

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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 28108-22-23

CLOSED HEARING

Child's Name:

J.H.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

Morris Scott, Esq.
Disability Rights of Pennsylvania
1800 John F. Kennedy Boulevard
Philadelphia, PA 19103

Local Education Agency:

North Penn School District
401 E. Hancock Street
Lansdale, PA 19446

Counsel for the LEA

Macy Laster, Esq.
Wisler Pearlstine
460 Norristown Road
Blue Bell, PA 19422

Hearing Officer:

James Gerl, CHO

Date of Decision:

January 5, 2024

BACKGROUND

The parents filed a due process complaint alleging a denial of a free and appropriate public education under IDEA and discrimination on the basis of disability under Section 504. The school district contends that it provided FAPE and did not discriminate against the student. I find in favor of the school district with regard to the alleged denial of FAPE. I find in favor of the parents with regard to the alleged violation of Section 504.

PROCEDURAL HISTORY

Prior to the hearing, a conditional dismissal order was entered in this case. At the point of the entry of the conditional dismissal order, the parties had certified that the matter was settled and that they only needed time to finalize the agreement and obtain Board approval. Unfortunately, the parties were apparently not able to work together to finalize the settlement, and the due process complaint had to be reinstated.

At the hearing, counsel agreed to thirty stipulations of fact. Because of the large number of stipulations in this case, the length of time necessary to hear the case was shortened and the decisional process was accelerated.

The hearing was conducted in one in-person session. Nine witnesses testified at the hearing. Parent exhibits P-1 through P-27 were admitted into evidence. School district exhibits S-1 through S-24 and S-26 through S-45 were admitted into evidence. The school district withdrew its exhibits S-25 and S-46.

After the hearing, counsel for each party submitted written closing arguments/post-hearing briefs and proposed findings of fact. All arguments submitted by the parties have been considered. To the extent that the

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 and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

To the extent possible, 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

The due process complaint, as explained and clarified at the prehearing conference convened for this matter, and as confirmed at the due process hearing, presents the following issues:

1. Whether the parents have proven that the school district denied a free and appropriate public education to the student?
2. Whether the parents have proven that the school district discriminated against the student on the basis of a disability in violation of Section 504?

FINDINGS OF FACT

Based upon the parties' stipulations of fact, I have made the following findings:

1. The student is [redacted] years old, and the student's date of birth is [redacted].

2. The student resides with the student's parents.
3. The student is a [redacted] grade student at a high school in the district.
4. During the 2021 – 2022 school year, the student was a [redacted] grade student at a middle school in the school district.
5. During the 2022 – 2023 school year, the student was a [redacted] grade student in the district.
6. In November 2021, the school district received a doctor's note from a physician at a Children's Hospital who was treating the student.
7. On November 8, 2021, the school district issued a 504 plan for the student because of the student's migraines.
8. On February 8, 2022, the school district offered the student a fully virtual programming option which was rejected by the parents.
9. The school district revised the student's 504 plan to incorporate a diagnosis of postural orthostatic tachycardia syndrome (hereafter sometimes referred to a "POTS") in March and again in May of 2022.
10. On February 17, 2022, the school district received a doctor's note from a physician treating the student requesting a modified school program.
11. The school district issued a Permission to Evaluate the student on April 8, 2022.
12. The school district completed an evaluation of the student and issued an evaluation report on May 24, 2022. The report found the student eligible for special education under the primary disability category of Other Health Impairment. The report identified needs in the areas of math calculation, attendance/stamina, and self-advocacy.

13. The student's IEP team convened on June 2, 2022 to discuss the results from the evaluation report.

14. A June 20, 2022 IEP for the student included an attendance goal.

15. A Notice of Recommended Educational Placement (hereafter sometimes referred to as "NOREP") reflecting programming contained in the June 2022 IEP and referencing daily academic and itinerant emotional support services was issued on June 2, 2022 and returned on June 13, 2022 approved by the parent.

16. During the 2021 – 2022 school term, the student missed 15.5 days during the first marking period; 18 days during the second marking period, 22 days during the third marking period and 12.5 days during the fourth marking period.

17. On October 28, 2022, the school district received a doctor's note from the student's treating physician noting migraines, POTS symptoms, and requesting accommodations for lateness, absences and early dismissals.

