

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

DECISION

Child's Name: B. M.

Date of Birth: [redacted]

Date of Hearing:
October 14, 2011

CLOSED HEARING

ODR File No. 1855-1011KE

Parties to the Hearing:

[parent]

West York Area School District
2605 West Market Street
York, PA 17404

Representative:

Daniel M. Fennick, Esquire
1423 E. Market Street
York, PA 17403

Jeffrey D. Litts, Esquire
24 North Lime Street
Lancaster, PA 17603

Date Record Closed:

October 28, 2011

Date of Decision:

November 12, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

B.M. (hereafter Student)¹ is an elementary school-aged student in the West York Area School District (District). Student's Parent filed a due process complaint against the District asserting that Student is and should have been identified as a child with a disability under Section 504 of the Rehabilitation Act of 1973² as well as Pennsylvania Chapter 15³ by reason of Student's asthmatic condition. The Parent sought a Section 504 Plan and compensatory education.

The case proceeded to a due process hearing which convened in a single session at which the parties presented evidence in support of their respective positions. For the reasons which follow, I conclude that Student is eligible under Section 504 and Chapter 15, and that a plan of accommodations must be developed to address Student's needs.

ISSUE

Whether the Student is a child with a disability and is entitled to a Section 504 Plan, and, if so, what accommodations are necessary for inclusion in that Plan;⁴ and

Whether the District denied Student an appropriate education by failing to identify Student as a child with a disability and, if so, is Student entitled to compensatory education?

FINDINGS OF FACT

1. Student is an elementary school aged student who resides with the Parent within the District. The District is a recipient of federal financial assistance. (Notes of Testimony (N.T.) 22)

¹ In the interest of confidentiality and privacy, Student's name and gender, as well as other potentially identifying information, are not used in the body of this decision.

² 29 U.S.C. § 794.

³ 22 Pa. Code §§ 15.1 *et seq.*

⁴ The due process complaint also suggested that Student was an "OHI [other health impaired] special education student" (Complaint at 2), which is a category of eligibility under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 *et seq.*, but that claim was not pursued. (N.T. 14-16)

2. Student has had respiratory problems since approximately six months of age which progressed as Student grew older, requiring hospitalization on some occasions. Student has been diagnosed with asthma. (N.T. 26-28, 54, 65, 70, 84, 112-14; Parent Exhibit (P) 2, P 3)
3. When Student experiences difficulty breathing, Student's symptoms include coughing and wheezing and sometimes a fever. (N.T. 30-31, 54-56, 126)
4. Student has an inhaler and also uses a nebulizer. (N.T. 31, 54-55)
5. Student has attended school in the District since kindergarten (the 2007-08 school year). Student missed 40.5 days of school that year but made sufficient progress to advance to first grade. (N.T. 146; P 6; School District Exhibit (S) 1, S 26)
6. During the 2008-09 school year, Student was in first grade. Student was absent 31 days that school year. Student was referred to the Instructional Support Team (IST) in the spring of 2009 but made sufficient progress to advance to second grade. (S 2, S 27, 30)
7. Student was in second grade for the 2009-10 school year, and began to receive Title I services for Language Arts. (S 32)
8. During the 2009-10 school year, Student went to the nurse's office on 85 occasions for respiratory symptoms/asthma. Student was absent 46.5 days that school year, with 6.5 days unexcused. The Parent provided medical excuses for a number of those absences, but a majority of the excuses did not provide specific information on the reason Student was medically unable to attend school (*see, e.g.*, P 11 at 7, with a medical provider noting only "objective signs of illness"). (N.T. 74-76, 86-87; P 1, P 6, P 8, P 11; S 3, S 4, S 25)
9. At a Truancy Elimination Plan meeting in March 2010, a school nurse asked the Parent for medical documentation about Student's general health. The Parent provided information to the District that Student had allergies and asthma. (N.T. 88-89, 100-01, 190, 207-08; P 7 at 109-11; S 22A, S 24 at 1)
10. Also in the spring of 2010, the District sent notices to the Parent about Student's attendance. (P 9; S 9, S 10, S 13, S 22A)
11. Despite the Truancy Elimination Plan, the District noted continued concerns about Student's absences. (P 4, P 7; S 14)
12. Student repeated second grade during the 2010-11 school year. Student was embarrassed about repeating second grade. Student was retained because Student did not meet the academic expectations to be promoted to third grade. (N.T. 52, 62, 116, 142-44, 174, 181, 198, 237; S 8, S 15, S 28)
13. During the 2010-11 school year, Student went to the nurse's office on 34 occasions for respiratory symptoms/asthma. Student was absent 35 days that school year, and the Parent provided medical excuses for a number of those absences. However, a majority of

