

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: K.K.

Date of Birth: [redacted]

Dates of Hearing:

April 23, 2012

April 24, 2012

April 26, 2012

April 27, 2012

June 12, 2012

OPEN HEARING

ODR Case # 2573-1112KE

Parties to the Hearing:

Parents

Pittsburgh Public Schools
341 S. Bellefield Avenue
Pittsburgh, PA 15213-3516

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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July 16, 2012

August 7, 2012

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (hereinafter “student”) is a [redacted]-year old student who resided in the Pittsburgh School District (“District”) in the 2009-2010 school year when the student was identified as a student with a disability under the applicable provisions of Section 504 of the Rehabilitation Act of 1973 (“Section 504”).¹

Parents seek a finding that the District discriminated against the student with deliberate indifference in various acts and omissions regarding servicing the student with a Section 504 plan and seek compensatory education as a result of the alleged discrimination. The District counters that it met its obligations to the student under the provisions of Section 504.

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

ISSUES

Did the District engage in discrimination
in its treatment of the student
in the 2009-2010 school year?

If so, is compensatory education owed to the student
and in what amount?

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., 15.10 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for the protection of “protected handicapped students”.

STIPULATION

After the last hearing session, there was some confusion as to whether School District Exhibit ["S"]-13 had been admitted to the record. In post-hearing communications, the parties mutually agreed that S-13 is an exhibit of record.

FINDINGS OF FACT

1. The student attended District schools since kindergarten. In the early elementary years, the student was identified as gifted. (Notes of Testimony ["NT"] at 506-508).
2. Entering high school, the student was admitted to the District's advanced tracking program for gifted students, called the Center for Advanced Studies, or CAS. (NT at 337-338, 343-344, 506-508).
3. In high school, the student engaged in heavy loads of rigorous coursework as well as a number of activities and sports teams. (NT at 509-516, 659-665).
4. In the 2008-2009 school year, the student was in 11th grade. (NT at 80-81, 516-517, 666).
5. In February 2009, the student experience what appeared to be an ordinary stomach virus. Over the course of a few days, however, the student's vomiting did not lessen. By the end of February 2009, the student had been hospitalized. Through March and April 2009, intermittent hospitalizations continued due to excessive vomiting and attendant side effects. (*See generally* S-1 at 1-13; *See generally* Joint Exhibit ["J"]-1 at pages 1-38; NT at 81-82, 517-521).
6. Ultimately, the student was diagnosed with gastroparesis, a paralysis of the gastrointestinal nervous system. (S-8; NT at 517-518).
7. As a result of the amount of school days the student missed due to illness and hospitalizations, the student began to receive homebound instruction in April 2009. Instruction continued in coordination with the District through the end of the 2008-2009 school year, and into the summer of 2009 with a private tutor. This private tutor happened to be a District teacher who assisted the

- student in completion of 11th grade coursework, outside of a chemistry class and a Japanese class, which she continued to work on throughout the summer of 2009 and into the fall of 2009. (See generally S-1 at 1-13; S-1 at 15-17; See generally J-1 at pages 32-115; NT at 521-529, 666-667).
8. Over the summer of 2009, while vigilant about health issues, the student was free of symptoms related to gastroparesis. (NT at 526-528, 666-667).
 9. The outset of the 2009-2010 school year, the student's 12th grade year, began without health problems. The student's coursework was quite rigorous. (S-1 at page 14, S-3; NT at 528-529, 667-669).
 10. By October 2009, however, the student's symptoms returned. (See generally S-1 at 18-47; J-1 at 119-120, 127; NT at 530-532, 669).
 11. By early November 2009, the student was again placed on homebound instruction due to an inability to attend school related to the side effects of gastroparesis. (S-1 at 48-49, 51-53, S-2 at 1-10, S-5, S-6; see generally J-1 at 135-161, 178-194).
 12. On November 10, 2009, the student was identified as a student with a disability and a Section 504 plan was developed for the student. (S-2 at 11, S-7; J-1 at 204-206; NT at 100-101, 360, 432-433, 536-537).
 13. The Section 504 dated November 10th contained three accommodations for the student: (1) the student would receive homebound instruction through December 1st, with renewal as necessary; (2) the student was given the option of attending school when health permitted, notifying the school counselor so that teachers could be informed that the student would be in attendance that day; and (3) 50% extended time on assignments. (S-7).
 14. The Section 504 plan dated November 10th also included a provision for access to the nurse's office, or alternatively the CAS office, in the event of a medical emergency. (S-7).
 15. On November 17th, parents signed the Section 504 plan dated November 10th but did not approve the plan, instead requesting an informal conference to discuss the plan. (S-1 at 58-60, S-7; J-1 at 207-211).