18. On November 3, 2022, December 13, 2022 and February 2, 2023, the IEP team reconvened and made changes to the student's IEP goals based on the team's concerns regarding student progress and attendance.

19. On December 12, 2022, the school district issued a release to communicate with the student's medical team.

20. A NOREP referencing daily academic and itinerant emotional support services and rejecting removal of the attendance goal was issued on March 3, 2023 and was returned rejected by the parents on March 14, 2023.

21. A two-part annual IEP team meeting was held on May 30 and June 9, 2023.

22. On May 8, 2023 the school district received a letter from a pediatric cardiologist treating the student requesting specific accommodations for the student.

23. A Permission to Reevaluate form was returned on June 12, 2023 by the parents with consent provided for all evaluations proposed except physical therapy.

24. The school district issued a referral to the Intermediate Unit's school attendance improvement program (hereafter sometimes referred to as "SAIP") on June 9, 2023 and a PTRE on June 12, 2023.

25. Two NOREPs were issued recommending supplemental emotional support, academic support, a counseling referral, and extended school year services on June 23, 2023 and returned rejected by the parents on July 3, 2023.

26. During the 2022 – 2023 school term, the student missed 23.5 days during the first marking period; 30 days during the second marking period; 36 days during the third marking period and 33.5 days during the fourth marking period.

27. On September 21, 2023, the school district received a letter from a doctor treating the student regarding a medical visit and a clearance to return to school that day.

28. The school district completed an evaluation of the student and issued an evaluation report on October 12, 2023.

29. The student's IEP team met on November 2, 2023 to discuss the results of the reevaluation.

30. The student's family received procedural safeguards before, during and/or following each IEP team meeting.

Based upon the evidence in the record compiled at the due process hearing, I have made the following findings of fact: ¹

31. The student is a great kid who is very athletic. (NT 95 – 97)

32. The student has been diagnosed as having POTS. POTS refers to an inappropriate increase in heart rate upon standing up. It is part of a larger diagnosis of dysautonomia, which is a disorder of the autonomic nervous system and typically affects adolescent women. (NT 112 – 118, 152 – 154)

33. Generally, individuals with POTS experience fewer symptoms and improve over time. It is unusual for the symptoms to get worse over time. The student will likely be well sometime between late 2023 to mid-2024. (NT 133-141)

34. When the student stays home from school, there are no adults present. The student generally sleeps until about 1:00 pm on those days, but the student does not attempt to attend school after waking up. (NT 80-81, 179-182)

35. The student's March 2022 504 plan noted that because of the student's disabilities, the student would become fatigued and have frequent and sometimes extended absences. (P-5; NT 301-302)

36. The May 24, 2022 evaluation report for the student included input from the student's medical team. The student's medical team recommended accommodations for the student and a schedule for the student's transition

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; and "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____").

back to full-time attendance at school, including supplemental homebound instruction. The medical team advised the student's parents to contact them if the student was having difficulty getting back to school. As part of the evaluation report, the student and parent completed BASC rating scales to determine the student's behavioral needs. The student's rating scales revealed clinically significant ratings for somatization (the tendency to be overly sensitive to and to complain about relatively minor physical problems and discomfort), attitude to school and atypicality. The parent's rating scales revealed an at-risk rating, one point below a clinically significant rating, for somatization. The evaluation report identified needs in the area of math calculation, attendance/stamina and self-advocacy. (S-11; NT 199-200)

37. An IEP team meeting was held on June 2, 2022 to discuss the results of the ER and to develop an IEP. The student was invited to but did not attend the meeting. The parent actively participated in the meeting. The team considered the student's 504 plan and the medical documentation. The IEP included goals for math calculation, self-advocacy and attendance. The attendance goal was supported by specially designed instruction and accommodations. The specially designed instruction in the IEP included: chunking of assignments, repetition, visual aids/ graphic organizers, reminders, check-ins, positive reinforcement, reduced homework, dictation software, the opportunity to go to the counselor or case manager, flexibility in schedule, extended time, permission to carry snacks, unrestricted use of the bathroom and study guides. (S-11, S-12; NT 203, 272-278, 298-301)

