

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

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

CLOSED HEARING

ODR File Number:

25447-21-22

Child's Name:

W.V.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

Pro Se

Local Education Agency:

Dallastown Area School District
700 New School Lane
Dallastown, PA 17313

Counsel for the LEA:

Shannon Pierce, Esq.
Fox Rothschild
10 Sentry Parkway
Blue Bell, PA 19422

Hearing Officer:

James Gerl, CHO

Date of Decision:

October 29, 2021

BACKGROUND

The parents filed a due process complaint alleging that the school district failed to implement the student's 504 plan. The school district contends that any failure to implement the student's 504 plan was an inadvertent and harmless mistake. I find in favor of the parents with regard to the issue of failure to implement the student's 504 plan.

PROCEDURAL HISTORY

The parents proceeded without legal counsel in this matter. The hearing was conducted in one virtual/video session. The parties agreed to a small number of stipulations, which saved some valuable hearing time.

Three witnesses testified at the hearing, and the student's mother testified a second time in rebuttal. Parent Exhibits P-1 through P-6 were admitted into evidence. School district Exhibits S-1 through S-17 were admitted into evidence.

At the close of the hearing, each party offered oral closing arguments. In addition, the parties were permitted two calendar days after the hearing to submit any additional written argument. The school district provided written argument, but the parents did not do so. The parents supplied some authority concerning relief prior to the hearing. All arguments and authority 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 as 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.

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).

ISSUE PRESENTED

Based upon the due process complaint and the discussions had at the prehearing conference by Zoom meeting herein, the instant complaint presents one issue:

1. Whether the parent has proven that the school district failed to implement material portions of the student's 504 plan?

FINDINGS OF FACT

Based upon the parties' stipulation of fact, as agreed to by the parties, I make the following findings of fact:

1. The student is [mid-elementary aged] with a date of birth of [redacted].
2. The student's parents are residents within the boundaries of the school district.
3. At all times relevant hereto, the school district was the local education agency for the student.

4. The student has a diagnosis of asthma. The student qualifies as a student with a disability under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act and Chapter 15 of the Pennsylvania Code.

5. On May 5, 2021, a Section 504 plan was created for the student to begin on May 6, 2021 and to expire on September 20, 2021. The parents approved the 504 plan.

6. The student's Section 504 plan exempted the student from the mask or face covering requirement while attending class and in the hallways, in the lunchroom and while riding any school district transportation.

7. Following the creation of the student's 504 plan, the student attended an elementary school in the district without a face covering for the remainder of the 2020 – 2021 school year.

8. During the 2021 – 2022 school year, the student attended the elementary school from August 26, 2021 through September 3, 2021 without wearing a face covering.

9. On September 7, 8 and 9, 2021, the student attended the elementary school without wearing a face covering and spent each school day separate from the student's regular education classroom.

10. Beginning on September 10, 2021, the student stopped attending the elementary school in the school district.

11. On September 13, 2021, the student's mother notified the school district by e-mail that the student would be withdrawing from the school district and enrolling in a private school.

Based upon the evidence in the record compiled at the due process hearing, I make the following findings of fact.¹

12. The student is [redacted]. (NT 42)

13. The parents moved to the area because of the excellent reputation of the school district. (NT 43 – 44)

14. On August 31, 2021, the State Department of Health issued an order effective September 7, 2021 requiring all individuals in schools to wear face coverings while inside because of the covid pandemic. There was an exemption for certain students with medical conditions. (NT 79 – 81, 87 – 89, 91 – 96)

15. The student's parents believed that the mask Order was immoral and beyond the authority of the governor. The parents believed that the mask requirement was illegal and that it did not have to be obeyed. (NT 70 – 73, 101 – 103; P -3)

16. The student's 504 plan was created after an evaluation. The student's 504 plan included only one accommodation – that the student would be exempted from the mask requirement because of the student's asthma. (P-1, P-6; S-4; S-2, S-3; NT 26, 49, 86)

17. On Friday, September 3, 2021, the student's father called the principal on the telephone. The father stated emphatically that the mask

