

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

Student's Name: M.J.

Date of Birth: [redacted]

ODR No. 13552-1213AS

CLOSED HEARING

Parties to the Hearing:

Parents

Representative:

Pro Se

Neshaminy School District
2001 Old Lincoln Highway
Langhorne, PA 19047

Jane Williams, Esq.
331 Butler Ave.
New Britain, PA 18901

Dates of Hearing: 08/13/2013

Record Closed: 08/13/2013

Date of Decision: 10/05/2013

Hearing Officer: Brian Jason Ford

Introduction

The Parents¹ requested this due process hearing to obtain accommodations for their child (the Student) under Section 504 of the Rehabilitation Act of 1973 (Section 504).² The District argues that the Student is not eligible for Section 504 accommodations.

The Parents originally requested two due process hearings, one for each of their children, on February 18, 2013. Both complaints (this one and ODR No. 13553-1213AS) were consolidated – meaning that they would be heard together, but that separate decisions would be written for each child. Both complaints raised claims under the Individuals with Disabilities Education Act (IDEA)³ and Section 504. After some delays, a hearing convened on August 13, 2013.

At the outset of the hearing, the Parents withdrew their IDEA claims and proceeded under Section 504 only.⁴ The Parents were quite clear that they are demanding particular accommodations for the Student, and did not care whether the accommodations were provided under the IDEA or Section 504. The Parents were clear and explicit about their desire to proceed under Section 504 only.⁵

This decision and order concerns the Student referenced in the cover page only. Portions of this decision and ODR No. 13553-1213AS are identical; for example, sections explaining the applicable laws. The findings of fact and ultimate outcome of this case is, however, student-specific.

Issues

Is the Student entitled to a Section 504 Service Agreement or Plan?

If the Student is entitled to a Section 504 Service Agreement or Plan, must that Plan include the specific accommodations demanded by the Parents, specifically a communications log (between home and school), use of a word processor in school, and tutoring?⁶

¹ “Parents” in this decision refers to the Student’s biological father and his current wife. The Student’s biological mother was not a party to these proceedings. Other than in the cover page of this decision, identifying information is omitted to the extent possible.

² 34 C.F.R. Part 104.4.

³ 20 U.S.C. § 1400 *et seq.*

⁴ NT at 19-26.

⁵ NT at 19-26. Although I could not offer legal advice to either party, I did have a significant conversation with the Parents on the record about this decision, took a recess in order for the Parents to consider this decision, and made an exceedingly clear record about the Parents’ choice.

⁶ The Parent characterized their claim as including four demands: 1) a § 504 agreement, 2) a communications log, 3) a word processor and 4) tutoring. I have divided these demands into two issues, as entitlement to a § 504 plan is a prerequisite to the other two demands.

Section 504 / Chapter 15 – Overview

I will begin by explaining what Section 504 is, how it applies to Pennsylvania school districts, and what it requires schools to do. Broadly, Section 504 prevents school districts from discriminating against children with disabilities by denying them participation in, or the benefit of, regular education.⁷ Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from regular education.

In 2008, the Americans with Disabilities Act was amended, and those amendments extended the protections of Section 504 to all students who 1) have a physical or mental impairment that substantially limits one or more major life activities; or 2) have a record of such an impairment; or 3) are regarded as having such an impairment. As such, students who are regarded as having a disability are protected. However, the United States Department of Education, Office of Civil Rights (OCR) has clarified as follows:

“In public elementary and secondary schools, unless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a "record of" or is "regarded as" disabled is insufficient, in itself, to trigger those Section 504 protections that require the provision of a free appropriate public education (FAPE). This is consistent with the Amendments Act ..., in which Congress clarified that an individual who meets the definition of disability solely by virtue of being “regarded as” disabled is not entitled to reasonable accommodations or the reasonable modification of policies, practices or procedures. The phrases "has a record of disability" and "is regarded as disabled" are meant to reach the situation in which a student either does not currently have or never had a disability, but is treated by others as such.”⁸

As such, the Student in this case is entitled to accommodations, including a Section 504 Plan, only if the Student actually has a disability.

Pennsylvania regulations describe how school districts must comply with Section 504.⁹ Those regulations are found at Title 22, Chapter 15 of the Pennsylvania Code (Chapter 15). Chapter 15 defines a “protected handicapped student” as a student who:

Is of an age at which public education is offered in that school district; and

Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program; and

⁷ 34 C.F.R. Part 104.4(a).

⁸ <http://www2.ed.gov/about/offices/list/ocr/504faq.html>

⁹ 22 Pa Code § 15 *et seq.*

Is not IDEA eligible.^{10, 11}

Chapter 15 also defines a service agreement as a “written agreement executed by a student’s parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student.”