38. Throughout the 2022-2023 school year, the school district offered the option of homebound instruction which would include a tutor coming into the student's home. The parents refused this option. (NT 73, 79-80, 215, 349-352)

39. Throughout the 2022-2023 school year, the school district offered the option of fully virtual instruction. The parents declined this option. (S-17; NT 70-71, 283-285, 348-349)

40. The parents requested that the student be provided with streaming services for the student's classes. The school district declined this request because streaming was only provided by the school district during the COVID school closures. (NT 85-86, 350-351, 394-395)

41. On November 3, 2022, an IEP meeting was held to discuss parent and teacher concerns that the student was not able to keep up with a math course. School team members recommended that the student move into a different math class with a slower pace. The change in the student's math class was made. Because of the student's absences, the IEP was revised to include new specially designed instruction that required teachers keep a list of essential work that the student was required to complete if the student had extended absences and was not meeting the attendance goal. (S-14; NT 206-207)

42. As of November 22, 2022, the student was making progress on the self-advocacy and attendance goals. The student's attendance was 46 per cent, up from a baseline of 35 per cent. The student made minimal progress on the math goal. (S-10; NT 208)

43. On December 13, 2022, an IEP team meeting was held to discuss the student's progress. The parents' primary concern was the student's stress level. The team discussed the option of the student attending the district's Virtual Academy, but the parents declined the option. The team also discussed the option of the student participating in virtual instruction for math and science while moving to in-person co-taught classrooms for English and History. Parents believed that these changes would help alleviate the student's

stress. The IEP was amended to provide that there would be no reduction of points for late work. (S-17; NT 208-210, 282-285, 288-289)

44. As a result of the December 13, 2022 IEP team meeting the student's schedule was changed to in-person co-taught English and History and virtual instruction in Math and Science. The student attended the virtual classes more regularly. By April 2023, the student was attending virtual Math and Science an average of 9.125 hours per week. (S-17, S-18; NT 212, 284-285)

45. Throughout the 2022-2023 school year, school district staff requested consent to communicate with the student's medical team. The parents provided consent for school district staff to speak with a nurse practitioner on the student's team, but the parents revoked this consent a few days later. No additional consent to speak to members of the medical team was granted by the parents. (S-17, S-44; NT 53-54, 78-79, 102-103, 217-218, 288-289, 352)

46. On January 3, 2023, the school district received a letter from a nurse practitioner on the student's medical team recommending the student's "re-entry until full days are tolerated" through a schedule that would "gradually increase from 1.75 days up to 5 days per week" while continuing to provide partial virtual days. (S-22, S-44)

47. An IEP team meeting was convened on February 2, 2023 to discuss the student's progress. The parent requested that the attendance goal be removed from the IEP because the parent felt that it was unattainable. School district staff continued to believe that based upon the medical information provided, the attendance goal was appropriate and that the goal was needed to address the student's attendance needs. The option of homebound instruction which included a tutor going into the student's home

was discussed at the meeting. The parent declined the option of homebound instruction. (S-22, S-24; NT 212-215, 349, 361, 374-376)

48. On March 14, 2023, the parents rejected the NOREP with the school district's proposed programming and requested mediation. The parents objected to the attendance goal in the IEP. (S-24, S-25)

49. On March 16, 2023, the school district received a letter from a neurologist on the student's medical team stating that because of migraine headaches, the student may need to come to school late, leave early or miss school from February 1, 2023 until March 15, 2023. (S-44)

50. On May 12, 2023, the school district received a letter from the student's treating cardiologist outlining educational limitations and providing recommendations for accommodations at school. The letter states that frequent absences are to be expected given the student's medical condition, and the student should not be penalized for those absences. The recommendations noted that "over time" treatment leads to an improvement in symptoms and the student may be able "to move closer to a full day." (S-29; P-17)

51. A two-part IEP team meeting was convened on May 30, 2023 and June 9, 2023 to discuss the student's progress, concerns regarding absences and to incorporate the medical information from the cardiologist. At the meeting, the parent expressed concerns regarding the student's weight loss, behavioral health needs, physical limitations and peer interactions. The school district offered counseling options for the student to be provided by school staff or by outside private counselors. The parent rejected the counseling options and stated that she would pursue private counseling instead. While discussing the student's attendance issues, the team discussed the Intermediate Unit's Student Attendance Improvement Program (SAIP) which involves conducting an in-home functional behavioral analysis as well as

providing supports and services to help get the student to school. The school district made a referral to the SAIP. The student's parents rejected the SAIP option. (S-27, S-28, S-29, S-30, S-31; NT 81, 220-221, 254, 286-288, 346-347)

