

*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: C. S.

Date of Birth: [redacted]

Date of Hearing: October 5, 2011

**CLOSED HEARING**

ODR Case # 2231-11-12-KE

Parties to the Hearing:

[Parent]

Chester Upland School District  
1720 Melrose Avenue  
Chester, PA 19013

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Dean Beer, Esq.  
McAndrews Law Office  
30 Cassatt Avenue  
Berwyn, PA 19312

Leo Hackett, Esq.  
102 Chesley Drive/Suite 1A  
Media, PA 19063

November 4, 2011

November 15, 2011

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (“student”) is a late teen-aged student residing in the Chester Upland School District (“District”). The student and parent claim that the student is 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”).<sup>1</sup> Furthermore, the student and parent assert that the District has failed in its Section 504 obligation to provide the student with a free appropriate public education (“FAPE”) and that the District has violated the anti-discrimination provisions of Section 504. Student and parent seek compensatory education as a result of these alleged deprivations.

The District counters that the student does not qualify as a student with a disability under Section 504. To the extent that the student is a student with a disability, the District asserts alternatively that it has not denied the student a FAPE to the student and has met its obligations Section 504.

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<sup>1</sup> 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.

Finally, the District argues that, because the student had reached age 18 at the time the complaint was filed, parent did not have standing to bring a complaint for alleged deprivations under Section 504.

For the reasons set forth below, I find in favor of the student and parent on the issue of standing. I find in favor of the District, however, on the issue of the student's qualification under Section 504.

### **ISSUES**

Is there an issue of standing regarding the student and student's parent to bring a claim for allege violations of Section 504?

Is the student a student with a disability under the terms of Section 504?

If so, has the student been denied a FAPE Section 504?

If so, has the student, on the basis of handicap, been excluded from participation in, been denied the benefits of, or otherwise been subjected to, discrimination on the part of the District under the terms of Section 504?

If the answer to either or both of questions #2 and/or #3 is in the affirmative, is compensatory education owed to the student?

### **FINDINGS OF FACT**

1. The student came from a private school to the District in [redacted] the 2004-2005 school year. (School District Exhibit ["S"]-4 at page 73; Notes of Testimony ["NT"] at 55-56).
2. The student came to the District after an incident [of misconduct] at the private school. The District was not informed of the reason the student left the private school and enrolled in the District. (NT at 60-63).

3. The student performed very well academically in the years prior to coming to the District and [the two subsequent years]. The student was often described as talented, diligent, and a model student. (S-2 at pages 9-57).
4. In the first three years of high school at the District [redacted], the student continued to perform very well academically. The student earned final grades of As and Bs, with the exception of one C in English in 11<sup>th</sup> grade. (S-2 at pages 5, 7).
5. Student achieved high class rankings in high school [specifics deleted]. (S-2 at page 7).
6. Throughout high school, the student participated in [a rigorous extracurricular activity] at the District. The [activity instructor] described the student as “pretty close to a perfect [participant]”. The student was selected to participate in [redacted] leadership programs. By senior year, the student was [in a leadership position]. (NT at 222-227).
7. Beginning in April 2005, the student began to attend community mental health therapy sessions for depression and anger management. Throughout middle school and [most of] high school, the student received these services at community or hospital locations, at times sometimes scheduled during the school day. (Parent’s Exhibit [“P”]-2, P-4, P-6, P-8; NT at 64-71, 75-76, 87-91, 123-125).
8. In [redacted] the 2009-2010 school year, due to the student not maintaining attendance at these sessions, as a matter of convenience and access, the community mental health services provider began to use an office [within the District] to provide services to the student. (P-4; NT at 90-92).
9. The District provided a meeting place for the sessions. No District personnel were involved in the sessions, and no records of the sessions or the student’s treatment were shared by parent with the District. (NT at 67, 71, 91-92, 95, 126, 173-176).
10. The first half of [the 2009-2010 year] proceeded as other school years had. The student performed very well academically, although grades in [two classes] were markedly lower (Cs, Ds, and Fs). The [teachers] testified that the lower grades were due to the student’s lack of interest/academic engagement and not turning in assignments. (NT at 104, 201-207, 248-250).

