

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.B.

Date of Birth: [redacted]

Dates of Hearing:
April 4, April 25, May 5, May 17
2011

CLOSED HEARING

ODR Case # 01786-10-11-JS

Parties to the Hearing:

Parent[s]

Chambersburg Area School District
435 Stanley Avenue
Chambersburg, PA 17201

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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June 7, 2011

June 21, 2011

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (“student”) is a [teenaged] student residing in the Chambersburg Area School District (“District”). The parties dispute whether the student is a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”) and Pennsylvania special education regulations (“Chapter 14”).¹ Additionally, the parents dispute whether the student is a student with a disability under the Rehabilitation Act of 1973 (specifically under Section 504 of that statute, hence the follow-on reference to this section as “Section 504”).²

Parents seek compensatory education as a result of these alleged deprivations. The District counters that at all times it has provided a FAPE to the student and met its obligations under IDEA, Chapter 14, and Section 504.

Finally, the parties disputed the scope of parents’ claim for compensatory education. Evidence in the first hearing session was devoted to the scope of the parents’ claims pursuant to 34 C.F.R. §§300.507 and 300.511(f). As a result of the evidence presented, the District was found not to have misrepresented or withheld information

¹ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See also 22 PA Code §§14.101-14.164.

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.

regarding the student's special education program. Therefore, the scope of the hearing, and any potential recovery, were limited to a period after November 10, 2008 (two years prior to the date parents' complaint was filed).

For the reasons set forth below, I find in favor of the parents on some issues and the District on other issues.

ISSUES

Is the student a student with a disability under the terms of IDEA/Chapter 14 and/or Section 504?

If so, has the student been denied a free appropriate public education ("FAPE") by the District under the terms of IDEA/Chapter 14 and/or Section 504?

Has the student, on the basis of handicap, been excluded from participation in, been denied the benefits of, or otherwise been subjected to, discrimination on the part of the District under the terms of Section 504?

If the answer to either or both of questions #2 and/or #3 is in the affirmative, is compensatory education owed to the student?

FINDINGS OF FACT

1. The student moved into the District from [another state] in the fall of 2007, attending 4th grade for the 2007-2008 school year. (School District Exhibit ["S"]-2).
2. In 6th grade, the 2009-2010 school year, the student began to exhibit elevated levels of behavioral issues. (Parents' Exhibit ["P"]-9; Notes of Testimony ["NT"] at 149-156).

3. In September 2009, the student received four demerits for hitting another student, field trip misconduct, using inappropriate language in class, and disrespect. (P-9 at page 1; NT at 149-156).
4. In October 2009, the student received six demerits for talking in class, disrupting class, throwing a pencil in class, throwing an eraser in class, and locker room misbehavior. The student received additional detentions for some of these incidents, and for alleged theft of food from the cafeteria, as well as a 1-day suspension. (P-9 at pages 1-9; NT at 149-156).
5. Given the number of behavior incidents over September and October, the student was placed on “low department” for the marking period and was barred from non-academic activities at the District. The notice letter to the parents indicates: “Being placed on Low Department may suggest that a behavior problem exists [sic] that could affect your child’s overall academic and social progress.” (P-9 at page 9; NT at 149-156).
6. In December 2009, the student was involved in a fight with another student and received a 3-day suspension. (P-9 at pages 11-13, 16-17; NT at 149-156).
7. After the December fighting incident, the student was referred to a school-based assistance team process. As part of this process, observation data was gathered from the student’s school counselor and teachers. Almost all observers reflected that the student exhibited problematic school behavior in excessive talking, distractibility, and some observers noted verbal and physical aggression. (P-8, P-9 at pages 14-27; NT at 156-163).
8. Given the behavior incidents over November and December, the student was again placed on low department. (P-9 at page 28).
9. In January 2010, the student’s mother provided input to the student assistance team. (P-5).
10. Following the December/January information-gathering, the student was not referred for an evaluation. (NT at 162-163).
11. In February 2010, the student was diagnosed by a private psychiatrist with attention deficit hyperactivity disorder (“ADHD”), bereavement, and adjustment disorder. As part of the psychiatric evaluation, the students’ teachers noted highly elevated levels of taking excessively and distractibility. There were also indications

that disrupting class was somewhat of a problem across multiple classes. (P-10, P-11).

