth in Section 504. Third, the teachers cogently and credibly testified, and the non-testimonial extrinsic evidence supports, a finding that each teacher, even after the District unilaterally discontinued the written Section 504 agreement, continued to implement the existing accommodations. For example, [redacted]. This fact was corroborated by

the mother when she, during the teacher's testimony, produced one of the teachers' enlarged worksheets (N.T. pp.702-707). The record also demonstrates the teachers reduced the length of the homework assignment, the teachers encouraged the Student to use the Chromebook, and the teachers used the CHOP's "no count" - missed assignments strategy. The record is preponderant that when the Student was medically cleared to return to school, the District offered and provided a variety of supports. Limited by the Parents' refusal to release then existing data, the District provided school health services, implemented the [redacted], implemented the Section 504 Agreement and at public expense, hired a dedicated one-on-one nurse.

With and/or without the enlarged accommodated materials and several of the CHOP recommendations, the Student excelled in the regular education curriculum, mastered [redacted] goals, earned high grades in honors math and was promoted to the next grade. These facts lead me to conclude that the Student received an equal opportunity to access the benefits of the District's educational program, despite the lack of a written Section 504 Agreement. Accordingly, while I now find that the District's discontinuation of the Section 504 Agreement was a procedural violation, I also find the violation under these particular facts and circumstances was harmless error.

Substantively, the Parents contend the District failed to provide close supervision, a one-on-one aide, OT, PT and a one-on-one nurse are fatal Section 504 flaws. The evidence is conclusive that when the District reached out either to CHOP or the Parents to collaborative about the suggested services, they were rebuffed. Contrary to the procedural and substantive requirements at 34 C.F.R. §§104.34-104.36 relating to the educational setting, evaluation team meetings, and placement decisions, the Parents blocked all of the District's attempts to communicate with CHOP. First, on multiple occasions, the Parents, after receiving their procedural safeguards,

refused to consent to a reevaluation. Second, on multiple occasions, the Parents refused to sign a release of information allowing the District to obtain then existing necessary medical and behavioral health data. Third, the Parents prevented the District funded, one-on-one nurse, who at the time of the request, was physically on-site in the Student's school, from talking to the CHOP's staff by phone. This sequence of decisions blocked the testing and evaluation protections at 34 C.F.R. §104.35(b). At the same time, the Parents' decisions negated the opportunity under subsection 104.35(c) to hold meaningful placement discussion (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are). Rather than a group of persons knowledgeable about the student, reviewing evaluation data, and discussing accommodations, placement and programming options, the Parents insisted on an all or nothing CHOP directed process. It is black letter law that when parents request services "(b) The parents should include available relevant medical records along with their written request for the provision of services." 22 PA Code Chapter 15.6 Thereafter, (f) "If upon evaluation of the information submitted by the parents, the school district determines that it needs additional information before it can make a specific recommendation concerning the parents' request, the district shall ask the parents to provide additional medical records and grant the district permission to evaluate the student." 22 Pa Code Chapter 15.6. Simply put, the Parent cannot request accommodations in one breath and in the next, prevent the District from performing its statutory obligations to design and provide the accommodations. The CHOP's letters, taken as a whole, called for significant changes to the methods of instruction, the content of the instruction, called for OT, PT, and one-on-one supports for a Student with above-average intelligence taking honors-level classes. Yet, the CHOP's letters never clearly linked the accommodation requests to updated assessment data or to a new

or existing otherwise qualifying disability. Under these facts, the Parents cannot expect to prevail on a claim that the District failed to provide a substantive offer of a FAPE when they withheld consent for all that they now complain about. Accordingly, for all of the following reasons, the Parents' substantive Section 504 FAPE claims are rejected.

