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**Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order**

ODR No. 30048-24-25

CLOSED HEARING

Child's Name:

M.J.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

11/24/2024

INTRODUCTION AND PROCEDURAL HISTORY

The student, [Student] (Student),¹ is a mid-teenaged high school student residing within the boundaries of the Belle-Vernon Area School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.³ Student currently attends the District high school.

During the summer of the 2023-24 school year, the Parent filed a Due Process Complaint under the IDEA and Section 504, contending that the District did not provide appropriate programming for Student for the 2022-23 and 2023-24 school years; as a remedy, she sought compensatory education. The District denied the Parents' contentions and the relief demanded. The matter proceeded to an efficient hearing.⁴

Following review of the record and for all of the reasons set forth below, the Parent's claims shall be granted in part and denied in part.

¹ In the interest of confidentiality and privacy, 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).

² 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 are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are codified in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative evidence is not necessarily given where unnecessary.

ISSUES

1. Whether the District's proposed programming provided offered over the 2022-23 and/or 2023-24 school years were appropriate particularly relating to mathematics instruction and peer conflicts; and
2. If the District's programming for Student during that time period was not appropriate, is Student entitled to compensatory education?

FINDINGS OF FACT

1. Student is mid-teenaged and resides in the District. Student is eligible for special education based on Other Health Impairment (anxiety, Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, and a medical condition). (P-16 at 1; S-3.)
2. Student takes medication for a medical condition diagnosed when Student was not yet school-aged. Stress can lead to flares in that condition and one other also diagnosed at an early age. (N.T. 168-69, 171-72.)
3. Student has been determined to be eligible for special education since the end of the 2015-16 school year in the District. (P-1; S-3 at 1.)
4. Student was reevaluated by the District in January 2022. The resulting Reevaluation Report (RR) provided results of previous evaluations, including a cognitive assessment in 2015 reflecting a cognitive score between one and two standard deviations below the mean. Prior assessment of academic achievement reflected average to below average-range scores across domains with one low score on

the Written Expression Composite. Progress monitoring data was also included. (S-3 at 3-10.)

5. The January 2022 RR identified needs in the areas of mathematics and reading comprehension skills, with a recommendation for continuation in learning support for mathematics and regular education for all other aspects of the educational program. (S-3 at 13.)
6. During and just prior to the school years in question, Student experienced conflict with a specific peer (the other student). The other student also resided near Student and they have known each other for many years. Student has never experienced similar conflicts with other peers. (N.T. 175-76, 186-90, 389-90.)
7. Prior to the start of the 2022-23 school year, a District administrator met with Student and the other student and their parents to confirm an understanding of no contact between the two students. (N.T. 201-02, 391-92, 423-25.)
8. Over both school years at issue, the Parent reported conflicts with the other student to school personnel after Student reported them to the Parent. (N.T. 193-94, 199.)
9. Student exhibited flares of the medical conditions because of stress from the conflict with the other student. (N.T. 197-98; P-8.)
10. The school counselor met with Student's class for lessons two or three times during each of the school years in question. Individually, the counselor met with Student once during the 2022-23 school year and several times over the 2023-24 school year, eventually occurring monthly. During the 2024-25 school year, weekly check-ins were occurring. Student has never reported any difficulties at school to the counselor. (N.T. 346-48, 366-67.)

11. Student's teachers communicated frequently over the school years at issue. (N.T. *passim*.)
12. The special education teacher and the Parent were in frequent contact over both the 2022-23 and 2023-24 school years. (N.T. 279.)
13. District high school teachers were present in the hallways during class changes and the movement of the students during the 2022-23 and 2023-24 school years. None observed any interactions between Student and the other student, or emotionality by Student. (N.T. 62-64, 100, 121.)
14. A class period at the District high school is generally 42 minutes long. (N.T. 44.)

January 2022 IEP

15. An Individualized Education Program (IEP) was developed for Student in January 2022. (S-4.)
16. Parent input into the January 2022 IEP noted Student's determination as well as the conflict with the other student, medical conditions, and a need for counseling. Information from teachers did not mention any behavioral concerns and was overall positive, with some noting a need to participate more in class discussions; the IEP and its accommodations reportedly benefitted Student. Academic and functional needs were identified in the IEP as mathematics and reading comprehension skills. (S-4.)
17. Annual goals in the January 2022 IEP addressed reading comprehension and vocabulary questions, aiming for a specific performance by Student; and mathematics problem solving using all four operations and a calculator with a specific performance by Student. Program modifications and items of specially designed instruction addressed test and assignment accommodations and

modifications; preferential seating; verbal and visual cues; checks for understanding; and access to the resource room. Student's program was one of itinerant learning support, with Student participating in regular education except for mathematics instruction. (S-4.)

