

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

**Pennsylvania Special Education Hearing Officer**

**Final Decision and Order**

**Closed Hearing**

**ODR File Number:**

24533-20-21

**Child's Name:**

[A.R.]

**Date of Birth:**

[redacted]

**Parent:**

[redacted]

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**Hearing Officer:**

Joy Waters Fleming, Esq.

**Date of Decision:**

May 27, 2021

## **Information and Procedural History**

Student<sup>1</sup> is currently [mid-teenaged], enrolled in the [redacted] grade in a Charter School (Charter) and is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student has attended the Charter since the 2019-2020 school year entering as a [redacted] grader. The Parent filed a due process complaint alleging the Charter failed to provide Student with a free appropriate public education (FAPE), as required under the IDEA, Section 504 of the Rehabilitation Act of 1973 (Section 504), and the Americans with Disabilities Act (ADA), as well as the federal and state regulations implementing those statutes.<sup>3</sup> The Parents seek compensatory education as a remedy. In response, the Charter maintained that its educational programming, as offered and implemented, was appropriate for Student and that no remedy is due.<sup>4</sup>

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<sup>1</sup> In the interest of confidentiality, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> The Parent's IDEA 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).

<sup>3</sup> The applicable federal and state regulations implementing Section 504 are found at 22 Pa. Code Chapter 15, and 34 C.F.R. Section 104.101 et seq. In addition to the claims under IDEA and Section 504, the Parent presents a claim under Title II of the Americans with Disabilities Act ("ADA"). This special education due process hearing has no jurisdiction over such claims. Accordingly, claims under ADA are dismissed for lack of jurisdiction.

<sup>4</sup> The case proceeded to a multi-session hearing convening virtually due to the COVID-19 pandemic and resulting school closures. Because of schedule conflicts, availability of witnesses, including the necessity for additional sessions, the decision due date was extended for a good cause, upon written motion of the parties.

For reasons that follow, the claims of the Parent are granted.

## **Issues**

- 1) Did the Charter School deny student a FAPE during 2019-2020 school year?
- 2) Did the Charter violate Section 504 of the Rehabilitation Act by failing to provide a 504 services contract or by providing an insufficient 504 service contract?
- 3) If the Charter violated Section 504, what, if any, remedy is owed?
- 4) Did the Charter deny student FAPE during the 2020-2021 school year?
- 5) If student was denied a FAPE, is compensatory education owed?

## **Findings of Facts**

### **2019-2020 School Year- [Redacted] Grade**

1. The Charter school uses a lottery to select students for enrollment.  
(N.T. 187)
2. On August 19, 2019, the Parent enrolled the Student in the [redacted] grade at the Charter for the 2019-2020 school. On registration documents, the Parent indicated that Student did not have an IEP or evaluation report but did have a current 504 service agreement. Through a signature, the Parent requested the release of records from the previous school attended by the Student to the Charter. (P-1, S-2, S-3; N.T. 109)

3. The Parent did not provide the Charter with the 504 plan implemented during the 2018-2019 school year. (P-1, S-2, S-3; N.T. 109)
4. When an incoming student notifies the Charter of an existing 504 plan, the documentation is requested from the parent, if not supplied, the Charter contacts the school of previous attendance. (N.T. 190)
5. On September 4, 2019, the Parent contacted the Charter about the procedure to report bullying or negative comments directed toward the Student. On September 25, 2019, the Principal responded and invited the Parent to a meeting for further discussion. (P-15, pp. 1-2)
6. In September 2019, the Parent contacted the Charter for assistance in developing a 504 plan because of Student's ADHD diagnosis. (P-15, p. 4; N.T. 76)
7. On September 25, 2019, a learning support teacher contacted the Charter's contracted special education consultant and advised that Parent sought a section 504 plan for the Student. (P-4; N.T. 129)
8. The Charter's special education consultant has responsibility to advise the leadership team and staff, provide direction on the development of 504 and IEPs and guide team members if questions arise regarding IEPs. (N.T. 125-127)
9. On or about October 31, 2019, the Parent provided the Charter with a letter from the Department of Child and Adolescent Psychiatry and Behavioral Sciences at the Children's Hospital of Philadelphia (CHOP) that Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), received medication management and suggested eligibility for a Section 504 accommodation plan. The CHOP letter

provided examples of accommodations and modifications. The letter had a scan date of July 18, 2017.<sup>5</sup> (P-2, P-15, S-4; N.T. 191)