12. In March 2011, the student was involved in an incident where the student was alleged to have engaged in threats to another student, including an allegation that the student brought a [redacted] to school. The District's incident report indicates that the student admitted to these behaviors. (P-15; S-15).
13. The incident triggered a disciplinary process called a building-level review. A building-level review is a meeting between building-level administrators and parents to address behavior/disciplinary concerns. (P-19 at pages 3-4; S-8 at page 4; NT at 452).
14. At the conclusion of the building-level review, a District school psychologist in attendance accompanied the student and mother to a partial hospitalization program. The school psychologist testified that it was a courtesy to the family for an informal consultation; but mother's testimony is more persuasive that the visit was to investigate, and to initiate, enrolling the student in the partial hospitalization program. (P-19 at pages 3-4; S- 8 at pages 3-4; NT at 165-166, 378-383, 512-524).
15. The District did not request permission to perform a functional behavior assessment or an evaluation for eligibility under IDEA and/or Section 504. (NT at 383-384).
16. In early April 2010, a building administrator contacted parents to determine if the student would be admitted to the partial hospitalization program. When parents did not pursue the partial hospitalization program, the District initiated an administrative review. The partial hospitalization program is a year-round program with a six-hour day; two hours each day are spent in academic tutoring and four hours each day are spent in group therapy. (P-19 at page 4; S-8 at page 4; S-25; NT at 167, 173-174; 524-526).
17. An administrative review is a progression beyond the building-level review and involved central office administration to address behavior/disciplinary concerns. (452-453).
18. In early May 2011, the administrative review convened but was not completed. The administrative review was never re-visited thereafter. (P-15; S-15; NT at 524-526, 640-642).

19. On the date of the administrative review, the District requested permission to evaluate. (P-16).
20. In May 2011, parents filed a special education due process complaint but withdrew the complaint shortly thereafter. (P-12; S-1; NT at 44-45).
21. The record does not speak definitively to the student's academic performance in 6th grade, but the record taken in its entirety does not seem to indicate that the student experienced academic difficulty in the 2009-2010 school year.
22. In August 2010, parents obtained a neuropsychological evaluation which diagnosed the student with conduct disorder, oppositional defiant disorder, and generalized anxiety disorder. (P-18).
23. In September 2010, the District issued its evaluation report. The report concluded that the student did not have a disability. (P-19; S-8).
24. In late September 2010, the District issued a notice of recommended educational placement ("NOREP"). It indicated: "(The student) was evaluated and found not eligible for sp. ed. Services. The school recommends a 504 which includes a positive behavior support plan." Explaining this proposed action, the NOREP indicates: "This would be the least restrictive option." The educational recommendation is: "Regular education with supports of 504 plan that will be developed by team which includes parent." The NOREP was completed by a District supervisor of special education. (P-20; S-10; NT at 393-394).
25. Parents approved this Section 504 recommendation but indicated that they did not agree with the recommendation regarding special education. Parents requested an independent educational evaluation ("IEE"). (P-20; S-20).
26. The District claimed that the NOREP's embrace of a Section 504 plan was in error. In early October 2010, it convened a Section 504 committee meeting to consider the student's eligibility for Section 504. The committee found that the student had a disability that impaired the student's learning. But it found that the disability did not substantially limit the student's learning. The student's mother was the only member of the committee to dissent from this conclusion. (P-21; S-9).

27. Based on the parents' request for an IEE, the District funded an IEE which was issued in late December 2010. The evaluator recommended that the student is eligible under IDEA as a student with emotional disturbance, and other health impairment (ADHD). (P-26).
28. The District re-issued its evaluation report in February 2011 to include the results of the IEE. (P-28; S-7).
29. The student's behaviors improved in 7th grade, the 2010-2011 school year. But the reports and concerns from the previous school year continued to be present. Teacher observations completed for the IEE in the midst of the 2010-2011 school year indicates the student has weaknesses/challenges/elevated levels in peer interaction, excessive talking, fidgeting, and distractibility. In December 2010, the student received a demerit for being disrespectful to a teacher; in January 2011, the student threw water in a class; in February 2011, the student received demerits for "constant and excessive" talking in class and for an inappropriate drawing. (P-25, P-30).
30. The student did not experience academic difficulty in the 2010-2011 school year. (S-14; see generally NT at 850-870).

DISCUSSION AND CONCLUSIONS OF LAW

Eligibility under IDEA

To be eligible under IDEA, a student must have a disability that affects educational performance and that requires specially designed instruction. 34 C.F.R. §300.8. One of the qualifying disabilities is other health impairment, defined as limited strength, vitality, or alertness, including heightened alertness to environmental stimuli, due to any number of conditions (including ADHD) that adversely affects educational performance. 34 C.F.R. §300.8(9).

In this case, the student is not eligible under IDEA. Clearly, the student has a qualifying disability, primarily ADHD as well as other diagnoses that feed into issues of conduct and behavior self-regulation. (FF 11, 22, 27). But the student does not require specially designed instruction. Indeed, given the many behavioral challenges the student has confronted, the student's academic performance has not been affected and in some areas, like mathematics, it has continued to be very strong. (FF 21, 30).

Accordingly, the student does not qualify as a student eligible for services under IDEA. As such, the question of whether or not the District has provided the student with a FAPE under the IDEA is rendered moot.

Eligibility under Section 504

Section 504 defines a handicapped person, the qualifying term for Section 504 eligibility, as an individual having "a physical or mental impairment which substantially limits one or more major life activities". 34 C.F.R. §104.3(j)(1).

Here, the District itself, through its Section 504 committee process, recognized that the student has a physical or mental impairment that limits the major life activity of learning. (FF 26). Its position is that the disability does not substantially impair the student. The record does not support the District's position.

First, the NOREP issued by the District in September 2010 is explicit that the placement recommended by the District involves regular education settings with a Section 504 plan. The NOREP was scribed by a special education administrator at the District and could not be more clear that a Section 504 plan was envisioned as a component of the student's program. Indeed, parents agreed with this explicit recommendation. Testimony by District witnesses to the contrary, that the NOREP was issued in error and the Section 504 committee was the final word, was unpersuasive. The NOREP was written and issued with the clear intent that the District would provide a Section 504 plan. (FF 24, 25, 26).

Second, the District's actions in its handling of the student's severe discipline incident in March 2010 belie the notion that the student's disability is not substantially impairing. Coming out of the building-level review, the District sought to have parents move the student out of a regular education setting and into a partial hospitalization program where the student would receive only tutored academics and four hours of daily group therapy. And the District's position was founded solely on the school-based behaviors. (FF 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 16).

Accordingly, the student is eligible for services under a Section 504 plan.

Provision of FAPE Under Section 504

A public school district receiving federal funding must provide a free appropriate public education to any handicapped person who is a student in the district. 34 C.F.R. §104.33.

The student in this case qualifies for protection under Section 504. Again, as discussed above, the student has not experienced any academic difficulties as a result of the disability. (FF 21, 30). Therefore, the District did not deny the student a FAPE under the terms of Section 504.

Discrimination Under Section 504

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) he is disabled or has a handicap as defined by Section 504; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of her disability. Ridgewood; W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

In the instant case, the student is disabled and is otherwise qualified to participate in school activities. (FF 3, 4, 5, 6, 7, 8, 9, 10, 12,

13, 14, 16, 24, 25, 26). While not made an explicit matter of proof in this case, it is a near certainty that federal funding flows to the District.

More pointedly, the District knew or should reasonably be expected to know of the student's disability. Throughout the fall of 2009, the student was repeatedly disciplined for serious classroom and school-based behaviors toward teachers and peers. (FF 2, 3, 4, 5, 6, 7, 8). The student's teachers consistently noted problematic behavior across academic settings yet the student assistance process did not lead to any identifiable outcome or resolution. (FF 7, 9, 10, 11). Ultimately, the student was involved in a weapon/threat situation with peers. (FF 10, 12 15). Throughout all of this, the District did not seek to evaluate the student in any manner until the parents filed for special education due process in May 2010. (FF 10, 15, 20).

Finally, the District has discriminated against the student. Egregiously, following the above litany of problematic behaviors, the District's response when the student was involved in the weapon incident was to hold the District's disciplinary process over the parents' head to facilitate the student's removal from the District. (FF 12, 13, 14, 16, 17, 18, 19). While the District witnesses attempted to portray its actions as one of voluntary assistance to the family, the record—especially the highly credible testimony of the student's mother—supports the finding that the District attempted to leverage the administrative review process

against parents in order to have the student removed to the partial hospitalization program. (FF 14, 16, 18).

The District's handling of its building-level and administrative-level review processes in March, April, and May 2010 was discriminatory based on the student's disability.

Compensatory Education

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEIA. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). As outlined above, the student has not been denied FAPE.

Accordingly, there will be no award of compensatory education.

CONCLUSION

The student is not eligible as a student with a disability under IDEA. The student does, however, have a disability that impairs the major life activity of learning.

The student has not been denied FAPE.

As set forth above, the District discriminated against the student based on the student's disability, which it knew about or should have been expected to know about.

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is disabled under the terms of Section 504, and the District discriminated against the student.

Within 20 days of the date of this order, the District shall convene a meeting of a Section 504 team to design a Section 504 plan for the student.

The Section 504 team shall consider, and where appropriate the 504 team shall address, manifestations of the student's ADHD and other school-based behavior concerns, including excessive talking, distractibility, conflict/opposition with teachers and peers, inappropriate classroom behaviors, and any other behavioral matter the team feels may impair the student's school-based behaviors and learning. The team shall explicitly consider, and where appropriate incorporate, the recommendations contained in the IEE related to impairments of the student's school-based behaviors and learning.

Furthermore, in addition to its current notification procedures, the Section 504 plan shall include a separate procedure for explicit email notification to parents of the student's behavior that results in the assignment of any demerit or detention.

Any claim or issue not addressed in this decision is denied.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

June 21, 2011