

*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:** 22267/18-19

**Child's Name:** A. G.                      **Date of Birth:** [redacted]

**Parents:**  
[redacted]

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**Hearing Officer:** James Gerl, CHO    **Date of Decision:** August 10, 2019

## **DECISION**

### **DUE PROCESS HEARING**

22267/18-19AS

### **BACKGROUND**

The parents contend that the school district violated Section 504 and the ADA by failing to observe its child find duty; by failing to provide certain reasonable accommodations to the student and by failing to implement the student's Section 504 plan. In this case, I find that the district did not breach its child find duty. I find that the school district discriminated against the student in violation of Section 504 by failing to provide the reasonable accommodation of allowing the student to record classroom lectures. I find that the accommodations in the student's 504 plan were otherwise appropriate. In addition, I find that the district properly implemented the student's 504 plan.

### **PROCEDURAL HISTORY**

The parents filed a due process complaint alleging that the school district violated both IDEA and Section 504. At the due process hearing, counsel for the parent

announced that the parents had withdrawn all IDEA allegations and were proceeding only under Section 504 and the Americans with Disabilities Act.

At the due process hearing, which was conducted in one session, seven witnesses presented testimony. Parents' Exhibit 1 was admitted into evidence. The school district's Exhibits 1 through 13 were admitted into evidence. School district Exhibit 14 was withdrawn by agreement of the parties and S-14 was not considered in the preparation of this decision.

After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact. All arguments submitted by the parties have been considered. To the extent that arguments advanced by the parties are in accordance with the findings, conclusions, and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments have been omitted as not relevant or not necessary to a proper determination of the material issues as presented herein. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

The hearing officer asked counsel to include argument in their briefs concerning whether a Pennsylvania IDEA hearing officer has the authority to decide issues under the Americans with Disabilities Act. Counsel for the district addressed the issue.

Counsel for the parents did not address the issue. It is not necessary for the hearing officer to reach this issue, however, inasmuch as neither party has made any argument that the result would be different under the ADA as opposed to Section 504. Accordingly, the hearing officer does not reach the issue of authority to decide issues under the Americans with Disabilities Act because it is not necessary on these facts.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

### **ISSUES PRESENTED**

Counsel were asked to provide a bulleted list of issues before the hearing. Counsel for the parents complied, but the lawyer for the district did not do so. At the hearing, however, counsel for the district agreed with the parents' statement of issues. By agreement of the parties, the following issues are presented:

1. Have the parents proven that the school district violated its child find duty under Section 504?
2. Have the parents proven that the accommodations contained in the school district's 504 plans for the student were not appropriate?

3. Have the parents proven that the school district failed to implement the student's Section 504 plan?

### **FINDINGS OF FACT**

Based upon the parties' stipulations of fact at the due process hearing, the hearing officer makes the following findings of fact:

1. The student was born on [redacted].
2. The student is a resident of the school district.
3. The student is eligible under Section 504.
4. In December 2012, the student was diagnosed with ADHD, reading disorder, developmental coordination disorder, and handwriting difficulty.
5. At the time of the due process hearing, the student had just completed the 9th grade school year.
6. The student was diagnosed in November/December 2012 with ADHD. The student was diagnosed on October 2, 2013 with a reading disorder and a developmental coordination disorder (handwriting difficulty). The student was diagnosed on February 25, 2019 with a specific learning disability in reading and written

expression under DSM-5, generalized anxiety disorder, and an auditory processing disorder. (See also, S-1; S-3; S-5)

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact:<sup>1</sup>

7. The student is very creative and energetic. The student loves animals, especially horses. (NT 55 – 56)

8. The student has had a Section 504 plan with the district since at least November 15, 2012. (S-1 at page1)

9. The district developed an evaluation report for the student on March 24, 2013 when the student was in third grade. The evaluation reviewed a number of previous records and reports, including the student’s proficient and advanced scores in reading and math benchmarks. The evaluation noted that the student had a high average IQ score of 111 on Wechsler Intelligence Scale for Children, Fourth Edition and average scores in academics on the Wechsler Individual Achievement Test, Third

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<sup>1</sup> (Exhibits shall hereafter be referred to as “P-1,” etc. for the parents’ exhibits; “S-1,” etc. for the school district’s exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as “NT\_\_\_”).

