

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: S.P.

Date of Birth: [redacted]

Dates of Hearing:

July 2, 2012

August 30, 2012

September 6, 2012

November 8, 2012

OPEN HEARING

ODR Case # 2628-1112KE

Parties to the Hearing:

Parents

Fairview School District
7460 McCray Road
Fairview, PA 16413

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Jeffrey Ruder, Esquire
429 Forbes Avenue
Suite 450
Pittsburgh, PA 15219

Thomas Lent, Esquire
717 State Street / Suite 701
Erie, PA 16501

December 10, 2012

January 7, 2013

Jake McElligott, Esquire

INTRODUCTION

[Student] (hereinafter “student”)¹ is a [late-teenaged] student who resides in the Fairview School District (“District”). The parties dispute whether the student should have been identified by the District as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”) and Pennsylvania special education regulations (“Chapter 14”),² as well as whether the District met its obligations to the student under the Rehabilitation Act of 1973 (specifically under Section 504 of that statute, hence the follow-on reference to “Section 504”) and Pennsylvania education regulations which implement Section 504 (“Chapter 15”).³ Particularly, the dispute centers on whether the District should have identified the student as a student with a health impairment, due to migraine headaches, given the student’s non-attendance at school and/or non-engagement in cyber school in the 2009-2010, 2010-2011, 2011-2012 and current 2012-2013 school years.⁴ Additionally, parents claim that the District discriminated against the student as a result of the student’s disability. As a result of

¹ The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

² It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.164.

³ 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 services to “protected handicapped students”.

⁴ The parties agree that the scope of parents’ claim is limited to a period two years prior to the filing of the special education due process complaint, namely December 7, 2009.

these claims, parents claim the student was denied a free appropriate public education (“FAPE”) and seek compensatory education as a remedy.

The District counters that the student does not qualify as a student with a disability under the terms of IDEIA/Chapter 14 because the student does not require specially designed instruction. To the extent that the student qualified as a student with a disability under Section 504/Chapter 15, the District argues that those needs were met with an appropriate Section 504 plan. For those reasons, the District claims that, at all times, it met its obligations to the student and that no compensatory education is owed.

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

ISSUES

Should the student have been identified as a student with a disability under the IDEIA?

Did the District provide FAPE to the student under its Section 504 obligations?

Did the District discriminate against the student on the basis of the student’s disability in violation of Section 504?

If any of these questions are answered in the affirmative, is compensatory education owed to the student?

FINDINGS OF FACT

1. As early as April 2005, in 3rd grade, the student experienced excessive absences due to migraine headaches. Excessive absences due to migraine headaches continued in subsequent school years. (Parents' Exhibit ["P"]-1, P-2; School District Exhibit ["S"]-37).
2. In February 2008, during the student's 6th grade year, the student was given a Section 504 plan to address the student's inability to complete assignments and make progress through the curriculum due to excessive absences. (P-1).
3. In the fall of 2008, during the student's 7th grade year, the student entered a partial hospitalization program for mental health treatment. While the evaluator opined that he felt it was medically necessary for the student to remain in the program, the degree to which the complaint of migraines intersected with the student's mental health needs was unclear. (P-4; S-5).
4. In February 2009, a previous round of special education due process was settled by the parties. Part of that settlement agreement envisioned that the student would complete District academic requirements through school attendance or, failing that, through cyber school. (S-8).
5. In March 2009, as a result of the student's experience in partial hospitalization, the student was re-evaluated by the District. The student was found not to be eligible under the IDEIA. (P-6; S-3).
6. In March 2009, contemporaneous with the District's re-evaluation, the student was discharged from the partial hospitalization program for excessive non-attendance. (S-4).
7. In April and May 2009, the District voiced concerns that the student was not engaging in cyber school work. The student completed the 2008-2009 school year, the student's 7th grade year, in cyber schooling. (S-34; Notes of Testimony ["NT"] at 120-121).

