

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:

21807-18-19

Child's Name:

A.M.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Charles Jelley Esq.

Date of Decision:

01/29/2019

INTRODUCTION AND PROCEDURAL BACKGROUND

The Parents of an elementary school-age Student filed the instant due process Complaint alleging the local education agency (L.E.A. or District) failed to offer the Student a free appropriate public education (FAPE), as defined by Section 504 of the Rehabilitation Act (Section 504 or R.A.) and its state law counterpart at 22 Pa. Code Chapter 15 (Chapter 15) and/or the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1401 *et seq.*¹ To redress the alleged violations, the Parents now seek compensatory education from March 2018 through January 2019.² After taking testimony, reading the record and giving due consideration to all of the arguments along with the extrinsic and intrinsic evidence, I now find in favor of the District. All other claims or affirmative defenses, not otherwise proven or addressed herein, are dismissed with prejudice. An appropriate **ORDER** and Notice of Appeal follows.³

Issues

¹ The Parties agree the Student resides in the District with the grandparents. The parties further agree the grandparents are now acting as the "Parent" have standing to initiate this action. Therefore, throughout this Decision I will refer to the Student's grandparents as the "Parents" or Parent.

² The Parents' claims arise under Section 504 of the Rehabilitation Act and 22 Pa. Code Chapter 15. The federal regulations implementing Section 504 are codified at 34 CFR §104.104.1-37. The federal implementing the IDEA are found at 34 CFR §300.1 *et. seq.*

³ The Decision Due Date was extended for a good cause, upon written motion of the Parties. Initially the case was closed, subject to reinstatement, when the Parties appeared to be moving towards a resolution. When the resolution talks broke down the Parent requested and I granted their request to reinstate the due process Complaint. References to the record throughout this decision will be to the Notes of Testimony (N.T.), 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.

1. Did the District offer the Student a free appropriate public education within the meaning of Section 504 of the Rehabilitation Act, from March 2018 through January 2019; if not, is the Student entitled to appropriate relief in the form of compensatory education?
2. Did the District deny the Student a free appropriate public education within the meaning of the Individuals with Disabilities Education Action, from March 2018 through May 14, 2019; if not, is the Student entitled to appropriate relief in the form of compensatory education? (N.T. pp.13-16).

FINDINGS OF FACT

THE STUDENT NEEDS SPECIALLY-DESIGNED INSTRUCTION

1. The Student resides with the Parents in the District. (N.T. p.8-11).
2. In February 2018, the Parties agreed the Student was a person with the disability of autism, within the meaning of the IDEA. The Parties further agreed because of the Student's disability; the Student required specially-designed instruction (SDI). The Parties later agreed, in September 2018, the Student was a person with a disability within the meaning of the Section 504, and who, because of the disability of autism, is also a person with a disability within the meaning of Section 504 required specific accommodations. (P-3, P-10, P-9, P-10).

THE THIRD GRADE IEP

3. On August 22, 2017, while the Student was in third grade, the Parties jointly participated in an Individual Education Program (I.E.P.) meeting. The 35-page I.E.P. included a notation that the Student exhibited behaviors that impeded learning, along with Parent and teacher input. The I.E.P. notes the Student participates throughout the day in the regular education classroom; however, the

District does provide a half-hour of itinerant autistic support each day. (P-3, NT p.426).

4. The present levels of educational performance note the Student seldom needs redirection to stay on task. (P-3 pp.6-11).
5. The present education levels include AIMSweb reading and written expression scores and data from the Student's positive behavior support program (PBSP). (P-3 pp.14-16).
6. The present levels also included the Parent's rating on the Behavior Assessment System for Children-Second Edition (BASC-2). The Parent rated the Student in the "Clinically Significant" range for behavior and adaptive behavior. While "Internalizing" and "Externalizing" behaviors, were rated at the "At-Risk" level. The Parents' Conner's rating scales also noted similar behavioral concerns relating to hyperactivity, impulsivity, executive functioning, peer relations, aggression and defiance. (P-3 pp.14-16).⁴
7. The present levels include ability and achievement data. The Student's full-scale I.Q. falls in the average range, as does the Student's standard scores (S.S.) in reading and math skills. (P-3 pp.17-18).
8. The Student has average speech and language skills. (P-3 p.19).
9. The present levels include the results of the functional behavior assessment (F.B.A.). The F.B.A. notes the Student can complete 90% of classroom work at 75% accuracy. The F.B.A. includes the antecedent behaviors of concern, the perceived function of the behavior, and suggested consequences. The present levels list social skills, sustaining attention and coping skills are areas of functional

⁴ The grandmother filled out the rating forms.

needs. (P-3 pp.19-21).