Edition. The evaluation report concluded that the student had a disability but was not in need of specially designed instruction. The mother agreed with the conclusions of the report. (S-2)

10. A 504 team meeting for the student was convened on May 24, 2018. At the meeting, the student's mother requested that as an additional accommodation in the 504 plan the student be permitted to record classroom lectures. The school counselor, who was the student's 504 case manager, stated that audio recordings are not an accommodation that the school district puts into 504 plans. (NT 228 – 229, 235-236;; NT 64)

11. A 504 service plan was developed for the student on May 24, 2018. The plan noted that the student was diagnosed with ADHD, reading disorder and developmental coordination disorder, and that the disabilities may negatively impact the student's classroom performance in the areas of concentrating, thinking and writing. The plan includes the following accommodations: An extra set of textbooks; testing accommodations, including utilization of read write Google to read tests to the student and an electronic version of assessments; an opportunity to use assistive technology (Read Write Google, Snapverter, Google Docs – speech to text); science, social studies and math assessments scored on content and not conventions or spelling; use of earbuds during assessments; copy of notes provided per student request; and extended time on assessments up to half the allotted time. The student's parents, as well as the

other team members, agreed with this service plan and the accommodations included in it. (S-4; NT 119-120)

12. The student's mother repeated the request that the student's 504 plan include an accommodation that the student be allowed to record class lectures in an e-mail to the school counselor, who was the student's 504 case manager, on June 14, 2018. The e-mail stated that the recordings would not relate to "other students' FERPA rights which pertains to educational records." (S-12 at p. 1)

13. The student's mother repeated the request that the student's 504 plan include the accommodation of recording class lectures in an e-mail to a special education official of the school district on August 19, 2018. (S-12 at p. 7; NT 235)

14. The special education director for the school district sent an e-mail to the mother on August 29, 2018 stating that the district would not agree to include an accommodation of permitting the student to record classroom lectures in its 504 plan, mentioning the protection of other students' privacy. The e-mail stated that other accommodations are in place, which the school district believes meets the student's needs. The school district declined the request. (S-12 at p. 9, 12-13; NT 235-236, 73-74)

15. The parents had the student evaluated by an independent school psychologist from September 2018 through February, 2019. The evaluator issued a report on February 25, 2019. The evaluator administered the Woodcock Johnson IV



tests of cognitive ability and found that the student had general intellectual ability score of 100, which is in the average range. The student was assessed on the Woodcock Johnson IV tests of achievement where the student's scores in all clusters were low average to high average except for low scores in phoneme-grapheme knowledge. The evaluator administered two behavior assessments. On the Behavioral Assessment for Children, the teacher's rating scores on this assessment were all within the acceptable range except for at-risk scores with regard to withdrawal and social skills. The parents' rating scales showed additional at-risk scores. The scores of the student revealed at-risk scores with regard to inattention/hyperactivity and attention problems. The evaluator also administered the Conners 3rd Edition rating scales which revealed a significant difference between what was reported at home and at school, with withdrawn and social skills being significant at school. (S-5; P-1)

16. The parents' independent evaluator concluded that the student met the criteria under the DSM-5 for dyslexia and that the student had severe chronological - phonemic deficits. (S-5; NT 166 – 167)

17. The report of the parents' evaluator concludes that the student demonstrates severe chronological – phonemic deficits, an anxiety disorder, an auditory disorder and problems with auditory working memory and auditory attention. The report states that the student's disabilities should be accommodated by permitting the student to record classroom lectures. (S-5; P-1)

18. The parents' independent evaluator noted that the student and the student's mother stated that the current reading accommodations in the student's 504 plan were adequate to meet the student's needs and had helped the student gain access to text. (S-5 at p. 27)

19. Because the independent evaluator found that the student had limited auditory memory span ability and related stress pertaining to the student's auditory deficits, it was necessary for the student to be able to record classroom lectures. (S-5 at p. 28)

20. The report of the parents' independent evaluator made a number of other recommendations for the student's academic program, including digital textbooks, speech to text technology, the use of a calculator, that the student be given teacher's lecture notes, counselling and monitoring for depression. (S-5)

21. The attorney for the parents sent an e-mail to the attorney for the school district on July 12, 2019 alleging that the accommodation of audio recording of class lectures is necessary, and the district's refusal was a violation of Section 504. (S-12 at pp. 10 – 11)

