

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

ODR No. 14573-1314KE

Child's Name: R.T.

Date of Birth: [redacted]

Dates of Hearing: 3/31/14, 4/17/14, 4/24/14, 4/29/14

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

School District
Avon Grove
107 Schoolhouse Road
West Grove, PA 19390

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney
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June 2, 2014

June 22, 2014

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student in this case developed a physical disorder that substantially impacts Student's ability to attend school due to a disruption of a normal sleep pattern. Prior to onset in the spring of 2013, Student was a socially and academically successful high school student who had never exhibited educational problems of any kind.

Parents became concerned about Student's unusually high and increasing school absences toward the end of the 2012/2013 school year, culminating in a truancy complaint that prompted Parents to investigate a potential sleep disorder. Two doctors specializing in sleep disorders reached the same diagnosis and prescribed nearly identical sleep behavior programs to control the symptoms, but those have been largely unsuccessful for Student.

In response to Parents' request for an evaluation for an IEP or a §504 plan, the District initiated a full psycho-educational evaluation and determined in March 2014 that Student is not IDEA eligible, but is a protected handicapped student under §504 and Chapter 15 of the Pennsylvania Code.

Parents initially filed a due process complaint in January 2014, and later submitted an amended complaint, alleging a child find claim, challenging the District's procedures for conducting a §504 evaluation and alleging a denial of services for most of the 2013/2014 school year.

The hearing was held in four sessions from the end of March to the end of April 2014. For the reasons that follow, Parents are awarded limited equitable relief for the District's failure to timely complete its evaluation, resulting in a delayed determination of Student's protected status and the adverse consequences of truancy convictions related to the primary symptom of Student's disability. In all other respects, however, Parents' claims are denied.

ISSUES

1. Did the School District fail to timely initiate an evaluation of Student?
2. Was the scope of the District's evaluation inappropriate for the suspected disorder?
3. Did the District fail to consider all medical records concerning Student's disorder?
4. Did the District fail to provide reasonable accommodations for Student's disorder during the 2013/2014 school year, including during the evaluation process?
5. Did the School District violate §504 by excluding Student from Student's educational program during the 2013/2014 school year?
6. If any of the District's actions constituted §504 violations, is Student entitled to compensatory education and/or other equitable relief, and if so, in what form and amount?

FINDINGS OF FACT

Background/Absence Issues During the 2012/2013 School Year

1. Student, a teen-aged child, born [redacted] is a resident of the School District, and although not eligible for IDEA special education services, is a qualified and protected handicapped Student pursuant to §504 of the Rehabilitation Act of 1973, in accordance with Federal and State Standards. 34 C.F.R. §§104.32—104.37; 22 Pa. Code §§15.1—15.11 (Stipulation, N.T. p. 16)
2. Until the 2012/2013 school year, Student had been academically and socially successful, exhibiting no school-related problems, including with attendance (N.T. pp. 804, 805)
3. In the 2012/2013 school year, Student began missing more days of school than usual. Student missed 11 days, all excused by Parents, during the entire 2011/2012 school year, but 18 days between September 2012 and March 2013, 7 excused by Parents and the rest unexcused. Despite the increase, the number of absences did not raise any “red flags” for District staff. (N.T. p. 805, 808, 810; J-7 pp. 2, 3)
4. Parents were concerned about Student's absences and tardiness, which had also increased during the 2012/2013 school year. Parents contacted the District in March, 2013 with a request that the high school staff speak to Student about the importance of regular school attendance. (N.T. pp. 51, 53, 56; J-1, J-2, J-7 pp. 1, 4)¹

¹ Commendably, the parties submitted joint exhibits in this matter, which avoided an unnecessarily long documentary record. The joint exhibits are designated by the letter “J” followed by the exhibit number.

5. Between mid-March and early May, Parents were increasingly frustrated by Student's apparent refusal to get out of bed in the morning and their inability to arouse Student from sleep. School staff and Parents were concerned that Student may have experienced "something drastic" in or out of school that had triggered the school attendance problem that Student would not reveal. In internal e-mail communications, school staff noted that Student was "very private" and a "closed book." Parents confirmed that Student rarely discussed problems. (N.T. pp. 53, 56, 68, 805, 809, 920, 922, 923; J-2)
6. When the assistant principal and the home-school visitor (HSV) spoke with Student about the reasons for missing school, Student said that s/he had been having an "off year" and had not been feeling well. (N.T. p. 805; J-2, J-9)
7. The high school staff could identify no school-related issues adversely affecting Student, such as bullying or other difficulties with either peers or teachers that might have caused Student to avoid school. (J-9)
8. In a meeting with District staff, Parents reported that Student seemed depressed and anxious. The guidance counselor learned that Student had reported feeling overwhelmed by the amount of work that had been missed and wondered how s/he would ever catch up. (J-3)
9. In April, Student's family experienced two traumatic events that created significant stress for the family. Student's grandparents were involved in a serious automobile accident and Father suffered a heart attack. Although Father is now fully recovered, the outcome of the medical crisis and prognosis were in doubt at the time. (N.T. pp. 57, 567; J-9 p. 1)
10. After Student confided to Parents that s/he was having significant difficulty falling asleep at night, Parents took Student to their family doctor during the first part of May. The doctor prescribed melatonin, but the medication was ineffective and Student continued to miss school frequently. (N.T. pp. 51, 56, 57; J-7 p. 3, J-9)
11. Ultimately, with the prior knowledge of Parents, the District initiated truancy proceedings in an attempt "to assist the family." (N.T. pp. 54, 925, 926; J-3, J-4, J-9 pp. 2, 3)
12. On the night before the May 28 truancy hearing, Parents and Student found information on the internet about a sleep disorder that appeared to fit Student's symptoms. The magistrate district judge who handled the case refused to accept the internet information, informing Parents that they would need a documented medical diagnosis of a sleep disorder in order for Student to be excused from school. (N.T. pp. 170, 171, 499, 500, 929, 930; J-9 p. 3)
13. The judge continued the truancy hearing, telling Student that the charges would be dismissed if Student arrived on time for school and remained for the entire day for the rest of the school year, and would be found guilty if there were any additional absences, tardies or instances of leaving early. The school reported to the judge that Student was

