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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UPPER PERKIOMEN SCHOOL DISTRICT,

Plaintiff,

v.

D.G., by his parents and natural guardians E.G. and K.G., and individually,

Defendants.

No.

17 5280

FILED

NOV 22 2017

KATE BARKMAN, Clerk By [Signature] Dep. Clerk

COMPLAINT

Pursuant to 20 U.S.C. § 1415(i)(2), the Upper Perkiomen School District (hereinafter "UPSD" or "District") files this Complaint seeking review of the order of the Special Education Due Process Hearing Officer decision finding that the District failed to conduct an appropriate evaluation of D.G. ("Student"), and that the District denied Student a free appropriate public education for a period of several weeks during the 2016-2017 school term, under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq..

I. INTRODUCTION

1. Student completed his senior year of high school and graduated from the District in June 2017. On or about September 6, 2016, while participating in football practice, Student sustained a concussion. Due to symptoms related to the concussion, Student missed a significant amount of school and, upon his return, Student required a number of accommodations to allow him access to the curriculum. Accordingly, a 504 Service Agreement ("504 Plan") was developed and implemented by the District.

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2. On April 17, 2017, Student's parents, on behalf of Student, (collectively, "the Family") filed a due process complaint alleging that the District failed to provide Student with FAPE on account of violations of Section 504, including failing to appropriately evaluate Student after his concussion and failing to provide Student with appropriate services and accommodations. In the complaint, the Family requested compensatory education and an independent educational evaluation ("IEE") at public expense.

3. On September 4, 2017, Hearing Officer Linda M. Valentini entered a Decision and Order (attached hereto as Exhibit "A") finding that the District failed to conduct an appropriate evaluation of Student prior to developing his 504 Plan and directing the District to fund an independent neuropsychological evaluation.

II. JURISDICTION AND VENUE

4. This case arises under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*, and therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1331.

5. This Court has authority to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367 because the state law claims are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy.

6. This matter was heard before a Special Education Hearing Officer who issued a final decision and order and, therefore, administrative remedies have been exhausted. 20 U.S.C. § 1415(i).

7. The decision of the Hearing Officer is dated September 4, 2017, and this matter was timely filed within the 90 day timeline pursuant to 20 U.S.C. § 1415(i)(2)(B).¹ The District

¹ The time period for filing an appeal of an administrative hearing officer decision to federal court is 90 days and the deadline for filing an appeal to the Pennsylvania Commonwealth Court is 30 days. Pa. R.A.P. 341; 20 U.S.C.A. §

filed a Petition for Review in the Commonwealth Court of Pennsylvania on October 5, 2017, and the matter was assigned to Judge Quigley. On October 16, 2017, Judge Quigley issued an Order indicating that “it appearing that this appeal may be untimely, the parties shall address whether the appeal is untimely in their principal briefs on the merits.” On October 26, 2017, the matter was removed to the Middle District of Pennsylvania by way of a Notice of Removal. The District asserts that the appeal was filed on a timely basis.

8. Venue is proper under 28 U.S.C. § 1391(b) as both Plaintiff and Defendant are citizens of and reside in the Eastern District of Pennsylvania, and the facts concerning this matter occurred in the Eastern District of Pennsylvania.

III. PARTIES

9. Parents, E.G. and K.G., are residents of the Upper Perkiomen School District, located in the Eastern District of Pennsylvania.

10. D.G. is eighteen (18) years old, and the son of E.G. and K.G.

11. The Upper Perkiomen School District is a school district located in Montgomery County, Pennsylvania. It is a recipient of federal funds and considered a Local Educational Agency (LEA) under the Individuals with Disabilities in Education Act.

IV. BACKGROUND

A. Section 504 of the Rehabilitation Act of 1973

12. Under Section 504 and its implementing regulations, 34 C.F.R. §§ 104.31 *et seq.*, public school districts must provide a FAPE to each qualified disabled child in elementary and secondary school.

1415(i)(2)(B). The time period for the appeal of a hearing officer decision under Section 504 is analogous to the period specified in the IDEA.

13. For purposes of Section 504, a FAPE is “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.” 34 C.F.R. § 104.33(b)(1).

14. In the context of education the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled Student with a free, appropriate public education. *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009).

15. Borrowing from analogous IDEA case law “meaningful” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999). An eligible Student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996).

16. The federal court in the Eastern District has held, “[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not”. *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002). An appropriate education under the Rehabilitation Act is one that reasonably accommodates the needs of a handicapped child. *Ibid.* The Third Circuit opined that “to offer an ‘appropriate education’ under the Rehabilitation Act, a school district must reasonably accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefit”. *Ridley Sch. Dist. v. MR.*,

680 F.3d 22 260, 280 (3d Cir. 2012); *See also Blunt v. Lower Merion Sch. Dist.*, 2014 U.S. App. LEXIS 17629 (3d Cir. Sept. 12, 2014) Again borrowing from IDEA case law, what is guaranteed is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

A. Facts

17. D.G. was identified by the District as a student eligible for special education under the IDEA in 3rd grade.

18. On May 5, 2016, towards the end of Student’s 11th grade year, the District issued a Re-Evaluation Report which indicated that: (1) Student had scored Proficient or above on all Pennsylvania achievement testing; and (2) Student had achieved mastery of all IEP goals. The District subsequently issued a Notice of Recommended Educational Placement (“NOREP”) recommending that Student be exited from special education services.

