

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: D.H.

Date of Birth: [redacted]

Dates of Hearing:

March 10, 2010

May 19, 2010

CLOSED HEARING

ODR Case # 00549-09-10-AS

Parties to the Hearing:

Parent[s]

Beverly Gallagher
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Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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June 14, 2010

June 29, 2010

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a teen-aged student residing in the Southern York County School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)¹. The student’s disabilities, set forth in more detail below, are identified as other health impairments. This disability also qualifies the student under the protections of the Rehabilitation Act of 1973 (specifically under Section 504 of that statute, hence the follow-on reference to this section as “Section 504”).² Parent claims the student has been denied a free appropriate public education (“FAPE”) under both IDEIA and Section 504, and has been denied the benefits of an education as the result of discrimination under Section 504, because the student has been denied technology to allow the student to access classroom instruction from home. The District counters that it has offered a program that is designed to provide FAPE, and that it has fully complied with its duties under both IDEIA and Section 504.

¹ It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. See also 22 PA Code §§14.101-14.163.

² It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. See also 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for the protection of “protected handicapped students”. 22 PA Code §§15.1, 15.10.

For the reasons set forth below, I find in favor of the parent and student.

ISSUE

Is the student's educational program reasonably calculated to provide FAPE in the least restrictive environment ("LRE")?

FINDINGS OF FACT

1. The student qualifies under IDEIA as a student with an other health impairment and a specific learning disability in written conventions. (School District ["S"]-9 at page 14).
2. Specifically, the student has been identified as a student with [an extremely rare genetic disorder] and attention deficit hyperactivity disorder. (S-9 at page 14).
3. The diagnosis of [this disorder] which, in the student, manifests itself in a condition called [redacted] resulting in an excess of a compound in the body which creates an imbalance in other compounds in the body. The lower levels of these other compounds leads to the symptoms exhibited in [the condition]. (Parents' Exhibit ["P"]-33; Notes of Testimony ["NT"] at 32-35, 224-231).
4. The student was born with [the disorder] and, since 1999, has treated with a pediatrics metabolic specialist at Johns Hopkins Hospital. (NT 32, 216-223).

5. As a result of [the condition], approximately once per month, the student's body undergoes an acute inflammatory response, with symptoms that are akin to the body fighting off a bacterial or viral infection, much like having a severe flu. (NT at 238-242).
6. These symptoms exhibit themselves in two distinct phases—an acute phase (referred to by the student's treating physician as a "spell" or an "episode") and a recovery phase. (NT at 32-33, 238-239, 243-244).
7. In the acute phase, the student experiences severe, debilitating symptoms over a period of two or three days— very high fever, vomiting, deep bone and joint pain, diarrhea/constipation, extreme swelling of lymph nodes, ulceration of the gastro-intestinal tract, and a large, red, spotted rash. The acute phase lasts approximately 2-3 days (although it can last longer), and during the acute phase, the student mainly sleeps. (NT at 32-33, 238-239, 288-290).
8. The student is hardly able to tolerate fluids or nutrition during the acute phase. (NT at 36-37, 243).
9. After the acute phase, the student enters a recovery phase of the illness. The recovery phase can last anywhere from 3-7 days. The student is extremely debilitated during the recovery phase due to the overall toxicity of the body's inflammatory response and due to loss of muscle mass from the vomiting/diarrhea and the inability to take any meaningful sustenance. (NT at 33, 242-244).

10. The student loses 3-4% of muscle mass for each day the acute phase lasts, potentially leading to upwards of a 10% loss of muscle mass for a typical acute phase. (NT at 243-244, 249-250).
11. The cyclical inflammatory response caused by [the condition] has resulted in the student having a medical form of anorexia. Every time the inflammatory response is triggered, the student's body identifies food proteins in the body at that time as a potential toxin. Over time, the student's body has rejected more and more foodstuffs as potentially toxic, thereby generating an aversion to food. In effect, the student has lost the ability to eat most foods. (NT at 92-96, 244-247, 281-282).
12. As a result of the student's medical anorexia, the student receives nutritional formula directly into the stomach through a gastric tube. Outside of the acute and recovery phases, this gastric feeding takes place only overnight at a steady, hourly rate. During the acute phase, the student cannot tolerate the normal rate of the nutritional formula, and it is cut by approximately 85%. Often, the student can tolerate no nutrition at all. Both result in the loss of muscle mass as outlined in Finding of Fact 10. During the recovery phase, the needs to return the student to a normalized intake of nutritional supplement, and to rebuild muscle mass, are paramount. Therefore, during the recovery phase, the student's gastric feeding takes place over the course of the entire day until