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; and "J-1," etc. for joint exhibits; references to page numbers of the transcript of testimony taken at the hearing is hereafter designated as "NT___").

mandate was illegal. The father asked the principal whether the school would be enforcing the mask requirement. The principal told the father that he was required to follow the mask requirement. The father then called the principal a coward. The father stated that the mask requirement was illegal and that “just following orders” was not a defense. The student’s father did not mention the student’s 504 plan in the conversation. The father argued that the governor did not have the authority to require masks. After the telephone conversation, the principal then e-mailed the parents explaining the school district’s mask exemption form. (NT 50 – 52, 71 – 73; S-10; P-3)

18. On September 7, 2021, both parents were in their vehicle in the car rider line, dropping the student off at school. When the principal saw the student’s father, the principal asked whether the student would be wearing a mask at school. The father [got into a verbal altercation with the principal.] This interaction between the father and the principal took between two and five minutes. (NT 53 – 59, 74 – 76, 85 – 86; S-10, S-11)

19. After the student left the vehicle on September 7, 2021, the principal brought the student to a large instruction room. A teacher and four other students without masks were also in the large classroom at the beginning of the day. One of the students went back to the regular classroom after the parents of that student authorized that student to wear a facial covering. The student engaged in some classwork and assignments on a Chromebook and took breaks for lunch and recess. The student was upset for about an hour after the school drop-off, but then began smiling and laughing. (NT 53 – 60)

20. The student’s parents picked up the student in the afternoon of September 7, 2021 without incident. (NT 59)

21. On September 8 and September 9, 2021, the parents dropped the student off without a mask or other facial covering. The parents did not

submit the requested exemption form. The student attended the separate classroom and had similar academic assignments and activities on September 8 and 9, 2021. (S-13, S-14; NT 60, 85 – 86)

22. On the afternoon of September 8, 2021, the student's mother e-mailed the school district's special education director stating that the student's 504 plan was being ignored by the school. The email did not mention the expiration date of the 504 plan. The e-mail asked the special education director to contact the parent but provided no further details. (S-12)

23. On the morning of September 9, 2021, the student's mother e-mailed the principal requesting that the school honor the student's 504 plan mask accommodation. The e-mail mentioned the September 20, 2021 expiration date of the 504 plan. (S-14; NT 60 – 61)

24. On the morning of September 9, 2021, the principal received a call from a complaint investigator for the Bureau of Special Education regarding the student's 504 plan and its implementation. (NT 62 – 63, 85)

25. After speaking with the complaint investigator and reading the parent's e-mail, the principal read the student's 504 plan and discovered the September 20 expiration date. The principal conferred with the school district's special education director and determined that the school district needed to acknowledge the September 20 expiration date for the student's 504 plan. The principal then called the student's mother and informed the student's mother that the student would be able to return to class the next day, September 10, 2021, and that the student would be able to do so without a face covering and that the student could join the student's regular classroom at that time. The principal also suggested a date for a meeting to update the student's 504 plan, but the parent was not available on those dates. The student's mother said that she would confer with the student's

father and get back to the principal concerning a meeting date. (NT 60 – 63, 33 - 34)

26. In the late afternoon on Thursday, September 9, 2021, the principal emailed the school staff informing them that the student was exempted from the mask requirement until September 20, 2021. The email informed staff not to instruct the student to put a mask on if the student was not wearing a mask. (S-15; NT 63 – 64)

27. The student's parents did not mention the expiration date of the 504 plan to the principal or other school staff in any communication between September 3 and September 8, 2021. (NT 61 – 62, 66, 101 – 103)

28. On September 13, 2021, the student's mother informed the principal that it would take approximately a week for the student to be enrolled in the private school. The student's mother requested that the student attend cyber school until that time. The principal, on September 13, 2021, informed the parent that it would take approximately a week to set up the cyber program and so, instead, offered to send the student's schoolwork through Google Classroom so that the student could continue education at home pending withdrawal. (S-17; NT 65 – 66)