10. The I.E.P. includes a single behavioral goal to address self-regulation through teacher prompting during the unstructured time and nine S.D.I.s like access to sensory items and frequent breaks. The I.E.P. team considered and ruled out the need for extended school year services. (P-3 p.31-32).
11. The I.E.P. team considered a variety of supplemental aides, supports and services to assist the Student in participating in the regular education curriculum and classroom. (P-3 p.33).
12. The District prepared and provided the Parents with a seven-page standalone positive behavior support plan (PBSP). The PBSP described the behaviors of concern, included a behavioral goal statement, and called for daily data collection. The PBSP also calls for the autistic support teacher to provide weekly support to the regular education staff. (P-5 pp.2-6).
13. On or about January 26, 2018, the District issued prior written notice offering to conduct a comprehensive evaluation. The notice indicated that the reevaluation would include ability and achievement testing, benchmark assessments in reading and math, along with an F.B.A., an assistive technology, occupational, and speech and language evaluation. (P-6 p.2). The Parent approved and returned the prior written notice on February 2, 2018. (P-6).
14. On or about February 2, 2018, during third grade, the District reported, to the Parents, that the Student mastered the then-current annual goal. The District scheduled and the Parties met, revised and updated the single annual behavioral goal. The I.E.P. form includes a handwritten note stating that the Student was beginning to complain about school, did not want to attend school, and displayed physical

signs of stress. The seven-page revised I.E.P. included a new behavioral goal statement calling for the Student to role-play social skill situations. The goal statement includes progress monitoring data that states by the end of the third making period, the Student correctly identified and applied two strategies to solve social problems 92% of the time. (P-4 p.7).

THE 2018 REEVALUATION REPORT

15. On March 30, 2018, the District issued a 58-page reevaluation report (R.R.). The R.R. included teacher and Parent input. The updated ability testing confirmed the Student's general thinking and reasoning skills continued to fall in the "Average" range. Likewise, the Student's achievement standard scores (S.S.) ranged from a "Superior" S.S. of 121 in Letter-Word Identification to a "Low Average" S.S. of 86 in "Sentence Fluency." Six of the Student's S.S. fell in the "High-Average" range, while the remaining six fell in the solid "Average" range. (P-7 pp.14-16). This data profile indicates average ability and achievement. (P-7).
16. The Student earned "Average" scores on the Test of Written Language Fourth Edition (TOWL-4) and the Gray Oral reading Test-Fourth Edition (GORT-4). (P-7 pp.15-16).
17. Four teachers and the Parent each completed Behavior Assessment of Children Third Edition (BASC-3) rating scales. The first teacher's ratings indicated that the Student exhibits typical classroom behavior and self-control compared to other children in the class. Aggression, Internalizing Problems, School Problems, Behavioral Symptoms Index scores were not an area of concern. The second teacher rated "Conduct Problems" at the "At-Risk" level. The third teacher rated "Hyperactivity" at the "At-Risk," while the fourth teacher rated the

Student's behavior in the solid average range. (P-7 pp. 19-26). On nine (9) out of 11 areas, the Parent rated the Student "Average" with "At-Risk" rankings on "Withdrawal" and "Attention Problems." (P-7 pp.25-28).

18. Four teachers also completed Student ratings using the Behavior Rating of Executive Functioning Second Edition (BRIEF-2). The Student earned teacher ranking T-scores of 41, 42, 43; all of the scores fell well below the T-score cut-off score of 65. This data set indicates that the Student's ratings fell in the "Not Clinically Significant" range. When the Parent completed the ratings, the Student earned one T-score of 56 in the "Not Clinically Significant" range. The examiner noted that the Parent's scores did indicate ongoing transition issues at home when moving from task-to-task, along with an inability to shift attention from one activity to another. Finally, a lack of flexibility in decision-making was noted as an area of concern. (P-7 pp.29-32).
19. The Student's Gilliam Autism Rating Scales-Third Edition (GARS-3) completed by the four core teachers and the Parents trended towards a "Probability" of an autism diagnosis. (P-7 p.33).
20. The Occupational therapist (O.T.) assessment focused on functional skills and adaptations that promote educational objectives. After administering three standardized assessments of writing ability, sensory processing and visual-motor integration, the O.T. evaluator concluded that the Student demonstrated age-appropriate skills to manipulate classroom tools and manage classroom-related tasks. The O.T. examiner concluded that the Student did not demonstrate a need for O.T. supports. (P-7 pp.37-39).
21. The assistive technology examiner concluded that the Student does

not require assistive technology support to access the regular education curriculum. The examiner also noted that the Student should continue to use the "Type to Learn" program at home. (P-7 40).

22. The speech and language assessment included the results of the Clinical Evaluation of Language Fundamentals-5 (CELF-5). The Student's receptive and expressive skills scores all fell in the "Average" range. (P-7 pp.39-41).
23. As part of the reevaluation, the District called on the intermediate unit to repeat a previous functional behavioral assessment (F.B.A.). The summary of the F.B.A. notes two behaviors of concern. The F.B.A. notes that the Student makes inappropriate noises during class and engages in off-task behavior. The F.B.A. summary goes on to state that the team was "unable to report the antecedents that typically precede the targeted behaviors due to the low frequency of the behaviors occurring." The F.B.A. team hypothesized that the behaviors of concern might be reinforced by peer attention and gaining access to preferred items or activities. (P-7 pp.40-41).
24. The F.B.A. included a motivation assessment. The motivation assessment results indicate that the Student's off-task behaviors may be related to attention-seeking or attempts to gain social acceptance or status (P-7 pp.44-50).
25. The Student earned "Average" skill scores on the AIMSweb math probes and "Above Average" scores on the AIMSweb written expression and reading probes. (P-7 pp.50-52).
26. After reviewing all of the data sets, the evaluation team, including the Parents, jointly decided that although the Student is a person diagnosed with autism, the Student no longer needed individualized

specially-designed instruction. The evaluation team recommended and the Parent agreed that the District should move forward to consider if the Student was a person with a disability, within the meaning of Section 504, and who, because of the autism disability, required accommodations, aids, related services or supports. (P-7 pp.52-53).