52. The student attended the academic support class in the emotional support classroom 44 minutes per day, where the student's case manager would provide the student with a list of essential work that the student had missed and provide support as the student completed the work. The case manager would also push-in to the student's classes to help the student stay on task. The case manager met weekly with the student's teachers to discuss concerns. When the student had a lot of work to do, the student often complained that the student's stomach hurt, but the student did not accept the case manager's offers that the student go see the school nurse. (NT 262-268)

53. The school district attendance policy provides that when a student has unexcused absences for three consecutive days during a school year or fifteen cumulative days during a school year, a notice is sent to the parents. If a student misses six or more days (unexcused) during a school year, the student is habitually truant. When a student under 15 years of age is habitually truant, the school district may file a complaint with the magistrate district judge. If a student who is 15 years old or older is habitually truant, the school district shall file a complaint with the magistrate district judge. (S-42)

54. An absence may be excused if a medical note is provided in the appropriate timeframe. The student's family had provided medical documentation linking the student's disability to the student's attendance issues. (NT 233-242)

55. The school district attendance policy provides that if a habitually truant student is a student with a disability, the student's 504 team or IEP

team and the special education director shall be notified to address the student's needs "in accordance with law." (S-42, NT 250-255)

56. The school district attendance policy is not applied consistently in order to avoid the result of a large number of students ending up in truancy court. The school district staff who enforce the policy have a lot of flexibility and discretion in how the policy is applied and when to excuse student absences. (NT 344-345, 390-391)

57. The school district treated most or all of the student's absences as unexcused. (Record evidence as a whole)

58. The school district sent an official "Notice of Child's Illegal Absences" to the student's parents on the following dates: November 1, 2021; February 8, 2022; October 7, 2022; October 21, 2022 January 6, 2023 and February 23, 2023. The notices threaten criminal prosecution and potential referral to a child welfare agency among other sanctions. P-11, S-45; NT 49-50)

59. The official "Notice of Child's Illegal Absences" letters are generated automatically to all students with unexcused absences. The letters are sent out over the signature of the school principal, but the principal does not see or approve the letters. (NT 195-196, 233-234, 320-326, 331-337)

60. The school district has not yet initiated formal truancy proceedings against the parents or student. No notice has been sent to the parents rescinding the threat of truancy proceedings. (NT 82-84, 315; Record evidence as a whole)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as my own legal research, I have made the following conclusions of law:

1. A parent or a local education agency may file a due process complaint alleging one or more of following four types of violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq*, (hereafter sometimes referred to as "IDEA"): an identification violation, an evaluation violation, a placement violation or a failure to provide a free and appropriate public education (hereafter sometimes referred to as "FAPE"). IDEA §615(f)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

2. The United States Supreme Court has developed a two-part test for determining whether a school district has provided a free appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program (hereafter sometimes referred to as "IEP") is reasonably calculated to enable the child to make progress in light of the child's unique circumstances. Endrew F by Joseph F v. Douglass County School District RE-1, 580 U.S. 386, 69 IDELR 174 (2017); Board of Educ., etc. v. Rowley, 458 U.S. 178, 553 IDELR 656 (1982); KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018); Abigail P by Sarah F v Old Forge Sch Dist, 82 IDELR 227 (MD Penna. 2023).

3. In order to provide FAPE, an IEP must be reasonable, not ideal. KD by Dunn v. Downingtown Area School District, *supra*; LB by RB and MB v Radnor Twp Sch Dist, 78 IDELR 186 (ED Penna 2021).

4. The appropriateness of an IEP in terms of whether it has provided a free appropriate public education must be determined at the time that the IEP was made. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education; instead, it requires an educational plan that provides the basic floor of educational opportunity. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); DS v. Bayonne Board of Education, 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 251, 52 IDELR 211 (3d Cir. 2009).