2022-23 School Year

18. Student went to the resource room on a daily basis during the 2022-23 school year. That period resembled a structured study hall with students making up work and receiving assistance after a check-in with the special education teacher. Student typically worked on assignments for English class, and also took tests there when needed with support (reading aloud by the teacher). (N.T. 273-75.)
19. Student's IEP was revised several times over the course of the 2022-23 school year to reflect a change in mathematics class and use of a calculator; physical activity restrictions in August 2022; immediate access to the resource room for tests in September 2022; and a different mathematics class in November 2022. (P-3; P-4; P-5; S-4 at 2.)
20. Student never reported any difficulty with a peer to the resource room teacher and did not exhibit signs of emotionality there. (N.T. 318-20.)
21. Early in the 2022-23 school year, the Parent asked that Student be provided a trial period in a mathematics class. Student moved from a different mathematics class to that class at the time but was not successful, so a co-taught class of the same subject was discussed, and the Parent agreed with the change. (N.T. 126, 181-84, 282, 315; P-3 at 7; P-18 at 1; S-4 at 11.)
22. After the trial period, Student moved to the co-taught mathematics class with both a regular and a special education teacher present every day for the entire period. Both teachers provided instruction while the

other provided extra support by monitoring all students, checking for understanding, and differentiation with individual assistance as needed. (N.T. 43-46, 80-81, 99, 111, 315-16.)

23. The other student was also in that co-taught mathematics class. Together, the mathematics teachers seated both students in opposite sides of the classroom and maintained their separation, implementing a rule that all students remain seated and silent until the end of each class. (N.T. 51-52, 60-62, 120.)
24. The mathematics teachers had access to, reviewed, and implemented Student's IEP. (N.T. 67-72, 99, 105, 108, 115-16.)
25. The Parent communicated with the regular education mathematics teacher frequently during the 2022-23 school year about Student's peer conflicts with the other student in the mathematics class. Both teachers monitored the two closely and never observed any interaction between them. Eventually the Parent's communications were referred to administration because of their frequency and interruption of instructional time for the teacher. (N.T. 49-50, 52-59, 75, 77, 102-03, 120., 386-88)
26. Student never exhibited extreme emotions in mathematics class during the 2022-23 school year. (N.T. 73, 82.)
27. At the end of the first semester of the 2022-23 school year, Student remained consistent without meeting the reading comprehension goal but did not have sufficient probes due to absences; and the mathematics goal could not be monitored in the fall of 2022 because of limited probes. (S-6.)
28. A new IEP was developed in January 2023. Parent input into the January 2023 IEP noted Student's need for self-advocacy skills and continuation of co-taught mathematics. Teacher information again did

not include any behavioral concerns and was overall positive, with some noting needs for self-advocacy, self-confidence, and class participation; the IEP and particularly its accommodations reportedly benefitted Student. Student's academic and functional needs identified in the IEP remained mathematics and reading comprehension skills. (S-6.)

29. Annual goals in the January 2023 IEP addressed reading comprehension and vocabulary questions, aiming for a specific performance by Student; and mathematics problem solving using all four operations and a calculator with a specific performance by Student. Program modifications and items of specially designed instruction remained from the January 2022 IEP. Student's program continued to be one of itinerant learning support, with Student participating in regular education except for the resource room period. The Parent approved the accompanying Notice of Recommended Educational Placement (NOREP). (S-6; S-7.)
30. Student ended the 2023-24 school year with grades ranging from As to Cs, and 47 days absent. (P-14; S-12; S-14.)

2023-24 School Year

31. Student had the same resource room support during the 2023-24 school year. (N.T. 276-79.)
32. At the start of the 2023-24 school year, Student had a particular mathematics class. Very early in the fall, the other student needed to be in that same mathematics class because of a schedule change that limited class choices for the other student. Several options were discussed with the Parent, including a different period for the mathematics class that would lead to several schedule changes for Student new teachers; both Student and the other student remaining

in the same mathematics class; or Student taking a different class that would address mathematics to some extent as part of a basic personal finance course with career exploration aspects. The Parent opted to have Student not take the first mathematics class but instead take the alternate class the second semester. (N.T. 137-38, 151-53, 207-09, 356-57, 362-63, 436-40.)