The Discrimination and Retaliation Claims are Unavailing

Discrimination and retaliation are distinct causes of action, with separate elements, and both aim to prevent different types of harm. At times, in this instance, the Parent and the Student conflated the distinct elements of each cause of action. See, *Derrick F. v. Red Lion Area Sch. Dist.*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). While there may be cases where the same conduct may constitute both discrimination and retaliation, this is not that case. Here the Student and the Mother have identified distinct factual predicates for two factually and legally different claims on behalf of the two different individuals. Because the factual predicate acts for the Student's and the Mother's discrimination claims, vary when reviewing the Student's claims evidence of alleged acts of discrimination like the refusal to provide summer school, medical homebound instruction, a one-on-one aid, or a private nurse each claim will be reviewed individually. As argued by the Student's retaliation, claims fall under the category of a third-party retaliation. In a third-party retaliation claim, the Student must prove he/or she was subjected to a materially adverse action as a result of another person's conduct; therefore, I will address the Student's retaliation claims at the same time I review the mother's claims.

As for the Mother's arguments concerning her distinct associational discrimination and retaliation claims, this hearing officer will disregard the evidence identified by mother, which relates to the Student's discrimination claims, that at times, she now contends spills over into her discrete retaliation and/or discrimination claims. More specifically, as for the Mother's

retaliation claims, and the Student's retaliation claims evidence related to the District's withdrawal of the Section 504 agreement, and/or the District's revocation of the offer to pay for the IEE after filing the instant action will be reviewed as material to the mother's participation and opposition retaliation claims. Likewise, I will review the evidence that as a result of the mother's actions, the Student suffered a third party retaliatory harm. Curiously, after the District concluded its case in chief, the Parents did not offer any specific pretext based burden-shifting evidence challenging the District's justification for its alleged actions, omissions, or inactions (N.T. p.869). The Parents' and the Student's decision not to offer any pretext evidence attacking the District's justification defense made the task of completing the instant analysis more cumbersome; therefore, this gap in the presentation of the proofs factored into following analysis and decision (N.T. p.869). Accordingly, whether viewing all of the evidence as an integrated whole or applying the burden-shifting analysis, for all of the following reasons, I now find the mother and the Student failed to provide preponderant proof of denial of discrimination, retaliation, or associational discrimination.

THE STUDENT'S DISCRIMINATION CLAIMS

The Student makes four broad-based claims of discrimination. First, the Student claims the District and by implication, the nurse failed to implement the IHP. Second, the Student claims that District discriminated against the Student when they refused to provide a one-on-one aide or a one-on-one nurse. Third, the Student claims the District discriminated against the Student by not providing summer school services. Fourth the Student complains that the District discriminated against the Student in failing to provide homebound instruction. First, I will address the claims as a group and then second, assuming *arguendo* pretext evidence existed, I will address each claim as presented. Accordingly, or all of the following reasons, the Student's claims are rejected.

To prove discrimination, the Student must establish the District's actions were deliberately indifferent. The mother's testimony taken as a whole did meet the initial burden of establishing a prima facie case of alleged discrimination. More specifically, the Parents point to the CHOP's letters contending the District failed to provide all of the CHOP directives, like a one-one-on-one aide or a one-on-one nurse, summer programming, and homebound instruction. Therefore they argue in a bootstrap fashion that the Student was denied a benefit based because of a disability. After hearing proofs of these allegations, the District offered a series of nondiscriminatory justifications and/or reasons for its' challenged actions, inactions and omissions. First, they contend the implemented the IHP. Second, absent consent, an evaluation and a team meeting, including the Parents, the District could not move forward on the request for one-on-one aide and other academic supports or related services. Third, since the mother never enrolled the Student in summer school, they assert the claim is insufficient as a matter of law. Fourth, they contend when presented with a physician's statement documenting a medical condition the District provided homebound instruction they initially provided services. Thereafter they deemed the request insufficient and rejected the request on substantive grounds. Recognizing that the District's burden is merely one of production, not persuasion after the District closed its case in chief, the Parents rested their case. The mother and the Student did not produce any direct or evidence of pretext to negate the District's justifications. Accordingly, applying the black letter law in *Stapleton, Fry, and Fuentes* absent pretext evidence attacking the District's justification, the mother and the Student failed to meet their burden of proof. Accordingly, the mother and the Student's discrimination, and the mother's associational discrimination claims are denied.