16. The District felt that parents' concerns were centered on the details of homebound instruction and not the Section 504 plan dated November 10th. (J-1 at 209-211).
17. Throughout the remainder of November 2009, the parties continued to communicate about the Section 504 plan dated November 10th but reached no agreement. (S-2 at 16-17; *see generally* J-1 at 218-235).
18. The District was advised that the student had anxiety issues, but the student was receiving private treatment. The parties did not pursue counseling sessions at the District. Throughout their interactions, with one another, the concerns of both parties were focused almost exclusively on academic concerns. (S-2 at 30-31; NT at 85-87, 107-109, 422-425, 441-443, 520-521, 557-564, 667-669, 754-770).
19. In mid-December 2009, the District requested permission to evaluate the student to determine eligibility for special education and related services under the Individuals with Disabilities in Education Improvement Act of 2004. Parents declined to give permission for the evaluation. (S-11; NT at 441-442, 559-560).
20. From November 2009 through January 2010, the student received homebound instruction. Due to the advanced level of the coursework, and the amount of work required given the student's overweighted academic schedule, the homebound instruction was not successful. The student dropped advanced placement European History and biology. The academic material was self-taught or completed in conjunction with instruction by private tutors. (S-1 at 54, 64-122, 144-170, S-2 at 32-110, S-6, S-13; J-1 at 212, 216-217, 220-423; S-13; NT at 360-367, 428-430, 533-536, 556-557, 561-564, 669-679, 721-722).
21. On January 13, 2010, the student's section 504 team met to revise the Section 504 plan dated November 10th. Counsel for both parties participated in the revision meeting. (S-2 at 27-29, S-12; Hearing Officer Exhibit-3; NT at 443-444).
22. The Section 504 plan dated January 13th included eleven accommodations, as follows:
 - Homebound instruction through the end of January 2010 to allow for transition back to the school environment;

- Modification of the District attendance policy, negating penalties for medically-related absences;
- Eating and drinking in the school environment was allowed;
- Freedom to come and go from the school building as needed, signing in and out at the front doors of the school building;
- Permission to skip homeroom and proceed directly to 1st period;
- Schedule modifications;
- Requirements for direct instruction in five classes (English, calculus, Japanese, Chinese, physics);
- Scheduling modifications for access to physics instruction;
- Modification of assignments;
- Modification of assessments;
- Establishment of a single point-of-contact for communication/coordination with a medical relapse causing absence for three or more consecutive school days. (S-12; NT at 443-455).

23. In late January/early February 2010, the student exited homebound instruction and began to attend at the high school building. (S-2 at 111-118, S-20; J-1 at 424; NT at 393, 565-566, 679-681).
24. By the time the student returned to school, the vomiting and attendant side effects related to the student's gastroparesis had largely resolved. (J-1 at 405; NT at 577).
25. Given the demands of the student's school schedule, and the amount of work to be made up, the student became overwhelmed in the school environment. Instead of attending classes, the student came to the school building each morning and stayed in the library. (NT at 574-581, 684-690).
26. There was rank confusion at the District as to who should be overseeing the administration of/compliance with the student's Section 504 plan dated January 13th. The principal of the high school, heavily involved in the homebound and Section 504 issues in the fall of 2009, went on maternity leave in late February 2010. The principal and assistant principal thought that the school counselor was overseeing the student's Section 504 plan. The school counselor testified that, to her knowledge, she had no duties at any time related to overseeing the Section 504 plan.

Overlaying all of this, to have one channel for the constant stream of email communication between the parents and the District, the CAS program coordinator eventually became the point-of-contact with the parents. Based on credibility findings, it was the duty of the school counselor to monitor the student's Section 504 plan dated January 13th, a duty which she failed to perform. (NT at 74-75, 161-168, 221-241, 374-388, 723-733).