10. The Charter refused to accept the undated letter from CHOP, deeming it too old and requested a more recent letter to support the Parent's request for a 504 plan. (P-2; N.T. 192-193)
11. The Charter policy to create a 504 plan requires initiation from a physician or a medical note that is dated within the calendar year. (N.T. 191-192)
12. On November 1, 2019, the Parent provided the Charter with a letter from CHOP dated October 31, 2019, that Student was in treatment for ADHD. The letter referenced side effects from prescribed medication and requested that Student have access to snacks and a full lunch. (P-3, P-15, p. 6, S-5; N.T. 77-78, 193)
13. On November 12, 2019, in a "note for school," CHOP provided a school management headache protocol for the Student. The letter indicated Student experienced frequent headaches and cited bullying and a heavy backpack as factors. On November 13, 2019, the Parent provided the letter to the Charter. (P-4, P-15, p. 7, S-6; N.T. 80, 195)
14. On December 13, 2019, the Parent contacted the Charter and expressed concern that Student continued to fail math. That same

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<sup>5</sup> The letter from CHOP had a print date of 10/31/2019.

day, the Charter invited the Parent to a meeting scheduled for December 17, 2019. (P-15, pp.9- 10; N.T. 137, 200)

15. Student earned first-quarter grades of F in Math, B- in English Language Arts (ELA), C- in Science, B-Social Studies, C+ Spanish, A in PE, B+ in Art, B+ in Music, and A in Computer Science.
16. On or about December 16, 2019, the Parent provided the Charter with a letter from CHOP that Student would attend a medically necessary, twice-weekly organizational skills program to address struggle in school related to the ADHD diagnosis. (P-5, S-7; N.T. 85)
17. On December 17, 2019, the Charter and the Parent met to discuss developing a Chapter 15 (Section 504) Services Plan to address Student's needs related to ADHD. (P-6, P-15, p.9; N.T. 85-86, 132)
18. The Charter never received the Student's 504 plan from the previous school attended. (N.T. 189)
19. The 504 plan offered five strategies that included preferential seating, a classroom point system, extra time if needed, a daily planner for homework recordation and parent review, and encouragement to chunk assignments into manageable pieces. (P-6; N.T. 77-78)
20. On February 6, 2020, the Parent contacted Student's math teacher and requested additional supports to assist Student. On February 18, 2020, the Parent contacted the Charter and requested a

meeting to discuss modification of Student's 504 plan to prevent failure of math. (P-15, pp. 14-1; N.T. 88-91)

21. Student earned second marking period grades of F in Math, ELA-D, Social Studies-B, and C- in Science and Spanish. (P-9)
22. On March 4, 2020, the Parent requested an evaluation of Student for "special education services/IEP," citing failing grades in math and declining grades in reading. (P-7, S-8; N.T. 91-93)
23. On March 11, 2020, the Charter closed because of the Coronavirus pandemic and transitioned to virtual instruction. (N.T. 208)
24. The Student received third marking period grades of C+ in Math, C- in English Language Arts, C- in Science, C in Spanish, and B- in Social Studies. (P-9, S-8)
25. On April 13, 2020, the Parent followed up with the Charter about the "IEP test request" and notice received that Student was failing math. (P-15, p. 21-22; N.T. 139)
26. On April 23, 2020, the Charter Principal forwarded the Parent's concerns to its Special Education Consultant. The Consultant advised that a permission to evaluate should be issued, which "will buy us some time and put us in a good legal position as [Parent] is asking for an IEP Test request." The Charter did not issue a permission to evaluate to the Parent. (P-15, p. 21; N.T. 143)