Even assuming arguendo, the mother's lengthy testimony includes pretext evidence, and it does not, the District's justification based upon the inability

to perform a statutory duty, created by the Parents, in this instance, is compelling. First, the nurse, at all times relevant, implemented, monitored and recorded the provision of school nursing interventions, tasks and protocols. For example, the nurse maintained a schedule to administer medications, and the nurse communicated the Student's nursing care needs to the teachers. Hundreds of times over the two schools year, the nurse received input from the mother and the staff at CHOP's hematology, CHOP's gastroenterology, CHOP's asthma clinic, the CHOP's Developmental-Behavioral Pediatrics clinic, and the CHOP Care Network in Pottstown about the concussions protocols. The nurse regularly reduced the CHOP's input into a working IHP, describing how the nurse would attend to the Student's disability and non-disability health care needs. When the record is viewed as a whole, the record is preponderant that the Student was provided equal access to the school nursing service and the nurse implemented each IHP. Therefore, the Student's discrimination claim is denied.

As for the denial of homebound services. The request for homebound services was made on April 8, 2019, and approved on April 12, 2019. After a behavioral incident in the home, services were curtailed due to a safety concern and then restarted. The evidence is preponderant; the District provided the homebound service; therefore, the Student's discrimination is denied. As for the 2019 request for homebound, the District determined the request was insufficient. Existing case law holds, and I agree that the decision to grant or deny homebound instruction is a regular education decision outside my jurisdiction. That said, as argued hear I now find the evidence is preponderant that the Parents failed to prove deliberate indifference.[10]

[10] *Mary Price, v. Commonwealth Charter Academy Charter School,* 74 IDELR 286, 119 LRP 31110 (E.D. Pa 2019) (school justified its denial of the request to provide homebound

The one-on-one nurse claim is equally misplaced. After not being allowed to evaluate the Student, the District acquiesced and provided a one-on-one nurse. Regrettably, even when offered the accommodation, the Parents refused to send the Student to school, contending the dedicated nurse was unacceptable. Therefore, after receiving the requested accommodation of a dedicated nurse and then not sending the Student to school, the Student's discrimination claim is rejected.

As for the summer school claim, when asked, the special education supervisor provided the mother with the contact information for the guidance counselor and the website address to review the list of off courses. Thereafter on multiple occasions, the mother either emailed or met with District staff about the regular education summer school option. The evidence is preponderant that even after the face-to-face meeting about the summer school program, the Student never enrolled in the District-wide regular education summer school program; therefore, the evidence is preponderant that the District did not deny the Student access to any services or refused to accommodate the Student. The Parents' reliance on the applicable IDEA based extended school year (ESY) regulations for students with IEP is misplaced. First, the Parent's rejected the District's offer of an IDEA based FAPE. Second, the absent consent the District could not collect the necessary ESY data. Third, unlike the IDEA, Section 504 does not require the District to create an individualized program out of whole cloth; rather, Section 504 prohibits the District from refusing to modify existing policies or procedures on the basis of a disability. Since the Student never enrolled, the evidence is preponderant that the District never denied the Student access to or refused to modify its District-wide summer school

instruction by pointing out that the guardian refused to allow it to contact the psychiatrist for an explanation, hearing officer decision affirmed).

program. Accordingly, applying the burden-shifting analysis and even assuming *arguendo* the Student did present a *prima facie* case, the Parents never attached the District's justification; therefore, the claim is rejected.