22. Because of the student's disabilities, it is difficult for the student to take notes during classroom lectures. In addition, the student has "terrible" handwriting and spelling, and the student is unable to keep up with the amount of information. (NT 27-28)

23. The student's auditory processing disorder and problems with short-term working memory make note taking especially difficult for the student. (NT 24 – 32; NT 126 – 127)

24. The student has specifically requested the use of a smart pen to record classroom lectures. The pen and the paper and the notebook that comes with the smart pen are synched together so that if the student was having trouble keeping up with a particular part of a lecture, the student could make a mark with the pen on the special paper and then when replaying the recording, it would go to the specific point at which the teacher was talking. In that way, the student could go directly to the part of a lecture that the student had missed rather than having to listen to the entire lecture. Certain smart pens can also be connected to a computer system to upload the student's handwritten notes. (NT 52 – 54; NT 68 – 70)

25. On April 5, 2019, the student's 504 service plan was updated. The plan mentions the evaluation by the parents' private evaluator and the conclusions thereof. The 504 plan includes the accommodations from the previous plan, plus the following additional accommodations: a copy of notes provided to the student; coordinate testing in a separate quiet location when the student needs to use speech to text; preferential classroom seating. The student's mother did not agree with the 504 plan. (S-6; NT 105)

26. The student's 504 plan was revised again on July 1, 2019. Additional accommodations included the use of a calculator, having teachers request clarification if the student's handwriting or spelling is unclear and meetings at the beginning and end of each semester to discuss whether other accommodations, for example, audio recording of class lectures, might be needed, and consideration of a future academic support class. The student's mother did not approve this 504 plan. (S-7; NT 105)

27. The school district does not allow 504 plans for students with disabilities to include the accommodation of recording classroom lectures. (NT 64, 228-228, 235-236)

28. The school district's policy of not allowing the accommodation of recording lectures as an accommodation in 504 plans for students with disabilities substantially impairs the right of parents to participate in the process. (record evidence as a whole)

29. The district's refusal to accommodate the student's disabilities by including the accommodation of permitting the student to record classroom lectures in the student's 504 plan discriminated against the student by denying the student meaningful participation in educational activities and meaningful access to educational benefits. (record evidence as a whole)

30. The school district issued a prior written notice and permission to evaluate consent form to the parents on July 1, 2019 proposing to conduct an evaluation to

determine whether or not the student might be eligible under IDEA. The parents have not signed the permission to evaluate form. (S-8; NT 105)

31. The student's teachers and the school counselor, who served as the student's 504 case manager, implemented the student's 504 plans, including the accommodations contained in the plans. (NT 211 – 214; 195 – 199, 174-178, 224-234; S-4; S-6; S-7)

32. In 7th and 8th grades, the student earned high B's and A's in all classes. On the PSSA tests taken by the student during the 7th and 8th grade years in the areas of language arts, mathematics and science, the student received proficient scores. On the Keystone exam the student took during the 8th grade year, the student earned advanced scores in Algebra I. (S-9; S-10; S-11; NT 233)

33. During the 2018 – 2019 school year, the student received high B's and A's in all classes. In addition, on the Keystone exam for biology, the student received an advanced score. (S-9; S-11)

34. The student's pattern of strengths and weaknesses resulting from the student's disabilities constitutes a profile that puts forward a perfect storm in the sense that the student is achieving well now in school, but if the student does not get the accommodation of being permitted to record of classroom lectures, the student will no longer be able to achieve well in school. Particularly because of the auditory processing disorder, the memory issue and the handwriting problems of the student, the rigor of

lecture courses in the high school environment require that the student be able to record lectures. (NT 132-138, 166-168; S-5)

### **CONCLUSIONS OF LAW**

Based upon the arguments of counsel, all of the evidence in the record, as well as independent legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of her or his disability be excluded from participation and/or be denied the benefits of or be subjected to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 C.F.R. § 104.33; 22 Pa. Code § 15.1. To establish a violation of Section 504, a parent must prove (1) that the student is disabled; (2) that the student was otherwise qualified to participate in school activities; (3) that the school district received federal funds and (4) that the student was excluded from participation in, denied the benefits of or subject to discrimination at the school. To offer an appropriate education under Section 504, the district must reasonably accommodate the needs of the handicapped child to ensure meaningful participation in educational activities and meaningful access to educational benefits. To comply with Section 504, a school district must provide education and related aids or services that are designed to meet the individual educational needs of handicapped

students as adequately as the needs of non-handicapped students are met. Ridley School District v. MR and JR ex rel. ER, 680 F. 3d 260, 58 IDELR 271 (3d Cir. 2012).