27. On May 6, 2020, the Charter advised the Parent that the Student was not meeting grade-level expectations and failing math. (P-8)
28. Under the 504 plan, the Parent did not receive daily feedback from Student's teachers through the homework planner, and the teachers did not check to ensure that Student wrote homework assignments in the planner. (P-2, P-3, P-4; N.T. 86-89)
29. At the conclusion of the 2019-2020 school year, the Student received final grades of F in Math, C- in ELA, C- in Science, B in Social Studies, C in Spanish, A in PE, B+ in Art and Music and an A in Computer Science. (P-9, S-13)
30. Student had the same math teacher for [redacted] grade and [redacted] grade up to February of the 2020-2021 school year when the teacher left the Charter. (N.T. 44, 165-166, 176)<sup>6</sup>
31. During the 2019-2020 school year, the Charter did not issue a permission to evaluate because the Charter Principal was advised that evaluations had to occur in person once school reopened for face-to-face instruction. (N.T. 208-209)

### **2020-2021 School Year – [Redacted] Grade**

31. On September 17, 2020, the Charter issued to the Parent prior written notice to conduct an initial evaluation of Student. The evaluation request was dated August 10, 2020. On September 18, 2020, the

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<sup>6</sup> The Math teacher was not available to testify during the due process hearing.



Parent consented to the evaluation of Student. (P-10, P-17, S-14, S-15)

32. For inclusion in the evaluation report, the certified school psychologist administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), Wechsler Individual Achievement Test, Third Edition (WIAT-III), the Behavioral Assessment Systems for Children, 3<sup>rd</sup> Edition (BASC-3), Conners Rating Scale 3 (Conners), reviewed records, collected parent and teacher input, interviewed the Student and made behavioral observations. (P-11)

33. On October 19, 2020, the District issued its evaluation report (ER) of Student. (P-11, S-16)

34. On the (WISC-V), Student earned a Full-Scale IQ of 86, within the low average range. On the (WIAT-III), the Student received below-average scores in Mathematics and Math Fluency and average scores in Basic Reading. Student's grade equivalency ranged from 4.9 to 5.7 on the math subtests. The ER noted that Student had difficulty with telling time, coin value, probability, finding average, geometry, multi-step word problems, order of operations, algebraic equations, pi, fractions, and multi-digit multiplication and division. Student did not know basic math facts. (P-11)

35. On the Behavioral Assessment Systems for Children, 3<sup>rd</sup> Edition (BASC-3), Student's former [redacted] grade math teacher-rated Student in the clinically significant range for hyperactivity and atypicality. He contributed that Student often speaks out of turn

during class, has trouble staying seated, disrupts the schoolwork of other adolescents, almost always babbles to self, often acts strangely and seems odd, and often makes careless mistakes. (P-11 pp. 10-12)

36. On the Conners Rating Scale 3 (Conners), Student's former [redacted] grade math teacher and current [redacted] grade teacher-rated Student as markedly atypical (indicative of significant problems) for inattention, hyperactivity, impulsivity, aggression/defiance, and peer relations. They contributed that Student is inattentive, impulsive, easily distracted with a short attention span, fidgets or squirms when seated, and talks out of turn. (P-11, p. 13)

37. For inclusion in the ER, Student's former [redacted] grade math teacher contributed that he did not believe Student needed special education because Student's struggles were due to focus and not an academic deficit. (P-11, p. 4)

38. The ER concluded that Student continued to meet criteria for ADHD with attention difficulties impacting classroom performance. Student demonstrated attention deficits and was easily distracted, had difficulty concentrating, a short attention span, made careless mistakes, missed deadlines, and was hyperactive and impulsive. The ER determined that the Student was eligible for specially designed instruction as a child with a primary disability of other health impairment (OHI) and a secondary disability of specific learning disability in math problem-solving. (P-11, pp. 15-16)

39. The ER suggested numerous academic interventions that included (hands-on learning, including visual/tactile/auditory instruction, guided practice, modeling, manipulatives, prompts, chunking, and

scheduled breaks). The ER determined that Student needed learning support to improve Student's math skills and recommended small group instruction. (P-11, S-16)

40. On November 10, 2020, the Charter and the Parent met to discuss input for the IEP. (N.T. 57)

41. A learning support teacher hired in November 2020 by the Charter developed Student's IEP. (N.T. 31, 57)

42. On November 18, 2020, the IEP team met. At the meeting, the Parent requested goals to address Student's focus, time on task, and organizational needs. The special education consultant attended the meeting in place of the Charter principal. (P-12, P-13, S-17; N.T. 58-59, 160-161)