THE MOTHER'S ASSOCIATIONAL DISCRIMINATION

The threshold for associational standing under Section 504 requires preponderant proof that the non-disabled persons have standing to seek relief only if they allege that they were personally excluded, personally denied benefits, or personally discriminated against because of their association with a disabled person. When the record is viewed as a whole, the mother has not produced preponderant evidence that she was excluded from, personally denied benefits, or personally discriminated against because of her association with the Student. The record is clear; at all times relevant, the District actively communicated with the mother. The mother was invited to attend, and at times did attend the [redacted] IHP, IDEA IEP and Section 504 meetings. On multiple occasions, the District provided the mother with notice of her procedural safeguards and prior written notice of each proposed action and/or refusal. Here as in the Student's case, the mother did not offer any substantive evidence to challenge the District's justification for its actions. Assuming the termination of the Section 504 Agreement was an act of discrimination, the mother failed to prove a loss of or denial of any personal benefit. In the weeks and months leading up to the termination of the Agreement, the mother asked and the District agreed to extend the deadline to review the IEP and the Section 504 Agreement. When the deadline passed, the special education administrator, contrary to Chapter 15.7 requirement for a written plan, made a procedural error in terminating the Agreement. While not completely on point, I find the direction from the United States Education Department (USDOE) persuasive in this instance. USDOE advises that when the team cannot reach consensus, the public agency must provide the parents with prior written

notice, of the agency's proposals or refusals, or both, regarding the child's educational program and make a decision to act.[11] The District provided advanced notice of its proposed action, provided the procedural safeguard and then made a regrettable decision based upon the OCR Agreement to discontinue the written agreement. The District does, however, have support in the Office of Special Education guidance for its actions. Therefore, taken as a whole, I now find that the mother has not met her burden of proof on her individual discrimination claims. Accordingly, for all of the reasons above, I now find against the mother and for the District and appropriate Order follows.

THE MOTHER'S AND THE STUDENT'S RETALIATION CLAIMS ARE UNAVAILING.

The record is clear that the mother engaged in protected activity, and the Student was the focus of the protected activity. Therefore, under these unique facts, I find the mother and the Student engaged in a protected activity and the Student was otherwise covered under Section 504 as a third-party beneficiary. The mother and the Student both point to the removal of the Section 504 Agreement and/ the withdrawal of the offer of the IEE as adverse actions. It is also clear that the removal of the Section 504 Agreement closely followed and was causally connected to the Parent's rejection of the IDEA NOREP, procedural safeguards and the IDEA IEP. Likewise, the withdrawal of the offer to pay for the IEE followed the filing of this due process complaint. Therefore, I now find that the District's action was causally connected to their participation in securing benefits for the Student. First, the Parents and the Student's proofs fail as to an adverse action. As described above, the Student received all benefits of the Section

[11] *Letter to Richards*, 55 IDELR 107 (OSEP 2010); *Buser v. Corpus Christi Indep. Sch. Dist.*, 20 IDELR 981 (S.D. Tex. 1994), *aff'd*, 22 IDELR 626 (5th Cir. 1995).

504 Agreement and the mother was not otherwise excluded from participation from the school. Accordingly, I now find both claims fail for failing to prove an essential element. Applying the burden-shifting model endorsed in the case law, the outcome here hinges on the District's justifications and the mother and Student's proof of pretext. Like the discrimination claims described above, the mother and the Student did not offer any pretext evidence attacking the District's alleged justifications. Accordingly, absent preponderant evidence that otherwise neutralizes the District's justification both claims the mother's and the Student's claims fall short, an appropriate Order denying the retaliation claims follows. Assuming arguendo, when reading the record as a whole, pretext evidence was produced, the remaining evidence is insufficient. The special education supervisor terminated the Section 504 agreement on the belief that once the District offered an IDEA FAPE and IEP, the District was no longer required to implement the Section 504 agreement. While poorly executed, the supervisor justification for terminating the Section 504 Agreement has some support in the case law. While neither the Part B regulations nor the Section 504 regulations indicate how a parent's revocation of consent for IDEA services affects a district's obligations under Section 504. Courts and hearing officers are divided as to whether a parent's rejection of an IEP amounts to a waiver of or a bar to 504 academic accommodations and related services. The Office for Civil Rights in *Letter to McKethan*, 25 IDELR 295 (OCR 1996), that the rejection of IDEA services amounts to a rejection of services under Section 504. Thereafter there has been an ongoing debate as to whether the *McKethan* letter is persuasive. *See, e.g., Lamkin v. Lone Jack C-6 Sch. Dist.*, 58 IDELR 197 W.D. Mo. 2012); and *Fox Chapel Area Sch. Dist.*, 59 IDELR 208 (SEA PA 2012) (favoring *McKethan*). On the other hand, decisions concluding that the revocation of consent for IDEA services does not terminate a student's right to a 504 plan. See, *Kimble v. Douglas County*