19. Parents disagreed with the recommendation of this June 9, 2016 NOREP, and Student was set to begin the 2016-2017 school term with an IEP.

20. On September 6, 2016, Student collided with another player at sports practice, and suffered a concussion.

21. The District involved BrainSTEPS, a “consultative service to assist school districts and families with the reentry of students who have sustained brain injuries,” and convened on October 11, 2016 for a meeting to discuss Student’s re-entry to school.

22. On November 9, 2016, the Parents, the Student, the school counselor, the assistant principal of the high school, and the BrainSTEPS representative met to develop a §504 Service

Agreement. The Family signed a NOREP exiting Student from special education services on November 9, 2016.

23. On November 11, 2016, Parents completed the District-required application for homebound instruction. The District approved the application on November 21, 2016, took steps to obtain a homebound instructor, but was ultimately unsuccessful.

24. On December 16, 2016 the Concussion and Head Trauma Program recommended that D.G. return to school on January 23, 2017.

25. Upon request of the Parents, the District enrolled Student in an environmental science course with the Montgomery County Intermediate Unit (MCIU).

26. On or about February 1, 2017, the parties met to discuss the second semester and revisions to Student's §504 Service Agreement. Parents were in agreement with the §504 Service Agreement, and requested two more provisions be added.

27. Student completed the 2016-2017 school term, graduated with his class, and was accepted to a local community college.

28. Hearing Officer Linda Valentini held, in relevant part:

While recognizing that implementation may not have been perfect, when Student was in school **I find that the BrainSTEPS framework accommodations offered to Student as well as the accommodations offered through the subsequent 504 Plan were appropriate.** The District's accommodations assisted Student to successfully persevere and fulfill requirements for graduation by the end of the year in accord with Student and Parents' wishes...**I cannot find nor did the Parents identify what additional elements the BrainSTEPS framework or the Section 504 Plan should have contained, the absence of which denied Student FAPE.**

29. However, Hearing Officer Valentini also held that the District's Section 504 Evaluation Report was an inappropriate evaluation, and ordered an independent neuropsychological evaluation and public expense. Specifically, the award of the evaluation:

is expected to 1) identify any residual impairment in functioning and suggest strategies Student can use to accommodate for this impairment; 2) **serve as a formal evaluation for Student to present to college disability offices so that if sequellae of the brain injury remain, appropriate accommodations and assistance can be put in place**; 3) assess whether Student requires therapy or counseling services to help process the difficulty of dealing with any lingering impairment and/or to address mood issues related to having a very different senior year than had been anticipated.

V. CLAIMS

A. Count I

30. The Hearing Officer erred as a matter of law when she concluded that an independent neuropsychological evaluation at District expense was appropriate relief under §504 and its implementing regulations.

31. There is no authority under §504, or case law that permits a hearing officer to award an independent evaluation. There is only authority to award tuition reimbursement and/or compensatory education. *Chambers v. School District of Philadelphia*, 587 F.3d 176 (3d Cir. 2009); *see also Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999), *M.C. v. Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996), and *Lauren G. v. West Chester Area School District*, 906 F.Supp. 2d. 375 (E.D. Pa. 2012).

32. The Hearing Officer's award of an independent educational evaluation is not permitted and, therefore, violates §504.

33. In addition, the Hearing Officer held that she could not find any additional elements the BrainSTEPS framework *or* the Section 504 Plan could have contained.

34. The evaluation ordered by the Hearing Officer also seeks to serve as a formal evaluation for Student to present to college disability offices, not in any way related to Student's programming while attending school in the District.

35. Even if this Court were to find that the IDEA regulations apply in this Section 504 case, the Hearing Officer's award is still improper. An IEE is defined in the IDEA regulations as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. §300.502(a)(3)(i). As of June 2017, when Student graduated, the District is no longer the agency responsible for the education of D.G.

36. The purpose of an evaluation is, first, to determine whether the child meets any of the criteria for identification as a "child with a disability" as that term is defined in 34 C.F.R. §300.8, and second, **to provide a basis for the contents of an eligible child's IEP**, including a determination of the extent to which the child can make appropriate progress "in the general education curriculum." C.F.R. §§300.8, 300.304(b)(1)(i), (ii). Here, Student was not eligible for an IEP after November 9, 2016. The awarding of an independent evaluation is a misuse of the Hearing Officer's authority.

VI. RELIEF REQUESTED

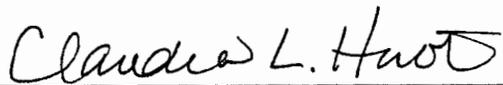
37. The District requests that this Court partially reverse the Hearing Officer's order dated September 4, 2017, and find:

- a. The District is not required to fund an independent neuropsychological evaluation for Student.
- b. The District is considered the prevailing party under §504.
- c. Parents are not the prevailing parties, and deny parents' claim for reimbursement of all attorneys' fees and costs.
- d. Such other or further relief that this Court deems necessary or appropriate.