**THE SECTION 504 SERVICE AGREEMENT AND
THE NOTICE OF RECOMMENDED EDUCATIONAL PLACEMENT**

27. On or about April 18, 2018, through April 23, 2018, the secretary for the Director of Special Education sent multiple emails and made multiple phone calls to schedule a mutually convenient time to meet and discuss the development of a Section 504 Agreement. Ultimately, the Parties agreed to meet on April 24, 2018. (S-61 pp.1-15).
28. On or about April 23, 2018, the Parent emailed the secretary stating that the Parents could not make the April 24, 2018, meeting. At the same time, the Parents offered to meet on May 7, 8, 14, 15, 2018, to develop a working Section 504 Agreement. (S-61 pp.1-15).
29. On April 25, 2018, the District, in writing, invited the Parents to a meeting on May 14, 2018, to develop a Section 504 Agreement. (S-61 p.15).
30. When the Parties met on May 14, 2018, the Parents signed the Notice of Recommended Educational Placement (NOREP) agreeing to the recommendation that the District stop providing the Student with the autistic support and individualized S.D.I.s. (S-61 pp.14-16).
31. The special education teacher implemented the Student's I.E.P. until May 14, 2018, when the Parent signed the NOREP. (S-59, S-63, S-64, S-66, S-67, N.T. pp. 421-431).

32. On May 25, 2018, the Special Education Director's secretary invited two staff members to participate in a tentative Section 504 meeting. The May 25, 2018, email noted a telephone conversation the secretary had with the Parents confirming that the Parents wanted to convene the Section 504 meeting in August 2018 when school came back in session. (S-65 p.1).
33. On August 20, 2018, a "Draft" 504 agreement was circulated following the meeting. (P-10).
34. The August 2018 Section 504 plan provided the following aids, services and accommodations:
 - a. Organization structure for story problems with multiple steps;
 - b. Redirection with two reminders when off-task;
 - c. Reminders to review [Student's] work completion;
 - d. Review and allow an opportunity to correct work; and,
 - e. Provide early finisher projects to aid in developing organization and math concepts. (P-10).
35. After the August 2018 meeting, the Parent contacted the Director of Special Education concerning the 504 plan requesting clarification about how the listed accommodations would support the Student in the regular education classroom. The Parent also expressed dissatisfaction that the S.A. identified the Student's specific disabilities. (P-24 pp. 1-2).
36. On or about September 6, 2018, the District and the Parents continued to meet to develop the third grade Section 504 SA. (P-19).
37. At the Parents' request, the District removed the listing of the Student's disabilities from the cover sheet, clarified the multi-step process to address story problems, clarified the redirection and review process used for work completion and further described the "finisher projects" as supplemental ungraded work that once

completed would provide the Student with additional positive behavior bonus points. (P-9, N.T. p.380).

38. On September 18, 2018, the building principal wrote to the Parents stating that the Student had four (4) disciplinary incidents. The note also stated that the principal assigned the Student two (2) recess detentions. (P-13 pp.4-5).
39. On September 19, 2018, the Parents consented to the S.A. and the District began to implement the S.A. (P-9, p.4, N.T. p.381).

THE RAPIDLY CHANGING CIRCUMSTANCES

40. Sometime in the mid-fall 2018, the Parent wrote a three (3) page letter to the Superintendent and the Board about alleged procedural and substantive violations in the development of the Section 504 Agreement, the Student's then-current unmet needs and the District's response to the Student's changing circumstances. (P-25).
41. After reviewing the letter, the Superintendent and two Board members met with the Parents. In an effort to respond to the Parents' concerns and the Student's needs, the Superintendent directed the building level principal to take the lead in developing /revising future S.A. The Parent withheld the Student from school until she obtained a face-to-face meeting with the Board and the Superintendent. (N.T. p.77, S-34, N.T. pp.477-482).
42. On October 11, 2018, the elementary school principal wrote to the Parents about ten (10) unexcused school absences. (P-13 pp.1-3).
43. Throughout October 2018, the Parties were in regular email contact about revisions to the then-current September 2018 SA. (P-13).
44. On October 19, 2019, the parents, the school psychologist, the building principal, and a teacher attended a meeting to revise the

- S.A. (S-34 pp.1-6, NT p.254).
45. From October 22 through October 30, 2019, the building principal and the school psychologist worked together to revise the S.A. (S-34 pp.1-6, NT pp.254-255).
 46. On October 25, 2019, the Parent inquired about the S.A. revisions. (S-34 pp.1-6, NT pp.255-258).
 47. On October 25, 2019, the Parent and the building principal met to discuss the Student's then-current 15 unexcused school absences. During the meeting, the District proposed and the Parents rejected a truancy elimination and attendance plan. (S-34 pp.1-6, NT pp.297-303).
 48. On October 25, 2019, after returning home from the principal's meeting, the Parents emailed the building inquiring about a message that the Student would not be allowed to participate in the Halloween parade if outstanding math assignments/tests were not completed. After speaking with the teacher, the building principal emailed the Parents stating that the Student misunderstood the teacher as the outstanding work was about to be completed and participation in the parade was not an issue. (S-34 pp.1-6).
 49. On October 25, 2018, the Parents emailed the principal, the teachers and the Superintendent, asking the District to provide a one-on-one aide and stress reduction techniques like blowing bubbles to address escalating anxiety, attention and emotional concerns. (S-43 p.2).
 50. On October 30, 2018, the principal invited the Parents to attend a November 5th or 6th, 2018, Section 504 meeting. (S-43 p.6). The invitation included a "Draft" SA. *Id.*