After providing these definitions, Chapter 15 explains what schools must do for protected handicapped students:

a “school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student’s abilities.”¹²

From this point, Chapter 15 goes on to list a number of rules describing what must happen when a schools or parents initiate evaluations to determine if students are protected handicapped students.

After evaluations, Chapter 15 goes into more detail about service agreements. In doing so, Chapter 15 first sets out rules for what must happen when parents and schools are in agreement:

If the parents and the school district agree as to what related aids, services or accommodations should or should no longer be provided to the protected handicapped student, the district and parents shall enter into or modify a service agreement. The service agreement shall be written and executed by a representative of the school district and one or both parents. Oral agreements may not be relied upon. The agreement shall set forth the specific related aids, services or accommodations the student shall receive, or if an agreement is being modified, the modified services the student shall receive. The agreement shall also specify the date the services shall begin, the date the services shall be discontinued, and, when appropriate, the procedures to be followed in the event of a medical emergency.¹³

¹⁰ 22 Pa Code § 15.2.

¹¹ All IDEA-eligible students are also protected by Section 504. However, for IDEA-eligible students, school districts satisfy their obligations under both laws by compliance with the IDEA and its regulations. For example, IDEA-eligible students receive an IEP, not an IEP and a Section 504 plan. The particular requirements of Chapter 15 apply when a student is a protected handicapped student, but is not IDEA-eligible.

¹² 22 Pa Code § 15.3

¹³ 22 Pa Code § 15.7(a).

When parents and schools cannot reach an agreement, a number of dispute resolution options are available, including formal due process hearings.¹⁴

Applied to this case, I must first determine if the Student is a protected handicapped student. If the Student is a protected handicapped student, the Student must have a 504 Agreement, and I will consider the Parents' specific demands for accommodations. If the Student is not a protected handicapped student, the Student is not entitled to a 504 Agreement.

Protected Handicapped Student

The Parents argue that the Student is a protected handicapped student, and the District disagrees.¹⁵ As noted above, Chapter 15 establishes a three part test to determine eligibility. Two of those three parts are not in dispute. The Student is school-aged, and neither party argues that the Student is IDEA-eligible (for purposes of this hearing). The remaining question, therefore, is whether the Student has a "disability which substantially limits or prohibits participation in or access to an aspect of the student's school program."¹⁶

The Burden of Proof

In lay terms, the Parents have requested this hearing, and are asking me to find that the Student is 504-eligible and force the District to provide accommodations. The Parents must, therefore, prove that the Student is 504-eligible. The Parents must satisfy their burden by a preponderance of evidence, meaning that the evidence must demonstrate that it is more likely than not that the Student is 504-eligible. If the evidence favors the District, or is completely equal on both sides, I cannot find in the Parents' favor.

More specifically, the burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief.¹⁷ The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise.¹⁸ In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

¹⁴ 22 Pa Code §§ 15.7(b), 15.8(d).

¹⁵ Neither party used those exact words. The Parents, who were pro se, left no doubt that, in their view, the Student is entitled to a written 504 Agreement, including specific accommodations. The District was equally clear that, in its view, the Student is not 504-eligible. There is no doubt, therefore, that eligibility is not only a threshold issue, but the primary issue in this case.

¹⁶ 22 Pa Code § 15.2.

¹⁷ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

¹⁸ See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004)

Findings of Fact

At the Parents' request, the District's Certified School Psychologist (CSP)¹⁹ conducted an educational evaluation of the Student.

At the time of the evaluation, the Parents were concerned about the student's organizational skills, ability to complete homework, writing skills, reading comprehension skills, and fine motor skills.²⁰

The CSP evaluated the Student and authored an Evaluation Report (ER).²¹

At the time of the evaluation, the CSP was evaluating for potential IDEA eligibility. As a result of the evaluation, the CSP determined that the Student did not have any of the disabilities or categories of disabilities recognized by the IDEA.²²

Although the IDEA was the focus of the evaluation at the time, based on the same information obtained through the evaluation, the CSP testified that, in her opinion, the Student does not have a disability for purposes of Section 504 or Chapter 15.²³

The ER did not include a test to specifically rate the Student's fine motor abilities. However, many components of the ER called for the Student to use a pencil and write, and the CSP observed no physical impairment with those tasks. The Student's visual-perceptual motor skills, measured by timed tests that called for the Student to manipulate objects, were also in the average range.²⁴ Moreover, the volume of writing that the Student was able to produce over a given period of time was above average as compared to a normative sample of same-aged peers, and the student did not complaint of hand fatigue.²⁵

On writing assessments, the Student's spelling was appropriate, and the content of an essay produced as part of a normative test was at grade level.²⁶

In a followup interview with the Student's teacher, the CSP learned that the Student's writing is sometimes not in line with expectations in the classroom. The reported variability of these instances in connection with the Student's performance on standardized assessments caused the CSP to have no concerns about the Student's ability to write.²⁷

¹⁹ The School Psychologist testified, and her curriculum vitae was entered as S-14.

