

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: H.B.

Date of Birth: [redacted]

Dates of Hearing:

June 8, 2011

June 17, 2011

July 8, 2011

July 20, 2011

OPEN HEARING

ODR Case # 1824-10-11-KE

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Chartiers Valley School District
2030 Swallow Hill Road
Pittsburgh, PA 15220

R. Russell Lucas, Esq.
3301 McCrady Road
Pittsburgh, PA 15235

Date Record Closed:

July 20, 2011

Date of Decision:

August 1, 2011

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is [a preteenage] student residing in the Chartiers Valley School District (“District”) who has been identified as a student with a disability under the Rehabilitation Act of 1973 (specifically under Section 504 of that statute, hence the follow-on reference to this section as “Section 504”).¹ The parties agree that the student qualifies for services under Section 504. The parties disagree over the appropriateness of the implementation of the student’s Section 504 plan in the 2010-2011 school year.

For the reasons set forth below, I find in favor of the District.

ISSUES

Was the student denied a free appropriate public education (“FAPE”) from the alleged inappropriate implementation of the Section 504 plan in the 2010-2011 school year?

Did the District discriminate against the student based on disability from the alleged inappropriate implementation of the Section 504 plan in the 2010-2011 school year?

If the answer to either question is in the affirmative, what remedy is available to the student?

¹ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. See also 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for the protection of “protected handicapped students”. 22 PA Code §§15.1, 15.10.

FINDINGS OF FACT

1. The student entered the District in the 2007-2008 school year, the student's 2nd grade year. (Parents' Exhibit ["P"]-1, P-3).
2. The student enjoyed generally successful academic school years thereafter, although the student demonstrated consistently lower grades in Spanish. (P-3).
3. In August 2010, just prior to the outset of the 2010-2011 school year, the student's 5th grade year, the student suffered a concussion after a fall from a tree. (P-1, P-4).
4. In the first few weeks of the school year, the student struggled with academic material and exhibited behaviors focused on cleaning and reorganizing materials in the desk. (Joint Exhibit ["J"]-2, J-3).
5. In October 2010, the student shared in a private counseling session that the student's teacher employed a classroom technique called the "Cone of Shame Wall". (P-6).
6. The Cone of Shame Wall was a means to inform students that they had missing or incomplete assignments. Pictures of students that owed work were posted on a board labeled "Cone of Shame", at the top of which was a picture of the teacher's own dog with a shielding cone around its neck. The name and concept for the "Cone of Shame" came from an element of a children's movie. (P-6).
7. When the student shared information about "Cone of Shame Wall", the student was highly emotional and felt belittled by the practice when the student's picture was posted to the board. (P-6).
8. Parents contacted the District, withdrawing permission to utilize the student's photograph or visual image. (School District Exhibit ["S"]-17).
9. The teacher and building principal defended the use of the "Cone of Shame Wall". The building principal noted that her investigation did not discover any complaints from other students in the class or from their parents. (Notes of Testimony at 308-309, 314-315, 318, 484-493, 618-620).
10. In late September 2010, the District and the parents collaborated on a Section 504 plan to address the student's needs

due to complications from the concussion and diagnoses of attention deficit hyperactivity disorder, anxiety issues, and intestinal/digestive issues. (P-7, P-8, P-10, P-11; S-1).

11. The Section 504 plan addressed the student's ability to consult with a counselor, limited contact activities in gym, classroom behaviors, extended time on tests/quizzes, scheduling projects and assignments, discipline, and use of a peer to help with organizational skills. Additionally, the plan addressed the student's need to visit the nurse and use the restroom. (P-7; S-1).
12. In the latter half of November 2010, parents agreed to the Section 504 plan. (P-7; S-1).
13. Over the course of December 2010 – May 2011, the District implemented the Section 504 plan.
14. In April 2011, the District issued an evaluation report to determine if the student was eligible for special education. The District recommended that the student continue to receive services through a Section 504 plan and not through an individualized education plan. Parents agreed. (S-4, S-5).
15. In April and May 2011, parents communicated with the District about ongoing dissatisfaction with various aspects of the student's school year. (P-14, P-16, P-18).
16. In mid-May 2011, the parties met to discuss and to revise the student's Section 504 plan. There was no agreement. (S-2).

DISCUSSION AND CONCLUSIONS OF LAW

Provision of FAPE under Section 504

An analysis of denial of FAPE under Section 504 is analogous to denial-of-FAPE claims under the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEA"). To assure that an eligible child receives a FAPE (34 C.F.R. §300.17), an IEP must be reasonably

calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for “significant learning” (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

In this case, the student’s Section 504 plan is reasonably calculated to address the student’s needs in the educational environment. (FF 10, 11, 12, 13). Although parent brought out many valid points about imperfect implementation over the course of the school year, any flaws in the implementation of the Section 504 did not rise to the denial of a FAPE under the requirements of Section 504. (FF 11, 13).

Discrimination under Section 504

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

Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); W.B. v. Matula, 67 F.3d 484, 492 (3^d Cir. 1995).

In this case, there is no dispute that the student is disabled and is otherwise qualified to participate in school activities; the District knows and acknowledges that the student is disabled. While not made an explicit matter of proof in this case, it is a near certainty that federal funding flows to the District. Thus, the legal determination to be made is whether the student “was excluded from participation in, denied the benefits of, or subject to discrimination at the school”.

The District did not exclude the student from participation in, or deny the students the benefits of, schooling. (FF 8, 10, 11, 13). The legal conclusion regarding discrimination, however, is a closer call.

In the end, the weight of the record taken in its entirety supports the conclusion that the District did not discriminate against the student. The use of the “Cone of Shame Wall”, however, was a potentially discriminatory practice. (FF 6). First, the use of shaming in an educational environment (even if perceived as humorous by some) is clearly unprofessional and fraught with peril. Second, the use of shaming language and students’ pictures as a means of communicating that a teacher needs to see a student is unfathomable. Students’ names can be written on a board with instructions to see the teacher if a student’s name appears (a very common practice), or a teacher can simply summon a student to her desk for a conversation. Third, the principal’s

investigation—asking other students how they felt about the “Cone of Shame Wall” and gauging their non-reaction and the non-reaction of other parents—makes no sense. (FF 9). Every student in a classroom—both with and without disabilities—has unique needs; for students with disabilities, Section 504 and IDEIA require that the needs of those students be addressed in an individualized way. To hear of a particularized need/reaction of a student with disabilities but then base decisions on a sampling of other students’ needs/reaction is exactly the opposite of what those statutory structures envision and dictate.

Again, the record does not support a finding that the District discriminated against the student. But a different mosaic of facts could lead to a different conclusion. This decision should not be read to support unprofessional educational practices that could easily lead to treatment of students with disabilities that amounts to discrimination.

Because the student was not, under the terms of Section 504, denied a FAPE or subject to discrimination, no remedy is required.

CONCLUSION

The implementation of the student’s Section 504 plan in the 2010-2011 school year did not deny the student a FAPE. The District did not engage in discriminatory behavior based on the student’s disability.

•

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the District has complied with its obligations under Section 504 of the Rehabilitation Act of 1973 for the student's educational programming in the 2010-2011 school year.

Any claim not specifically addressed in this decision and order is denied.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

August 1, 2011