those excuses did not specify the specific reason that Student was medically unable to attend school (*see, e.g.*, P 12 at 19, with a medical provider noting only “objective signs of illness”). (N.T. 74-76, 86, 203; P 1, P 6, P 8, P 12; S 5, S 6, S 25)

14. When Student was absent from school during the 2010-11 school year, Student’s teacher made the missed work available and explained what was covered during the absence. Student was not expected to complete missed work the next day if Student was absent for several days in a row, and the teacher sometimes modified Student’s assignments. This practice was consistent with District policy. (N.T. 176-77, 184, 233-34)
15. Student was provided Title I Reading services during the 2010-11 school year during an intervention block when Student would not miss other instructional time. (N.T. 177-178, 182-83, 191; S 33)
16. Another meeting to develop a Truancy Elimination Plan was held in February 2011. The District initiated the truancy process because Student had missed days of school for which an excuse was not provided within three days. (N.T. 199-200, 204, 232)
17. In May 2011, the District convened another Truancy Elimination Plan meeting and again asked the Parent for medical documentation. This is the most recent plan and provides, among other things, that, “A DOCTOR’S note is required for EVERY absence” (S 23 at 3, emphasis in original), and that Student must make up work at recess. (N.T. 230-31; S 18, S 19, S 20, S 23)
18. Student’s family physician made some suggestions in August 2011 for Student to be accommodated at school due to Student’s asthma symptoms. (S 35)
19. Student is in [redacted] grade for the 2011-12 school year. (N.T. 52, 78)
20. When Student experiences difficulty breathing at school, Student goes to the nurse’s office to use an inhaler, and usually returns to class. Sometimes Student needs to rest for a few minutes in the nurse’s office. (N.T. 56-57, 68, 76-77, 79, 96-97)
21. Student sometimes is too ill to attend school due to respiratory symptoms. (N.T. 59, 66)
22. When Student misses school, Student sometimes has difficulty making up the work in the time allotted. (N.T. 70, 139-40)
23. At some point, Student’s Parent sent in a nebulizer to school and it was used on at least two occasions when an inhaler was not available for Student. (N.T. 80-83, 98-99)
24. On some days when Student is not feeling well in the morning or is anxious, Student’s Parent takes Student to the nurse’s office to rest before going to class. (N.T. 105, 107-08, 213-14)

25. As part of the Truancy Elimination Plan, Student has been given a reward for attending school. This strategy is not effective when Student is too sick to attend school. (N.T. 85, 105-06)
26. The District has not accepted some of the doctor's excuses for Student's absences because the notes did not provide sufficient information. (N.T. 135)
27. Pursuant to District policy, once a student misses fifteen days of school, a medical excuse is required. If an excuse is not provided within five days, the absence is unexcused, even if a medical note is provided after that five day period expired. (N.T. 231-32, 241-42, 248-49)
28. The following exhibits were introduced and admitted into evidence, all but two without objection:

P 1 – 13 (The District's objection to P 2 and P 3 was overruled, N.T. 117-19, 129-30); S 1-6, 8-10, 12, 14-37; HO 1

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);⁵ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole was essentially consistent on matters relevant to the issue presented. In some instances, witnesses' recollections differed, which did not

⁵ The burden of production, "*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

necessarily render the testimony incredible. The credibility of particular witnesses is discussed further in this decision as necessary.

Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning and breathing.⁶ 34 C.F.R. § 104.3(j)(2)(ii).

Pennsylvania provides a similar definition of “protected handicapped student:”

Protected handicapped student—A student who meets the following conditions:

- (i) Is of an age at which public education is offered in that school district.
- (ii) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program.
- (iii) Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under § 15.10 (relating to discrimination claims).