29. On September 14, 2021, the school district's special education director attempted unsuccessfully to call the parent. On September 21, 2021, the special education director spoke with the student's mother on the telephone. The special education director attempted to schedule a new 504 meeting for the student, but the student's mother refused saying that it was "too little, too late." The student's mother did not agree to a new 504 meeting and did not inform the special education director as to which private school the student would be attending. (NT 84 – 86, 62 – 63, 34 - 35)

CONCLUSIONS OF LAW

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

1. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of the disability be excluded from participation and/or be denied the benefits of or be subjected to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 C.F.R. § 104.33; 22 Pa. Code § 15.1. To establish a violation of Section 504, a parent must prove (1) that the student is disabled; (2) that the student was otherwise qualified to participate in school activities; (3) that the school district receives federal funds and (4) that the student was excluded from participation and/or denied the benefits of or otherwise subjected to discrimination by the school. Ridley School District v. MR and JR ex rel. ER, 608 F. 3d 260, 58 IDELR 271 (3d Cir. 2012).

2. In order to receive a free and appropriate public education as defined by Section 504, a student must be provided with regular or special education and related aids and services that are designed to meet the individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met. 34 C.F.R. § 104.33(b); TF by DF and TSF v. Fox Chapel Area School District, 62 IDELR 74 (W.D. Penna. 2013), affirmed in an unpublished decision at 589 F. App'x 594, 64 IDELR 61 (3d Cir. 2014).

3. To prevail on a claim of failure to implement an IEP under IDEA, parents must show that the school district failed to implement substantial or material provisions of the IEP. School District of Philadelphia v. Williams ex

rel. LH, 66 IDELR 214 (E.D. Penna. 2015); see, Van Duyn v. Baker School District, 481 F. 3d 770, 47 IDELR 182 (9th Cir. 2007).

4. In order to receive reimbursement for tuition for a unilateral private school placement under IDEA, parents must establish three elements: 1) that the school district has denied a free and appropriate public education or otherwise violated the special education law; 2) that the parents' private school placement is appropriate; and 3) that the equitable factors do not preclude the relief. School Committee Town of Burlington v. Department of Educ., 471 U.S. 359, 103 L.R.P. 37667 (U.S. 1985); Torrance County School District Four v. Carter, 510 U.S. 7, 20 IDELR 532 (U.S. 1993); Forest Grove School District v. TA, 557 U.S. 230, 52 IDELR 151 (U.S. 2009).

5. A special education hearing officer under IDEA or Section 504 has broad equitable powers to issue an appropriate remedy when a local education agency violates the special education laws. All relief under the special education laws that may be awarded by a hearing officer is equitable relief. Forest Grove School District v. TA, 557 U.S. 230, 52 IDELR 151 at n. 11 (2009); Sharon C v. School District of Philadelphia, 612 F. 3d 712, 52 IDELR 247 (3d Cir. 2010); CH by Hayes v. Cape Henlopen School District, 606 F. 3d 59, 54 IDELR 212 (3d Cir. 2010); School District of Philadelphia v. Williams ex rel. LH, 66 IDELR 214 (E.D. Penna. 2015); Stapleton v. Penns Valley Area School District, 71 IDELR 87 (N.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 Education Albuquerque Public Schools, 530 F. 3d 1116, 49 IDELR 241 (10th Cir. 2008).

6. Compensatory education is one remedy that may be awarded to parents when a school district violates the special education laws. In general, courts, including the Third Circuit, have expressed a preference for

a qualitative method of calculating compensatory educational awards that address the educational harm done to the student by the denial of FAPE. GL by Mr. GL and Mrs. EL v. Ligonier Valley School District Authority, 802 F. 3d 601, 66 IDELR 91 (3d Cir. 2015); Reid ex rel. Reid v. District of Columbia, supra. In Pennsylvania, in part because of the failure of special education lawyers to provide evidence regarding harm to the student caused by a denial of FAPE, courts and hearing officers have frequently utilized the more discredited quantitative or “cookie cutter” method that utilizes one hour or one day of compensatory education for each day of denial of a free and appropriate public education. The “cookie cutter” or quantitative method has been approved by courts, especially where there is an individualized analysis of the denial of FAPE or harm to the particular child. See, Jana K by Tim K v. Annville School District, 39 F. Supp. 3d 584, 53 IDELR 278 (N.D. Penna. 2014)

7. In the instant case, the parent has proven that the school district failed to implement substantial and material portions of the student’s 504 plan by not permitting the student to attend the student’s general education classroom without wearing a mask for three school days.

8. The parents have failed to prove that they should be awarded reimbursement for private school tuition for the student as a remedy for the school district’s short-term failure to implement the student’s 504 plan.

9. The appropriate remedy for the school district’s short-term failure to implement the student’s 504 plan is an award of compensatory education equal to the time that the student was not permitted to attend the student’s regular education classroom.

DISCUSSION

I. MERITS

1. Did the parent prove that the school district failed to implement the student's 504 plan?

In this case, the parents do not contend that the student's 504 plan was inadequate or that the student was denied a free and appropriate public education under Section 504. Instead, the parents contend that the school district failed to implement the student's 504 plan. The school district contends that its failure to follow the student's 504 plan was the result of an honest mistake.

By analogy to IDEA, in order to prevail on a failure to implement claim, a parent must prove that the failure of a school district to implement an IEP involves substantial or material portions of the plan. In the instant case, both parties agree that for three school days the school district did not implement the student's 504 plan provision that the student not be required to wear a mask. The student's 504 plan contained only one accommodation for the student's asthma; that is, that the student not be required to wear a mask. The 504 plan specifically exempted the student from wearing a mask, and that was the only accommodation included in the 504 plan. Accordingly, it is clear that not wearing a mask was the entire plan and, therefore, the failure to implement involved a provision material to the 504 plan. It is concluded that the school district failed to implement a material and substantial portion of the student's 504 plan for three school days.

The school district contends that because the failure to implement did not result in specific harm to the student, the implementation failure is

harmless and should not result in an award of relief. The hearing officer decision which the school district cites in its written argument is distinguishable, however, because, in that case, the hearing officer found that the school district had not failed to implement the student's 504 plan.

It is true that the school district made an honest mistake concerning the effective dates of the plan, but it did not implement the only accommodation in the student's 504 plan for three school days. Although the reasonableness of the district's actions with regard to the student are highly relevant concerning relief, the record is clear that material and substantial parts of the 504 plan were not implemented.

There are no disputed facts concerning the district's failure to implement the 504 plan for three school days. To the extent that the testimony of the witnesses differs with regard to any contested facts in this case, however, the testimony of the school district witnesses is more credible and persuasive than the testimony of the student's mother for the reasons more fully set forth in the discussion below.

Accordingly, the parents have proven that the school district failed to implement material provisions of the student's 504 plan for three school days.

II. RELIEF

Because the parents have proven that the student's 504 plan was not implemented with regard to material provisions of the plan, the student should be awarded three days of compensatory education in order to remedy the violation for the period of time during which the student was not permitted to attend the student's general education class. Although the

period of time involved was short, only three days, it is not accurate to say, as the school district's brief claims, that the violation was harmless. The student was separated from the student's usual general education class for three days. Although the student did some schoolwork in the separate setting, the separation did occur. Compensatory education is well suited to remedy the relatively small amount of harm to the student here.

The parents request that the student be awarded reimbursement for tuition to a private school instead. The parents submitted two articles prior to the hearing concerning reimbursement for unilateral placements under IDEA. The authority submitted by the parents, however, does not relate to tuition reimbursement as a remedy under Section 504. Accordingly, such authority is not persuasive.

The school district cited an unpublished decision by the Third Circuit Court of Appeals in its written summary and closing argument. Unpublished court decisions are not precedential. DF by AC v. Collingswood Borough Bd. of Educ., 694 F. 3d 488, 59 IDELR 211 (3d Cir. 2012). Accordingly, the unpublished decision cited by the school district was not considered.

The parties disagree concerning whether a special education hearing officer can award tuition reimbursement under section 504 or whether instead a parent would have to go to court and prove deliberate indifference in order to receive such an award. The question is not very thoroughly briefed, however, and in any event, it is not necessary to reach that question here because it is abundantly clear that an award of tuition reimbursement is not the appropriate remedy for the violation given the facts of this particular case.

First, the period of time in which the school district failed to implement the student's 504 plan was very short, only three school days. The school district notified the parents and all school staff that it would be implementing the 504 plan beginning on September 10th.

Second, and by analogy to IDEA, a parent must establish three things in order to be awarded tuition reimbursement for unilateral placement: 1) that the school district has denied FAPE to the student or otherwise violated the law; 2) that the parent's private placement is appropriate; and 3) that equitable factors do not preclude the relief.

Although in this case the parent has not proven a denial of FAPE, in other words discriminatory conduct under such a 504 plan, the parent has proven that the school district failed to implement a material portion of the student's 504 plan. The evidentiary record, however, contains no evidence whatsoever concerning the parent's private school placement and whether it is appropriate for the student. On this basis, reimbursement must be denied.

Third, and most importantly, all relief under IDEA and all relief that may be awarded by a hearing officer under 504 is equitable in nature. In the instant case, the equities clearly preclude an award of tuition reimbursement. The parents' behavior in this matter was extremely unreasonable. For example, the student's father cursed out the school principal and called him names repeatedly in front of the student and separately on the telephone. It is recognized that the parents have strong feelings in opposition to the mask Order, but the conduct of the parents in this case is inconsistent with the collaborative behavior that is absolutely essential to all matters related to the education of a child. See, Schafer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005). Moreover, the school district

made it clear to the parents that it would enforce the 504 plan immediately upon learning that the 504 plan had not expired and would not expire until September 20. It is clear from the evidence in the record that the school district was simply mistaken as to the cutoff date or expiration date of the 504 plan. After making the mistake as to the cutoff date, the response of the school district was reasonable in correcting its mistake. Moreover, these events took place during an on-going and deadly public health crisis coupled with an extreme reaction by a portion of the public to the mask Order. The parents, on the other hand, were aware of the cutoff date of the 504 plan but failed to let school officials know for over two full school days. The parents appear to be seeking to benefit from hiding the ball. The parents' failure to mention the expiration date earlier was also unreasonable.

In view of the foregoing, it is clear that the equities in this case compel a conclusion that reimbursement of private school tuition is not appropriate. Given the short duration of the violation and the fact that the school district simply made a mistake concerning the expiration date of the student's 504 plan and stood ready to rectify the mistake as soon as it was called to their attention, reimbursement is not an appropriate remedy here.

To the extent that the testimony of the witnesses differs with regard to the unreasonable conduct of the parents and any other contested facts in this case, the testimony of the school district witnesses is more credible and persuasive than the testimony of the student's mother because of the demeanor of the witnesses, as well as the following: the testimony of the student's mother that the student was devastated by having to go to a different classroom is inconsistent and inherently noncredible. The mother testified that the parents knew that the 504 plan allowed the student not to wear a mask until the cutoff date of September 20, yet neither parent

informed the school district of the cutoff date of the 504 plan that was still in effect in order to assess the “morality” of how the matter played out. The latter testimony is not consistent with the testimony about the student having been devastated by attending a separate classroom. In addition, the mother appears to have changed her testimony concerning whether the principal was being advised by school authorities to ignore the 504 plan; the mother’s initial testimony on this point is contradicted by the mother’s rebuttal testimony.

It is clear that the appropriate equitable remedy under all of these facts is three days of compensatory education to be awarded to the student.

ORDER

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

1. The school district is ordered to provide three full days of compensatory education to the student. The award of compensatory education is subject to the following conditions and limitations:

a. The student’s parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the student’s educational and related services needs.

b. The compensatory education services may be used at any time from the present until the student turns age twenty-one (21); and

c. The compensatory services shall be provided by appropriate and qualified professionals selected by the parents. The cost to the district of providing the awarded days of compensatory education may be limited to the average market rate for private providers of those services in the county where the district is located; and

2. All other relief requested by the due process complaint herein is denied.

IT IS SO ORDERED.

ENTERED: October 30, 2021

James Gerl

James Gerl, CHO
Hearing Officer