tardy on May 31. Student was also absent on June 6. (N.T. pp. 928, 829; J-7 p. 3, J-9 p. 3)

Sleep Disorder Diagnosis and Treatment

14. In June 2013, Parents had Student evaluated by a medical doctor who specializes in sleep disorders. The doctor diagnosed Student with an organic circadian rhythm disorder, delayed sleep phase type, meaning that Student's sleep-wake cycle is misaligned. Student goes to bed late and gets up late in terms of "clock time," resulting in consistent absences from school or lateness. (N.T. pp. 65, 66, 427, 583, 585, 588, 599; J-6 pp. 4, 5)
15. The doctor prescribed behavioral changes consisting of a regular bedtime and rising time (10:00 p.m./6:00 a.m.) and "sleep hygiene," *i.e.*, maintaining a good sleep environment by removing all light sources from Student's bedroom, such as a clock, computer, cell phone, computer and game system and keeping the bedroom quiet, dark and at a normal temperature. Student was also instructed to avoid daytime napping and to use a "sun box" for exposure to bright light immediately upon awakening. The combined changes were expected to make Student fall asleep earlier and wake up earlier. The doctor also prescribed melatonin, although Student did not find it effective. (N.T. pp. 588—590)
16. The doctor concluded that Student did not consistently follow the sleep hygiene protocol and use the light box. Consequently, although Student went to bed around 9:00 p.m., Student did not fall asleep until approximately 2:00 a.m., with continued difficulty awakening in time to get to school. (N.T. pp. 590, 592, 595)
17. At the time of Student's second visit to the doctor in January 2014, the doctor considered Student's condition unimproved due to Student's non-compliance with the behavior protocol, particularly less than 50% compliance with the morning use of bright light therapy, the main component of the treatment program. In the winter months use of a light box is necessary, but in the summer natural light works as well (N.T. pp. 592, 595, 628. 630—632; J-6 pp. 8, 9,)
18. Student's Father later visited the doctor's office alone and reported that Student's sleep pattern had changed further, to a 7:00 a.m. to 4:00 p.m. sleep/wake cycle. To determine whether Student had developed Non-24-Hour Syndrome, in which sleep times gradually progress around the clock, the doctor advised purchasing a Fit-bit that Student should wear all day to record Student's movements, collecting data that the doctor could download and analyze. (N.T. pp. 596, 597)
19. The doctor emphasized the importance of wearing the Fit-bit all day to assess whether Student is experiencing continued shifts of "sleep time versus clock time" by analyzing Student's movement patterns throughout the day. If Student does not wear the Fit-bit consistently and constantly, it will yield only partial data that will not be useful in determining whether Student's sleep patterns are changing over time. (N.T. pp. 597, 598, 604—606)

20. Although Student is unlikely to have Non-24 Hour Syndrome because it is rare in a sighted person, the Fit-bit data can also help the doctor determine whether the behavior treatment emphasis should shift to chronotherapy, whereby Student would attempt to stay up progressively later until Student's bedtime returns to normal and then take steps to maintain the normal bedtime. In effect, that therapy attempts to keep advancing Student's body clock until it coincides with clock time rather than trying to reset it back to a normal bedtime. (N.T. pp. 598—600)
21. Based upon the information provided by Parents in January and February, the doctor does not believe that Student can consistently attend school beginning at 9:30 a.m., and expects absences because the symptoms of the sleep disorder are not under control, according to Parent reports, and the doctor cannot predict when that situation may change. (N.T. pp. 600—602, 621, 623, 624)
22. Typically, patients who respond well to the plan for returning to a normal sleep pattern can achieve good results within 2—3 months. (N.T. p. 617)
23. In nearly twenty years of practice, the doctor has not treated adolescents who could not bring the sleep disorder under control by following the behavior plan he prescribed, but he may need to make adjustments to the diagnosis or treatment plan for Student based upon the Fit-bit data if Student is still making no progress toward improving his/her sleep pattern. (N.T. pp. 602, 620, 621, 630)
24. At Parents' request, the doctor wrote a letter to the truancy judge in both June 2013 and January 2014 explaining Student's sleep disorder. In the June letter, the doctor expressed confidence that the treatment program the doctor prescribed would allow Student to return to a normal sleep pattern over the summer and arrive at school on time when the new school year opened in September. In the January letter, the doctor noted that Student has not responded to the therapy due, in part, to the condition itself, and in part to Student's non-compliance. (N.T. pp. 586, 587, 607; J-6 pp. 5, 8)
25. With respect to school, the doctor recommended some flexibility in Student's schedule to minimize missing important classes, but also ground rules concerning school attendance and functioning in order to encourage Student to follow the treatment plan. In speaking with the high school assistant principal and the school psychologist, the doctor agreed with opinion of another treating doctor that Student could reasonably be expected to arrive at school by 9:30 each day, but now considers that assessment "too optimistic," since Student did not respond well to the treatment program. (N.T. pp. 608—611, 621)
26. In August 2013, Parents sought a second opinion from a different sleep medicine doctor, who confirmed the diagnosis of organic circadian rhythm sleep disorder, delayed sleep phase, and also prescribed sleep hygiene and light therapy, specifically recommending that Student awaken at a set time in the morning, followed by exposure to bright light, which she also considered the most important aspect of the sleep therapy protocol. The doctor gave Student sleep logs to document Student's sleep/wake cycle and scheduled a follow-up appointment for September. (N.T. pp. 413, 415, 416, 439, 440, 448)

27. The doctor also believes that it is very important for the patient to get up at the same time every morning, even with little sleep, since the relative sleep deprivation facilitates falling asleep earlier the following night. The doctor calculated that the optimum time for Student to have exposure to bright light is between 9:00 and 9:30. a.m. The light source can be natural sunlight or equipment, including a portable light source. (N.T. pp. 447, 448, 461, 463—466, 468)
28. The doctor estimated that it would take 4—6 weeks to reestablish a normal sleep/wake cycle if the sleep therapy program were followed daily as recommended, but it is possible that there are patients who never get control over a delayed sleep phase disorder. (N.T. pp. 440, 441, 455)
29. At the August 2013 appointment, the doctor recommended that Student begin with an 8:00 a.m. wake-up time for 1 week and move it back by an hour each week, so that by the time school started for the 2013/2014 school year, Student would be on track to arrive at school at a reasonable time. (N.T. p. 466, 467)
30. At the September appointment, Student reported following the sleep therapy program, with significant improvement. Due to morning sleepiness, the doctor prescribed a stimulant to be taken in the morning, and also continued melatonin. (N.T. pp. 417, 472, 473)
31. Symptoms of the sleep disorder can spontaneously recur after initial improvement, but relapses usually occur in patients who do not consistently follow the sleep therapy program, *e.g.*, by going off the program on the weekends. Although there may be occasions when the sleep therapy does not work well on a particular day, following the program consistently results in overall improvement of symptoms. (N.T. pp. 418, 419)
32. At the third appointment in November 2013, Student's sleep disorder was completely uncontrolled. Student and Parents reported extreme difficulty falling asleep before 5:00 a.m. The doctor concluded that Student was not complying with the sleep hygiene program and it was unclear whether Student was continuing to take melatonin. After a longer than usual appointment, in which the doctor tried to determine why Student had become non-compliant, she recommended a psychiatric evaluation, as well as trial of medication to induce sleep to help Student fall asleep before midnight. (N.T. pp. 419—422, 454)
33. Although Parents denied reporting to the doctor that Student was non-compliant, with the sleep therapy program, the doctor received no completed sleep logs, they had not purchased the recommended light box and the doctor recalled Student and Parent telling her that Student was playing music at night, when the environment was to be quiet in order to be conducive to sleep. (N.T. pp. 430, 431, 435, 436)
34. After the office visit in September, the doctor wrote a letter to the District generally requesting consideration for the sleep disorder. Before the November appointment, the

doctor provided a second letter specifically recommending that Student have a two hour “window” between 7:30 and 9:30 a.m. for arriving at school, since Student was still struggling with the sleep disorder, which prevented Student from awakening before noon. (N.T. pp. 441, 442, 444; J-6, pp. 6, 7)

35. The doctor does not believe that the sleep disorder should cause Student to miss full days of school if the sleep therapy program is followed. (N.T. pp. 425, 426)

Student’s Compliance with Sleep Therapy Program/2013-2014 School Attendance

36. Parents and Student reported that Student complied with the sleep therapy recommendations, but the program is not working. Student believes that Student knows his/her sleep habits and schedule better than the doctors. (N.T. pp. 69, 217, 502, 503, 505, 511, 569)
37. Parents have a light box, but because of Student’s difficulty getting up in the morning and getting to school on time, Student did not always use it, and was not using it consistently at the time of the hearing. Student dislikes the amount of time the light therapy takes and would prefer to go right to school on the days Student is up. Student also believes that the natural sunlight available in the spring provides the same effect (N.T. pp. 69, 528, 529, 644)
38. Student used the light box consistently for several weeks during the winter but never saw a positive effect in terms of either daytime alertness or nighttime sleepiness. (N.T. pp. 644, 645, 649)
39. Between the June and August doctor appointments, Student tried to comply with the sleep hygiene program, but because it was summer and Student did not have a job, it was difficult to stick with the plan. (N.T. pp. 72)
40. Student had more success with the second doctor’s recommendation of moving the wake-up time hour earlier each week over several weeks, since it was August, a few weeks before the school year began. (N.T. pp. 72, 506, 555, 556)
41. Student is wearing the Fit-bit recommended by the sleep doctor, but only to bed, not all day, because Student determined that it is not necessary to wear it all day to get the information needed for sleep. Student also believes that it is not recording all data and is not properly syncing with Student’s phone. (N.T. pp. 641, 650)
42. From the beginning of the school year through October 9 of the 2013/2014 school year, Student was late 8 times but did not miss any school. (N.T. pp. 72, 84, 86; J-7 p. 5)
43. Beginning on October 10, 2013 Student began missing school again, accumulating 74 absences by the end of March 2014. (N.T. pp. 84, 85; J-7 pp. 5—7)

44. Student believes the stress of having to make up considerable missed work and of the truancy court citations contributed to the increased absences. (N.T. p. 524)
45. In April 2014, at the time Student testified at the hearing, Student was attending school more consistently, arriving at approximately 10:00 a.m., but sometimes as late as 1:40 p.m. (N.T. pp. 528, 533, 653)

District's Evaluation Process

46. On July 11, 2013, Student's Mother with assistance of [another child], who is a teacher, e-mailed the District's Supervisor of Special Education requesting that Student be "tested for an IEP or a 504 Plan" prior to the beginning of the school year in order to obtain accommodations for Student's sleep disorder. (N.T. pp. 72, 73; J-5 p. 1)
47. Parents were informed that evaluations are not conducted during the summer months, and that they would be contacted when the school year began. The Supervisor forwarded Parent's email message to the school psychologist and alerted her of the need to issue a permission to evaluate (PTE) for Student when the school year began. (J-5 p. 2)
48. The school psychologist e-mailed Parent a medical records release form during the first week of the new school year, but Parent could not immediately open it on her computer. Eventually, however, she retrieved it, took the signed release, dated 9/16, to the District offices along with the doctors' reports, and met with the school psychologist. In the meeting with the school psychologist, Parent explicitly requested a §504 plan, believing that Student did not need an IEP because grades were not an issue. Parent was informed that the District's IDEA and §504 evaluations were not separate. (N.T. pp. 75—77, 80; J-5 pp. 3-7)
49. On September 20, the District mailed a PTE and Addendum to Parents, describing proposed assessments and information necessary to complete a full psycho-educational evaluation, and including an IDEA procedural safeguards notice. Parent initially requested a meeting to discuss the assessments to be administered and the time it would take for the evaluation. After a telephone discussion with the school psychologist, Parent no longer requested a meeting and returned the signed PTE, which the District received on October 9.² (N.T. pp. 78, 79, 82; J-5 pp. 3—11)
50. The school psychologist scheduled two sessions for the evaluation in November 2013, but Student missed school on those days. By letter dated November 22, the District notified Parents that it was holding the evaluation timeline in abeyance due to Student's absences from school on 11/20 and 11/22 @ 9:00 a.m., the two scheduled evaluation dates. The District also informed Parents that if Student was not made available for testing by February 1, 2014, the District would consider Parent's PTE revoked, requiring

² The school psychologist who was originally in contact with Parent and initiated the PTE began a maternity leave on September 16. The school psychologist substituting for her completed the PTE, answered Parent's questions about the evaluation process before Parent signed the PTE and conducted the evaluation. (N.T. pp. 668—671)

the evaluation process to begin again with a new PTE and 60 calendar day timeline to complete the evaluation. (N.T. pp.91, 92; J-14 pp. 1—3)

51. The school psychologist was unavailable to test Student on November 25, when Parent notified her that Student was at school. Student missed school, and, therefore, missed an evaluation session scheduled for 12/16 @ noon, requested by Parents. The school psychologist was available and could have begun the evaluation on 12/17 and 12/18 if Student had been in school. (J-14 pp. 4, 9, 10, 11)
52. The school psychologist identified 8 potential evaluation dates in January 2014, all beginning at noon. Although not a previously identified date, the school psychologist was finally able to begin the evaluation on January 15, after Parent notified her that Student was in school that day. (N.T. pp. 647, 692 ; J-14 p. 15)
53. The school psychologist was unable to establish a sufficient rapport with Student to conduct the clinical interview with Student at that session, and instead initiated cognitive and academic achievement assessments. The assessments could not be completed because Parent and Student requested that Student not be pulled from core classes for the evaluation and Student challenged the school psychologist over the need for the tests she was conducting. (N.T. pp. 575, 642, 643, 693—701, 796, 797, 801, 802, J-14 p.17)
54. Student was under the impression that an extensive evaluation was not necessary for a §504 evaluation because a §504 plan is supposed to be easy to get and provide accommodations. Student was frustrated by having missed so many scheduled evaluation appointments and by the school psychologist's lack of explanation concerning why the testing was necessary. Student did not believe the testing was needed to identify a sleep disorder for a §504 plan. (N.T. pp. 642, 643, 647, 648)
55. Although Student had agreed to meet with the school psychologist on Friday of the same week, the school psychologist was unable to meet with Student to complete the assessments until February 28. Between January 15 and February 28, there were only 11 days on which Student was not marked absent, some of which may have been school holidays or days the District was closed for inclement weather. (N.T. pp. 699—702; J-7 p. 6, J-14 pp. 19, 21)
56. The school psychologist discontinued setting evaluation appointments after January 29, since Student had not kept any of the scheduled appointments. She decided to complete the evaluation assessments on any day Student was in school. (N.T. pp. 703—705; J-14 p. 18)
57. The school psychologist initially believed that scheduling specific evaluation appointments would provide an incentive for Student to attend school on those days. Although the November 20 appointment was scheduled for 9:00 a.m., the psychologist was prepared to meet with Student at any time during the school day. (N.T. pp. 682, 787; J-14 pp. 10, 18)

58. The school psychologist strongly suspected that the sleep disorder was not the only thing interfering with Student's school attendance, and, therefore, believed it was essential to complete the social/emotional components of the evaluation before issuing a report. She was also aware that sleep disorders can be associated with clinical depression and other mental health conditions. (N.T. pp. 446, 671—674, 701, 702, 706—709, 789; J-15 p. 13)
59. The school psychologist did not want to issue an evaluation report that was based only upon the information that was available within 60 calendar days after receiving the signed PTE on October 9, without conducting psychological and other formal assessments, because she was concerned that if Student were identified as qualified for services under §504 based only on that information, Parent would refuse consent for the full IDEA evaluation. Although the school psychologist had input from Parents and teachers before administering assessments to Student, she believed social/emotional assessments were essential for assuring a full and complete picture of Student. (N.T. pp. 788—790)
60. The evaluation report (ER) was completed on March 12, 2014. Based on the assessments, including behavior rating scales completed by Parents and Student's teachers, the school psychologist did not identify "any social or emotional difficulties in the school setting" that supported identifying Student as IDEA eligible. (J-15pp. 1, 13, 14)
61. The ER concluded that Student's medically diagnosed sleep disorder significantly impacted Student's ability to attend school and access the general education curriculum, and, therefore, that Student should be identified as a protected handicapped student and provided with a §504 service agreement, to include, at least, extended time for completing assignments and missed work, preferential class scheduling, assistance with organization, check-ins with the guidance counselor, home/school communication concerning the effectiveness of the sleep treatment program and a transition plan to facilitate Student's return to school. (J-15 p. 13)

2013/2014 Truancy Proceedings/Attendance Concerns

62. Because Student had not completed the 2012/2013 school year without further tardies or absences, the magistrate district judge ultimately found Student guilty on the District's initial truancy complaint, resulting in a fine and loss of driving privileges. (N.T. pp. 138, 574, 812, 931)
63. At the hearing on Parents' appeal of the truancy conviction in the fall of 2013, the District agreed to a continuance in order to get Student involved with the Instructional Support Team and to give Student the opportunity to begin attending school regularly. (N.T. pp. 813—816, 932;)
64. When Student missed the following week of school, the high school vice principal, Student's guidance counselor and the HSV began to discuss a means for addressing

Student's continuing absences. High school staff contacted Parents, and Student's sleep doctors but had difficulty reaching the doctors immediately. Staff proposed implementing a strategy of gradually increasing school attendance over a period of four weeks, which had been successful with another student who had attendance problems that arose from different circumstances. The District also convened an interagency meeting, but was unsuccessful in improving Student's attendance.. (N.T. pp. 816—823; J-10, J-18 pp. 7, 8)

65. The high school vice principal believed that Parents had not done enough to assure Student's regular school attendance, and expected them to do more to assure that Student attended school. (N.T. pp. 823, 824)
66. Based upon information from Student's sleep doctors, the high school staff believed that the sleep disorder was controllable, "a disorder that can cure itself" and not a reason for Student to miss full days of school. (N.T. pp. 845, 847, 857, 869—871, 947, 948)
67. The high school staff notified Parents that a doctor's note was needed for Student to be excused from school for full days due to the sleep disorder. Although Parents attempted to provide a note that they drafted and asked one of the sleep doctors to sign, the note did not meet District standards for a proper excuse, and the District never received another note of that kind from any of Student's doctors. Student was permitted to arrive at school late during the entire 2013/2014 school year because of the sleep disorder. (N.T. pp. 830—832, 850, 851, 853, 888, 939, 940)
68. The District has access to a school refusal program that provides a team to evaluate students who will not attend school, tries to determine the problem and to develop a plan for helping such students return to school. High school administrative staff did not know why Student was not referred to the school refusal program. (N.T. pp. 883, 884)
69. At the second appeal hearing on the 2012/2013 complaint in November 2013, the judge affirmed the truancy conviction. (N.T. p. 837)
70. The District issued three citations to Student in December 2013, but later withdrew two of them. The District filed a second truancy complaint with the magistrate district judge on December 5, 2013 on the remaining citation. Student was again found guilty. The second truancy complaint was based upon the information from the sleep doctors that the sleep disorder was not a reason for missing full days of school. (N.T. pp. 89, 837, 838, 871, 941, 946; J-11, pp. 1—4)

Parents' & Student's Requests for Modifications Due to the Sleep Disorder

71. In early December 2013, Parents asked the school psychologist for a meeting to develop a §504 plan before the evaluation was completed, and was informed that it was not possible to proceed that way, because an evaluation is necessary to determine whether Student should receive a §504 plan, since a disabling medical condition does not automatically qualify a student for services under §504. (N.T. pp. 94—96; J-14 p. 4)

72. From the beginning of the 2013/2014 school year, Parents wanted to obtain a modified school schedule for Student, such as a later start to the school day, half days, online courses so Student could get caught up on the course work Student was missing. Parents requested rearranging Student's class schedule to put core courses in the latter part of the school day and transfer to a less challenging math class because Student had missed so much instruction. The District refused Parents' request to change the math class based upon its conclusion that Student was appropriately placed. (N.T. pp. 95, 96, 106—109, 183, 184, 207, 832—834; J-18 p. 1)
73. Student wanted to be assigned to a different English class that s/he could attend at the time Student felt able to begin the school day. Student's 2013/2014 schedule a fourth period lunch, which coincided with an approximate 10:00 a.m. start to the school day, followed a free period in which Student wanted to take an English class. (N.T. pp. 525—527)
74. Student reported feeling overwhelmed by the amount of work that had to be completed and frustrated when expected to take tests scheduled on the days Student attended school, despite not being in school regularly. In Parents' perception, the teachers made it difficult for Student to return to school. (N.T. pp. 190, 191, 521, 542)
75. Student believed that the teachers were happy when s/he attended school, but heard remarks from the attendance office staff that were not welcoming (N.T. p. 520)
76. As the school year moved into the final quarter, Parents were primarily concerned that Student would finish the coursework for the current school year and that there was a structured plan to reach that goal. Parents believed that whether a plan to educate Student in the public school setting will work depends upon the District's willingness to assure that Student can effectively participate in instruction, and must include a contingency plan in the event the initial plan that the parties adopt does not work as hoped. (N.T. pp. 212, 222—225, 229, 230)
77. During the 2013/2014 school year, Student's teachers provided assignments for Student to keep up with work missed due to absences and modified Student's workload. (N.T. pp. 902, 905, 906; J-19, J-20)
78. To a large extent, Student has been able make up the work missed due to absences in the 2013/2014 school year, but could not complete some assignments due to not being in class. Student found it easier to contact teachers directly rather than working through the Instructional Support Team (IST) teacher. Working independently to make up missed work, Student was able to complete all credits for the 2012/2013 school year. (N.T. pp. 521, 523, 550)
79. Student wants to attend school with friends and is satisfied with the progress made during the 2013/2014 school year. (N.T. p. 530)

DISCUSSION AND CONCLUSIONS OF LAW

Legal Standards

By the time of the hearing, the claims in this case were governed by the statute prohibiting disability-based discrimination, commonly referred to as “§504 of the Rehabilitation Act of 1973” or simply “§504,” found at 29 U.S.C. §794(a). §504 provides that,

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Notwithstanding language which, by its plain terms, proscribes discriminatory conduct by recipients of federal funds, in the context of education the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled student with a free, appropriate public education (FAPE). *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009).

The protections of §504 are implemented by federal regulations found at 34 C.F.R. §§104.32—104.37. In addition, Pennsylvania has adopted regulations to implement §504 in the context of prohibiting discrimination on the basis of disability and providing educational services in the public schools in 22 Pa. Code §§15.1—15.11 (Chapter 15). As explained in §15.1:

- a) This chapter addresses a school district’s responsibility to comply with the requirements of Section 504 and its implementing regulations at 34 CFR Part 104 (relating to nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from federal financial assistance) and implements the statutory and regulatory requirements of Section 504.
- (b) Section 504 and its accompanying regulations protect otherwise qualified

handicapped students who have physical, mental or health impairments from discrimination because of those impairments. The law and its regulations require public educational agencies to ensure that these students have equal opportunity to participate in the school program and extracurricular activities to the maximum extent appropriate to the ability of the protected handicapped student in question. School districts are required to provide these students with the aids, services and accommodations that are designed to meet the educational needs of protected handicapped students as adequately as the needs of nonhandicapped students are met. These aids, services and accommodations may include, but are not limited to, special transportation, modified equipment, adjustments in the student's roster or the administration of needed medication. For purposes of the chapter, students protected by Section 504 are defined and identified as protected handicapped students.

Despite the congruence courts have found between IDEA and §504, however, it is important to keep in mind that the statutes differ in focus. The primary focus of §504 is to “level the playing field,” *i.e.*, to assure that an individual, specifically, a school-aged student in this context, is not disadvantaged in education based upon a disability. As stated in *Chavez v.*

Tularosa Municipal Schools, 2008 WL 4816992 at *14, *15: (D.N.M. 2008):

“In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to a FAPE. In other words, the drafters of Section 504 were not only concerned with [a student] receiving a FAPE somewhere (as was the case with the IDEA), but also that a federally funded program does not treat [the student] differently because [she is disabled]...

Unlike the IDEA, Section 504 does not only look at what is a FAPE, but also what is fair.” *Ellenberg v. N.M. Military Inst.*, 478 F.3d at 1281-82 n.22 (quoting C. Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School*, 58 Stan. L.Rev. 1563, 1589 (2006)).

Elements of a §504 Claim

To assert a successful §504 educational discrimination claim, a parent must prove four elements: 1) that the student has a disability; 2) that he or she is otherwise qualified to participate in school activities; 3) that the LEA receives federal financial assistance; 4) that the student was excluded from participation in, denied the benefits of or subjected to discrimination at school. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490

F.3d 337, 350 (3rd Cir. 2005); *School District of Philadelphia v. Deborah A.*

Pennsylvania law defines a §504/chapter 15 “protected handicapped student” as

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.

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).

Evaluation Issues

The first issues Parents identified center on the obligation to locate and identify students who may be entitled to disability-related educational services

Child Find—2012/2013 School Year

Parents contend that the District should have recognized that Student might have a disability because of an unusual increase in absences during the late winter and spring of the 2012/2013 school year. (FF 3) That position, however, is unreasonable based upon the factual record.

It is certainly not surprising that Parents became concerned about the increase in Student’s school absences before the absences increased to the point that District staff began to notice. Student had never before exhibited behavior problems, and initially explained the increased school absences as a response to an “off” year and not feeling well. (FF 6) Even when the District staff also became concerned, they reasonably focused on a potentially stressful situation or occurrence. However concerning and difficult such matters may be, they do not inevitably turn into conditions with potentially long-term consequences.

In this case, Parents, who live with Student and became alarmed about Student's school attendance well before the District shared their concern, initially suspected a growing behavior problem, not a disability. By the time Student's absences triggered truancy citations and a District truancy complaint in May 2013, the school year was nearly over. Even with the truancy complaint looming, Parents and Student did not suspect a potential disability until the eve of the truancy hearing. (FF 12) It is unreasonable to charge the District, which is responsible for hundreds of students with varying levels of short and long-term problems with suspecting a disability under the circumstances that existed in the spring of 2013.

Scope of Evaluation

The next question concerns whether the District's evaluation was overly extensive in light of Student's medically diagnosed sleep disorder. Parents argue that the medical records they provided were sufficient for the District to determine that Student is protected under §504 and Chapter 15 and develop a §504 plan. Parents contend that a full psycho-educational evaluation was unnecessary at best, and an actual §504 violation at worst. Parents' position, however, contradicts the plain language of the federal regulations implementing §504 with respect to educational rights and protections, as well as the position of the Office of Civil Rights (OCR), the federal agency that provides guidance on the interpretation of the §504 education regulations and investigates complaints.

The federal regulations require a "preplacement evaluation" of a student believed to need special education or related services due to a disability before providing services. 34 C.F.R. §104.35(a). Moreover, OCR has explicitly stated that "School districts may use the same process to evaluate the needs of students under §504 as they use to evaluate the needs of students under the IDEA." *Protecting Students with Disabilities: Frequently Asked Questions About*

Section 504 and the Education of Children with Disabilities, 111 LRP 76408 (OCR, March 17, 2011 at p. 6 (FAQ #21); *See also* p. 8, FAQ #30) OCR has also stated that a medical diagnosis is an insufficient basis for determining whether a student is protected under §504. 111 LRP 76408 at p. 7 (FAQ #24).

The preplacement evaluation requirement is strictly enforced by OCR, even if both parents and the school district agree that no evaluation, or only a limited evaluation, is necessary. In the course of investigating a complaint by a parent that the school district failed to properly implement a §504 agreement, OCR determined that a school district violated the federal §504 regulations by failing to conduct an evaluation where the district developed a §504 plan for a student who had been privately evaluated, determined to have a learning disability by the private evaluator, and objected to a district evaluation. *In Re: Fort Atkinson (WI) School District*, 46 IDELR 142 (OCR May 1, 2006 at 4). Because the student in *Fort Atkinson* believed that an evaluation by the district was unnecessary, the district §504 coordinator met with the student and parent to develop a §504 plan based upon the private evaluation and the accommodations that student and parent requested. Although the evaluation issue was neither the subject of the complaint, nor an issue raised at all by the complainant, “OCR determined that the District did not properly evaluate Student A before placing Student on a 504 plan.” 146 IDELR 142 at p. 3. To comply with the regulatory requirements and end the OCR complaint investigation, the district agreed to conduct an evaluation of the student. 146 IDELR 142 at p. 4.

The *Fort Atkinson* OCR investigation report addressed a situation nearly identical to the circumstances presented by this case, except here the District did initiate its own evaluation of Student. (FF. 53, 54, 71)

Under the federal §504 regulations, the District was clearly required to conduct an evaluation prior to providing Student with a §504 plan, and, therefore, did not violate federal law in proceeding with a full psycho-educational evaluation rather than rely solely on the medical information provided by Parents. In fact, the District would have been in violation of the plain language of both the §504 regulations, as well OCR guidance had it provided Student with a §504 plan without an evaluation.

The state regulations relating to §504 implementation, found in Chapter 15 of the Pennsylvania Code, also include evaluation requirements, whether a potential disability is identified by a school district or a parent. 22 Pa. Code §§15.3, 15.6. A Parent who requests §504 services is required to submit a written request for an evaluation and services, accompanied by “relevant medical records.” §15.6 (a)(1), (b), (c)(1—3) The district is then required to evaluate the information received from parents and determine whether it needs additional information, which may include its own evaluation and/or additional medical records. §15.6(f) If the district then initiates a request to evaluate the student, it must request parent’s permission in writing and identify the procedures and tests it proposes to use. §15.6(g).

Here, the District followed all of the foregoing procedures in seeking a full psycho-educational evaluation of Student, and Parents consented to the evaluation. (FF 46, 48, 49) The District did not violate §504 by following the procedures prescribed by both federal and state regulations implementing §504 in the public school setting in preparing to evaluate Student at the beginning of the 2013/2014 school year.

Evaluation Timeliness, Accommodations

Although the District was permitted to engage in a full psycho-educational evaluation of Student, taking the position that every evaluation will be a full IDEA evaluation obligates the

District to then strictly follow IDEA procedures. Under 22 Pa. Code, §14.123(b), the District must complete an evaluation within 60 calendar days after receiving a signed PTE, except that the summer months, from the last day of the spring term until the day before the first day of the fall term, are excluded.

Here, the District received the signed PTE October 9, 2013, but did not issue the evaluation report until March 12, 2014, far more than 60 calendar days later. (FF 49, 60)

The District contends that it was entitled to an exception to the timeline under 34 C.F.R. §300.301(d)(1), which provides that the timeline does not apply if a parent repeatedly fails or refuses to make a child available for the evaluation. The District's reliance on the timeline exception is unreasonable in this case for two reasons. First, the school psychologist initially scheduled two evaluation sessions, on November 20 and November 22, approximately two weeks before the evaluation was to be completed. When Student did not attend school on those two days, the District immediately notified Parents that the timeline was being held in "abeyance" for failing or refusing to make Student available. Even without an attendance problem, a child could have an illness that spans such a short period. Unilaterally extending the evaluation timeline for "repeatedly" failing to produce a child for evaluation when a parent has been given only two opportunities to make the child available is inherently unreasonable.

In this case, where the District was well aware that the primary issue interfering with Student's ability to function in the school setting was attendance, waiting until two weeks prior to the evaluation due date, and then setting two assessment appointments was virtually guaranteed to delay completion of the evaluation report. The District, therefore, committed a procedural violation by not taking steps to assure that the evaluation would be timely completed.

In addition, Parents' argument that the District failed to provide reasonable accommodations for the evaluation is well-taken and related to the failure to timely complete the evaluation. Timely completion of the evaluation would have been possible had the District scheduled the assessment components of the evaluation around Student's difficulties in getting to school regularly by assigning someone who could be available if Student could get to school late in the day, after school hours, such as a private contractor, or by adjusting the school psychologist's hours on a few days to assure that the testing could be completed in a timely manner.

The District relied heavily upon the sleep doctors' opinions that Student should not have been missing entire school days, and, therefore, should have been able to be at school during school hours for the evaluation. In the context of the evaluation, in particular, that argument amounts to a pre-evaluation determination that the only basis for Student's eligibility for services under either IDEA or §504 was the sleep disorder. The District also argued, however, that it was essential to complete all psychological and educational testing because it suspected an additional disability that was contributing to the school attendance issue. Those positions are inherently contradictory. The District's conduct in refusing to provide accommodations in the evaluation process other than conducting the assessments later in the day when Student attended school suggests that it believed that the sleep disorder was the only basis for Student's inability to attend school regularly. If that was the case, evaluation measures designed to identify other potential disabilities would have been unnecessary, and the District should have issued the evaluation report within 60 days based upon the information it had already compiled from medical records, and parent and teacher input.

Since the school psychologist believed that some other potential disability was affecting Student in addition to the sleep disorder, the suspicion of an additional disability should have prompted the District to provide Student with additional evaluation accommodations in order to complete the testing in a timely manner, not only because of the explicit regulatory requirements but because Student was missing instruction due to the inability to attend school regularly and potentially needed services beyond sleep hygiene, such as psychological counseling or a behavior management plan, that the District could provide.

The evaluation results did not support identification of any other disability, but the District did not know that at the time it was taking an inordinate amount of time to complete its initial evaluation. Nevertheless, the District expected Student to participate in the evaluation with no accommodations for Student's difficulty in attending school.

Finally, even knowing only about the medically diagnosed sleep disorder, the District should have provided evaluation accommodations. Although Student's doctor believed that the disorder could be well enough controlled with sleep hygiene techniques to permit Student to attend school on most days, the doctor testified that he is now looking at other treatment possibilities, since the sleep hygiene techniques are not working for Student. Although it is clear from the record that Student has not been faithfully and consistently following the techniques, the doctor is not entirely certain that the treatment techniques will be successful even if Student follows the sleep program consistently.

Academic and Attendance Accommodations

Although the evaluation report was delayed, leading to a delay in providing Student with a §504 plan, the record establishes that Student has received sufficient informal and regular

education modifications such that there was no significant interference with Student's ability to make sufficient academic progress. (FF 75—78)

That is not the case, however, with respect to modifications to the attendance requirements. With respect to attendance and truancy, the District treated Student's sleep disorder as a behavior problem that Student could control. It is not certain that an evaluation that was timely completed, which would have identified Student as protected under §504, would have changed the District's mind about proceeding with truancy. Nevertheless, the record strongly suggests that adverse action was taken against Student on the basis of disability and that must be corrected.

Accordingly, the District will be ordered to expunge the truancy record and relieve Student and Parents of the effects of the truancy findings.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to expunge the truancy convictions against Student and reimburse any fine(s) paid by Parents or Student.

It is **FURTHER ORDERED** that in all other respects, Parents' claims are **DENIED**.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

June 22, 2014