33. Student did not have any mathematics class for the first semester of the 2023-24 school year, and there was only limited progress monitoring reported for the first two quarters. (N.T. 297-98; S-9 at 21-24.)
34. In the fall of 2023, Student's pediatric neurologist wrote a letter noting the effect of stress on Student's medical conditions. The Parent also asked for a safety plan for Student at school at that time. No formal plan was developed. (N.T. 211-12; P-8; P-18 at 5.)
35. An IEP meeting convened in November 2023 with the Parent attending to discuss Student's conflict with the other student and resulting increase in anxiety. Additional accommodations were added to the IEP: access to counseling or other trusted adult upon request, access to the learning support teacher/resource room; preferential seating near a trusted peer; and access to an individual restroom. (N.T. 304; P-18 at 5, 8; S-6 at 10.)
36. In the second semester of the 2023-24 school year, Student sometimes needed individual support and modified assignments in the alternate class. (N.T. 138, 155.)
37. During the second semester of the 2023-24 school year, progress monitoring data on the mathematics goal was based on those assignments that were appropriate for the goal, but those varied since

the class was not typically considered to be a mathematics class.
(N.T. 142-45, 309-10.)

38. Progress monitoring data on the mathematics goal during the 2023-24 school year was limited to a single test score during the third quarter and only three test scores during the fourth quarter. Probes could have been but were not administered during the first semester. (N.T. 109-10, 293-94, 335.)
39. Another IEP meeting convened in January 2024. (N.T. 306, 310.)
40. Parent input into the January 2024 IEP noted Student's need for expressive language skills. Teacher input reflected no behavioral concerns and was overall positive, with some again noting needs for self-advocacy, self-confidence, and class participation; however, absences were noted. The IEP including its accommodations reportedly benefitted Student. Student's academic and functional needs identified in the IEP remained mathematics and reading comprehension skills. (S-9.)
41. Annual goals in the January 2024 IEP addressed reading comprehension and vocabulary questions, aiming for specific performance by Student; and mathematics problem solving using all four operations with specific performance based on Student scored only 13% correct on an assessment of basic mathematics skills in January 2023. Program modifications and items of specially designed instruction remained from the January 2023 IEP with the addition of seating near a trusted peer, access to the resource room, access to a trusted adult, and counseling check-ins monthly. Student's program continued to be one of itinerant learning support, with Student participating in regular education except for the resource room period; and the Parent approved the accompanying NOREP. (S-9; S-10.)

42. Student attained an even lower score correct on the same basic mathematic skill instrument in January 2024. (N.T. 340; P-10 at 12.)
43. The January 2024 IEP was revised in mid-February 2024 to reflect hallway supervision when Student and the other Student were scheduled to be in proximity to each other and access to the safety accommodations by sponsors of after-school activities and clubs when Student and the other student would participate together. Monthly counseling check-ins were also reiterated. (S-9.)
44. All District staff who worked with Student were provided with a copy of the safety protocols after the January 2024 IEP meeting. (N.T. 310-11.)
45. An incident occurred in January 2024 with the other student and a peer of the other student in the hallway between classes, with the peer throwing a small rubbery object in Student's direction from several feet away. Student became emotional after that incident, believing the object to have hit Student. Student's resource room teacher immediately spoke with and comforted Student before a friend walked Student to the office. (N.T. 113, 328-32, 341, 419.)
46. Student ended the 2023-24 school year with all A and B-range grades and 36.5 days absent. (P-14; S-12; S-14.)
47. Student's IEP team convened again prior to the start of the 2024-25 school year to ensure that the safety protocols and mathematics needs would be appropriately addressed that year. (S-11.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. Case law

instructs that the burden of persuasion rests on the party seeking relief. *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 in this case lies with the Parent who filed the Complaint leading to the administrative hearing. Nonetheless, the burden of persuasion dictates which party prevails only in the few cases where the evidence is in “equipoise.” *Schaffer, supra*, 546 U.S. at 58.

A special education hearing officer, who is the fact-finder, must make credibility determinations of the witnesses testifying before him or her. *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); see also *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found most of the witnesses who testified to be credible as to the facts. In the instances where there were contradictions, those are generally attributed to lapse in memory or recall, or to differing perspectives, rather than an intention to mislead.

The weight accorded the evidence was not equally placed across all witnesses. The testimony of the Parent about the peer conflicts was of very limited persuasive value because this witness evaded and refused to answer questions presented by counsel for the District, despite repeated direction. Much of that testimony was also repetitive and went far beyond the questions posed. This circumstance, particularly when considered along with the more reasonable and persuasive testimony of numerous District professionals, ultimately tainted her testimony as exaggerated at best, perhaps because of reported verbal attacks against the Parent. The Parent’s role as a serious advocate for Student cannot excuse the responsibility to answer the questions that are asked.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles: Substantive FAPE

The IDEA obliges that all states provide a "free appropriate public education" (FAPE) to children who are eligible for special education as defined in the law. 20 U.S.C. § 1412. FAPE is comprised of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that FAPE is met through providing personalized instruction and support services that are aimed to permit the child to benefit educationally from the program while also complying with the IDEA procedural mandates.