2. The parents have proven that the district discriminated against the student in violation of Section 504 by failing to amend the student's 504 plan in order to reasonably accommodate the student's disabilities by allowing the student to record classroom lectures in order to continue receiving meaningful participation in educational activities and meaningful access to educational benefits.

3. The parents have not proven that the district has violated its child find duty under Section 504.

4. The parents have not proven that the district has violated Section 504 by failing to provide additional accommodations other than the accommodation of recording classroom lectures.

5. The parents have not proven that the district has violated Section 504 by failing to implement the student's 504 plan.

## DISCUSSION

**1. Whether the parent has shown that the school district violated its child find duty under Section 504?**

Although the parties have listed Section 504 child find as an issue for this hearing, the parents' brief does not mention the child find issue. Accordingly, the parents have waived this issue and it is not decided herein. Moreover, no evidence in the record pertains to the student before the first 504 plan or otherwise supports a finding that the school district violated its child find duty.

The parents have not proven that the school district violated its Section 504 child find duty.

**2. Have the parents proven that the accommodations contained in the school district's 504 plans for the student were not appropriate?**

The main thrust of the parents' argument concerning this issue is the parents' request that the student be provided with a smart pen or some similar device in order to record lectures. The student testified credibly and persuasively that the student has difficulty taking notes in class, particularly in the longer lecture classes. The student also testified credibly and persuasively that a smart pen would help the student to record lectures and by making marks or notes at significant points throughout the lecture when



the student has difficulty taking notes and then be able to play back just the portion of the lecture that the student missed. The student's mother also testified credibly and persuasively that the student needed to have the teacher's lectures recorded because of the student's note-taking problems.

Also, the report of the parents' private school psychologist points out that the student's limited memory span and auditory processing disorder cause the student to have difficulty taking notes that would be alleviated by the ability to record classroom lectures. The parents' private school psychologist also testified to the reasons why the student's disabilities cause the student to have difficulty taking notes during classroom lectures.

The student's mother requested that the district amend the student's 504 plan to include the accommodation of allowing the student to record classroom lectures in e-mails and then later in two Section 504 team meetings. The school district denied the request that the student be permitted to record classroom lectures as an accommodation of the student's disabilities. At the May 2018 504 meeting, the school district's school counselor, who served as the student's Section 504 case manager, stated that audio recording is not an accommodation that the school district puts into Section 504 plans.

The district's rigid no recording policy is analogous under IDEA to an IEP team predetermining the result of a meeting by refusing to consider input provided by the parent. See, Deal v. Hamilton County, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004). A school district cannot unilaterally rule out an entire class of accommodations for students with disabilities simply because it does not permit them. To do so completely deprives parents of their right to meaningful participation.

In later e-mail correspondence, district personnel stated that the reason for denying the request was that it would involve other students' privacy. The privacy reason, however, appears to be a pretext for the fact that the district simply does not allow recording of lectures for Section 504 students. If the other students' privacy were truly a concern, the student could simply be directed to not record the portions of the class where other students are talking. Instead, the school district simply refuses to allow Section 504 students to record classroom lectures. This is not acceptable. It is apparent from the testimony of the student and the student's mother, as well as the report and testimony of the parents' expert, that the student needs to record classroom lectures in order to reasonably accommodate the needs caused by the student's disability. The district's rigid and inflexible policy of prohibiting recording by students with 504 plans violates the law.

In its post-hearing brief, the district cites a number of cases in which districts denying a student request to record classes were held to be in compliance with Section 504. These cases are inapposite, however, because unlike here the parent did not show that the student's education was adversely affected by the denial. Here, the parents have shown that if the district does not include the accommodation of permitting recording of classroom lectures, the student's academic performance will decline.

Accordingly, the school district discriminated against the student in violation of Section 504 by denying the student meaningful participation in educational activities and meaningful access to educational benefits by refusing to include the accommodation of recording classroom lectures in the student's 504 plan.