School District RE-1, 60 IDELR 221 (D. Colo. 2013), *Northampton Area School District*, 63 IDELR 89(SEA PA 2014) (opposing McKethan). Absent preponderant evidence of pretext and give the unsettled status of the case law, the District justification stands unchallenged. Therefore, even putting aside the three-step burden-shifting analysis, the mother and the Student's first retaliation claim fails for lack of preponderant proofs.

As for the second claim, I now find the request for an IEE is a protected activity. The record is clear the District made the offer to fund an IEE to avoid litigation. The record is also clear that instead of accepting the offer to pay for the IEE, the Parents filed the instant action seeking what was offered, namely a free IEE. These facts, coupled with the District's justification that the IEE offer was made to avoid litigation, are not in dispute. Therefore, I now find that the District's withdrawal of the offer to fund the IEE before acceptance was not an adverse action. Absent an adverse action, the retaliation claims fail. Even assuming the withdrawal of the IEE is an adverse in light of my Decision at ODR FILE #21295-1920 KE the IEE issue is now resolved and the mother and Student were not entitled to an IEE and in fact, were not deterred. I find that the District's withdrawal of the IEE in no way deterred the mother from advancing her and the Student's claims. Therefore, after reviewing the non-testimonial and the extrinsic evidence in the record as a whole, putting the burden-shifting model aside, I now find in favor of the District and against the Student and the mother the retaliation claims are denied an appropriate Order follows.

SUMMARY

The rejection of the 2017 IDEA IEP and evaluation created a communication, trust and civility barrier too high for these parties to overcome. When the District did not follow the CHOP directives, the Parties became divided and those divisions became the basis for the instant claims and affirmative

defenses. The record is clear; the CHOP staff sent health care protocols and the nurse at all times implemented the IHP. The record is clear 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. The record is clear the [redacted] was implemented and the Student made meaningful progress and significant learning. The record is clear that the Parents and the Student failed to muster a preponderance of evidence to establish to support a finding of discrimination, retaliation, or associational discrimination. Accordingly, an appropriate Oder in favor of the District denying all claims follows. Any claims or defenses not otherwise addressed are dismissed with prejudice.

ORDER

And now, this 31st day of January 2020, it is hereby **ORDERED** as follows:

1. I now find in favor of the District and against the Parents, the Student and the mother on the claims for discrimination and/or associational discrimination for all school years in issue.
2. I now find in favor of the District and against the Parents, the Student and the mother failed to meet their burden of proof on the claims for retaliation.
3. I now find in favor of the District and against the Parents and the Student on the claims that the District failed to provide a FAPE within the meaning of Section 504 for all school years in issue.
4. I now find in favor of the District and against the Parents and the Student on the claims that the District failed to provide a FAPE, within the meaning of Chapter 16 for all school years in issue.
5. I now find in favor of the District and against the Parents and the Student on all other claims for violations of the IDEA, Chapter 16, and Section 504. All

claims for appropriate relief are dismissed with prejudice for all school years in issue. Likewise, all affirmative defenses are dismissed with prejudice.

Date: January 31, 2020 s/ Charles W. Jelley, Esq. LL.M.

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