43. The present levels of academic achievement in the November IEP noted Student needed to improve math problem solving, organization skills, focus, attention, rate of work, and homework completion across all subject areas. (S-17, p. 21)

44. The November IEP contained two goals. The math goal expected Student when (given 10 multi-step word problems using mixed math operations to develop an equation and solve with 80% accuracy on 3 consecutive trials). The second goal expected Student to (record assignments in all subjects and complete 80% of homework

assignments in all subjects during three consecutive weeks). The goals did not contain baseline data.<sup>7</sup> (S-17, p. 21, pp. 27-28; N.T. 58)

45. The November IEP offered program modifications and specially designed instruction (SDI) that included visual/tactile/auditory instruction, assignment chunking, additional time to complete assignments, preferential seating, scheduled breaks, small group instruction in math at least two times a week for thirty minutes, assessment accommodations, and a classroom point system. (S-17, pp. 29-30, P-12; N.T. 60, 65)

46. The Charter's special education consultant advised that it was not possible to determine a baseline in a new IEP when drafted but should be included after a student has been in a program for enough time. (N.T. 155)

47. Through the November IEP, the Student received virtual math intervention, two days a week for thirty minutes, in a breakout room. In January 2021, the Student continued to receive virtual math instruction two days a week with the special education teacher but was not put into a breakout room. (N.T. 104-105, 11-112)

48. By the second marking period of the 2020-2021 school year, the Charter had not obtained baseline data of Student's functioning for progress monitoring of the November IEP goals. (P-14; N.T. 64)

## **Discussion and Conclusion of Law**

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<sup>7</sup> The NOREP was not introduced into evidence.

## **General Legal Principles**

### **The Burden of Proof**

The burden of proof is composed of two elements, the burden of production and the burden of persuasion. The more essential consideration is the burden of persuasion, that determines which of two contending parties must bear the risk of failing to convince the finder of fact. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence that the moving party is entitled to the relief requested. The burden of going forward simply determines which party must present its evidence first, a matter that is within the discretion of the hearing officer. The burden of persuasion, in this case, was borne by the Parent, the filing party. Application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipose." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here. 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.*

### **Witness Credibility**

It is the responsibility of the hearing officer as factfinder to determine the credibility and reliability of witnesses' testimony. 22 Pa. Code §14.162 (requiring findings of fact); *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution*, 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 to make the required findings.

The findings of fact were made as necessary to resolve the issues; thus, not all the testimony and exhibits were explicitly cited when unnecessary. Only four witnesses testified. They included the Parent, the Charter's contracted special education consultant, Student's [redacted] grade learning support teacher, and the Charter Principal. In reviewing the record, the Parent's testimony was more credible. The witnesses affiliated with the Charter either had difficulty remembering details, recalling events, or were not involved in key decisions. They were able to offer very little convincing information that refuted the Parent's evidence.

## **General IDEA Principles**

### **Free Appropriate Public Education (FAPE)**

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and comply with the procedural obligations in the Act. The state, through its local educational agencies (LEAs), meets the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential. *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted).

Fairly recently, the U.S. Supreme Court observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a “merely more than de minimus” standard, holding instead that the “IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be “appropriately ambitious in light of [the child’s] circumstances.” *Id.* at 1000. In terms of academic progress, grade-to-grade advancement may be “appropriately ambitious” for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate considering a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also

*Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

## **Child Find and Evaluation Requirements**

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125. The statute itself sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

The obligation to identify students suspected as having a disability is commonly referred to as “child find.” LEAs are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). More specifically, LEAs are required to consider evaluation for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). “Special education” means specially designed instruction that is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). More specifically, “specially designed instruction means adapting, as appropriate to the needs of an eligible child



[], the content methodology or delivery of instruction.” 34 C.F.R. § 300.39(a)(2).

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of the child’s individual needs are examined. The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); see also 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data, including that provided by the parents, in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a). In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b).