²⁰ NT at 151-152.

²¹ S-9; NT at 163.

²² NT at 160.

²³ NT at 160-161.

²⁴ NT at 166-167.

²⁵ NT at 166.

²⁶ NT at 166.

²⁷ NT at 167.

For the 2013-14 school year, at the time of the hearing, the Student was scheduled to take Honors English.²⁸

During the 2012-13 school year, the Student took Honors Algebra. At the time of the District's evaluation, the Student was earning an "F" in that class.²⁹ Shortly thereafter, the Student scored "proficient" on the Keystone Algebra I exam (although the Student received low marks on a particular sub-test of the Keystone, the overall score was proficient). By the end of the 2012-13 school year, the Student earned a final grade of a "C."³⁰

With the exception of Honors Algebra, the Student's grades in core academic subjects were in the "B" range.³¹

On individual English writing assignments, the Student scored between 0% and 68% on eight separate occasions. These assignments varied in weight as a percentage of the Student's final grade for the class.³²

Throughout the 2012-13 school year, across all classes, the Student received 0% on graded 14 individual assignments. This indicates that the work was not completed or turned in.³³ Across all classes, the Student received failing marks on 45 individual assignments. These marks lowered the Student's final grades, all of which were passing, and most of which were in the "B" range.

Anecdotal information was solicited from teachers via forms on which teachers are asked to describe the Student's inattentive or off-task behaviors and class performance. Unlike the standardized scales, the anecdotal forms ask teachers to describe whatever incidents of those behaviors the Student may present, regardless of frequency or severity. On these forms, the Student's English teacher indicated that the Student's writing was below average, but also indicated that was not consistent.³⁴

On standardized assessments, the Student scored within grade and age expectations for writing.³⁵

During the District's evaluation, the CSP did not observe any signs of impulsivity, inattention or focus difficulties. Rather, the Student worked systematically, and at an average rate.³⁶

²⁸ NT at 166-170

²⁹ At the time of the evaluation, based on conversations with the Student's Math teacher, the CSP understood that roughly half of the students in the Honors Algebra class were receiving an "F." This highly unusual testimony was not supported or refuted by any evidence.

³⁰ NT at 169, 172, 228; S-12, S-9, S-1

³¹ NT at 169; S-12

³² P-1; NT at 197-198.

³³ See NT at 201-204.

³⁴ NT at 170; S-12

³⁵ NT at 170; S-12

³⁶ NT at 174, 180; S-9

Credible testimony reveals that the Student is disorganized at home, particularly in relation to school assignments completed at home, and homework.³⁷

The CSP had no concerns about the Student's executive functioning ability, and the Student exhibited nothing that would raise executive functioning concerns during the evaluation.³⁸

On 5th grade PSSAs, the Student scored in the basic range in writing, and in the proficient range in both math and reading. In 6th and 7th grades, the Student scored in the advanced range in both Math and Reading.³⁹

As part of the evaluation, the CSP observed the Student in class using a structured behavioral system for observation. The CSP observed that the Student was on-task 100% of the time. During one part of observation, the Student was engaged in a group science project. During another part of the observation, the Student was attentive to instruction in an English class.⁴⁰

The District's evaluation revealed no problems with working memory or processing speed, although some short-term memory sub-tests were in the low-average range.⁴¹

Standardized testing revealed that the Student has a low self-concept.⁴²

Based on assessments, observations, and information reported, the CSP does not endorse any of the diagnostic criteria listed in the DSM-5 for hyperactivity or impulsivity.⁴³

In the ER, the Student's teacher indicates that the Student avoids writing assignments.⁴⁴

After receiving the District's ER, the Parents obtained a private evaluation. The private evaluator drafted a report. That report concluded that the Student expresses some ADHD symptoms, but made no ADHD or executive functioning diagnoses.⁴⁵

The Parents' private evaluator contacted the District for input into the private evaluation. The District indicated a willingness to provide written input and/or complete paperwork

³⁷ See NT at 333.

³⁸ NT at 177-178

³⁹ S-1.

⁴⁰ NT at 181; S-9.