The only other specific accommodation which the due process complaint mentions is a weekly meeting with teachers. Although the parents' post-hearing brief pays lip service to the weekly meeting, there is no argument as to why the student needs this particular accommodation in order to receive meaningful access to educational benefits. Indeed, there is no evidence in the record that such a meeting is needed by the student. There is an argument in the parents' post-hearing brief that the student has had to serve as the student's own case manager, but this claim is not supported by the evidence in the record. To the extent that the parents claim that the school district has failed to meet the requirements of Section 504 by failing to provide

accommodations other than recording lectures, the parents have not sustained the claim.

It is concluded that the parents have proven that the school district has failed to reasonably accommodate the needs of the student and to allow meaningful participation in educational activities and meaningful access to educational benefits by denying the student the ability to record classroom lectures. All other claims by the parents regarding additional accommodations not included in the 504 plan are rejected.

**3. Have the parents proven that the school district failed to implement the student's Section 504 plan?**

The complaint claims that the school district failed to implement the accommodations provided in the student's Section 504 plan. The evidence in the record does not support the parents' claim in this regard.

Three school district teachers and the school district's school counselor, who served as the student's Section 504 case manager, testified that the student's Section 504 plan was implemented by the school district. The student's mother testified that the Section 504 plan was not properly implemented by the school district. Concerning this issue, the testimony of the school district witnesses is more credible and persuasive than the testimony of the mother because of the demeanor of the witnesses, as well as

the following: the student's mother, when asked a direct question about failure to implement, mentioned only the alleged failure by the teachers to provide their notes for classroom lectures to the student. Although the mother changed her testimony to add several more allegations of failure to implement later in her testimony, the testimony was provided only when counsel for the parents directed a series of leading questions to the mother concerning implementation. Although the rules of evidence do not apply with regard to admissibility at administrative hearings, said rules are useful when weighing testimony. Because the testimony of the mother regarding failure to implement was elicited largely through leading questions and not in direct answer to the original question about implementation, and because most of the testimony contradicts the original answer, the testimony is accorded very little weight.

With regard to the issue of the teachers providing the notes for their lectures to the student, it was the credible and persuasive testimony of the teachers who testified that they did provide said notes to the student. The credible and persuasive evidence in the record reveals that the school district did properly implement the student's 504 plan and provided the accommodations listed in the 504 plan to the student.

The parents have not proven that the school district failed to implement the student's Section 504 plan.

## **RELIEF**

The parents argue that the student should be awarded compensatory education. The school district, in its post-hearing brief, argues that the student should not be awarded compensatory education.

The function of compensatory education is to make a student whole and to restore the child to the educational path he or she would have been on but for the deprivation. GL by Mr. GL and Mrs. EL v. Ligoneer Valley School District Authority, 802 F.3d 601, 66 IDELR 91 (3d Cir. 2015). In the instant case, however, while the parents have proven that the student needs the accommodation of recording lectures in the classroom going forward, the parents have not shown that the student has suffered any harm resulting from the school district's violation of Section 504 so far.

Indeed, the parents' expert witness testified that the student's profile of disabilities presented a "perfect storm" wherein the student's disabilities, if not accommodated by permitting the recording of classroom lectures, has had little result so far because the student works so hard, but that if the student does not receive the accommodation in the future, the student's academic performance will very likely deteriorate.

Thus, although the parents have proven that going forward the student needs the 504 plan amended to include the accommodation of being able to record lectures in order to address the student's future academic performance, the failure to provide the accommodation of recording lectures has not been shown to impact the student's educational performance to date. In view of the fact that the parents have not demonstrated any past harm to the student by virtue of the omission of the accommodation of recording classroom lectures, however, it would be inappropriate to award compensatory education to the student on these facts.

Going forward, however, it is imperative that the school district amend the student's 504 plan to include the accommodation of recording classroom lectures. This may be done with a smart pen or any other appropriate device.

Because equitable relief under IDEA and 504 should be flexible and because the special education process is a collaborative process, see Schafer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005), the parties shall have the option to agree to alter the relief awarded, so long as counsel for both parties agree in writing.

## **ORDER**

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. The school district is directed to amend the student's 504 plan going forward to include the specific accommodation of permitting the student to record classroom lectures, using a smart pen or other appropriate assistive technology device to be provided by the school district.

2. The parties may adjust or amend the terms of this Order by mutual written agreement signed by all parties and all counsel of record; and

3. All other relief requested by the instant due process complaint is hereby denied.

IT IS SO ORDERED.

ENTERED: August 10, 2019

*James Gerl*

James Gerl, CHO  
Hearing Officer