Respectfully submitted,

WISLER PEARLSTINE, LLP

Dated: November 22, 2017



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EXHIBIT A

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: D [REDACTED] G [REDACTED]

ODR #19069/16-17 AS

Date of Birth: [REDACTED]

Dates of Hearing:

June 13, 2017

July 18, 2017

CLOSED HEARING

Parties to the Hearing:

Mr. and Mrs. Eric G [REDACTED]
1023 Lake Lane
Pennsburg, PA 18073

Upper Perkiomen School District
2229 East Buck Road
Pennsburg, PA 18073

Date of Decision:

Hearing Officer:

Representative:

Jennifer Bradley, Esquire
McAndrews Law Offices
30 Cassatt Avenue
Berwyn, PA 19312

Claudia Huot, Esquire
Wisler Pearlstine
460 Norristown Road Suite 110
Blue Bell, PA 19422

September 4, 2017

Linda M. Valentini, Psy.D. CHO
Certified Hearing Official

EXHIBIT "A"

Background

Student¹ is a late-teen aged post-high school student residing within the boundaries of the District who qualified as an individual with a disability as defined under Section 504 of the Rehabilitation Act, 29 U.S.C. §794 and Pennsylvania Chapter 15² pursuant to a concussion sustained during a school sports practice session just prior to senior year.

The Parents requested this hearing alleging that the District did not perform an appropriate 504 evaluation following Student's concussion, and that the District failed to provide/implement an appropriate 504 Plan. As remedies, they are requesting an Independent Educational Evaluation (IEE) at District expense to assess Student's functioning going forward, as well as compensatory education. The District maintains that all times it offered Student appropriate services under Section 504 and that no relief is warranted.

Based upon the preponderance of the evidence before me I find in favor of the Parents on some but not all their claims.

Issues³

1. Did the District fail to appropriately evaluate and assess Student after a concussion sustained in September 2016?
2. Did the District provide Student with appropriate services under Section 504?
3. If the District did fail in either regard what remedies are due?

Findings of Fact

1. Student was a senior in the District during the 2016-2017 school year and completed all required coursework, graduating in June 2017. [NT 38, 129]

Background

2. In 3rd grade the District identified Student as eligible for special education under the classification of specific learning disabilities. [S-2, S-25]
3. On May 5, 2016, at the end of Student's 11th grade year, the District issued a reevaluation report (RR) based on a record review that indicated Student had scored Proficient or above on all Pennsylvania achievement testing and that progress monitoring showed

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of 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 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).

³ The Issues are those identified at the outset of the hearing but reformulated to more clearly focus the decision.

mastery of all IEP goals. The District concluded that Student no longer required special education services. [NT 133, 136, 226-227, 232; S-2]

4. Concerned about Student's reading and writing, in part because of teacher comments related to Student's need for multiple revisions to written work and need for additional time to take tests, the Parents did not agree that Student should be exited from special education. The parties met and agreed to standardized assessment in the areas of reading comprehension and writing and the Parents approved the Permission to Evaluate that indicated these were the areas to be tested. An assessment in mathematics was not proposed or requested as there were no concerns about deficits in that area. [NT 39, 132, 233-235, 292; S-2, S-3]
5. Based upon the Parents' concerns the District psychologist administered subtests of the Wechsler Individual Achievement Test – Third Edition (WIAT-III) that assessed listening comprehension, reading comprehension, sentence composition, essay composition, and spelling, and he also administered the writing fluency subtest of the Woodcock-Johnson Tests of Achievement – Fourth Edition (WJTA-IV). [NT 236; S-4]
6. Student scored in the average range on all subtests, and there was no discrepancy between any of the achievement scores and previously assessed cognitive ability. As Student was functioning on a par with same aged peers based on nationally normed assessments of reading and written expression the District issued an RR on May 26, 2016 finding Student no longer eligible for special education. [NT 242; S-4]
7. The Parents disagreed with the District's recommendation and requested an Individual Education Evaluation (IEE) at public expense. The District denied their request and filed for due process to defend its reevaluation; however, the Parents withdrew their IEE request on June 20, 2016. [NT 140-141, 246, 294; S-5, S-21, P-10]
8. Because the Parents did not sign the June 9, 2016 NOREP exiting Student from special education, Student was to begin the 2016-2017 school year with an IEP. [NT 254]

Senior Year – First Semester

9. Just prior to the start of the school year at a school sports practice Student and teammates took photos of themselves in their school sports uniforms with props that could be interpreted as culturally insensitive and posted the photos on Instagram. The coaches strongly reprimanded the players involved and planned to remove them from the team. [NT 49-50; P-9]
10. Student sent a letter of apology⁴ to the District expressing, among other things, that the loss of a place on the team was such a blow that it had engendered thoughts about suicide. On August 25, 2016, Parents advised several people, including the school counselor and psychologist, of Student's statement. The school counselor immediately