The state, through its local educational agencies (LEAs), must provide FAPE to eligible students through the creation and implementation of an IEP that 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). As the U.S. Supreme Court has more recently observed, an IEP must be "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*, 520 U.S. 386, 399 (2017).

Individualization is the primary consideration for purposes of the IDEA. Nevertheless, an LEA need not "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); *see also Lachman v. Illinois State Board of Education*, 852 F.2d 290, 292 (7th Cir. 1988), *cert. denied*, 488 U.S. 925 (1988). Instead, the law commands that services be reasonable and appropriate in light of a child's unique circumstances, and not necessarily those that his or her "loving parents" might desire. *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989); *see generally Endrew F., supra; Ridley, supra;*

A child's IEP is not a guarantee. "The IEP *must aim* to enable the child to make progress." *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018) (emphasis in original). Assessment of whether a proposed IEP complies with all standards 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) (same). IEP development, of course, must follow and be based on an evaluation, and then be continuously monitored and updated by changes in the interim. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320-300.324.

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family has "a significant role in the IEP process." *Schaffer, supra*, 546 U.S. at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

General IDEA Principles: Compensatory Education

It is well settled that compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy

deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

General 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). To establish a Section 504 claim, “a plaintiff must prove that (1) the child was disabled; (2) the child was “otherwise qualified” to participate in school activities; (3) the school received federal financial assistance; and (4) the child was excluded from participation in, denied the benefits of, or subject to discrimination at the school.” *Ridley*, *supra*, 680 F.3d at 280 (citation omitted).

The obligation to provide FAPE has been considered to be substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). The two statutes do intersect,

but as the Third Circuit recently observed, they are not the same. *LePape v. Lower Merion School District*, 103 F.4th 966, 978 (3d Cir. 2024). The IDEA itself notes that claims under Section 504 are not limited by the IDEA. 20 U.S.C. § 1415(l); *see also id.* The IDEA, thus, places no restrictions on Section 504 claims. *Le Pape, supra*, 103 F.4th at 979. “The statute’s administrative exhaustion requirement applies *only* to suits that ‘see[k] relief ... also available under’ IDEA.” *Luna Perez v. Sturgis Public Schools*, 598 U.S. 142, 147, 143 S. Ct. 859, 864, 215 L. Ed. 2d 95 (2023). “Once he has exhausted those claims in an IDEA hearing, a plaintiff may pursue them as he otherwise would in a district court.” *Le Pape, supra*, 103 F.4th at 979.

Where a party raising claims under these statutes based on the same facts does not assert any legal distinction among them as applied to the case, the differences do not need to be separately and extensively addressed. *B.S.M. v. Upper Darby School District*, 103 F.4th 956, 965 (3d Cir. 2024). As *B.S.M.* observed, “[d]epending on the factual basis for a denial-of-FAPE claim, the legal differences ... may be of no moment.” *Id.* at 146-47 (emphasis omitted) (quoting *J.M. v. Summit City Board of Education*, 39 F.4th 126 (3d Cir. 2022)). Here, the Parent’s Complaint did not set forth any separate averments limited to Section 504, nor did she present evidence that there was a different factual basis under the two statutes. Thus, to the extent applicable, the IDEA and Section 504 based on the same set of facts may be addressed together.

The Parent’s Claims

The first issue is whether the District failed to provide Student FAPE in the area of mathematics during the 2023-24 school year. The record establishes clearly that mathematics skills were a known area of deficit requiring specially designed instruction during the school years at issue. This was provided over the course of the 2022-23 school year. Yet, at the start of the 2023-24 school year, Student was removed from all specially designed mathematics instruction. and the subject was essentially ignored

for the entire first semester where there was essentially no progress monitoring on that goal. The second semester did at least have mathematics components, but that aspect of the program was not even adequate enough to obtain the requisite progress monitoring data. The learning support teacher candidly testified that probes could have been conducted but, for whatever reason, were not. It is perplexing that the needed mathematics instruction and progress monitoring probes were not provided in the resource room where Student went every school day for an entire period. As the Parent observes, the lower score on the basic mathematics skills measure was a glaring example of Student's ongoing struggles in that area that were unmet. The failure to provide programming in the area of mathematics over the entire 2023-24 school year was undoubtedly a denial of FAPE, and for the same reasons violated Section 504.