- the student has regained lost muscle mass and strength to return to school. (NT at 36-37, 90-92, 244-245, 247, 255-256, 269-270).
13. During the acute and recovery phases, the student requires intricate nursing to ensure the student's return to a non-episodic state. This intricate nursing is performed by the parents, primarily the student's mother. (NT at 36-38, 71-72, 90-97, 100-108, 249-250, 253-255, 266-267).
 14. Neither party disputes that the student is unable to receive instruction during the acute phase of the student's illness. The student sleeps most of the first day of the acute phase; the student is more alert on the second day of the acute phase but still largely unavailable for instruction. (NT at 101-103, 106-107).
 15. During the recovery phase, the student is debilitated but is awake, alert, and attentive to activities. The student reads and is read to, and can attend to a television screen to watch programs. (NT at 33-34, 102-103, 107-108).
 16. When the student is not experiencing the acute or recovery phases of [the condition's] symptoms, the student is able to attend school, participate in the life of the school, and participate in instruction. (NT at 140-141, 449).
 17. During the 2008-2009 school year, [redacted], the student was absent from school for 55 days. (S-2).

18. Through March 10, 2010 in the 2009-2010 school year, [redacted] the student was absent from school for 35.5 days. (S-6).
19. The student's treating physician expects that the student will continue to have cyclical episodes throughout the student's secondary school years. (NT at 258-259).
20. Due to the student's disability, and consequent absences, the student misses large amounts of coursework. The student's individualized education plan ("IEP") notes that the symptoms of [the condition] "can impede (the student's) ability to retain information due to lengthy absences" and that the student "needs support across the curriculum when absences cause (the student) to miss instruction and/or learning practice time." (S-9 at pages 6, 13).
21. The student's mother, an elementary school teacher, and a special education teacher testified or observed that they observed the student being overwhelmed by the amount of make-up work the student had to do. The student's mother testified, and regular education teacher observed, that the frustration often centered on having missed class information and not having any instruction to guide the student's understanding of material and/or assignments. (P-11 at page 3; NT at 57-58, 75-76, 139, 417).
22. In November 2009, the student's special education teacher and academic subject teachers met with the student because the

student was “struggling with keeping up and not completing work or maybe not working to...potential.” The amount of uncompleted work was a concern. This is was not a normal practice with the student, and the parents were not invited to the meeting or informed about the meeting until after the fact. (NT at 413-416).

23. Since the 2006-2007 school year, [redacted], parents have sought as part of the IEP team process a webcam setup that would allow the student to receive instruction remotely during the acute and recovery phases when the student was unable to attend school. (NT at 58-59).

24. The principal of the student’s elementary school was resistant to any webcam, or remote access technology, for the student. In the 2008-2009 school year, however, [redacted] the parents agreed to the District’s offer to have a webcam room available for the student in the elementary school. In the parents’ eyes, however, this was viewed as a half-measure; parents acquiesced in the District’s webcam room but did not abandon a request to have remote access technology available to the student at home. (NT at 63-65, 73).

