

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: M.L.

Date of Birth: [redacted]

ODR No. 16460-14-15-KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Harry McGrath, Esquire
O'Malley, Harris, Durkin & Perry, P.C.
345 Wyoming Avenue
Scranton, PA 18503

Abington Heights School District
200 East Grove Street
Clarks Summit, PA 18411-1776

William J. McPartland, Esquire
Marshall, Dennehey, Warner, Coleman &
Goggin
50 Glemaura National Boulevard
Moosic, PA 18507

Dates of Hearing:

August 17, 2015

Record Closed:

August 27, 2015

Date of Decision:

September 4, 2015

Hearing Officer:

William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child in this matter (Student)¹ lives within the respondent District. (NT 33-34.) Student has graduated from a District high school, (NT 6), and has been admitted to a post-secondary educational institution (College), (NT 5-7). When in the District's schools, Student was identified as a child with a disability pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504) and Chapter 15 of the Pennsylvania Code (the state regulations implementing section 504). Student's parent (Parent) asserts that the District discriminated against Student on the basis of disability, specifically by refusing to provide post-secondary transition services in the form of an evaluation required by the College, to which Student intends to matriculate. Parent seeks an order that the District provide the requested evaluation at this time.

The hearing was completed in one session. I have weighed all of the testimonial and documentary evidence of record. I conclude that the District violated section 504 by failing to provide Student with the requested evaluation, and I order the District to provide the requested evaluation.

ISSUES

1. Did Student have a right under section 504 to post-secondary transitional services?
2. If Student had a right under section 504 to post-secondary transitional services, did section 504 give Student a right to a comprehensive psychoeducational evaluation, for purposes of preparation of a section 504 plan by the College, as part of such services?
3. If Student had a right to a comprehensive psychoeducational evaluation under section 504, did Student's graduation from high school in June 2015 terminate any such right?

¹ Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

4. Did the District comply with any obligation under section 504 to provide post-secondary transitional services in the form of a comprehensive psychoeducational evaluation for purposes of preparation of a section 504 plan by the College?
5. Should the hearing officer order the District to provide Student with a comprehensive psychoeducational evaluation as requested by Parent, for purposes of the preparation of a section 504 plan by the College?

FINDINGS OF FACT

1. Student is diagnosed with Asperger's Disorder, Mood Disorder, Attention Deficit Disorder (ADD), Combined Type (ADHD), Dysthymic Disorder and Overanxious Disorder. (NT 6, 34-37; S 2.)²
2. Student's diagnosis of ADD includes a diagnosis of hyperactivity as one of the two "types" of ADD. (NT 175-176.)
3. Student is disabled within the meaning of section 504, and Student's disability substantially limits Student's major life activity of learning. (S 2.)
4. Student's disabilities interfere with Student's self-esteem, rate of speech and ability to organize work, causing anxiety, anger and frustration. (S 2.)
5. Prior to enrolling in the District for tenth grade, during the 2012-2013 school year, Student was enrolled in another public school district. This prior district had provided Student with psychoeducational evaluations, the last of which was dated November 2, 2011. (NT 35-36; S 6.)
6. The prior district's November 2011 evaluation concluded that Student could not be classified with a specific learning disability. The evaluation corroborated some of Student's then-current medical diagnoses; however, it found no basis to classify Student under the IDEA. (S 6.)
7. The prior school district provided Student with a section 504 service agreement, and Student moved to the District for tenth grade as a child with a disability under section 504 and with a section 504 service agreement. (NT 35-36.)
8. The District provided Student with a section 504 service agreement from 2012 until Student's graduation in June 2015. (NT 36-38; S 2.)

² The parties submitted a joint exhibit book; however, as is often permitted in these matters, the exhibits are marked as School District ("S") exhibits. They will be cited as such with the understanding that they were offered jointly.