15 Pa. Code § 15.2.

Section 104.35 of the applicable regulations implementing Section 504 requires 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.*

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood Board of Education v. N.E., 172 F.3d 238, 253 (3d Cir. 1999). “In addition, the plaintiff must demonstrate that defendants know or should be reasonably expected to know of his disability.” *Id.* That obligation includes the duty of child find under Section 504. 34 C.F.R. §

⁶ Although not an issue in this case, asthma is expressly listed as a type of chronic health condition that may constitute an other health impairment under the IDEA. 34 C.F.R. § 300.8(c)(9).

104.32; *Ridgewood* at 253. Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995).

In the context of education, Section 504 and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Id.* (citation and quotation marks omitted); *see also* 34 C.F.R. § 104.33(a). Under Section 504, “an appropriate education 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 nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). The obligation to provide a “free appropriate public education” is substantively the same under Section 504 and under the IDEA. *Ridgewood* at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm. 2005). The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit.” *Ridgewood* at 247. “There 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).

Student’s Eligibility

The District maintains that Student’s asthma is successfully managed at school so there is no reason or need for a Section 504 Plan. (N.T. 94-95; District’s Closing at 10-13, 14-16) The Parent, on the other hand, claims that Student is a child with a disability and is entitled to the protections of Section 504 in order to be appropriately accommodated at school. (N.T. 14-16; Parent’s Closing at 25-31)

It appears to be undisputed that the provision of Title I services to Student to date has been an appropriate intervention for Student. However, the number of Student’s absences from school is and has been astonishing (Findings of Fact (FF) 5, 6, 8, 13), and no level of in-school support can be adequate if a student is not actually present. The District did make efforts in the spring of 2010 to obtain information from the Parent on Student’s general health, and further did attempt to address Student’s absences through a Truancy Elimination Plan at that time. (FF 9, 10, 11) It is abundantly clear from the record that the communications and relationship between the parties was and is strained and difficult, and that the District’s knowledge about Student and Student’s health was hampered both before and after the spring of 2010. Nevertheless, over the course of the 2009-10 school year, the District was certainly well aware that Student’s asthma required attention at school on a regular and frequent basis. (FF 8, 20) Moreover, it is also apparent that all of the interventions in place during that school year were clearly insufficient to permit Student to advance to the third grade the next fall. (FF 7, 9, 12)

As noted above, the law imposes an obligation on school districts to identify students who are suspected of having a disability. The question, then, is whether the District had sufficient information about Student to invoke a responsibility to determine whether Student had a disability within the meaning of Section 504 and, if so, when that obligation arose. After

careful review of the evidence, this hearing officer concludes that by the end of the 2009-10 school year, when Student had not demonstrated the academic expectations to advance to the third grade even with Title I support (FF 7, 12), the District had in its possession adequate indication that Student had a health condition which substantially limited Student's ability to access and participate in an educational program to trigger its child find obligation pursuant to Section 504 and Chapter 15. While it may be that many children with asthma do not require specific accommodations at school other than access to an inhaler, this hearing officer finds credible, as well as undisputed, the testimony that Student is not able to go to school some days because of Student's asthmatic condition. (FF 21) Indeed, it is difficult to imagine a more serious adverse impact upon a child's ability to participate in or access an aspect of an educational program than an inability to go to school. For all of these reasons, this hearing officer finds that Student meets the criteria under both Section 504 and Chapter 15 as having a health impairment that substantially limits Student's ability to access Student's education.

Additionally, this hearing officer concludes that the District should have initiated the evaluation process by the beginning of the 2010-11 school year, which is a reasonable time after it determined that Student would not progress to third grade. Had it done so, the District would have been in a position to convene a team to identify Student's specific educational needs and develop a plan which provided necessary accommodations for Student to access Student's educational program. Because the District failed to take these steps, this hearing officer will direct the District to immediately begin the process of conducting a comprehensive evaluation of Student which will provide an educational team with adequate information from which a Section 504 Plan shall be developed. The evaluation shall include medical information about Student for which the Parent will be required to sign releases.

The Section 504 Plan shall include a provision that the District's policy requiring a medical excuse for all absences after a student has misses fifteen days will not be strictly followed for Student. While the District may require the Parent to provide a specific reason for Student's absences from school in order to be excused, it would pose an undue hardship on the Parent in this case if she is required to take Student to a medical professional every time Student is not feeling well enough to attend school because of Student's documented asthma.⁷ Furthermore, the Section 504 Plan shall also include a provision that if the Parent provides a medical excuse more than five days after an absence, the absence shall be considered excused. While it is understandable that the District has a detailed attendance policy which is applicable to all students and is consistently enforced (FF 27), it must also recognize that such a policy must at times yield to particular circumstances such as those presented in this case.