8. In the 2009-2010 school year, the student's 8th grade year, the student engaged in cyber schooling which the student completed in July 2010. (S-9; NT at 120).
9. In July and August 2010, the parties discussed the student's transition to 9th grade for the 2010-2011 school year. Parents indicated that they did not want the student to have a Section 504 plan to see if a transition to high school could be made without a plan. (P-25; S-9).
10. In September 2010, the student began to attend the District high school. Even though the student did not have a Section 504 plan, the District had prepared a number of accommodations, including the availability of a resource room (called the "refocus room") if the student needed a break, access to the nurse's office, collection of missed work for pick-up at the office on days of absence, and extended time on assignments. (NT at 124-126).
11. The student began to miss school shortly after the school year began. (P-8; S-11, S-26).
12. Over the course of September-December 2010, the student continued to have excessive absences. The District communicated with parents regarding the absences, indicating that medical excuses would be required and, ultimately, truancy proceedings might be pursued. The parties met multiple times to adjust accommodations for the student. (P-8, P-9, P-10, P-11, P-13, P-15; S-11, S-12, S-13, S-14, S-15, S-16; NT at 152-156).
13. In January 2011, due to the amount of the student's absences and consequent missed schoolwork, the student began to engage in cyber schooling through the District. (P-16; S-17; NT at 156-157).
14. In March 2011, the District proposed a Section 504 plan that included cyber schooling based on successful completion of subject area content rather than hours spent on the content. The student was given the option to attend high school classes on a non-graded, non-credit basis to supplement the cyber schooling and was permitted to participate in District extracurricular activities. The parents did not approve the Section 504 plan until May 2011. (P-17; S-6, S-28).

15. In April 2011, as the final quarter of the school year approached, the District communicated with parents regarding the student not having completed cyber school subject area content. (S-29).
16. In May 2011, the student was still not making progress on the cyber school content. The District extended from June 9th (the end of the school year) to July 1st the student's ability to complete the cyber school content. At the same time, the parents signed and returned the March 2011 Section 504 plan. (P-17, P-18; S-6).
17. In the 2010-2011 school year, the student earned four academic credits. (S-41).
18. In the 2011-2012 school year, the student's 10th grade year, the student continued in District cyber schooling. (S-41, S-43, S-45).
19. In January 2012, the District proposed a Section 504 plan that continued to utilize cyber schooling based on the completion of content and not time-on-task, with flexible course scheduling, waiver of the District's attendance requirements with the provision of quarterly medical verifications, access to building-based District resources and extra-curricular activities. (S-7).
20. As of the date of the hearing, in the current 2012-2013 school year, the student continued in District cyber schooling. (NT at 460-461).
21. The testimony of District witnesses is persuasive that the student has very strong intellectual skills and, when the student engages academic material, has never exhibited any need for modification or adaptation. (NT at 43-160, 453-693, 702-788).
22. The parents' expert witness testified credibly but unpersuasively that the District engaged in acts and omissions which amount to violations of IDEIA/Chapter 14 and/or Section 504/Chapter 15. (P-19, P-20; NT at 169-329).

DISCUSSION AND CONCLUSIONS OF LAW

Qualification under IDEIA/Chapter 14

Pursuant to the requirements of IDEIA/Chapter 14, a student qualifies as an eligible student under IDEIA as a “student with a disability”⁵ by meeting two qualifying criteria: (1) the student is identified as a student with one or more enumerated disabilities that (2) require specially designed instruction as a result of that disability.⁶ A student who does not have a qualifying disability is not eligible as a student with a disability under IDEIA. Likewise, a student who has a qualifying disability, but does not require specially designed instruction as a result of that disability, is not eligible as a student with a disability under IDEIA. Here, parents claim that the student qualifies as a student with a disability as a student with a health impairment, namely:

limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—(i) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) adversely affects a child's educational performance.⁷

In this case, the District does not dispute that the student’s migraine condition is a disability, a seemingly chronic health problem

⁵ 22 PA Code §14.101.

⁶ 34 C.F.R. §300.8(a).