5. For a procedural violation to be actionable under IDEA, a parent must show that the violation also caused a loss of educational opportunity for the student, seriously deprives the parents of their participation rights, or causes a deprivation of educational benefit. Ridley School District v. MR and JR ex rel. ER, *supra*; Abigail P by Sarah F v Old Forge Sch Dist, 82 IDELR 227 (MD Penna. 2023); IDEA § 615(f)(3)(B); 34 C.F.R. § 300.513(a).

6. A parent cannot compel a school district to use a specific educational methodology. A school district is afforded the discretion to select from among various methodologies in implementing a student's IEP. Ridley School District v. MR and JR ex rel. ER, 680 F. 3d 260, 58 IDELR 271 (3d Cir. 2012); JL v. Lower Marion School District, 81 IDELR 251 (E.D. Penna 2022); see EL by Lorsson v. Chapel Hill – Carrboro Board of Education, 773 F. 3d 509, 64 IDELR 192 (4th Cir. 2014); Lessard v. Wilton – Lyndborough Coop School District, 592 F. 3d 267, 53 IDELR 279 (1st Cir. 2010); In re Student With A Disability, 51 IDELR 87 (SEA WVa. 2008).

7. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of his or her disability be excluded from participation and/or denied the benefits of or be subject 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 receives federal funds; and 4) that the student was excluded from participation in and denied the benefits of or subject to discrimination at the school. To offer an appropriate education under Section 504, the school district must reasonably accommodate the needs of a 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 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 281 (3d Cir. 2012); Strepp ex rel MS v Midd West Sch Dist, 65 IDELR 46 (M.D. Penna. 2015).

8. A parent need not prove deliberate indifference to establish a violation of Section 504 in a proceeding before a hearing officer. However, to be awarded compensatory damages, i.e., money damages, by a court for a violation of Section 504, a parent must meet the deliberate indifference standard. SH by Durell v. Lower Merion Sch Dist, 729 F.3d 248, 61 IDELR 271 (3d Cir. 2013); Anderson v Abington Heights Sch Dist., 71 IDELR 217 (M.D. Penna. 2017).

9. An IDEA hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates the Act. All relief under IDEA is equitable. Forest Grove School District v. TA, 557 U.S. 230, 52 IDELR 151 (at n. 11) (2009); Ferren C v. School District of Philadelphia, 612 F. 3d 712, 54 IDELR 274 (3d Cir. 2010); CH by Hayes v. Cape Henlopen Sch. Dist., 606 F. 3d 59, 54 IDELR 212 (3d Cir 2010); Sch. Dist. of Philadelphia v.

Williams ex rel. LH, 66 IDELR 214 (E.D. Penna. 2015); Stapleton v. Penns Valley Area Sch. Dist., 71 IDELR 87 (E.D. Penna. 2017). See Reid ex rel. Reid v. District of Columbia, 401 F. 3d 516, 43 IDELR 32 (D.C. Cir. 2005); Garcia v. Board of Ed., Albuquerque Public Schools, 530 F. 3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a Disability, 52 IDELR 239 (SEA W.V. 2009).

10. The parents have not proven that the school district denied a free and appropriate public education to the student.

11. The parents have proven that the school district discriminated against the student on the basis of a disability in violation of Section 504.

DISCUSSION

I. Merits

1. Whether the parents have proven that the school district failed to provide a free and appropriate public education to the student?

The parents contend that the IEPs developed for the student were not appropriate. The school district contends that it provided FAPE to the student at all times.

The parents have not proven that the school district denied a FAPE to the student. The parents do not even attempt to argue that the student's IEPs were not reasonably calculated to confer meaningful educational benefit on the student in view of the student's unique individual circumstances.

Accordingly, the parents have not demonstrated that the student's IEPs fell short of the legal standard. Their argument is rejected.

The main thrust of the testimony of the parents' witnesses was that the program provided by the school district to the student was not ideal. For example, the student's mother testified that the student would do better if the school district had employed the parents' preferred methodology of streaming the student's classes. Similarly, the expert medical witness called by the parents testified that remote classes were not "ideal" for the student. Although it is understandable that all parents want the best possible education for their child, IDEA does not impose a duty upon the school district to provide the best possible education. In this case, the student's IEPs were clearly reasonably calculated to confer meaningful educational benefit in view of the student's unique individual circumstances. The parents have not proven that the student's IEPs were substantively inadequate.