⁴ Student's mother testified that Student wrote the letter independently. Given the Parents' concerns about Student's written expression, I find the letter was quite well written.

contacted Parents, requesting permission to speak with Student about the reference to suicidal thoughts. [NT 52-53, 146; P-9]

11. The school counselor and the school psychologist met with Student and conducted a risk assessment after which they determined that Student was not a risk to self. Receiving the results of the District's risk assessment, the Parents did not seek any further private assessment or counselling services regarding Student's statement. [NT 52-54, 146-47]
12. Ultimately through parental intervention and additional consideration on the part of the District Student was permitted to remain on the sports team but was suspended for several games. [NT 55; P-9]
13. Shortly thereafter, during a September 6, 2017 sports practice at school, Student and another player collided. The following day, because of her specific professional training, Student's mother recognized the symptoms of concussion. On September 8, 2016 the Parents notified the District about the concussion and the related medical assessment that had been done. [NT 56-59, 324; S-9].
14. On or about September 12, 2016, the District received the "Initial Concussion Return to School Form" prepared by an orthopaedics (sic) practice recommending that Student not return to school until further notice. Student was placed on "brain rest" and no recommendation was made for homebound instruction. [NT 329; P-4, P-6]
15. On or about September 26, 2016, the District received a follow-up report from the orthopaedics practice recommending that Student not return to school, that an evaluation by a BrainSTEPS (Strategies Teaching Educators, Parents and Students)⁵ team be conducted, and that homebound instruction begin. Student thereafter received ongoing assessment through the orthopaedics practice and other assessments through another health facility and through an area hospital for children (Hospital). [NT 70, 329; S-7, S-28, P-4, P-6, HO-1⁶]
16. Overall, Student was identified as having a mild traumatic brain injury with vestibular/oculomotor dysfunction that limited Student's ability to take notes and read materials. Impact Screenings through October 24, 2016 compared to Student's pre-injury Baseline Screening reflected difficulties with cognitive efficiency and memory. [NT 63, 75, 79, 425; P-4]
17. In accord with the medical recommendations, the District immediately began researching options for homebound instruction and advised the Parents that specific documentation was needed before homebound instruction could begin. [NT 167-168, 326-328; S-9]

⁵ BrainSTEPS is jointly funded by the Pennsylvania Department of Health and the Pennsylvania Department of Education, Bureau of Special Education. It is designed to consult with school teams and families in the development and delivery of educational services for students who have experienced any type of acquired brain injury. [HO-1]

⁶ Rather than hold a third hearing session solely to have a BrainSTEPS representative describe that service, the hearing officer proposed that the District produce written information about the program. Both parties through counsel agreed to this plan and the information was obtained and marked as HO-1.

18. Between October 2 and October 5, 2016, the school counselor completed the BrainSTEPS form and made a referral for the BrainSTEPS service. [NT 332; S-10, S-21]
19. BrainSTEPS is a consultative service to assist school districts and families with the reentry of students who have sustained brain injuries. BrainSTEPS teams assist schools with school reentry planning and 504 Plan development. [HO-1]
20. Once a referral is made for BrainSTEPS a team meeting is held at which BrainSTEPS provides a certified school psychologist to hear concerns of districts and families and to receive and review any available evaluations and medical reports. During the meeting the BrainSTEPS team creates a reentry plan called a "framework" which is emailed to the school team, the parents, and the student within 48 hours of the meeting. Follow-up meetings are scheduled at parent or district request. [NT 333, HO-1]
21. On or about October 4, 2016, the Hospital issued a report which contemplated Student's return to school and recommended a number of accommodations. [S-28, P-4]
22. On or about October 6, 2016, the District received a follow-up report from the orthopaedics practice recommending a return to school for three (3) hours a day, thus eliminating the need for the previously recommended homebound instruction. [NT 330; P-6]
23. Given the orthopaedics practice's return-to-school recommendation, a return meeting was held between the District and Parents on October 10, 2016 during which a schedule was discussed. Because of the time constraints and necessary credits Student's first semester schedule was modified to include only two classes: European History and Environmental Science. [NT 82, 338-339; S-11, S-28]
24. The next day, on October 11, 2016, Student, the Parents, the school counselor, the school psychologist, a school administrator and the BrainSTEPS psychologist met for the BrainSTEPS meeting. The team discussed the doctors' reports and recommendations to date and developed accommodations that could assist Student with reentry to school. The school counselor recorded the accommodations and devised Student's schedule. The BrainSTEPS team put together a framework outlining the recommended accommodations for Student's return to school. In accord with BrainSTEPS policy, the framework for Student's re-entry was emailed to all team members. [NT 175, 335-336, 340, 343, 346; S-9, S-11]
25. At the BrainSTEPS meeting, the team decided that it would not create/implement a 504 Plan right away but instead would implement the recommendations in the framework prepared at the BrainSTEPS meeting. [S-21]
26. The BrainSTEPS framework created at the October 11th meeting included suggested accommodations to address symptoms resulting from the concussion including: internet access to textbooks⁷ and reading materials to listen to the text and/or have the ability to