⁷ 34 C.F.R. §300.8(c)(9).

that adversely affects the student's educational performance. Having found that, however, the record supports a conclusion that the student does not qualify as a child with a disability under IDEIA/Chapter 14 because the student does not require specially designed instruction as a result of that impairment. In fact, the record weighs heavily that the student has a robust intellect that requires no specially designed instruction. In that regard, the District's approach to servicing the student through a Section 504 plan with educational accommodations, rather than an individualized education plan with specially designed instruction, is the appropriate course. (The appropriateness of the Section 504 programming is addressed below.) Without the need for specially designed instruction, then, the student does not qualify as a student with a disability under the terms of the IDEIA/Chapter 14.

Accordingly, because the student is not a child with a disability under the terms of IDEIA/Chapter 14, the District has no obligations to provide services to the student under those statutory/regulatory frameworks.

Compensatory Education

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a

student FAPE under the terms of the IDEIA/Chapter 14.⁸ In this case, because the student is not a child with a disability under the terms of IDEIA/Chapter 14, and the District has no obligations to provide services to the student under those statutory/regulatory frameworks, no award of compensatory education is owed to the student.

Denial of FAPE under Section 504/Chapter 15

Here, there is no dispute between the parties that the student qualifies as a “protected handicapped student” under the terms of Section 504/Chapter 15.⁹ These statutory/regulatory frameworks require that protected handicapped students in Pennsylvania schools must be provided with FAPE.¹⁰ In determining whether or not a school district has provided FAPE to a protected handicapped student, the standards under Section 504/Chapter 15 are analogous to those under IDEIA/Chapter 14.¹¹

To assure that an eligible child receives a FAPE, a Section 504 plan must be reasonably calculated to address the needs of the protected handicapped student allowing the student to gain meaningful

⁸ Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992).

⁹ 22 PA Code §15.2. Chapter 15 nomenclature speaks of “protected handicapped students”; Chapter 14, at 22 PA Code §14.101, uses the term “student with a disability”.

¹⁰ 34 C.F.R. §104.33; 22 PA Code §15.1.

¹¹ P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009).

educational benefit.¹² ‘Meaningful benefit’ means that a student’s program must address the student’s needs in such a way that the benefit is not minimal.¹³

In this case, the District has appropriately addressed the student’s needs through the accommodations and/or Section 504 plans it has had in effect since the student was discharged from the partial hospitalization program in March 2009. The District has attempted to accommodate the student in a school environment where the student would be available for instruction. Over the course of years, however, the student has been unable to attend regularly, not only within the District but even in the partial hospitalization program in the fall of 2008 and spring of 2009. The District, however, has attempted to meet the student where instruction can be delivered, namely at home through a cyber school environment. Even in cyber schooling, which is already a highly flexible approach, the District has adjusted timelines and requirements to accommodate the student’s needs. The entirety of the record weighs in favor of the District in its continuing attempts to meet the student’s needs through accommodations and Section 504 plans.

Accordingly, the District met its obligations under Section 504/Chapter 15, and the student was not denied FAPE. Therefore, no compensatory education award is owed.

¹² 34 C.F.R. §§104.1-104.61; Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982); M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996).

¹³ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999);

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 his disability.¹⁴

In this case, the first, second and fifth prong of this analysis is undisputed. While not a matter of evidence, the receipt federal funds by the District is a near-certainty. The crux of a finding that the District discriminated against the student, then, is whether the student was the subject of discrimination as the result of the disability. Here again, the entirety of the record supports a conclusion that the District did not discriminate against the student.

Accordingly, it is an explicit finding that the District did not discriminate against the student.

CONCLUSION

The student is not a “student with a disability” under the terms of IDEIA/Chapter 14. The District provided FAPE, or stood ready to provide

¹⁴ Ridgewood; W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

FAPE, to the student under its Section 504/Chapter 15 obligations. The District did not discriminate against the student. No compensatory education is owed to the student.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is not a student with a health impairment under the terms of IDEIA/Chapter 14. The District met its obligations to provide FAPE to the student under the terms of Section 504/Chapter 15 and did not discriminate against the student. No compensatory education is owed to the student.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

January 7, 2013