25. In the student’s latest IEP, from March 2010, a program modification provides for the following: the student will be able “to view classroom instruction via a clearly visible and audible webcam in a private room at (the student’s middle school) when

- (the student) is too ill to be in class. (The student) will report to nurse (*sic*), with assistance, who will notify instructional staff. A call should be made home that (the student) is moving from the classroom to the webcam room. During this time, the personnel monitoring will be expected to assist with assignments requiring writing by scribing or recording information.” (S-9 at page 22).
26. For the 2009-2010 school year, the webcam room was a conference-type room adjacent to the nurse’s suite. The student would have an instructional aide present, but this individual is not consistently assigned to the webcam room, is not trained or authorized to monitor or attend to the student’s symptoms. The student’s parents are not permitted in the webcam room. (NT at 65-67, 384-386).
27. The District’s webcam capability allows a viewer to see the whiteboard in the front of the room and to pan the camera to follow a teacher as he or she might move around the room. Teachers wear lapel microphones so that there is full audio for the teacher’s words. There is an iChat feature that allows a viewer to send an instant message to the teacher in each classroom. (NT at 307-308, 443-446).
28. Because of the student’s discomfort during the recovery phase, in the 2009-2010 school year, the student utilized the webcam room only four times for limited periods. The student’s

discomfort on one of these occasions led to the student lashing out verbally at the aide. (S-8; NT at 65-72, 443-449).

29. The parents have investigated a grant-funded remote access technology program available through the National Center for Electronically Mediated Learning called Providing Education by Bringing Learning Environments to Students, or “PEBBLES”. PEBBLES involves the use of a desk-mounted “avatar” unit in a classroom and another avatar unit in a remoter location. Using a secure wireless video and audio connection between the avatar units, a viewer can manipulate the camera on the classroom-based unit to see and hear the class and can use a signaling device to indicate that the viewer has a question or comment. The base of each avatar unit is a scanner so that paper can be shared back and forth between the units (for example, as paper is passed out in a class, or as written work is collected by a teacher). (see generally NT at 153-204).
30. Images captured on the District’s webcams can be transmitted in live stream outside of the District. The District’s information technology (“IT”) witness testified that the integrity of the video/audio signal from the District is dependent on the reliability and integrity of the internet service provider for the individual viewing the transmission. The IT witness feels the

reliability and integrity of internet service providers in the area is sub-standard. (NT at 326, 352-354).

31. The student's father testified that the internet service provider for the family is Comcast Cable. The student's father regularly engages in videoconferencing in his job duties to the point that his employer upgraded the Comcast Cable connection to the family's home. The student's father testified credibly that the internet service at the family's home readily accommodates excellent streaming video. (NT at 456-464).
32. The District's IT witness testified that the classroom webcams could be used to capture video/audio of classroom instruction that could be saved to a DVD or other portable storage device and viewed by the student at a later time. (NT at 356-357).
33. The student's IEP team has not discussed or considered webcam arrangements outside of the webcam room in the school. (P-12, P-13; NT at 73-75, 125-127, 368-373).
34. Under the terms of the March 2010 IEP, the student receives one hour of homebound tutoring for every seven hours of school absence. In effect, the student receives one hour of homebound tutoring for every day of instruction missed. (S-9 at page 21).
35. The homebound tutoring is geared toward assignment completion and makeup work and does not consist of direct instruction. (NT at 52-56).

36. At the beginning of the 2009-2010 school year, the student's grades were modified by classroom teachers due to the amount of incomplete work. The student's special education teacher does not believe that similar grade modifications have been made since the fall of 2009. (NT at 54-55, 410-411).

DISCUSSION AND CONCLUSION OF LAW

To assure that an eligible child receives FAPE,³ an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.”⁴ “Meaningful benefit” means that a student's program affords the student the opportunity for “significant learning”,⁵ not simply *de minimis* or minimal education progress.⁶

Moreover, both federal and Pennsylvania law, require that the placement of a student with a disability be in the LRE.⁷

Pursuant to the mandate of 34 C.F.R. §300.114(a)(2):

“Each (school district) must ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled, and... special classes, separate schooling, or other

³ 34 C.F.R. §300.17.

⁴ Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

⁵ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

⁶ M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996).