The parents argue that the student's IEPs were flawed because they did not address the student's needs. It is significant, however, that the parents refused to permit the school district staff to speak with the student's medical team about how the student's disability affects student's educational needs. The parents allowed the IEP team members to speak only with one nurse practitioner, and to her only for a few days. The parents cannot deny the school district permission to speak to the student's medical team about the student needs and then pursue a complaint alleging that the IEP does not address the student's needs. The parents' contention that the student's IEP does not meet the student's needs is rejected.

The unique individual circumstances of this student include the fact that the student has a temporary disability that frequently causes the student to be absent from school. The record evidence reveals that the school district

offered many alternatives to the parents in order to attempt to address the student's attendance problems. Among the options that were offered by the school district, in addition to the IEP attendance goal, were the following: virtual classes; homebound instruction with a tutor in the home; a specialized attendance program through the Intermediate Unit that would also include an in-home functional behavioral analysis; and counseling for the student. The parents refused all of these alternatives. Instead, the parents insisted upon the school district providing the student's classes through the parents' preferred methodology of streaming the classes. The school district rejected the streaming option because it no longer offered streaming to any students after the school closures caused by the COVID pandemic. It should be noted that there is no medical or other evidence in the record to support the parents' argument that the student required streaming of the student's classes. In any event, the law is clear that a parent cannot compel a school district to adopt a specific educational methodology, such as streaming classes. The parents' argument is rejected.

In their post-hearing brief, the parents strongly object to the student's IEP containing an attendance goal. Once again, the parents do not provide any medical evidence that an attendance goal is inappropriate for the student. On the contrary, the reports of the student's medical team and the testimony of the parents' medical expert are all consistent with the student having an attendance goal and gradually increasing attendance at school. Because, as the student's cardiologist testified persuasively, the student's disability will become increasingly less of a problem over time, the attendance goal is highly appropriate. The parents' argument is rejected.

At each IEP team meeting, the team considered all requests and input provided by the parents. Many of the parents' concerns resulted in revisions

to the various IEPs for the student. The IEPs offered to the student were clearly reasonably calculated to confer meaningful educational benefit in view of the student's unique individual circumstances, including the student's excessive absences.

The parents have not proven that the student's IEPs were not reasonably calculated to confer meaningful educational benefit in view of the student's unique circumstances. Moreover, while actual progress is not guaranteed under IDEA, in this case, the student did make progress toward the student's IEP goals, especially considering the student's frequent absences.

The testimony of the school district witnesses concerning this issue was more credible and persuasive than the testimony of the student's mother and the student. This conclusion is made because of the demeanor of the witnesses, as well as the following factors: the student's mother was very evasive on cross-examination. The student's mother changed her testimony as to the reason for declining counseling services for the student. The student contradicted the testimony of the student's mother with regard to whether the student stays in bed all day when the student stays home from school. The testimony of the student's mother was also very evasive with regard to whether the student's IEP documented the efforts by the school district to

obtain a signed release from the parents in order to speak with the student's medical team.

It is concluded that the parents have not proven that the school district denied a free and appropriate public education to the student.

2. Whether the parents have proven that the school district discriminated against the student on the basis of a disability in violation of Section 504?

The parents contend that the school district's application of its attendance policy to the student constitutes discrimination against the student on the basis of the student's disability. The school district contends that it did not discriminate against the student.

The parents have proven that the school district's attendance policy, as applied to the student, discriminates against the student on the basis of a disability. The parents' post-hearing brief points out correctly that the school district violated Section 504 because there was no clear explanation as to why it did not treat the student's absences as excused and because the school district issued letters threatening criminal prosecution and other criminal sanctions against the parents and the student if the student's absences did not cease.

The school district's attendance policy does have a provision that when a student with a disability is truant, the special education director and the student's team is notified. Yet as this case demonstrates, it is apparently not the case that absences that are caused by a student's disability are considered excused or that the IEP team, rather than criminal truancy court, handles the problem.