27. With no one monitoring the Section 504 plan, from February-mid April 2010, the student was present in the school building but was in the library and was not accounted for. The Section 504 plan dated January 13th gave the student a tremendous degree of autonomy. Teachers assumed the student was not in class or at tutoring sessions due to medical reasons, and so the student was marked absent from most classes over this period. (S-12, S-15, S-20; NT at 389-394, 684-690, 778-779, 782-789, 817-824, 868-872, 893-899, 937-943, 966-972).
28. In mid-April 2010, at a meeting at the high school, parents became aware that the student had not been attending certain classes. In mid-May, parents learned that the student had been absent from all classes. (S-20; NT at 169-178, 579-587, 691-692, 941-943, 968-970).
29. Over May and June 2010, the student completed missing coursework. Though eligible to participate in commencement exercises, the student chose not to. The student completed the necessary coursework by June 25, 2010 and was considered a June 2010 graduate of the District. (S-1 at 186-214, S-2 at 234-316, S-16; NT at 587-597, 599-601, 693-696, 723-733).
30. The student graduated [and] was accepted at [redacted] University, and enrolled there in the fall of 2010. (S-23; NT at 262-263, 602-603).
31. The parents' expert, both by report and in testimony, is credible that his review of the facts and circumstances led him to doubt the efficacy of the District's response to the student's needs. (P-11, P-12; *See generally* NT at 276-335).

DISCUSSION

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 the instant case, there is agreement between the parties that prongs #1, 2, 3, or 5 have been met. The dispute hinges on whether the District was deliberately indifferent to the student’s needs and, as a result, the student has been excluded from participation in or denied the benefits of school-based programs or activities, or been subject to discrimination. Ridgewood; Matula; 34 C.F.R. §104.4(a).

Here, the District was careless but did not act with deliberate indifference toward the student. Obviously, the student is gifted with a superior intellect. (FF 1, 2, 3, 4). The student’s educational program was deeply impacted, however, with the onset of both bouts of the student’s gastroparesis. (FF 5, 6, 7, 10, 11, 18, 20). But the District’s response to

the October 2009 illness was timely, both in terms of homebound instruction and the Section 504 plan dated November 10th. (FF 11, 12, 13, 14).

Without doubt, the homebound Section 504 experiences between November 2009 and January 2010 was choppy; indeed, in many ways, it was a failure. (FF 20). But, importantly, it was not a failure due to any indifference on the part of the District. If anything, the District worked diligently with the family to answer their questions and address their concerns. (FF 20).

Likewise, after the student returned to high school in February 2010, the District's carelessness allowed the student to hide away, literally, in the school environment. (FF 21, 22, 23, 25, 26, 27, 28). But, again, the District did nothing deliberate.

If the question presented by this record is "was the District careless in how it implemented programming for the student?", the answer is resoundingly "yes". (FF 7, 11, 15, 16, 17, 20, 25, 26, 27, 28). The question presented, though, is "was the District deliberately indifferent in discriminating against the student?". The record in its entirety weighs in the District's favor. (FF 5, 7, 9, 11, 12, 13, 14, 16, 17, 18, 19, 21, 22, 23, 29, 30).

The parents' expert points out, quite rightly, many of the District's failings. (FF 31). As indicated above, however, these failings do not support a finding that the District acted with deliberate indifference.

Additionally, in weighing the opinions of the expert, many of the conclusions drawn by the expert are related to denials of a free appropriate public education, which this record does not support (and for which parents make no claim). (FF 30).

Taken as a whole, then, the record in its entirety does not support a finding that the District acted with deliberate indifference in programming for the student. As such, the District did not engage in discrimination against the student in violation of Section 504, and no compensatory education will be awarded.

CONCLUSION

The District was careless in many regards in its attempts to provide programming for the student pursuant to its obligations under Section 504. But the District's acts and omissions in this regard do not rise to the level of deliberate indifference.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Pittsburgh School District did not engage in discriminatory

acts and omissions regarding the student's programming under Section 504.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

August 7, 2012