⁷ 34 C.F.R. §§300.114-120; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993).

removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

The federal LRE regulations are certainly written in terms of physical locations.⁸ Yet the federal LRE regulations are also clear that a student must, if at all possible, be educated in the school where the student would attend if not disabled and that “consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs”.⁹ Pennsylvania’s LRE regulations are in accord with the federal regulations.¹⁰

In this case, the student has been denied a FAPE because the District has not sought to educate the child in the LRE. It seems counter-intuitive to find that a placement at a school-based site is more restrictive than a student’s home. (FF 23, 24, 25, 26, 27). Yet given the student’s diagnosis and symptoms, and the effect of those diagnosis/symptoms on the student’s learning, the District is in a position through the use of available technologies to make the student’s regular education environment available to the student as a live video/audio stream or on a storage device. (FF 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29, 30, 31, 32). While a live stream is available in the District’s webcam room, the potential

⁸ 34 C.F.R. §§300.115, 300.116(b)(3).

⁹ 34 C.F.R. §§300.116(c)(d).

¹⁰ 22 PA Code §14.145.

harmful effect on the student or on the quality of services that the student needs outweighs the fact that it is physically located at a District site.¹¹ (FF 25, 26, 27, 28).

The District's webcam room ignores the student's unavailability for instruction during the recovery phase. (FF 6, 9, 10, 11, 12, 13, 15, 17, 18). The webcam room modification in the March 2010 IEP is written with an image of the student engaged in the regular education environment and needing a break away from it. (FF 25). The weight of the record, however, clearly supports a finding that at any one time, the student falls markedly into one of three categories—non-episodic where the student requires no remote modifications, acutely episodic where the student is not instructional, or episodically recovering where the webcam room has proven ineffective; the District webcam room is inappropriate for any of these three categories. (FF 14, 15, 16, 26, 28).

And the homebound tutoring has also proven to be ineffective. The student's absences lead to large amounts of incomplete work and overwhelming amounts of makeup work. (FF 17, 18, 19, 20, 21, 22). This is due almost exclusively to the fact that the student misses extensive periods of direct instruction and the tutoring cannot and does not provide it. (FF 21). In effect, the District has substituted five hours of assignment tutoring per week for hundreds of hours of direct instruction without any IEP team consideration of available technological modifications that might allow the

¹¹ See 34 C.F.R. §§300.116(d).

student to access direct instruction during the recovery phase. (FF 17, 18, 20, 21, 22, 23, 29, 30, 31, 32, 33, 34, 35, 36).

By way of dicta, there is certainly an intersection here of the tides of LRE as a physical location with a technological decoupling of place due to the virtualization of teaching and learning through technology. Those tides, though, swirl around educational policy and practice, technological capabilities and advances. This decision, however, is grounded in a simple question: has the District provided FAPE in the LRE by utilizing (or at least considering) available technological modifications to allow the student to access direct instruction as it is delivered in the regular education setting? The weight of the record supports an answer in the negative.

For the foregoing reasons, the District has denied the student a FAPE in the LRE under the mandates of IDEIA as well as the FAPE mandates of Section 504.¹² Likewise, the District has been excluded from participation in, and denied the benefits of, regular education instruction such that the District's program amounts to discrimination on the basis of handicap against the student under Section 504.¹³

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¹² 34 C.F.R. §104.33.

¹³ 34 C.F.R. §104.4; Ridgewood; W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the District is ordered to convene the IEP team within 20 days of the date of this order explicitly to consider and discuss options for remote access to direct instruction in the regular education environment for the student at home during the recovery phase of the student's symptoms.

This explicit consideration and discussion shall include, but not necessarily be limited to, the PEBBLES avatars, live streaming of the instruction using the District's in-class webcams, and storing video/audio files of the classroom instruction on a portable storage device for delivery to the student on a regular basis during absences in the recovery phase. The IEP team shall include any IT, technology, assistive technology, and/or distance education professional that either party wishes to be part of the team.

Regardless of the IEP team's deliberations, pursuant to 34 C.F.R. §300.323(a), by the first school day of the 2010-2011 school year, the IEP team shall have in place a device, or a process, or a means to allow for remote access to direct instruction in the regular education environment for the student at home during the recovery phase of the student's symptoms.

Any claim not addressed in this decision and order is denied and dismissed.

s/Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer
June 29, 2010