## **Procedural FAPE**

If an IDEA violation is procedural in nature certain remedies may be appropriate if it impeded the child’s right to FAPE, significantly interfered with the parents’ opportunity to participate in the decision-making process regarding FAPE, or caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2))

## **Section 504 Principles**

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Significantly, “[t]here are no bright line rules to determine when a school district has provided an appropriate education required by Section 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002). In this case, the coextensive Section 504 claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed.

## **Section 504 Evaluations**

The applicable federal regulations implementing Section 504 require that an evaluation shall be conducted “before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 C.F.R. §104.35. An initial evaluation under Section 504 must assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id.* Pennsylvania’s Chapter 15 regulations similarly obligate a school district to obtain sufficient information in order to determine whether

a child is a “protected handicapped student” and to involve the parents in that process. 22 Pa. Code §§ 15.5, 15.6.

## **Section 504 Discrimination**

The provisions of 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*

## **Parent’s Claims**

At the beginning of the 2019-2020 school year, the Student entered the Charter as a [redacted] new student. On registration documents, the Parent disclosed that Student received educational services under a 504 plan at the previous school. Although the Parent consented to the release of former school records, the Charter never received the previously implemented 504 plan. In December 2019, after the Parent supplied medical documentation that substantiated the need, the Charter developed a 504 plan for Student. In March 2020, the Parent requested an evaluation of Student for “special education services/IEP.” The COVID-19 pandemic struck, the Charter briefly closed, transitioned to virtual instruction, and the evaluation report was not issued until the following school year, in October 2020. In November 2020, the Charter offered an IEP to the family.

The Parent contends that the Charter failed to fulfill its obligations toward the Student under Section 504 and the IDEA. In support of this contention, the Parent asserts that the Charter ignored Student's behaviors, and Parent supplied information indicative of a need for intervention; a 504 plan was not developed in a timely manner, and once implemented, it was deficient. Parent also assert their evaluation request was ignored and the IEP ultimately implemented contained inadequate supports for Student.

In response, the Charter claimed that from the beginning of the 2019-2020 school year, it utilized Student's pre-existing 504 plan, revised the plan in concert with the Parent, and then implemented the updated plan. The Charter further contends that no evaluation of Student was possible during the pandemic. Finally, the Charter asserts that the IEP developed and implemented was appropriate. For the following reasons, the Parent has preponderantly established that the Charter denied Student FAPE during the 2019-2020 and 2020-2021 school years.

### **2019-2020 School Year-[Redacted] Grade**

From the beginning of the 2019-2020 school year, the Parent, on multiple occasions, requested a 504 plan for Student because of needs related to an ADHD diagnosis. These requests were accompanied by medical documentation from treatment providers at CHOP, suggestions for accommodations, and written in-school protocols to counter side effects from prescribed medication. Although the requests for a 504 plan were well documented, the Charter rejected the first letter from CHOP then claimed the previous school year's 504 plan was never received with the Student's educational records.<sup>8</sup> Once satisfied with the documentation provided by the

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<sup>8</sup> The Charter inaccurately averred, in its Answer to the Complaint that Student's previous school year's 504 plan was implemented until revised.

Parent, the Charter chose not to initiate an evaluation of Student and instead, in December 2019, offered a 504 plan. By the time that plan was implemented, the Parent's expressed concerns for Student's academic stability were beginning to materialize with consecutive quarter failing grades in Math, the precise subject area in which the Parent expressed concern and requests for support.

The central issue is whether the Charter met its child find obligations toward this Student under Section 504 and the IDEA following Student's enrollment at the Charter in the fall of 2019. There is evidence that the Charter was aware of Student's diagnosis and services before Student started the [redacted] grade. Nevertheless, even assuming that upon entry to the Charter, Student had a disability within the meaning of Section 504 and Chapter 15, eligibility for accommodations requires something more: a substantial limitation on access to or participation in educational programming due to the disability. Overall, the Parent's disclosure of a previous 504 coupled with a request for accommodations, with medical substantiation, Student's failing math grades, and observed lack of focus, and resultant disruptive behaviors should have been enough for the Charter to suspect that Student might have been a child with a disability. The Charter should have evaluated this Student certainly by the time the first quarter grades were finalized. There was sufficient information to indicate that the Student may have a disabling condition that required special education to receive equal opportunity to participate in school services, activities, and programs.

Although a 504 plan was introduced in December 2019, it was not based on a Charter conducted evaluation or other assessment of Student's individual school-based needs. Instead, the 504 plan was brief and cursory, listing some of the suggestions from the CHOP letter, initially rejected by the

Charter. Most of the 504 accommodations were generic (preferential seating, extra time, writing down homework) and did not appear to be tied to specific needs. Student's [previous] grade teachers were either not available to testify or were no longer employed by the Charter. However, the Parent credibly testified that critical aspects of the deficient plan were not implemented, unfortunately to the detriment of this Student. The Student continued to receive poor math grades despite the 504 support and the Parent's enrollment in a medically necessary, twice-weekly organizational skills program at CHOP. In March 2020, the Parent requested an evaluation of Student, citing failing grades in math. Unfortunately, the Charter did not commence the evaluative process. Student failed [redacted] grade math, yet the Charter remained unresponsive to the Parent's request for intervention with no movement toward starting the requested evaluation.

The Charter's delay in evaluating the Student after the Parent request resulted in a denial of FAPE. Although face to face instruction was suspended in mid-March until the end of the 2019-2020 school year, in response to the COVID19 pandemic, the Pennsylvania Department of Education (PDE), in reliance on direction from the US Department of Education, issued guidance that a District's obligation to provide FAPE was not altered, waived, or excused.<sup>9</sup> PDE guidance on Evaluations and Reevaluations stated: "LEAs and parents should continue to work together to meet IDEA requirements, including evaluation and reevaluation timelines, as best as possible. LEAs and parents should make every effort to complete evaluations and

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<sup>9</sup> See *Report to Congress of U.S. Education Secretary Betsy DeVos*, <https://www.ed.gov/news/press-releases/secretary-devos-reiterates-learning-must-continue-all-students-declines-seek-congressional-waivers-fape-lre-requirements-idea>.

reevaluations as possible with as little delay as possible.”<sup>10</sup> PDE further clarified that “[e]valuation and reevaluation timelines have not been waived by USDE.” *Id.* It recommended that LEAs make efforts to complete portions of the evaluation “that do not require face-to-face assessments or observations” (such as rating scales), “conduct a review of existing evaluation data,” “use virtual evaluation tools,” or “consider the provision of additional supports and services for a student prior to the completion of an initial evaluation to ensure access to their educational program.” *Id.* The Charter elected none of these options. The challenges posed to the Charter as it transitioned to the online delivery of education to meet the needs of its students during an unprecedented public health crisis cannot be minimized. However, after the Parent’s request, the Charter did not issue permission to evaluate or undertake any efforts, even those not requiring face-to-face contact to commence the evaluation until the 2020-2021 school year.<sup>11</sup>

Based on the evidence presented, the Parent has preponderantly established that during the 2019-2020 school year, the Charter violated its child find responsibilities which denied Student FAPE under Section 504, Pennsylvania law, and the IDEA.

## **2020-2021 School Year- [Redacted] Grade**

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<sup>10</sup> Pennsylvania Department of Education Bureau of Special Education Guidance on Evaluations and Reevaluations, available at: <https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/Guidance-on-Evaluations-and-Reevaluations.aspx>

<sup>11</sup> Pandemic guidance available from the Pennsylvania Department of Education advised, “[e]valuations and re-evaluations that do not require face-to-face assessments or observations **may take place while schools are closed**, so long as a student's parent or legal guardian consents. LEAs may conduct a review of existing evaluation data and use virtual evaluation tools”. <https://www.education.pa.gov/K12/Special%20Education/FAQContact/Pages/Guidance-on-Evaluations-and-Reevaluations.aspx>

In September 2020, the Charter finally issued permission to evaluate the Student. In October, the Charter completed its evaluation of Student. Overall, the evaluation was appropriate.<sup>12</sup> It assessed the Student in all areas related to the suspected disability and was sufficiently comprehensive to identify the child's special education and related services needs. Although Student's [previous] grade math teacher opined that he did not believe Student needed special education because Student's struggles were due to focus and not an academic deficit, the ER concluded that Student was eligible for special education because of OHI as related to the diagnosis of ADHD and a specific learning disability in math problem-solving.

In November 2020, the IEP team met to develop educational programming for the Student. The Parent contends that the resultant IEP failed to provide FAPE because the IEP lacked: baseline data, adequate math support, behavioral and transition goals. The Parent has met the burden of proof. The November IEP contained two goals. One goal addressed math, and the other focused on homework completion. These goals were insufficient to address Student's identified needs. Although the goals were supported by program modifications and (SDI) that incorporated suggestions from the ER (visual/tactile/auditory instruction, assignment chunking, additional time, preferential seating classroom point system). The ER also explicitly noted various math deficiencies (telling time, coin value, probability, finding the average, geometry, multi-step word problems, order of operations, algebraic equations, pi, fractions, multi-digit multiplication, and division); this now [redacted] grader experienced. Yet, the math goal had no baseline data to measure growth and only generically addressed

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<sup>12</sup> The Complaint did not challenge the adequacy of the Charter conducted evaluation.



word problems using mixed math operations. Student's identified math needs far exceeded the single math goal in the IEP.

Beyond math, Student's additional needs noted in the IEP included organization skills, focus, attention, rate of work, and homework completion across all subject areas. Although listed, no IEP goals were developed to address these deficiencies that appear to relate to Student's eligibility based on OHI. Although a homework completion goal was developed, it was insufficient and unresponsive to Student's needs. The goal merely expected Student to write down assignments and complete 80% of homework. This Student met the criteria as OHI specifically because of the ADHD that impacted classroom performance and manifested itself through distracted behavior, difficulty concentrating, a short attention span, careless mistakes, missing deadlines, and hyperactivity and impulsivity. The sole homework goal did not contain baseline data. Although it addressed a need to develop consistent practices related to capturing assignments and turning in homework, it fails without other individualized supportive measures and compatible goals.

During the hearing, the Charter's special education consultant testified and undoubtedly advised that baselines were not necessary when the IEP was developed and that data could be added in the future. While that may be practical, it did not occur in this matter. By the second marking period of the 2020-2021 school year, the Charter still had not obtained baseline data for either goal. Overall, the November IEP was not appropriately ambitious nor reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances. The Parent has preponderantly established that the Charter's procedural and substantive

violations denied Student FAPE. An award of compensatory education is appropriate.

Finally, 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. Here, the record does not support a determination that the Charter acted with deliberate indifference toward this student, and nothing in this record suggests that contention. Accordingly, the Charter has not discriminated against the student based on disability status.

### **Compensatory Education**

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Big Beaver Falls Area Sch. Dist. v. Jackson*, 615 A.2d 910 (Pa. Commonw. 1992)). In this case, the District has denied the student FAPE, which has resulted in substantive harm on multiple levels—through a child find violation, delayed evaluation in the design and implementation of the student’s IEP. Although this Student made progress and was promoted to the [the next] grade, there are deficits in the Student’s special education program, which must be corrected, that require a remedy. Therefore, as a matter of equitable consideration, the student is awarded 300 hours of compensatory education for the Charter’s failures over the 2019-2020 and current 2020-2021 school years (through the date of this order).

### **ORDER**

AND NOW, this 27th day of May 2021, in accordance with the foregoing findings of fact and conclusions of law, the Charter has denied the student a free appropriate public education.

- 1) Student is awarded 300 hours of compensatory education reflecting this denial-of-FAPE through the date of this order.
- 2) The Parent may decide how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the Student's current or future IEPs or identified educational needs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to the student and the family.
- 3) Within ten (10) school days of the date of this Order, the Charter will collect baseline data to be used for development of responsive educational programming.
- 4) After baseline data is collected, the Student's IEP team shall meet to revise the IEP to address the student's specific academic deficits related to math and functional deficits associated with OHI as determined by the Charter's evaluation report.
- 5) Nothing in this Order limits the parties' ability to agree mutually and in writing about any use of the compensatory education hours.

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

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esquire  
Special Education Hearing Officer

5/27/2021