Moreover, the testimony in this case revealed that the implementation of the school district's attendance policy is highly subjective. School district officials have a lot of flexibility and discretion and may take many undefined circumstances into account in applying the attendance policy to avoid the undesired result that a large number of students would end up in criminal truancy court. The use of a highly subjective policy or practice lends itself to potential discrimination. See, Cole v. Hawker Beechcraft Corp., 111 LRP 66122 (D. Kan. 2011); Widner v INNO4 LLC, 123 LRP 33806 (N.D. Ga. 2023). In this case, the subjective application of the school district's attendance policy coupled with the factors below proves disability discrimination.

In the post-hearing brief filed by the school district, the district argues that in this case a decision was made to have the student's IEP team handle the student's truancy. The school district presented no documentary evidence to support that this determination had been made or communicated to the parents. Indeed, the only documentary evidence that shows that the IEP team was handling the matter, in any way, was the attendance goal contained in the student's IEP.

According to the school district witnesses, there is a lot of flexibility baked into their application of the attendance policy. The school district was clearly not, as it argues, merely applying state law.

There is also no evidence in the record concerning how the school district determines when an absence is excused. For example, in this case the student's medical providers provided clear statements that the student's disability affected the student's attendance at school, but there is no attempt to explain which of the student's absences, if any, were excused. It appears from the truancy letters sent to the parents, very few, if any, of the student's absences were excused. The highly flexible and subjective application of the

decisions to excuse absences is discriminatory and does not appear to be even-handedly applied when, as here, the truant student has a disability. The school district's attendance policy, as applied to this student with a disability, resulted in disparate treatment.

The parents received numerous threatening letters, but the parents were never formally notified, or otherwise notified, that the threatening letters did not apply to them and that instead, the student's attendance problems would be handled exclusively by the student's IEP team. The parents were never informed that criminal court proceedings were off the table. The failure to document and notify the parents of the removal of the student's truancy case from the criminal system, coupled with the flexible and subjective application of the attendance policy constitutes discrimination.

The testimony of the parents' witnesses was more credible than the testimony of the school district witnesses with regard to this issue. This conclusion is made because of the demeanor of the witnesses, as well as the following factors: the school district witnesses were evasive and gave no clear explanation concerning why the student's absences were considered unexcused by the school district despite medical documentation of the student's disability. Moreover, the district's position that the matter had been transferred from the criminal truancy process to the student's IEP team conflicts with the documentary evidence.

It is concluded that the parents have proven that the school district discriminated against the student on the basis of a disability.

II. Relief

In this case, the parents have not proven a denial of FAPE. Accordingly, the parents' request in their post-hearing brief for compensatory education is not appropriate. The parents' request for money damages for distress is clearly beyond the power of an administrative IDEA hearing officer to award, and, therefore, is rejected.

The parents have proven a violation of Section 504. The harm to the student and parents here involves the school district's failure to excuse the student's absences despite medical documentation, and the resulting multiple letters threatening criminal prosecution, and referral to a child welfare agency, among other sanctions. Accordingly, the appropriate relief for the school district's violation of Section 504 is to require the school district to provide formal written notice to the parents that its threats of criminal prosecution of the parents and student for attendance reasons have been rescinded and that the student's attendance issues will hereafter be handled by the student's IEP team, as the school district has conceded as true in its post-hearing brief. The other appropriate relief is an order requiring the school district to remove the letters threatening criminal prosecution of the student and the parents and other sanctions from the student's educational record.

Because all relief under IDEA is equitable relief, it should be flexible, and because special education under IDEA and Section 504 requires a collaborative process, Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005), the parties shall have the option to agree to alter the relief awarded herein, so long as both parties and their lawyers agree in writing.

ORDER

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

1. The school district is ordered to provide to the parents, on or before February 7, 2024, formal written notice that the previous letters threatening criminal truancy prosecution against the student and parents are rescinded, and that because of the student's disability, the student's issues with regard to attendance will be handled by the student's IEP team going forward;
2. The school district shall, on or before March 7, 2024, remove from the student's educational record the letters previously sent to the students' parents threatening court proceedings and other sanctions because of the student's absences;
3. The parties may adjust or amend the terms of this order by mutual agreement signed by all parties and counsel of record; and
4. All other relief requested by the instant due process complaint is hereby denied.

IT IS SO ORDERED.

ENTERED: January 5, 2024

James Gerl

James Gerl, CHO
Hearing Officer