⁷ The District investigated the availability of an online textbook for Student and advised the Parents that it was most cost-effective for the Parents to purchase the online textbook license for \$135 and then be reimbursed by the

adjust the font size of text; teacher-provided notes; preferential seating; breaks during instruction; extra time for assignments and assessments. The framework also recommended: considering Pass/Fail for the first quarter and reevaluating at the end of the quarter; excusing/modifying assignments as much as possible; considering a 504 Plan after two to four weeks of being back at school to determine needs. [S-11]

27. As of the date of the BrainSTEPS meeting, Student was still not attending school, but it was anticipated that Student would begin partial school days on October 13, 2016. The school counselor forwarded the BrainSTEPS framework of accommodations and modifications to Student's teachers and discussed the accommodations with them. [NT 339, 343]
28. On October 20, 2016, based on Student's report, the Parents expressed concern that some of the BrainSTEPS framework, such as provision of teacher notes, large font, access to audio books, use of a laptop and extra time to travel between classes, was not yet being implemented. [NT 97]
29. Although Student's attendance after October 13, 2016 was sporadic the teachers overall implemented accommodations set forth in the framework. Among other things, the Environmental Science course was put on Google Drive so that Student could access the materials on a computer and magnify the font; Student was provided with notes; Student was excused from homework; Student's course materials were enlarged. The school psychologist taught Student how to enlarge course materials on the library copy machine and the computer to which Student had access during study halls. The guidance counselor who was charged with monitoring implementation did acknowledge that there were some instances when the teachers had not followed the framework. [NT 347, 352, 354; S-7]
30. Although when present in school Student received accommodations and modifications within the BrainSTEPS framework, in the absence of a signed NOREP Student had never been exited from special education and the District discussed whether to revise the IEP to offer the agreed-upon accommodations. While it could and did implement the BrainSTEPS framework, the District told the Parents that Student had to be exited from IDEA special education services in order to have a formal Section 504 Plan. [NT 97, 100, 284-285, 424; S-2, S-9, S-21, S-24]
31. On November 9, 2016 in accord with the original BrainSTEPS framework indicating possible creation of a 504 Plan in two to four week after reentry, the Parents, Student, the school counselor, the BrainSTEPS representative, and the assistant principal of the high school met to develop a 504 Plan. [NT 296, 356; S-26]
32. At the November 9, 2016 meeting the Parents reluctantly signed the NOREP exiting Student from special education. The team discussed the possibility of Student dropping the AP European History class and concentrating only on the Environmental Science

District; the publisher requires districts to purchase multiple licenses at a much greater cost rather than allowing the purchase of one license. The Parents did not select this option, possibly because they misunderstood the process.

course. Accordingly Student's first semester course schedule was revised so that Student would take only the Environmental Science course along with two study halls. [NT 92, 101, 357; S-26)

33. Although the family considered the option of Student walking in the graduation ceremony with classmates but not completing coursework until the following school year, neither Parents nor Student wanted to take that option. [NT 170-171]
34. The 504 Plan incorporated the BrainSTEPS framework and doctors' reports/recommendations and offered the following accommodations: BrainSTEPS consultation as needed; shortened school day; no homework; breaks during the day as needed; extra time to complete assignments and assessments; no standardized testing; no classroom tests/quizzes; provision of teacher notes; large print books/books on tape; no PE; limited computer work. [NT 363; S-26]
35. The 504 Plan was emailed to the Parents on November 9, 2016⁸. [NT 103, 357; S-26, S-27]
36. Since concussion symptoms were persisting and some worsening, upon the recommendation of the orthopaedics practice the Parents brought Student to an area Concussion and Head Trauma Program to see a neurologist on November 10, 2016. However instead of being seen by a neurologist Student was seen by a nurse practitioner who in a letter dated November 10, 2016 recommended homebound instruction. [NT 105, 108; P-3]
37. Because homebound instruction had previously been taken off the table the Parents had not completed and submitted the necessary paperwork to begin homebound instruction that was given to them in late September or early October. The District advised the Parents that this paperwork was still needed and re-sent it to them. [S-26]
38. The Parents immediately completed the necessary application for homebound instruction on November 11, 2016 and the District approved it on November 21, 2016. The District took steps to find a homebound instructor but ultimately was unsuccessful. [S-14; P-9]
39. Between November 16, 2016 and December 3, 2016 (a period that included the Thanksgiving holiday), Student was absent from school. [S-7]
40. During this time while Student's environmental science course was accessible online in large print on Google Drive the Parents preferred that Student take an online environmental science course offered through the Intermediate Unit. [NT 407-408]
41. On December 16, 2016, the Concussion and Head Trauma Program recommended that Student return to school on January 23, 2017 and that consistent with Parent's preference fulfillment of the science graduation requirement be met by completing the online environmental science course provided by the Intermediate Unit and funded by the

⁸ The mother testified that she never received the 504 Plan, but given her diligence it is unclear why she then didn't follow up with the District. [NT 103]

District. The District acquiesced to the Parents' preference, and enrolled Student in the IU environmental science course. [NT 104, 362, 408-410; P-3]

Senior Year – Second Semester

42. As of January 24, 2017, Student was successfully taking the online IU environmental science course, with an 88% average. Upon Student's return to school, Student was to continue to work on the online course during a study hall between 11:00 – 1:00 which included a half-hour lunch. Several staff members were available to help if Student needed assistance. Student completed the course ahead of schedule with minimal assistance. [NT 169-170, 369; S-20, S-21, P-9]
43. On or about February 1, 2016, the parties met to discuss the second semester and revisions to Student's 504 plan. The parties decided that Student would continue with the online science course and add Sociology and English, a roster that met Student's graduation requirements. [NT 170, 362, 367-368; S-20, S-21]
44. The Parents were in agreement with the 504 Plan revisions, but added two more provisions: parental notification of any of Student's visits to the school nurse and weekly reporting from teachers to parents about Student's classroom activities. [S-21]
45. On February 6, 2017, a follow-up BrainSTEPS meeting was held where the Parents presented input from Student's treating doctors. The 504 Plan was finalized and the teachers were advised of the revised 504 Plan. [NT 118, 365; P-1]
46. Implementation of the February 6, 2017 504 Plan included: availability of desk top computer and loaner laptop; instruction on using the computer and copy machine to enlarge text; modification of assignments and excusal from some assignments; extended time on assignments; chunking of larger assignments; notes printed in large font and highlighted; extended time to get to classes; status updates from teachers to Parents. [NT 25, 193, S-21]
47. As of February 16, 2017, Student had a B+ in Sociology and an A in English IV and had completed 66% of the online science course. On April 21, 2017 Student completed the online environmental science course ahead of schedule, receiving a final grade of B-. [NT 170; S-20, S-21]
48. Student emailed the school counselor twice over the course of the second semester with specific concerns, one of which was Student's difficulty completing an English assignment. After consideration of the circumstances and receiving Student's input, the teacher excused Student from the assignment. [NT 413-414; S-21]
49. When the Parents raised a concern about writing supports for Student with respect to a research paper that was due, the 504 Plan was revised on May 9, 2017 to provide assistance from the English teacher for organizing writing assignments. However, Student only met with the English teacher after the teacher advised the Parents that Student was not meeting with him; Student told the teacher that help was not required. [NT 127-129; P-1]

50. Student completed the 2016-2017 school year, graduated with Student's class, and was accepted at a community college. [NT 129-130, 372; S-20]

Evaluation

51. The District did not plan any assessments at the time of the October 11, 2016 BrainSTEPS meeting because Student was having significant ongoing symptoms from the concussion. Within the framework of BrainSTEPS, assessments conducted directly with Student would likely not be an accurate representation of Student's abilities. [NT 296-299]
52. However, the District did not investigate whether rating scales could be administered to parents, teachers and/or Student in order to gain a more specific understanding of the nature and extent of Student's post-concussion impairment. [NT 302]
53. The District's school psychologist noted that concussions can affect a student's long term memory, executive functioning, mood, attention, concentration, organization, and shifting between tasks. [NT 273]
54. There are a variety of assessment instruments that the District could have utilized to assess possible deficits without involving Student at all including the BRIEF-2, BASC-3, Conners-3, Millon, Brown, and/or Beck. [NT 274-277]
55. Neither the guidance counselor nor the school psychologist contacted any of Student's treating medical personnel to gain understanding of their recommendations as they applied to Student specifically. [NT 279]
56. At some undetermined point the District created a "Section 504 Evaluation Report" which contained no assessments or evaluation results. The one-page form "evaluation report" merely included the name and address of one Parent; the 504 Plan meeting date; the Student's name, birth date, ID number, grade and school; the names of "participants" including Student, father, mother, the LEA representative, the guidance counselor, the BrainSTEPS team member, and the school psychologist. Under Nature of the Student's Disability the "evaluation report" states "[Student] was diagnosed with a mild traumatic brain injury from a sports injury that occurred on 9/6/16. There is also a vestibular/oculomotor dysfunction (eye tracking and focusing)". Under the Major Life Activity that the Student's disability limits the "evaluation report" notes "[Student's] vision and concussion are impacting [Student's] level of reading, memory, learning, and concentration". The Basis for Determining the Disability was listed as "Medical notes dating back to 9/7/16 from various medical providers". The Educational Impact of the Disability is left blank. Under Accommodations the "evaluation report" says "BrainSTEPS consult through remainder of school, as needed". [S-27]
57. The Parents maintain that they did not receive the one-page "Section 504 Evaluation Report" at the time of the November 9, 2016 504 Plan meeting or afterward. The District did not provide it as part of the Parents' records request contained in the complaint, the District did not provide it as part of its required 5-Day disclosures prior to the hearing,

and the District did not present it at the first hearing session. This document finally surfaced after the first hearing session which is the first time the Parents saw it. [NT 358-359, 432; SD-27]

58. The guidance counselor, testifying that she is aware of the requirement to conduct a comprehensive Section 504 evaluation, acknowledged that this one-page document is in fact the evaluation the District completed pursuant to Section 504. [NT 387-388]
59. The District's school psychologist testified that he never saw any other evaluations the District completed other than previous reevaluation reports and the reevaluation report he completed in May 2016. [NT 289-290]

Legal Principles

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); see also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). Generally the witnesses presented as testifying to the best of their recollections, although the guidance counselor was a particularly difficult witness who had a tendency to become defensive and to evade answering questions forthrightly when they were first posed.

504 FAPE: Section 504 of the Rehabilitation Act of 1973, § 794 ("Section 504") protects "handicapped persons". The definition is provided in the Section 504 regulations at 34 CFR § 104.3(j)(1): "Handicapped person means any person who (i) has a physical or mental impairment

which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” Under Section 504 and its implementing regulations, 34 C.F.R. §§ 104.31 *et seq.*, public school districts must provide a FAPE to each qualified disabled child in elementary and secondary school. For purposes of Section 504, a FAPE is “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.” 34 C.F.R. § 104.33(b)(1).

Under Pennsylvania Chapter 15, a “protected handicapped student” is a student who 1) Is of an age at which public education is offered in that school district; and 2) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program; and 3) Is not IDEA eligible. *See* 22 Pa. Code § 15.2. In this case Student was no longer IDEA-eligible and therefore the Section 504 FAPE standards were controlling for Student’s final high school year.

Notwithstanding language which, by its plain terms, proscribes discriminatory conduct by recipients of federal funds, in the context of education the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled Student with a free, appropriate public education. *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009) Borrowing from analogous IDEA case law “meaningful” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood*. An eligible Student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996), *cert. den.* 117 S. Ct. 176 (1996); *Polk*.

The federal court in the Eastern District has held, “[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002). An appropriate education under the Rehabilitation Act is one that reasonably accommodates the needs of a handicapped child. *Ibid*. The Third Circuit opined that “to offer an ‘appropriate education’ under the Rehabilitation Act, a school district must reasonably accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits.” *Ridley Sch. Dist. v. MR.*, 680 F.3d 22 260, 280 (3d Cir. 2012) *See also Blunt v. Lower Merion Sch. Dist.*, 2014 U.S. App. LEXIS 17629 (3d Cir. Sept. 12, 2014) Again borrowing from IDEA case law, what is guaranteed is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore*.

504 Evaluations: The applicable federal regulations implementing Section 504 require that an evaluation shall be conducted “before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.”

34 C.F.R. §104.35. An initial evaluation under Section 504 must assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id.* Pennsylvania's Chapter 15 regulations similarly obligate a school district to obtain sufficient information in order to determine whether a child is a "protected handicapped student" and to involve the parents in that process. 22 Pa. Code §§ 15.5, 15.6.

Compensatory Education: Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999); *P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 739 (3d Cir. 2009) (quoting *Lauren W. v. DeFlaminis*, 480 F.3d 259, 272 (3d Cir. 2007)). The "child is entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem." *M.C. v. Central Regional; Ridgewood*.

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). To compensate for past violations, "[a]ppropriate remedies under IDEA are determined on a case-by case basis." *D.F. v. Collingswood Bd. of Educ.*, 694 F.3d 488, 498 (3d Cir. 2012). Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method ("hour for hour"), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*. An alternate, relatively recent method ("same position"); aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014); *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA."). The "same position" method has been most recently endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015). "Compensatory education is crucial . . . and the courts, in the exercise of their broad discretion, may award it to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation." *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 625 (3d Cir. 2015). Given the limited numbers of compensatory education owed to Student I will use the hour-for-hour method.

Discussion

While information about the years preceding the May 2016 reevaluation were not relevant to this hearing, it became clear that just prior to Student's senior year the relationship between the parties deteriorated significantly. The conflict began with the District's contested recommendation to exit Student from special education, intensified by the parental request for an IEE and the District's filing for due process, and was further impaired by Student's inappropriate

Instagram posting and subsequent threatened removal from the sports team. By the time Student sustained a concussion practicing on this same team, the parties were already at odds with one another. Given this lead-up to due process, it is not surprising that despite spending well over an hour just prior to the convening of the hearing the parties, each with an excellent and experienced attorney, could not settle the matter and required this due process hearing.

The Parents allege that the District failed to appropriately evaluate Student after Student sustained a concussion on September 6, 2016 and that the District failed to offer Student appropriate related aids, services and accommodations during the 2016-2017 school year. As remedies the Parents are seeking an Independent Educational Evaluation at public expense as well as compensatory education.

Evaluation: Contrary to the District's position that it was inappropriate to evaluate Student post-concussion, the Parents argue that at no time did the District investigate whether in fact Student could participate in standardized testing, and if not, they challenge why the District did not investigate whether rating scales could be administered to the Parents, teachers and/or Student to investigate the extent of Student's post-concussion deficits in the areas of long-term memory, executive functioning, mood, attention, concentration, and shifting between tasks. The District's school psychologist testified that there are a variety of rating scale instruments that could have assessed deficits in the aforementioned areas without necessarily involving Student at all. The Parents argue that by failing to appropriately evaluate Student the District is in violation of Section 504 by failing to conduct a comprehensive evaluation prior to development of the 504 Plan.

There is a question as to when in fact the District's "Section 504 Evaluation Report" was produced. The Parents maintain that they never received the 504 evaluation report the District purportedly sent, the District psychologist did not see a 504 evaluation report in Student's educational records, and a copy of the 504 evaluation report was not produced and added to the record until after the first hearing session. While I do not believe that the District belatedly manufactured the 504 evaluation report to present at the hearing, I am inclined to believe that it was not done prior to the November 9, 2016 meeting held to discuss a 504 Plan and that it was never sent to the Parents. Regardless of when it was created and whether or not the Parents ever received it, looking at the document itself, I find that it in no way can be viewed as an appropriate "evaluation". Although it serves to answer the question of whether or not there is a disability, it completely fails to assess the areas of potential disability Student may have been dealing with post-concussion.

While it could be argued that at this point even a belatedly produced or extremely poorly done evaluation is water over the dam given that Student succeeded in accomplishing the school work needed for graduation, I hold that the Student is entitled to a remedy for this substantive denial under Section 504 as articulated in the federal regulations and Pennsylvania Chapter 15. Accordingly, to remedy this serious violation I will order an independent neuropsychological evaluation at public expense. This evaluation is expected to 1) identify any residual impairment in functioning and suggest strategies Student can use to accommodate for this impairment; 2) serve as a formal evaluation for Student to present to college disability offices so that if sequellae of the brain injury remain, appropriate accommodations and assistance can be put in place; 3)

assess whether Student requires therapy or counseling services to help process the difficulty of dealing with any lingering impairment and/or to address mood issues related to having a very different senior year than had been anticipated.

FAPE - Homebound: From November 11, 2016 when the Parents completed the necessary paperwork for homebound instruction until Student's January 23, 2017 clearance to return to school, Student was entitled to homebound instruction. Since during the first semester Student was taking the parentally-requested and District-funded online Environmental Science course, which the parties had agreed was to be the only course Student took in the first semester, no homebound instruction was needed. However, from the date of the beginning of the second semester the District should have had instructors in place for the planned social studies and English courses, and Student should have received one (1) hour per week for each of these courses for a total of two (2) hours per week through January 22, 2017, the day Student was permitted to return to school. The number of hours, which shall be based upon the District's calendar, are to be used exclusively for educational, developmental and/or therapeutic services, products or devices.

FAPE – School-based: While recognizing that implementation may not have been perfect, when Student was in school I find that the BrainSTEPS framework accommodations offered to Student as well as the accommodations offered through the subsequent 504 Plan were appropriate. The District's accommodations assisted Student to successfully persevere and fulfill requirements for graduation by the end of the year in accord with Student and Parents' wishes. Therefore, no additional compensatory education is due. Further, borrowing from an analogous IDEA case in our circuit, *Coleman v. Pottstown Sch. Dist.*, 64 IDELR 33 (3d Cir. 2014, *unpublished*) (While the guardians here alleged the IEPs were inadequate, they did not identify the services the student required to receive an educational benefit) I cannot find nor did the Parents identify what additional elements the BrainSTEPS framework or the Section 504 Plan should have contained, the absence of which denied Student FAPE.

Order

It is hereby ordered that:

1. The District failed to appropriately evaluate and assess Student after a concussion sustained in September 2016.
2. As a remedy for the District's failure to conduct an appropriate evaluation of Student, the District shall fund an independent neuropsychological evaluation to fulfill the purposes enumerated in the body of this decision. The evaluator must possess specific training and expertise in neuropsychology and must be a Pennsylvania certified school psychologist. The evaluation must be completed and a report issued within six months of the date of this decision.
3. The District denied Student FAPE under Section 504 by not providing homebound instruction from the date of the beginning of the second semester of the 2016-2017 school year through January 22, 2017. Student is entitled to compensatory education in the form of two (2) hours per week for each of the calendar weeks in this period. The hours are to be used exclusively for educational, developmental and/or therapeutic services, products or devices. The value of these hours shall be based upon the usual and customary rate charged by the providers of educational, developmental and therapeutic services in the county of Student's residence and geographically adjacent Pennsylvania counties. The hours must be used within six months from the date of this decision.
4. Under the BrainSTEPS framework, and the subsequent 504 Plan, the District provided Student with appropriate accommodations and therefore no additional compensatory education is due.

Any claims not specifically addressed by this decision and order are denied and dismissed.

Linda M. Valentini, Psy.D., CHO

September 4, 2017

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UPPER PERKIOMEN	:	
SCHOOL DISTRICT,	:	
	:	
Plaintiff,	:	
	:	No.
v.	:	
	:	
D.G., by his parents and natural	:	
guardians E.G. and K.G., and individually,	:	
	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I, Claudia L. Huot, Esquire, hereby certify that on the date set forth herein a true and correct copy of the foregoing Complaint was mailed, with a waiver of service, via regular U.S. Mail, and by electronic mail, to:

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