9. Parent disclosed to the District's school counselor that Parent intended to seek admission to the College for Student. Parent provided this information to the school counselor at the end of Student's junior year in high school (2013-2014 school year), and at the beginning of Student's senior year (2014-2015 school year). (NT 38-41, 86-88; S 5.)
10. The District's director of special education (Director) was aware that Parent wanted a psychoeducational evaluation for purposes of informing the College's plan for accommodating Student's disabilities, but was waiting to find out the specific tests and assessments that the College would need. (NT 86-88; S 5.)
11. September 2014, District provided two forms to Parent: a form to request an evaluation in writing as required by Pennsylvania regulations; and a permission to evaluate form. These forms did not indicate the purpose for Parent's oral request. (NT 41-44; S 4.)
12. Parent did not return the forms and therefore did not authorize the evaluation at that time. Parent informed the School's counselor that Parent continued to desire a psychoeducational evaluation of Student, for purposes of assisting Student in Student's application to the College, and to provide information for the development of a section 504 accommodation plan by the College. (NT 41- 44; S 4.)
13. By letter dated October 28, 2014 the District's Director sent a second form to Parent, seeking Parent's authorization to conduct a psychoeducational evaluation. The consent form indicated that the purpose of such evaluation would be to provide information for postsecondary institutions. (NT 79-82, 86; S 5.)
14. Parent did not return the form, and never during Student's senior year did Parent return a signed permission to evaluate to the District. Parent notified the District that Parent was withholding the consent form until Parent could find out what testing the College would require in order to develop accommodations for Student. (NT 42-44, 77.)
15. The College accepted Student for matriculation, pending completion of necessary forms and appropriate payment or guarantee of tuition and fees, in December 2014. (NT 45-46.)
16. The District conducted a section 504 meeting with Parent on January 21, 2015. The District's Director attended part of the meeting. (NT 44, 47, 121-122, 124, 164; S 5.)
17. At the January 21, 2015 meeting, Parent indicated a desire for Student to receive post secondary transition services as an accommodation under section 504. (NT 47-48.)
18. All District personnel agreed to provide Student with access to the post-secondary transition services offered by the District to other students with disabilities. All District personnel agreed that these transition services would include the provision of a psychoeducational evaluation for purposes of post secondary transition to the College. District personnel changed Student's section 504 service agreement to reflect this agreement by adding "access to transition services" to the list of accommodations to be provided to Student in Student's section 504 service agreement. (NT 44-48, 152-154, 159, 169-170; S 2, 5.)

19. The District's agreement to provide evaluation for transition purposes was not limited as to the date on which it could be initiated. (NT 47-48; S 2, 5.)
20. Post-secondary transition services as provided by the District to students with disabilities include evaluations to assist the students in transitioning to post-secondary education, employment and community living. (NT 137-148, 152-154, 166-170.)
21. In late April and early May 2015, Parent received all the forms and documentation needed to finalize Student's admission to the College. Parent filled out the necessary forms and made arrangements for tuition payment before May 21. (NT 49-53, 94.)
22. Between May 19 and May 21, 2015, Parent contacted the College and spoke to the person in charge of obtaining necessary information to enable the College to provide accommodations for eligible matriculating students with disabilities, the learning enrichment specialist (Specialist). During that period, Parent next asked the District's Director to contact this individual at the College. (NT 53-57, 91.)
23. The College follows Educational Testing Service guidelines that require the College to obtain a recent psychoeducational evaluation - or physician's report with diagnosis, severity of disability and symptoms, and current level of functioning - in order to develop accommodations for newly admitted students such as Student. The report must include cognitive testing based upon adult standards for requests to accommodate learning disabilities or ADHD. The guidelines require an evaluation or physician's report no more than five years old for accommodating a learning disability; three years old for accommodating ADHD; and six months old for accommodating a psychiatric condition or emotional disorder. Accommodation for a student with autism requires recent achievement data due to the variation of functioning of students with autism spectrum disorders. (NT 93-101, 111-118.)
24. The College also requires cognitive testing that utilizes adult standards, rather than the children's standards upon which Student had been tested in 2011. (NT 107-109; S 6, 7.)
25. Although Student had been evaluated by Student's previous school district in 2011 and by a licensed psychologist in 2010, neither of these evaluations met the Educational Testing Service criteria for recency of reports or those of the College. (NT 95-96, 103-109, 111-117; S 6, 7.)
26. The Director called the Specialist and discussed the parameters and content of any evaluation to be provided by the District to the College. The Director and Specialist could not agree on the parameters and content of any such evaluation. (NT 55-60, 96-99.)
27. The District refused to conduct a comprehensive psychoeducational evaluation as offered in Student's section 504 service agreement, due to the imminence of the summer break and the unavailability of staff. (NT 55-60, 96-99, 170.)
28. Parent requested a section 504 meeting with the Director; the District did not convene the requested section 504 meeting. (NT 60-63, 70.)

29. From May 27, 2015, the Director and the District's transition coordinator did not return Parent's phone calls requesting meetings to discuss Student's transition needs. (NT 70; S 9.)
30. Student graduated from high school on June 12, 2015. (NT 84.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.³ In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁴ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)⁵

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier

³ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

⁴ A “preponderance” is evidence that is more convincing than contrary evidence and leads to the conclusion that the fact to be proved is more likely than not. Greenwich Collieries v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor, 990 F.2d 730, 1993 U.S. App. LEXIS 5595 (3d Cir. 1993).

⁵ Although Parent brings this matter solely under section 504, the Supreme Court's analysis in Schaffer was based upon basic principles in the common law and in administrative law. I see no reason to deviate from this analysis under section 504. Moreover, the Third Circuit Court of Appeals has recognized that the two statutes are unusually similar with regard to the rights that they protect, and that at least one procedural requirement of the IDEA should be applied in section 504 cases. P.P. v. West Chester Area School District, 585 F.3d 727, 736 (3d Cir. 2009)(applying the IDEA statutory limitation of actions to section 504 cases). I conclude that the reasoning in these cases is applicable to section 504 cases; thus, I follow those cases here.

evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent’s claim, or if the evidence is in “equipoise”, the Parent cannot prevail under section 504 or the federal and state regulations that implement section 504 in Pennsylvania.

APPLICATION OF SECTION 504 AND CHAPTER 15

The Rehabilitation Act of 1973, section 504, provides:

No otherwise qualified individual with a disability ... 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

29 U.S.C. §794. Federal regulations implement this prohibition in school districts receiving federal financial assistance. 34 C.F.R. §104 et seq. The regulations define discrimination to include denying a qualified person with a disability the opportunity to participate in or benefit from the state-provided aid, benefit, or service, 34 C.F.R. §104.4(b)(i); affording benefits or services that are not equal to those afforded others, 34 C.F.R. §104.4(b)(ii); or providing services or benefits that are not as “effective” as those provided to others, 34 C.F.R. §104.4(b)(iii), 34 C.F.R. §104.33(b)(1)(i)(requiring educational agencies to provide services designed to meet students’ individual needs “as adequately as the needs of nonhandicapped persons are met ...”).⁶

⁶ Section 504 applies to agencies receiving federal funds, where the individual is disabled within the section 504 definition of disability and otherwise qualified to receive benefits from the educational agency. These elements of Parent’s section 504 claim were not contested. (NT 6-8.)

Both the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1412(A)(1)(a); 34 C.F.R. §300.101(a), and section 504, 34 C.F.R. §104.33, require school districts to provide their eligible students with a free appropriate public education (FAPE). The IDEA’s mandate is an “affirmative duty”, whereas the section 504 requirement is a “negative prohibition” to avoid discrimination by failing to provide students with services and benefits that are not as effective as those provided to non-disabled students. Ridley Sch. Dist. v. M.R., 680 F.3d 260, 280 and note 13 (3d Cir. 2012). Yet the Third Circuit has affirmed repeatedly that the FAPE requirements of both laws are similar. Ibid.

Here, Parent asserts that the District violated section 504 while Student was enrolled in the District by failing to provide Student with post-secondary transition services in the form of a comprehensive psychoeducational evaluation. The District asserts that section 504 does not affirmatively require the District to provide students with post-secondary transition services; moreover, it argues that as defined legally, under the IDEA, post-secondary transition services do not include comprehensive psychoeducational evaluation, 34 C.F.R. §300.320(b). It urges the conclusion that, therefore, it had no duty to provide Student with a comprehensive psychoeducational evaluation for purposes of transition to college.

The District cites some authority for the above assertions. Yankton S.D. v. Schramm, 93 F.3d 1369, 1376 (8th Cir. 1996)(noting that “only the IDEA” requires provision of transition services and holding the agency obligated to provide transition services under the IDEA); R.R. v. Oakland Unified Sch. Dist., 2014 U.S. Dist. LEXIS 27615 (N.D. Cal. 2014)(holding that a student had no entitlement to transition plan or services under section 504, and noting that section 504 does not “specifically address post-secondary transition planning.”); Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities, U.S. Dept.

Education, Office for Civil Rights.⁷ However, these authorities assert no more than that section 504 does not explicitly create an affirmative duty.

None of these authorities reaches the situation presented here, where the District included transition services as an accommodation in Student's section 504 service agreement, and agreed to provide an evaluation for post-secondary transition purposes as part of those services. This fact distinguishes the present matter from the case law and regulatory authority that this hearing officer and the parties have been able to find. I find this fact to be determinative and conclude that the District was obligated to provide the services stated and implied in the section 504 service agreement; as the District failed to do so prior to Student's graduation, it will be ordered to provide such evaluation as a form of compensatory education.

THE DISTRICT AGREED TO PROVIDE STUDENT WITH AN EVALUATION PURSUANT TO STUDENT'S SECTION 504 SERVICE AGREEMENT

Parent has met the burden to prove by a preponderance of the evidence of record that the District agreed to provide Student with a comprehensive psychoeducational evaluation for post-secondary transition purposes as part of the accommodations needed⁸ to provide Student with a FAPE under section 504 and Chapter 15. Parent's evidence shows that Parent repeatedly requested that the District provide such an evaluation, and that the District agreed to do so when it added "access to transition services" to Student's section 504 service agreement in January 2015. Parent's testimony is corroborated by the Permission to Evaluate form that the District sent to Parent as

⁷ This is found at www.2ed.gov/print/about/offices/list/ocr/transition/html.

⁸ In summation, the District asserts, without citation to the record, that "non-disabled students are not provided with post-secondary transition planning akin to those services that are statutorily mandated by IDEA" There is no evidence in the record to this effect. On the other hand, Parent did prove by a preponderance that the District promised evaluation as part of the service agreement required for compliance with section 504. This is preponderant evidence on this record that evaluation was needed as part of the District's section 504 compliance and FAPE obligation.

early as October 2014, which plainly recited that the purpose of the proposed psychoeducational evaluation was to “provide information for post secondary institutions.” (S 5 p. 2.) Thus, the evidence shows preponderantly that the Parent requested evaluation for such purpose, that the District knew it, and that the District agreed to provide evaluation for such purpose.

Parent also testified credibly that Parent reiterated this request at the January meeting in which the Student’s section 504 service agreement was reviewed. The record corroborates this testimony through an amended service agreement that included the provision that Student would “have access to transition services.” (S 1 p. 5, S 2 p. 1.)

Parent testified without contradiction that this was put into effect and that all involved understood this to mean that the District would provide the evaluation for post-secondary transition purposes. The evidence is preponderant that the service program to which the service agreement gave Student access was the District’s existing transition program for students eligible under the IDEA. The Director admitted that this program included evaluations for post-secondary transition purposes in some cases if needed.

This evidence corroborates the testimony of the Parent. Thus, the record is preponderant that the District determined that the requested evaluation was necessary to comply with its non-discrimination obligations under section 504, including its FAPE obligation, and that it promised to perform such an evaluation.

The evidence is murky as to whether or not the District’s Director of Special Education attended and approved the section 504 service agreement instituted in January 2015. Weighing all the evidence, I find that she did attend that meeting and that she did approve the District’s promise to provide the evaluation. She was very unclear about this, but did assert that she remembered attending a meeting and that she thought that the meeting that she attended was the January 2015

meeting. In fact, the record does not disclose that there was any other meeting with Parent that the Director was likely to have attended. Weighing all of her statements on this account, with the documentary record, I find that the Director was more likely than not present at the January meeting.

There is no doubt that the Director approved the agreement to provide the evaluation, because she had previously sent the October permission forms proposing to do so for post-secondary institutions' purposes. Nothing in the record suggests that the Director changed her mind about this, until the Parent made a request that was inconveniently late in the school year.

The District relies upon this late request. It argues that, whatever its agreement in the months preceding May 2015, it was entitled to decline to provide the requested evaluation because Parent failed to provide it with a permission to evaluate -- in September when requested, again in October when requested, and during the remainder of the 2014-2015 school year.

On the contrary, Parent explained credibly and reasonably that Parent had withheld permission in the Fall for two reasons: first, Parent wanted to find out exactly what testing the Student's eventual college would require, so that the transition evaluation would be complete when performed; second, due to marital strife that called into question Student's matriculation at the College (even if accepted by the College), Student was suffering from anxiety such that it would harm Student to undergo a comprehensive evaluation during the Fall months.

Parent credibly testified that, all along, Parent advised District personnel that Parent was waiting to get definitive information on what testing was needed. When Parent got this information, late in the year through no fault of Parent's own, Parent immediately made Parent's request. The District refused orally to honor it at this point. Thus, the lateness of the request and

the absence of written parental permission cannot be ascribed to parental lack of reasonable cooperation.

Nor is the inconvenience of Parent's late request sufficient reason to deny accommodation under section 504. Under the case law interpreting section 504, fiscal considerations are not to be ignored when determining the reasonableness of an accommodation. However, here, the District had already determined that the requested accommodation was reasonable, and that determination was not qualified by considerations of the timing of the request.