The other issue related to the peer conflicts is not so easily addressed. The Parent has described those conflicts as "bullying" throughout these proceedings. As the U.S. Department of Education has recognized, "Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."⁵ "Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA[and h]arassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE."⁶ "Whether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not

⁵ U. S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Bullying and Harassment, at 1 (October 26, 2010).

⁶ U.S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000).

receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied.”⁷ Indeed, our own Third Circuit has recognized that a student who is the victim of bullying and whose education is adversely impacted as a result can be denied FAPE. *Shore Regional High School v. Board of Education*, 381 F.3d 194 (3d Cir. 2004). However, in *T.K. v. New York City Department of Education*, 779 F.Supp.2d 289 (E.D.N.Y. 2011), the Court noted that, “[w]hat distinguishes bullying from other forms of childhood aggression, whether a hard-fought basketball game or rough-and-tumble play, is unequal and coercive power.” *Id.* (citation omitted). That Court found that the school district deprived a student of an appropriate special education program because it failed to take appropriate steps to address bullying of the student by other students, thereby negatively affecting the victim student’s opportunity for an appropriate education.

In this case, the Parent’s continued assertions of conflict with the other student at school simply have not been established by a preponderance of the evidence. There was nothing in the record to even suggest any unequal power by the other student over Student, or harassment based on Student’s disability. Moreover, her concerns were based solely on hearsay that were not followed by the most obvious response, another change in Student’s schedule. Although the District witnesses, and particularly the mathematics teachers during the 2022-23 school year, conceded that they could not have observed both students during every moment of every day, not a single District witness observed any interactions between the two students in mathematics class or the hallways. The only confirmed event was an interaction by a peer of the other student, and the description of the video of the incident did not support Student’s perception; nonetheless, the learning

⁷ U.S. Department of Education, Office of Special Education and Related Services, Dear Colleague Letter, 61 IDELR 263 (2013).

support teacher responded immediately to Student's reaction. Similarly, the rules set in place by the mathematics teachers and their vigilance were wholly appropriate responses to the concerns expressed by the Parent. Thus, even assuming *arguendo* that the reported incidents about which the Parent had concerns constituted, or were perceived by Student to be, bullying, here, unlike in *T.K.*, the District responded promptly to each and every concern of the Parent. This hearing officer concludes that there was no denial of FAPE on this basis.

To the extent it is necessary to address this claim under Section 504 separately, the Parent has also failed to establish discrimination against Student on the basis of a disability. As noted above, the Parent's assertions do not set forth any alleged discrimination that bears a relationship to Student's disability. In any event, the discussion and conclusions above regarding the denial of FAPE also apply to any asserted discrimination, and the reasonable responses of the District are not at all discriminatory. Accordingly, the Section 504 claims fail on this basis as well.

Remedy

The Parent having met the burden of persuasion on a denial of FAPE for the 2023-24 school year, Student is entitled to an award of compensatory education to remedy the deprivation. There is no evidence from which a make-whole remedy could be based; thus, the hour-for-hour approach will apply.

Student was not provided mathematics instruction over the entire 2023-24 school year, and accordingly is awarded 45 minutes per day⁸ for each day that Student attended over the 2023-24 school year, which is the time that one class period involving specially designed mathematics

⁸ The 42-minute period is rounded up for ease of calculation and consistent with most services provided to students.

instruction should have been part of Student's schedule for the entire year. There is no period of reasonable rectification because the denial of FAPE was more than obvious and should have been planned as of the first day of school, particularly since Student had the resource period daily.

The award of compensatory education is subject to the following conditions and limitations. Student's Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs in the areas of identified disability. The compensatory education may not be used for products or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent; and the cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

CONCLUSIONS OF LAW

1. The District denied Student FAPE over the 2023-24 school year, but not the 2022-23 school year.
2. The District did not discriminate against Student in any respect during the 2022-23 or 2023-24 school years.
3. Student is entitled to compensatory education to remedy the deprivation.

ORDER

AND NOW, this 24th day of November, 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District denied Student an appropriate education with respect to mathematics instruction over the 2023-24 school year.
2. The District did not deny Student an appropriate education over the 2022-23 school year.
3. Student is awarded 45 minutes of compensatory education for each day that attended school over the 2023-24 school year.

The terms and conditions in the attached decision apply as though set forth herein at length.

4. Nothing in this decision and order should be read to preclude the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 30048-24-25

Sent to counsel for both parties this date as required by 34 C.F.R. § 300.515 by electronic mail message as requested by counsel consistent with 22 Pa. Code § 14.162(n).