⁴¹ S-9; NT at 184-186. I give weight both to the CSP's description of the sub-tests used to assess the Student's short term memory, and to the CSP's testimony that short-term memory sub-tests may be deflated for the Student because the Student's short-term memory improves when memory tasks are purpose-driven.

⁴² S-9; NT at 204.

⁴³ NT at 189-192.

⁴⁴ S-9; NT at 205.

⁴⁵ P-3.

for the private evaluator. The private evaluator neither solicited written input nor sent forms for the District to complete.⁴⁶

Some testimony indicates that the Student may have occasional difficulty with reading comprehension, but neither party argues that the Student has any type of reading disability or disorder.⁴⁷

Before March of 2013, the Student would spend five days every two weeks with the biological mother (going to the biological mother's house after school on Monday and returning to the Parents' house on Sunday). After March of 2013, the Student remained on the same custody schedule, but would return to the Parents' home after school to do homework before going to the biological mother's house.⁴⁸

Discussion

By hearing this case and ODR No. 13553-1213AS together, certain key principles emerged in both cases that warrant discussion.

I note at the outset that the parties reached certain stipulations about both the Student and the Student's sibling at the start of the case. Even without those stipulations, there can be no doubt that both students are hard-working and want to do well in school.

There can also be no doubt that the Parents' hard work with both students is a significant contributing factor in their successes in school. Both students are very lucky to have such loving and dedicated parents.

It is also important to note that the CSP drafted ERs for both students. Both of these ERs include certain recommendations that the Parents (if not both parties) consider to be reasonable. Nothing prohibits the District from implementing any mutually-agreeable accommodations, whether or not either Student is 504-eligible. Testimony indicates that some teachers are doing exactly that.

Specific to the Student in this case, however, preponderant evidence does not establish that the Student has a disability for purposes of Section 504 accommodations.

Two evaluations were presented: the District's ER and the Parents' private evaluation. Neither of those concludes that the Student has a disability. In cross-examining the District's CSP, the Parent raised some points as to whether the standardized assessments documented in the ER are an accurate reflection of the Student's ability to perform in the classroom. These points are valid to the extent that standardized assessments are not designed to assess actual classroom performance. However, the District did not use the standardized tests as a measure of the Student's classroom

⁴⁶ See NT at 226.

⁴⁷ See NT at 336.

⁴⁸ See, e.g. NT at 341-342.

performance. Rather, these assessments measure aptitude and ability as compared to a normative age or grade-based sample, and the District used the tests for that purpose. This is why it is important to compare standardized testing to measures of the Student's actual performance, such as curriculum-based assessments – grades on tests, quizzes and other school work. By the end of the year, the Student's grades were mostly in the average range. Lower grades sometimes corresponded to more advanced classes, but the Student was satisfying grade-level expectations by the end of the 2012-13 school year.

Both Parents' testimony was credible, but that testimony does not establish a disability either. It is clear that the Student receives significant help at home, and that the Parents have observed behaviors that, in their opinion, corresponds to ADHD and/or an executive functioning problem. Testimony that such behaviors are not necessarily atypical for someone of the Student's age, and are not necessarily attributable to any disability, was equally credible – particularly in light of both evaluations and the Student's grades.

Regarding the grades, both parties engaged in some cherry-picking. It is true that the Student has had some academic difficulties. The District's witnesses were too quick to write off the many instances in which the Student failed to complete assignments or received low marks. The Parents' criticism of District witnesses who insisted upon focusing on the Student's "overall" performance is valid, but only to a point. Simultaneously, the Parents overemphasized the raw number of poor assignments without acknowledging the weight of the various assignments. It is a problem when a Student fails to turn in homework, but missing a two point assignment and failing a major exam are not the same thing, and the Student's final grades are the best indication of what the Student learned in each subject. The Parents' insinuation that whatever learning occurred happened exclusively at home is not supported.

All of the testimony reveals that the Student is diligent, bright and hard working, but has some difficulty with organization. Testimony also establishes that the tremendous support that the Student receives from the Parents factors into the Student's successes. This does not establish the existence of a disability for purposes of Section 504 by preponderant evidence. Consequently, the Student is not entitled to a Section 504 Service Agreement.

ORDER

Now, October 5, 2013, it is hereby **ORDERED** as follows:

The Parents have not proven that the Student is a protected handicapped student for purposes of Section 504 by preponderant evidence and, consequently, the Student is not currently entitled to a Section 504 Service Agreement or Plan.

Nothing in this order prohibits the Parents and the District from implementing mutually-agreeable accommodations for the Student, regardless of the Student's disability status.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER