

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

FINAL DECISION AND ORDER

Student's Name: C.G.

Date of Birth: [redacted]

ODR No. 14737-1314KE

OPEN HEARING

Parties to the Hearing:

Parent[s]

Representative:

Pro se

Unionville-Chadds Ford School District
740 Unionville Road
Kennett Square, PA 19348

Anne Hendricks, Esq.
1301 Masons Mill Business Park
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Huntingdon Valley, PA 19006

Dates of Hearing: 04/08/2014, 05/29/2014

Record Closed: 05/29/2014

Date of Decision: 06/10/2014

Hearing Officer: Brian Jason Ford

Introduction

This matter arises under Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4. In Pennsylvania, Section 504 is implemented in schools through 22 Pa. Code § 15 (Chapter 15). This matter was brought by [redacted] (Parent) on behalf of [redacted]. (Student) against the Unionville-Chadds Ford School District (District). [Redacted], the Student's other biological parent, was identified in the Parent's Complaint, copied on correspondences, and identified as a party in a pre-hearing order, but did not participate in this matter.

There is no dispute that the Student is a "protected handicapped student" as defined by Chapter 15. See 22 Pa. Code § 15.2. There is also no dispute about the appropriateness of the Student's Section 504 Service Agreement (504 Agreement). Rather, the Parent claims that the District has failed to implement the 504 Agreement. The Parent further claims that the District has failed to provide access to the Student's records.

Issues

1. Did the District fail to inform the Parent whenever the Student received scores of "0" on more than two assignments within a week?
2. Did the District violate Section 504 or Chapter 15 by failing to provide the Parent with copies of question booklets from the Student's tests?¹

Findings of Fact

Evidence and testimony was presented during two hearing sessions. I have carefully reviewed all of the evidence and testimony. Some of the evidence and testimony had questionable probative value, and was admitted over objection. Regardless, I make findings of fact only as necessary to resolve the narrow issues presented in this matter.

1. The Student's current 504 Agreement is a document that was executed by the Parent on November 27, 2013. That 504 Agreement was intended to run from November 27, 2013 through June 15, 2015. S-3.
2. Although the starting date of the Student's current 504 Agreement is November 27, 2013, the initial date of the 504 Agreement was May 23, 2013. Portions of the 504 Agreement were reviewed again on August 30, 2013. "Item # 5" of the 504

¹ At the outset of these proceedings, the District moved to dismiss this issue. The District argued that the issue arises under the Family Educational Rights and Privacy Act (FERPA), and that I have no jurisdiction to hear matters arising under FERPA. I denied the District's motion in a pre-hearing order, attached hereto as Appendix A.

Agreement was reviewed and revised on November 27, 2013. Item #5 is the portion of the 504 Agreement that includes all of the accommodations. P-3.

3. The 504 Agreement includes fourteen (14) accommodations. S-3, P-3.
4. The accommodation at issue in this matter is the fifth (5th) accommodation written in the 504 Agreement. In its entirety, that accommodation reads as follows:

Notify parents when [Student] has “0”s on more than 2 assignments within the week, even if [Student] has been absent; [Student] will follow up with the specific teacher the first 2 days of the following week to seek clarification on the assignment.
5. In the 504 Agreement, the accommodation at issue is written in bold. Elsewhere, the document states, “BOLDED information is new to the plan as of 9/27/13.” P-3 at 1, S-3 at 1. Consequently, the accommodation at issue has been in place since September 27, 2013.
6. The term “week” is not defined within the 504 Agreement.
7. The Student’s teachers understood that references to “the week” in the 504 Agreement were to a “school week.” School weeks start on Mondays and end on Fridays. See, e.g. NT at 31-31.
8. The Student’s teachers understood that they must notify the Parents if the Student missed more than two assignments within one school week. *Id.*
9. The term “assignment” is not defined within the 504 Agreement.
10. The term “assignment” does not appear on documents that record the Student’s grades. The Student’s work is categorized as class work, homework, projects, tests, quizzes, midterms, essays, writings, and the like. P-7, P-8, S-10.
11. On October 11, 2013, in Biology I, the Student received “0”s on two homework assignments and an online packet labeled as classwork. P-7. This is the only occasion revealed by the record in which the Student received more than two “0”s within the same class within a school week.²
12. The Student is frequently absent, but the rerecord does not reveal whether the Student was absent on October 11, 2013. See S-10 at 3.
13. The District administers tests using a “Scantron” form. Test questions are presented on a paper sheet or booklet. Students answer the test questions on a separate form

² The same is true going by weeks (as opposed to school weeks), which are seven-day periods starting either on Sundays or Mondays.

by filling in bubbles to answer multiple choice questions. See NT, *passim*. See also S-5, S-6, S-7, S-8, S-9, P-20, P-21.³

14. Students are instructed to not write their names on the question booklet. Sometimes, students will write their names on the question booklet, despite the instruction not to. NT at 116-117.
15. The District acknowledges that the form on which Students bubble in their answers are educational records. The District does not acknowledge that the question booklets are educational records. NT *passim*.
16. Without acknowledging that the question booklets are educational records, the District has proposed on at least one occasion that the Parent come into school to review a question booklet. P-10 at 7. The complete text of an email containing this invitation, sent by the school Principal on February 13, 2014, is as follows:

Hi Mr. [Parent],

You are more than welcome to contact my Asst principal, [Assistant Principal] ([email address redacted]), and arrange for a time to come to UHS to sit with [Assistant Principal] while you review this midterm exam. I am sure you can understand that we do not allow our tests to leave the building for test security reasons since we use many of the same questions from year to year. Thanks, [Principal].

17. Although there is no direct testimony on this point, I recognize that the Parent has limited availability during normal school hours as a result of work and military commitments.⁴
18. After sending the email of February 13, 2014, the District did not follow up with the Parent to propose times, and the Parent did not follow up with the District to request access (either before, during, or after normal school hours). See, e.g. NT at 214-217.

Discussion

It is important to start by recognizing the remarkably narrow scope of the issues presented in this matter. To illustrate with an example, the Student received 27 “0”s in Biology I between September 6, 2013, and March 28, 2014, but the question is whether more than two of those 27 “0”s fell within the same Monday-to-Friday period. If so, pedantically, the question becomes whether all of those “0”s are “assignments.”

³ There is no factual dispute that the District administers tests this way.

⁴ The Parent made statements to this effect while examining some witnesses, and the Parent required evening sessions to attend this hearing.

The record reveals only one instance in which the Student received more than two “0”s in one class in the same Monday-to-Friday period. On October 11, 2013, the Student received three “0”s in Biology I. If all three were “assignments,” the fifth accommodation in the Student’s 504 Agreement would trigger.

Two of the “0”s were for homework. The other “0” was on graded classwork.⁵ By any definition, and as the term is used colloquially, I find that both homework “0”s were “assignments.” The question now becomes whether the classwork “0” was also an “assignment.”

With no definition provided in the 504 Agreement, or by law, I turn to the Oxford Online Dictionary, which defines “assignment” as “a task or piece of work allocated to someone as part of a job or course of study.” See Oxford Online Dictionaries, <http://www.oxforddictionaries.com/definition/english/assignment>, last accessed June 10, 2014. Classwork is a task that a teacher allocates to a student as part of a course of study. Colloquially, the term “assignment” is more closely associated with homework than classwork. In fact, Oxford uses “a homework assignment” as the first example of the word. Even so, classwork easily satisfies the definition.

Further, any ambiguity about the term “assignment” in the 504 Agreement was caused by the District. The District chose words in the 504 Agreement that do not match the terms in its own grade reporting. It is proper to resolve this ambiguity in the Parent’s favor, especially because the District was in the best position to avoid such ambiguity.

For these reasons, I find that the District violated the terms of the Student’s 504 Agreement when it failed to notify the Parent that the Student missed more than two assignments during the school week that started on October 7, 2013 and ended on October 11, 2013. An appropriate order will follow.

The remaining issue concerns the question of whether the District denied the Parent access to student records. The District argues, in essence, that I need not determine whether the question booklets are student records. The District claims that it has offered to provide the same level of access that the Parent would be entitled to if the booklets were student records, and so the question is irrelevant.⁶ Despite the growing body of case law holding that test protocols – completely analogous to the question booklets in this case – *are* student records, the District’s point is very well made. Assuming that the question booklets are student records, the only relevant inquiry is whether the Parent is entitled to a greater level of access than the District has offered.

The District has invited the Parent to come to school and examine the test booklets with the Assistant Principal. However, the District has refused requests from the Parent to make copies of the booklets and send those copies to the Parent. This refusal is

⁵ This constellation suggests that the Student was absent on October 11, 2013, but the 504 Agreement requires parental notification regardless of whether the Student “has been absent.”

⁶ See NT at 263.

grounded in the District's argument that transmitting the booklets would compromise test security, as the same questions are used year after year. The District further argues that developing new tests each year is prohibitively costly. In light of the legal standard that I must apply, neither of these arguments are compelling. Assuming that the booklets are student records, Section 504 via Chapter 15 requires transmission under certain circumstances, regardless of cost or security concerns.⁷

As noted in my Pre-Hearing Order of March 27, 2014, Chapter 15 requires school districts to comply with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. § 99. Consequently, for protected handicapped students, a violation of FERPA is also a violation of Chapter 15.

FERPA regulations provide that "a parent or eligible student must be given the opportunity to inspect and review the student's education records." 34 C.F.R. § 99.10(a). The right to "inspect and review" records is different from the right to obtain a copy. The regulations specify circumstances under which parents are entitled to copies of student records:

If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall—

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

34 C.F.R. § 99.10(d).

Despite a lack of direct evidence, I have recognized that the Parent has limited availability during regular school hours. However, there is no preponderant evidence to substantiate a finding that circumstances effectively prevent the Parent from exercising the right to inspect and review the Student's records. More importantly, even if the Parent had proven those circumstances, the District still would have the opportunity to make other arrangements for inspection and review. Said simply, the District is only required to make copies of student records if it cannot accommodate the Parent.

The District should note that the Section 504 regulations do not require the Parent and District to find a mutually-agreeable time for inspection and review. Rather, if the Parent's circumstances prevent inspection and review, the Section 504 regulations

⁷ This is not to discredit the District's argument about test security. I find that the District's concerns about test security are important and, under a different set of laws, may be quite compelling. However, there is no carve out for test security if the law otherwise requires transmission. The District's secondary argument - that developing new tests each year is cost prohibitive - is not compelling at all.

require the District to either accommodate the Parent's schedule, or send copies. In this case, nothing in the record suggests that the District is unwilling or unable to provide access to the question booklets at a convenient time for the Parent.

In sum, assuming that the question booklets are student records, Chapter 15 requires the District to provide an opportunity for the Parent to inspect and review those booklets. It is more likely than not that circumstances effectively prevent the Parent from exercising the right to inspect and review. Nothing suggests, however, that the District cannot make other arrangements for the Parent to inspect and review the booklets. Consequently, the District is not obligated to provide a copy of the booklets to the Parent. An appropriate order will follow.

ORDER

Now, June 10, 2014, it is hereby **ORDERED** as follows:

1. The District violated the Student's 504 Agreement by failing to contact the Parent after the Student received "0"s on three assignments on October 11, 2013.
2. The District is **ORDERED** to abide by the terms and conditions of the Student's 504 Agreement, consistent with the foregoing Decision, until such time as said 504 Agreement is modified or expires.
3. The Parent's request for copies of test question booklets is **DENIED**.

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

/s/ Brian Jason Ford
HEARING OFFICER

APPENDIX A - PRE-HEARING ORDER OF MARCH 27, 2014

[Redacted], Parent [Redacted], Student	ODR No. 14737-1314KE
v.	
Unionville Chadds Ford School District	

PRE-HEARING ORDER

Introduction

This matter arises under Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4. The matter concerns [redacted] (Student), a student in the School District (District). The Complaint initiating these proceedings was completed and filed by [redacted], the Student's father. [Redacted], the Student's mother, is also a party. Both parents are *pro se*.

In the Complaint, [Parent] raises two issues, and characterizes both as "counts of Section 504 violation." Verbatim, those issues are:

1. Failure of LEA administration to adhere to accommodation per agreed 504 Service Agreement/Accommodations Plan guidelines revised as of November 27th, 2013, paragraph 5, bullet point 5.
2. Failure of LEA administration to provide access to students' education records through copies per 34CFR99.10; School District Notice of Parental and Student Rights Under Section 504, The Rehabilitation Act of 1973, paragraph 11, sentence 2.

Complaint at 2. The Complaint was filed on March 4, 2014.

On March 17, 2014, the District filed a combined Answer and Motion to Dismiss. To be clear, the District is *not* asking me to dismiss the Complaint in its entirety. Rather, the District argues that I have no jurisdiction to hear matters arising under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. § 99. The District has no objection to the portions of the Complaint that challenge the implementation of the Student's Section 504 plan.

On March 26, 2014, [Parent] filed a response to the District's motion. I have carefully considered the Complaint, the District's Motion and [Parent's] response. The motion is now ripe for disposition.

Section 504 and FERPA

Section 504 and FERPA are different laws that accomplish different things. Section 504 prohibits discrimination "on the basis of handicap." 34 C. § 104.4(a). In Pennsylvania, regulations specify how Section 504 applies to schools. That regulation is 22 Pa Code § 15 (Chapter 15). In broad, general terms, Section 504 and Chapter 15 require schools to make accommodations for students with disabilities, so that such students can participate in and receive the benefit of regular education. The District agrees that I have authority to hear claims arising under Section 504 and Chapter 15.

APPENDIX A - PRE-HEARING ORDER OF MARCH 27, 2014

FERPA, on the other hand, is a federal law that regulates how schools must both protect student records, and give parents access to student records. Through Chapter 15, there is some intersection between Section 504 and FERPA. Specifically, Chapter 15 has a confidentiality provision that requires schools to comply with FERPA (Chapter 15 explicitly references FERPA, and includes similar language on its own). 22 Pa Code § 15.9.

Jurisdictional Challenge

As noted above, the District challenges my authority to adjudicate claims arising under FERPA. In a literal sense, the District is correct. No statute or regulation gives me the authority to hear claims arising under FERPA. However, a careful reading of the Complaint reveals that [Parent] has not raised FERPA claims. Rather, [Parent] avers that the District's alleged failures to comply with FERPA have resulted in violations of Section 504. Because Chapter 15 explicitly requires compliance with FERPA in order to comply with Section 504, I have the authority to hear the claim that was plead.

Disclosure of Pre-Hearing Information

The District raised concerns about the content of [Parent's] response. The District believes that the response both details factual information that I should not consider prior to the hearing. The District also claims that the response includes information about the parties' discussions during a resolution session.

None of the facts averred in [Parent's] motion are pertinent to the question of my jurisdiction. I resolved that issue upon consideration of the Complaint. [Parent's] response is not evidence. [Parent] will have ample opportunity to present evidence to substantiate the Section 504 claims during the hearing. Further, the District is correct that I should know nothing about the parties' efforts to resolve this matter.

ORDER

Now, March 27, 2014, it is hereby **ORDERED** as follows:

1. The District's motion to dismiss is DENIED.
2. The parties shall not send any communications to the hearing officer concerning the substance of settlement negotiations.

/s/ Brian Jason Ford
HEARING OFFICER