While the late request was inconvenient, compliance with it would not have substantially altered the District's program. See generally, Hershman v. Muhlenberg College, 17 F. Supp. 3d 454, 457-458 (E.D. Pa. 2014)(section 504 does not require fundamental alteration of program). Mere administrative inconvenience does not absolve a district from accommodating a student under section 504. See generally, Helen L. v. DiDario, 46 F. 3d 325, 336-338 (3d Cir. 1995).

When Parent finally requested evaluation in late May 2015, the District declined to perform the evaluation because it did not have the staff available to do the evaluation before the end of the school year, and would not have staff available during the summer to finalize the evaluation. The Director also testified that there would not be an opportunity to observe Student in the classroom, due to end of year scheduling for seniors, so that the evaluation would not have contained this legally required element.

However, when the Director called the College representative responsible for gathering information to assist in planning its section 504 accommodations for Student, the Director adopted a new line of argument: that the evaluation was unnecessary because the Student's condition had not changed in the years following Student's last comprehensive psychoeducational evaluation in 2011. When the College representative did not agree with this, and insisted that fresh testing was

necessary, the Director terminated the conversation. Moreover, at that point, the Director ceased all meaningful communication with Parent on this issue as well.⁹

The record does not support the District's argument that the requested evaluation is not necessary for the College's purposes, for two reasons. First of all, the District witnesses are not qualified to determine what the College needs to comply with its own section 504 obligations; therefore, I accord any opinion testimony from District witnesses on this point little weight. Second, the College was following its own policy as to what is required, and the College's witness credibly testified that the College's policy required more than documentation of Student's high school accommodations and a 2011 re-evaluation report. The College showed that the disabilities for which Student sought accommodation required more recent cognitive testing on adult standardized scales. Moreover, it required extensive psychiatric information regarding Student's anxiety and mood difficulties; a mere doctor's note would not be sufficient. Thus, a preponderance of the evidence shows – contrary to the position taken by the District and its Director -- that the College did need a fresh psychoeducational evaluation, including cognitive and achievement testing, and evaluation of Student's attention and emotional support needs.

In making these findings and reaching these conclusions, I give the testimony of the Parent and that of the District's Director different weight. As noted above, Parent's testimony was facially credible and was corroborated by the rest of the record in material respects. On the other hand, I found the Director's testimony to have been somewhat self-contradictory and adversarial in quality; moreover, the history of the Director's changes of position in this matter reduces the reliability of the Director's testimony, and thus, its weight.

⁹ The evidence circumstantially indicates that this course of action was an attempt to "run out the clock" on Student's eligibility, by allowing Student to graduate in the hopes that this would cut off any District obligation to evaluate Student pursuant to Student's section 504 service agreement and the District's previous agreements.

STUDENT'S GRADUATION DID NOT OBVIATE THE DISTRICT'S PRE-EXISTING OBLIGATION UNDER SECTION 504.

The District's argument that its obligation ceased on Student's date of graduation is faulty. It is true that the IDEA terminates all prospective obligations as of the date of a valid graduation, and I accept for the sake of argument that the negative prohibition of section 504 would operate in the same fashion. The argument fails because this is not a present or prospective obligation. It is an obligation that arose before Student's graduation, when the District determined that the evaluation was necessary to comply with its obligation to avoid unequal treatment by providing the requested evaluation as part of its section 504 FAPE obligation. Therefore, any corrective order to address the District's refusal to perform its agreed section 504 services is in the nature of compensatory education that redresses a past failure to comply with section 504, not a prospective order based upon any obligation continuing after graduation, as the District argues.

CONCLUSION

In sum, I find that the District was obligated under section 504 to provide the accommodation that it agreed to provide in the Student's section 504 service agreement. It refused to do so, without any cause cognizable under section 504. Therefore, I order it to provide compensatory educational services in the form of a comprehensive psychoeducational evaluation.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the District is hereby **ORDERED** to provide Student with a comprehensive psychoeducational evaluation within

thirty days of the date of this order, including appropriate, current testing and evaluation of Student's cognitive functions and potential; current academic achievement testing; current testing and evaluation of Student's functioning in light of the Student's diagnoses and the educational needs arising therefrom; and current evaluation of Student's emotional functioning and any psychiatric disability, as well as the educational needs arising therefrom. The ordered evaluation shall meet the requirements of the College's policies for determining eligibility for accommodations and for determining the nature of such accommodations.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

September 4, 2015