51. On November 1, 2019, the teacher, the school psychologist, and the principal met, without the Parents, to discuss what additional accommodations could be added to the SA. (S-34 pp.1-6).
52. On November 6, 2019, the principal called the Parents to schedule a meeting to finalize the S.A. During the call, the Parents requested that the District place the Student in a neighboring District. (S-34 pp.1-6). The request for placement in another district was denied.
Id.
53. On November 7, 2019, the Parent sent the building principal a 14 point statement rejecting the District's proposed additions to the S.A. The rejection included the following points of disagreement and alleged violations:
 - a. The failure to provide a specific single point of contact to address day-to-day communication needs.
 - b. The Parents objected to the District's suggestion to provide the teachers, the bus driver, and the aides with an orientation/awareness training session about the nature of the Student's disability.
 - c. The Parents objected to any further contact with the Special Education Director and questioned the use of a "Dojo" communication app.
 - d. The Parents objected to the District's proposal that the Student sit in an assigned seat on the bus.
 - e. The Parents objected to the lack of a one-on-one aide.
 - f. The Parents objected to the use of a behavior contract, including removing recess as a consequence.
 - g. The Parents asked the District to place the Student in

another nearby district.

- h. The Parents objected to the District's proposal to teach the Student stress-reducing strategies.
 - i. The Parents objected to the Student using a journal to track social, emotional and behavioral feelings.
 - j. The Parents asked the District to use a "Binder" of challenging activities to deter behavior and track assignments.
 - k. The Parents repeated previous complaints about another student picking on the Student and objected to the inclusion of in-school counseling or social skills instruction.
 - l. The Parents objected to the District's proposal to reduce the number of math problems and small group instruction outside of the regular education classroom in the emotional support room.
 - m. The Parents requested an explanation why the proposed S.A. eliminated several of the then-current accommodations. (P-25 pp.1-3).
54. On November 7, 2018, the Parent and the principal exchanged multiple communications about the Student's unexcused absences and early dismissals referenced in the proposed and rejected School Improvement Plan (S-33 p.6, S-31, NT pp.297-299).
55. On November 9, 2018, after reviewing the Parent's email rejection of the S.A., the principal provided the Parents with a final proposed Section 504 S.A. The communication also included a copy of the Parents' Section 504 due process procedural safeguards. The letter

noted the previously agreed on September 19, 2018, Section 504 S.A. was still being implemented. (S-47 p.1, NT p.297).

56. The November 9, 2018, S.A. included the following aids, services and/or accommodations:
- a. A home/school communication system, including an orientation and awareness training for all staff.
 - b. Assigned seating on the bus along with permissible use of a personal device.
 - c. The use of a behavior contract to increase positive behaviors, including consistent, clear limits for classroom behavior, assigned area for sensory activities, reinforcement for self-monitoring, a journal to track emotions/attention, a daily checkout system, at the end of the day to summarize the day, teacher checks to ensure understanding of directions, and the opportunity for "seat breaks."
 - d. Additional teacher support in organizing and structuring math story problems.
 - e. Use of redirection techniques to increase on-task time.
 - f. Use of the emotional support classroom to complete classwork assignments. The S.A. also provided that if the Student did not review and redo math problems on request, the Student would receive the natural consequence of a low grade or zero.
 - g. Social skills training with the school counselor, one (1) time a week for 15-30 minutes.
 - h. Self-esteem reassurance and encouragement rather

than correction through criticism.

- i. The S.A. called for the District to provide the Student with a set routine to make the transition from class-to-class less stressful.
- j. The S.A. called for the District to provide the Student with extended time to complete math assignments.
- k. The S.A. called for the District to provide the Student with direct instruction on organizational skills and strategies.
- l. The S.A. called for the District to provide the Student with time to review completed work with the opportunity to correct responses before the work is turned in to the teacher.
- m. The S.A. called for the District to provide the Student with early "finisher" projects to develop organizational skills and earn positive behavior bonus points. (S-47 pp.1-8).

57. On November 26, 2018, the elementary school principal wrote to the Parents about ten (10) more unexcused absences. (P-13 pp.1-3).

58. On November 30, 2019, the Parent emailed the principal about a complaint that the Student was inappropriately disciplined during a peer-to-peer conflict during lunch. After investigating the complaint, the principal learned that after repeated attempts to redirect the Student, the staff changed the Student's seating. (S-34 p.5).

59. On December 12, 2019, the Parent emailed the principal describing an incident with a substitute teacher. In the email, the Parent-reported that the Student came home upset after the substitute

teacher asked the class if the Student always acted inappropriately during class. The Parent also reported that other students were picking on the Student. The assistant principal investigated the complaint and learned that the substitute teacher made a negative comment to the class after the Student did not respond to redirection to stop [disruptive behaviors]. The assistant principal confirmed that the Student and a peer each taunted each other with a series of made-up phrases. (S-34 pp.1-5. S-49, S-33 p.3). Neither the Student nor the peer was disciplined. *Id.*

60. On December 14, 2019, a teacher reported that the Student [engaged in a disruptive behavior] in the cafeteria. When the assistant principal viewed the video from the cafeteria, he confirmed the misconduct. When the misconduct was reported to the Parents, the Parents requested and the District agreed that the staff would not interview the Student about misconduct without the Parent being present. When the Parent viewed the video, she again asked and the District again denied the request to provide a one-on-one aide. (S-34 p.5).
61. On January 9, 2020, the assistant principal called the Parent about a behavioral incident alleging the Student [redacted] (S-34 p.5).
62. On January 11, 2020, the Parent, the Student and the assistant principal met to review the [redacted] incident; the Student acknowledged the misconduct and agreed to apologize to the peer. (S-34 p.5).
63. Between the initial call and the meeting about the [redacted] incident, the Student made [an inappropriate] comment to a [redacted] student. Earlier in the week, the Student made a similar comment to another student about being [redacted]. After learning of the

comments, the Parents repeated the request for a transfer to another district. (S-34 p.6). The District denied the request. *Id.*

64. On January 14, 2020, the principal received an email indicating a disagreement above having the Student apologize for the misconduct. (S-34 p.6).
65. On January 22, 2020, the principal reached out to the intermediate unit to identify additional strategies or resources to support the Student. (S-34 p.6).
66. On January 30, 2019, the Parents emailed the principal and the teachers stating that the Student was privately placed at an out of District placement. (S-56).
67. In the first marking period of the 2018-2019 fourth grade year, the Student earned a B in Reading, an A in Spelling, an A in English, a C in Math, a score of 100% in Social Studies 4, an A in Science, an S in STEAM 4, an S Music and Physical Education. (P-14 p.5).⁵

Applicable Legal Principles Burden of Proof

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief *Cf. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion rests with the Parent, who requested this hearing,

⁵ After carefully considering the entire testimonial record, including the non-testimonial, extrinsic evidence in the record, in its entirety, I now find that a preponderance of evidence exists that will enable me to draw inferences, make Findings of Fact and Conclusions of Law. Consequently, I do not reference portions of the evidentiary record prior to the scope of the claim or subsequent to the scope of the claim that are not relevant or outcome determinative to the ultimate factual or legal issue(s) in dispute.

while the burden of production rests with the District. In IDEA and Section 504 disputes, the hearing officer applies a preponderance of proof standard.

Credibility Determinations

As fact-finders, hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify.⁶ This hearing officer now finds the District's and the Parents' witnesses were credible, and their testimony was essentially consistent concerning the actions taken or not taken by the District or the Parents regarding the Student's FAPE. I found the testimony of the witnesses to be cogent, clear and at times persuasive. The Parties submitted written closing statements. All exhibits from both Parties were entered into the record and fully considered in the Final Decision.

The above factual statements constitute the written Findings of Fact and Conclusions of Law required by either the IDEA, Section 504, and/or state law. (20 U.S.C. § 1415(h)(4), and/or Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504), 34 C.F.R. §104.36, 22 P.A. Code Chapter § 14.162, 22 P.A. Code Chapter 15.7).

THE SECTION 504 FAPE REQUIREMENTS

While Section 504 of the Rehabilitation Act's plain language does not require a FAPE or IDEA like procedural protections like an I.E.P., the Section 504 and Chapter 15 implementing regulations do. The Section 504 regulations define an "appropriate education" as: regular or special education and related aids and services that (i) are designed to meet individual educational needs of disabled persons as adequately as the needs of non-handicapped persons are met, and (ii) are based upon adherence to procedures that

⁶ Cf., *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

satisfy the requirements of 34 C.F.R. §§104.33 (FAPE), 34 C.F.R. § 104.34 (educational setting), 104.35 (evaluations), and 104.36 (procedural safeguards). The cross-referenced regulations impose similar IDEA-like requirements, and yet at other times impose very distinct rights and duties not found in the IDEA concerning the identification, education, evaluation and placement of disabled students.

Courts, in this circuit, have explained Section 504's FAPE requirement as follows "[districts] must reasonably accommodate the needs of the handicapped child to ensure meaningful participation in educational activities and meaningful access to educational benefits. . . . However, § 504 does not mandate 'substantial' changes to the school's programs, and courts 'should be mindful of the need to strike a balance between the rights of the student and [his or her] parents and the legitimate financial and administrative concerns of the [s]chool [d]istrict.'" *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280-281 (3d Cir. 2012). At the same time, mere administrative or fiscal convenience does not constitute a sufficient justification for providing separate or different services." *Ridley*, 680 F.3d at 281 (citing *Helen L. v. DiDario*, 46 F.3d 325, 338 (3d Cir. 1995)). The 504 regulations further note that compliance with the IDEA procedural safeguards is one means, but not the sole means of meeting the requirement of Section 504. See, *C.G. v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 IDELR 41 (3d Cir. 2013), 34 C.F.R. § 104.31-36.

To establish a violation of Section 504, a parent must prove that: (1) the Student was disabled; (2) (s)he was "otherwise qualified" to participate in school activities; (3) the school district received federal financial assistance; and (4) the student was excluded from participation in or denied the benefits of the educational program receiving the funds or was subject to discrimination under the program. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012) citing *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253

(3d Cir. 1999)). Like the IDEA, Section 504 does not require the District to provide the best possible education. *Molly L. v. Lower Merion Sch. Dist.*, 194 F. Supp. 2d 422, 427, 436 (E.D. Pa. 2002). The sufficiency of a §504 service plan may be demonstrated at least in part by improving grades. *Timothy F. v. Antietam Sch. Dist.*, No. 12-2719, 2014 U.S. Dist. LEXIS 44112 (E.D. Pa. Mar. 31, 2014) *citing*, *Anello v. Indian River Sch. Dist.*, 355 F. App'x 594, 598 (3d Cir. 2009).

THE IDEA FAPE PROCESS, THE IEP MEETING, THE IEP DOCUMENT

The IDEA and the implementing federal regulations obligate local school districts to locate, identify, evaluate, and provide a free appropriate public educational services, in the least restrictive setting, to children eligible for special education. 20 U.S.C. §1412. To achieve the promise of a FAPE, districts must provide each disabled child an I.E.P. that is reasonably calculated to permit the child to receive a meaningful benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). An I.E.P. is a comprehensive program prepared by a group of people, including the teacher of the student, other school officials and the student's parents. An I.E.P. must be drafted in compliance with a detailed set of procedures found at 20 U.S.C. § 1414(d)(1)(B). When formulating an I.E.P., a school district "must comply both procedurally and substantively with the IDEA." *Id.*

IDEA PROCEDURAL AND SUBSTANTIVE FAPE VIOLATIONS

A procedural violation occurs when a district fails to abide by the IDEA's procedural safeguards requirements. Not all procedural violations amount to a denial of a FAPE. *See, C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 64 (3d Cir. 2010). A procedural violation constitutes a denial of a FAPE where it results in the loss of an educational opportunity and seriously infringes on

the parents' opportunity to participate in the I.E.P. process or causes a deprivation of educational benefits. 34 C.F.R. §300.513.

A substantive violation occurs when an I.E.P. is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 1001 (2017). The IDEA does not guarantee "the absolute best or 'potential-maximizing' education."⁷ Therefore, as *Endrew and Rowley* make clear, the I.E.P. must respond to the child's unique educational needs and individual circumstances. See, 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

REMEDIES AND APPROPRIATE RELIEF

Courts and hearing officers may award compensatory education and reimbursement as a remedy for alleged Section 504 violations.⁸ With these fixed principles in mind, I will not turn to the District's affirmative statute of limitations defense.

ANALYSIS AND CONCLUSIONS

OVERVIEW OF THE PARENTS' CLAIMS AND THE DISTRICT'S REPLY

Although the Parents' written closing makes a passing reference to IDEA violations, the closing statement's thrust is dedicated to the Section 504 claims; both claims as stated will be addressed herein. The District contends that at all times relevant, they followed all applicable procedural and

⁷ See, *Fuhrmann on Behalf of Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1043 (3d Cir. 1993) (recognizing that IDEA does not entitle a child to the best education available, but only one reasonably calculated to provide him or her with a meaningful educational benefit).

⁸ See, e.g., *Easter v. District of Columbia*, 66 IDELR 62 (D.D.C. 2015) (allowing a 22-year-old student to seek compensatory education based on the District of Columbia's alleged failure to make special education services available after his release from a juvenile detention facility); *Horton v. Boone County Sch. Dist.*, 62 IDELR 25 (E.D. Ky. 2013) (noting that a former student with ADD could seek compensatory education for his allegedly deficient Section 504 services); See, also, *J.B. v. Avilla R-XIII Sch. Dist.*, 61 IDELR 153 (8th Cir. 2013) (holding that the parents' requests for compensatory education and reimbursement for special education expenses brought their Section 504 claim within the scope of the IDEA's exhaustion requirement).

substantive requirements of the IDEA and/or Section 504. For all of the following reasons, I agree with the District.

THE STUDENT'S IDEA FAPE CLAIMS

The Parents' failure to provide a FAPE claim, under the IDEA or Section 504 from March 2018 to May 2018, when the Parents returned the NOREP, agreeing to exit the Student from IDEA services, is denied.

The teacher's testimony that she waited until the District received the signed May 14, 2018, NOREP evidencing the Parents' agreement to end IDEA services is cogent, clear and credible. Multiple District exhibits described above preponderantly document the fact that the teacher provided the agreed specially-designed instruction. The exhibits corroborate that from March through May 2018, the teacher provided the Student with the agreed on goal-related activities. For example, multiple exhibit pages include contemporaneous notes that document the date the instruction was provided and the Student's raw scores. Accordingly, the Parents' IDEA denial of a FAPE claim from March 2018 to May 2018 is denied as stated. To the extent they further allege the District failed to provide a Section 504 FAPE, in a reasonable time, from May 19, 2018, until September 14, 2018, is also denied.

THE STUDENT'S SECTION 504 FAPE CLAIM

There is no question as to whether the Student is a person with a disability, or that the Student's education was "free," or that the District receives federal financial aid. Therefore, the only question before this hearing officer is whether the District reasonably accommodated the Student's needs, ensured the Student was not excluded from meaningful participation in educational activities or denied any benefits. The Parents did not make any specific Section 504 claims of discrimination; therefore, the discrimination issue is now waived.

THE PARENTS' SECTION 504 PROCEDURAL FAPE CLAIMS

Shortly after the Parents agreed to end IDEA services, the District regularly reached out and communicated with the Parents to schedule a Section 504 meeting. Although the Parties agreed to meet on April 24, 2018, the Parents canceled the meeting on April 23, 2018. At the May 14, 2018, meeting, the Parents signed the NOREP and shared their emerging concerns about the need for continuing personalized Section 504 supports. The Parties mutually agreed to postpone any further discussions or meetings until August 2018. The late August 2018 Section 504 meeting and early September 2018 Section 504 meetings were not immediately productive. Finally, on September 19, 2018, after a series of back and forth reviews and revisions, the Parents' consented to the S.A. with four (4) specific aids/accommodations/services. Based on a holistic review of the record, I now find that the Parties acted in good faith. I now find the record is preponderant that any delay in preparing the S.A. did not prejudice the Student's FAPE rights or interfere with the Parents' right to participate in the development of the S.A. The record is preponderant that the District and the Parents were in regular contact about the S.A. First, the record is clear that the District offered and the Parents refused to consent to the proposed S.A. Second, the record is also preponderant that after agreeing to the Parents' requested revisions and input, the District promptly implemented the S.A. Therefore, the Parents' Section 504 procedural FAPE claim that the District failed to offer a FAPE in a timely fashion is denied.

THE PARENTS' SUBSTANTIVE SECTION 504 CLAIMS

The Section 504 FAPE regulations require that districts comply with specific procedural and substantive requirements. The Section 504 procedural FAPE requirements include the right to a FAPE, the right to an evaluation, the right to be educated in the least restrictive setting and the right to file a due process complaints when disagreements arise. 34 C.F.R. §104.33 (FAPE), 34 C.F.R. §104.34 (educational setting), 34 C.F.R. §104.35 (evaluations), and 34 C.F.R. §104.36 (procedural safeguards). In combination, these intertwined provisions are the building blocks for a Section 504 FAPE.

Consistent with the Section 504 procedural requirements, after giving due weight to the Parents' input, the District used the comprehensive IDEA evaluation as a basis to determine the Student was Section 504 eligible. Next, the District used the evaluation to construct a "Draft" S.A. The data from the March 2018 reevaluation report, the F.B.A. and the last agreed-upon I.E.P. noted three disability-related educational needs, *i.e.* (1) social skills, (2) sustaining attention and (3) coping/transition required reasonable accommodations. These three educational need areas became the foundation of the September 2018 S.A.

After a series of meetings, followed by some give and take, the Parties jointly developed, and the Parents consented to the current S.A.

The Parents now argue that the September 2018 S.A. is "vague" or not otherwise "specific" I disagree. The Parents' "vagueness" argument is grounded in a series of compare and contrast witnesses who were asked to comment on the descriptors used to "set forth the specific related aids, services, or accommodations" in a 2015 S.A. versus the descriptors used in the September and November 2018 Agreements. While the "vagueness" argument is somewhat thought-provoking, as argued here, I now find for the following reasons the argument is factually and legally incorrect.

The Parent's argument extends the requirements of 22 P.A. Code Chapter §15.7 beyond the regulation's plain language. While Chapter 15.7 does require a "written agreement" that ". . . shall set forth the specific related aids, services, or accommodations the student shall receive," along with the "date the service begins and ends," the state Chapter 15 regulations do not require the level of specificity argued for here. [22 P.A. Code §15.7].⁹ The record is preponderant that the September and November 2018 S.A. cover pages each included a start date and end date for each offered aid, service or accommodation. After reviewing all of the testimony and the exhibits, I now find the September 2018 S.A. "set forth the specific related aids, services, or accommodations" met the Student's Section 504 needs. Let me explain.

The first accommodation described a specific four-part strategy to solve multi-step problems. The second accommodation described an easy to understand redirection strategy to maintain the Student's attention. The third accommodation encourages the Student to review, revise and correct assignments. The fourth accommodation focused on early "finisher" activities to develop organizational skills. After completing the "finisher" activities, the Student could earn bonus points.

Contrary to the Parents' argument, the accommodations are specific.

Borrowing from the IDEA case law, after reading the accommodations, I now find that a person unfamiliar with the Student would understand and implement the accommodations as written, gauge the Student's level of participation in the program and determine whether the Student was

⁹ The plain language of the Section 504 regulations does not require a written S.A or specific descriptors to explain the accommodations. Therefore, I am reluctant to import IDEA IEP like IEP standards in this situation. See, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?* Perry Zirkel, *Journal of Law & Education*, Vol. 40, No. 3 fn.29, (July 2011).

benefiting.¹⁰ This series of specific accommodations tracked the needs identified in the Student's then-current educational profile.

Finally, the Parents' "vagueness" argument overlooks the un rebutted fact that despite the October and November turmoil, the Student earned average to above-average regular education grades. While average grades are not the gold standard of a FAPE, in this particular instance, I now find they do support a finding the S.A. accommodations were otherwise specific enough to facilitate the Student's participation in regular education. The passing grades also provide supporting indicia that the S.A. provided the Student with commensurate educational benefits otherwise offered to other non-disabled students.

Simply put, the accommodations described and explained to the staff responsible for implementing the S.A., their specific responsibilities and duties regarding the Student's required accommodations. Accordingly, I now find this combination of accommodations provided the Student with reasonable accommodations and a commensurate equal opportunity to access, participate and benefit from the regular educational program. Therefore, the Parents' September 2018 to November 2018 denial of FAPE claims, within the meaning of Section 504, are denied.

THE NOVEMBER 2018 SERVICE AGREEMENT

The record is clear that as the fall 2018-2019 school year went on, the Student began to display attention, peer problems and atypical discipline incidents not previously seen at school or in the home. The record is preponderant that these emerging problem areas, in turn, contributing to

10 Cf. Mason City Community School District, 46 IDELR 148 (SEA IA 2006); Rock Hill Local Sch. Dist., 111 LRP 67202 (SEA OH 09/19/11) (A district's IEP team drafted an IEP for a student that didn't explain how it could be appropriately and effectively implemented.); Minneapolis Special Sch. Dist. #001, 62 IDELR 276 (SEA MN 2013) (IEP failed to describe and explain for the staff responsible for implementing the IEP their specific responsibilities and duties in regard to the student's modified curriculum and required accommodations).

the Student's emerging anxiety, school refusal and the steady breakdown in the Parent-District relationship.

On October 25, 2018, consistent with applicable school attendance requirements, once the Student missed 10-school days, the Principal offered and the Parents rejected a plan to improve the Student's attendance. On or about October 30, 2018, aware of the change in the Student's circumstances, the principal offered multiple dates to meet, with the Parents, to revise the S.A. When the Parents could not attend the meeting, the District sent a "Draft" S.A. home.

On November 7, 2018, the Parents emailed the Principal rejecting all 14 of the accommodations/services/aids in the "Draft" S.A. The Parents now repeat the earlier claim that the accommodations were either "vague" and/or "non-specific." Rather than wait for the District's reaction to their input, the Parents asked and the District refused to place the Student, at public expense, in a regular education building in a nearby district. Finally, the Parents asked and the District refused to provide a one-on-one aide. Rather than schedule another meeting, the District issued a final S.A. with procedural safeguards.

Contrary to the Parents' arguments, the description of the Student's reaction to peer teasing, the substitute's teacher's inadequate response to the Student's misbehavior and the miscommunication about the Halloween parade do not collectively or individually rise to either a substantive or a procedural denial of a FAPE.¹¹ Let me explain.

For example, to avoid another teacher miscommunication mishap, the November 2018 S.A. called for all staff to receive Student specific disability awareness training. To reduce the likelihood of future home and school miscommunications, like the Halloween parade, the S.A. included a home

and school communication log along with additional organizational accommodations to sustain attention and complete all assignments. To strengthen the Student's social/coping skills, the S.A. called for the guidance counselor to provide social skills instruction once a week for 15 to 30 minutes. To manage occurrences of inattention or misbehavior, the S.A. cobbled together several positive behavioral aids/accommodations like a behavior contract, redirection strategies, and organizational supports to address coping with changes and transition from one activity to the next. Simply put, there is no evidence in the record that the District ". . . intentionally refused to take any remedial or corrective action to remedy the problem." *T. F. v. Fox Chapel Area Sch. Dist.*, No. 12cv1666, 2013 U.S. Dist. LEXIS 158197 (W.D. Pa. Nov. 5, 2013) citing *Scaggs v. New York Dept. of Educ.*, 2007 U.S. Dist. LEXIS 35860, 2007 WL 1456221, at * 16 (E.D.N.Y. 2007). Accordingly, I now find the evidence is preponderant for all of the above reasons that the Parents failed to establish a denial of a FAPE. Therefore, the Parents' Section 504 FAPE claim is denied.

SUMMARY AND CONCLUSIONS

First, the Parents' "vagueness" argument is factually and legally misplaced. Second, the September 2018 and the November 2018 S.A. did specifically described the educational accommodations, aids, and/or services needed to ensure the Student could participate in the regular education program and/or benefit from each S.A. Third, the record is clear the accommodations were reasonable and addressed the Student's educational needs. Fourth, the record is clear the accommodations offered the Student a commensurate opportunity to reach the same level of achievement otherwise offered to other Students. 34 CFR §104.4(b)(2). Fifth, and finally, the record is clear the Parents did not meet their burden of proof that the District denied the Student a FAPE within the IDEA's meaning. Therefore, for all of the above reasons described herein, the Parents' Section 504 FAPE claims and IDEA

FAPE claims are denied. An otherwise appropriate **ORDER** follows along with the Notice of Appeal.

ORDER

And Now, this January 29, 2021, it is hereby **ORDERED** as follows:

1. The Parents' Section 504 FAPE claims, as stated, are **DENIED**.
2. The Parents' IDEA FAPE claims, as stated, are **DENIED**.
3. All other claims for appropriate relief or affirmative defenses are dismissed with prejudice.

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer
ODR FILE #21807-1920 AS