11. In February 2010, the student was involved in a disciplinary incident [redacted].<sup>2</sup> (S-1; NT at 94, 104-109).
12. As a result of the incident, the District contemplated expulsion for the student but did not pursue that course. Parent requested an independent evaluation. The student completed the semester and graduated. (S-1, S-2 at page 7; NT at 109-112, 134-135, 150-151).
13. In August [following graduation], the independent evaluation report was issued. The independent evaluation found that the student had potentially ongoing psychiatric needs for depression and other social/emotional needs. (S-7).
14. Three of the student's teachers, the school counselor, and the [extracurricular activities instructor] all testified uniformly that the student was a model student who exhibited no social, emotional, or behavioral needs in the educational setting. (NT at 155-157, 164-169, 174-176, 203-204, 209, 212-216, 223-226, 237-239, 246-247, 251-255, 257, 259-260).
15. The parties were instructed to make any legal arguments on standing as part of their written closings. (NT at 35-41).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Standing

In formulating their arguments regarding standing (FF 15), neither party cited to any authority considering the issue. The District argues that parent does not have standing to bring claims under Section 504 because the student had reached age 18 when the complaint was filed. The argument is rendered moot by the language of the complaint itself.

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<sup>2</sup> While not directly addressed at the hearing, there are indications that the [incident may not have been entirely of student's doing]. (S-7 at page 9; NT at 150-152).

The complaint is drafted in terms of claims made by the student and the student's family. The first paragraph of the complaint, sent to the District by letter to opposing counsel, states: "(P)lease note the representation of this office with respect to this child and (the) family, and allow this correspondence to serve as the request of the child and the family for a due process hearing under Section 504 of the Rehabilitation Act and their implementing state and federal regulations." (See Complaint at page 1).

To that extent, from the outset, the complaint was brought on behalf of both the student and the parent. Student and parent further argue that, in not asserting lack of standing as an affirmative defense in the District's Answer and New Matter, the District waived that defense.<sup>3</sup> (Thompson v. Zoning Hearing Board of Horsham, Pa. Commonw. , 963 A.2d 622 (2009)). This is a persuasive argument.

Accordingly, parent has standing, along with the student, to bring claims for alleged violations of Section 504.

#### Eligibility under Section 504

Section 504 defines a handicapped person, the qualifying term for Section 504 eligibility, as an individual having "a physical or mental impairment which substantially limits one or more major life activities". 34 C.F.R. §104.3(j)(1).

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<sup>3</sup> The District first raised the issue in its opening statement at the hearing. (NT at 35-41).

Here, the student has a mental impairment, namely depression. (FF 7). The student was also receiving services for anger management. (FF 7). And, at least after graduation, an independent evaluator identified needs for the student. (FF 13).

The weight of the record, though, does not support a finding that the disability and needs of the students “substantially interferes” with the major life activity of learning or the student’s ability to access academic programming. Through the documentary evidence and testimony, a consistent mosaic of the student surfaces—the student academically excelled, engaged in and became a student leader of the [extracurricular] program, and never presented the District with any indication that any interventions were necessary. (FF 3, 4, 5, 6, 14).

Admittedly, before the student came to the District [redacted], there was a school-based incident; but the District was never made aware of that incident in any detail. And, again, an incident [redacted] in the student’s final semester—placed strains on the student. (FF 1, 2, 11, 12). And, of course, the student was receiving mental health therapy provided by outside providers. (FF 7).

But the District had no knowledge of any services being provided to the student and would have no reason to know—from an educational perspective, there was nothing to indicate that the student needed educational programming, services, or supports to access learning. (FF 8, 9, 10, 14).

Accordingly, the student is not eligible for services under a Section 504 plan.

Given this finding, the issues of alleged deprivation under Section 504 and attendant remedy are rendered moot.

### **CONCLUSION**

The student's parent has standing to bring claims for alleged violations under Section 504. In this case, however, the student is not eligible as a student with a disability under Section 504 because the student's disability does not substantially interfere with the student's learning.

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### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student is not disabled under the terms of Section 504.

Any claim or issue not addressed in this decision is denied.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

November 15, 2011