With respect to the instruction and work that Student misses during absences due to Student's asthma, the Section 504 Plan shall provide for a reasonable period of time within which Student must complete all assignments. Further, the team which develops the Section 504 Plan shall consider and decide upon appropriate methods of ensuring that Student is provided with concurrent or replacement instruction when Student is not at school due to Student's

⁷ The most recent Truancy Elimination Plan requirement of a medical excuse for every absence (FF 17) would similarly be impractical as part of Student's Section 504 Plan.

asthma.⁸ Student must not be required to miss both recess periods during any school day simply because Student was absent and needs to make up work. The evaluation will, of course, provide additional important information about Student's needs and recommendations for how the team might address them in a Section 504 Plan.

The next issue is whether Student is entitled to compensatory education because the District did not timely identify Student under Section 504 and Chapter 15. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* Many courts have considered compensatory education claims in the context of what award is "reasonably calculated to bring [a student] to the position that he would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

After careful consideration, this hearing officer concludes that compensatory education is not warranted. The above discussion explains that the District should reasonably have begun the evaluation process for Student by the beginning of the 2010-11 school year when Student repeated second grade. Had the District conducted an evaluation in the fall of 2010 and thereafter developed and implemented an appropriate plan of accommodations, Student would have successfully completed the school year and advanced to third grade. Here, Student's teacher made accommodations for Student's absences through providing instruction which was missed, and by modifying assignments and extending the time within which Student was expected to complete them. (FF 14, 22) As an accommodation, Student was able to go to the nurse's office in the morning if Student was not feeling well regardless of the reason. (FF 24) Student received Title I services which did not interfere with any other instructional time. (FF 15) Student met the academic expectations during the 2010-11 school year and progressed to [redacted] for this school year. (FF 19) Thus, despite an unsuccessful focus on truancy elimination (FF 16, 17, 25), this hearing officer concludes that the District provided appropriate accommodations to Student even without an evaluation and Section 504 Plan, and that Student is precisely in the same position Student would have been in had the District met all of its obligations to Student under the law. *B.C., supra*. Hence, an award of compensatory education

⁸ For example, the Parent has made the reasonable suggestions of using a web camera or providing a tutor. (Parent's closing at 29-30) This hearing officer will not order any particular method but encourages the team to collaborate on acceptable options for ensuring Student has continued access to the educational program.

would not be equitable based upon the foregoing findings and conclusions, and will therefore not be made.

Finally, this hearing officer makes the following observations. The relationship and communication between the Parent and District is and has been clearly strained. However, just as this hearing officer limited the testimony regarding attempts to schedule meetings and how successful those efforts were and why, she suggests that the parties put those experiences behind them and concentrate on the current school year and the future. The accompanying order directing the educational team to convene following the evaluation to develop a Section 504 Plan will provide the parties with the opportunity to demonstrate their dedication to and interest in providing for Student's needs. The parties are also encouraged to consider inviting a facilitator to the meeting to develop the Plan to assist them with this process.

CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that Student is eligible under Section 504 and Chapter 15, and that the District must immediately initiate an evaluation of Student to develop a Section 504 Plan to address Student's needs.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Within ten days of the date of this Order, the District shall initiate a comprehensive evaluation of Student to assess all areas of educational need which will be drawn from a variety of sources. The evaluation shall be conducted as soon as possible and within a reasonable period of time.
2. The Parent shall provide written consent to the evaluation if requested, and sign all necessary medical releases which are necessary to provide the evaluation team with information relevant to Student's educational needs.
3. Upon completion of the evaluation, its results shall be considered by a team of professionals to develop a Section 504 Plan.
4. The Section 504 Plan shall include provisions for (a) modifications to the District's attendance policy regarding required medical excuses as set forth in the above discussion; (b) a reasonable period of time within which Student must complete missed assignments; (c) appropriate methods of ensuring that Student is provided with concurrent or replacement instruction without causing Student to miss new instructional time or more

than one period of recess each day; and (d) any other accommodations determined to be necessary based upon the evaluation.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: November 12, 2011