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.H.

Date of Birth: [redacted]

Dates of Hearing:

May 16, 2012
June 20, 2012
June 25, 2012

CLOSED HEARING

ODR Case #2824-1112KE

Parties to the Hearing:	Representative:
Parents	Pamela Berger, Esquire 434 Grace Street Pittsburgh PA 15211
Fox Chapel Area School District 611 Field Club Road Pittsburgh PA 15238	Patricia Andrews, Esquire 1500 Ardmore Boulevard Suite 506 Pittsburgh PA 15221
Date Record Closed:	July 16, 2012
Date of Decision:	July 31, 2012
Hearing Officer:	Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[The student] is a [teenaged] student residing in the Fox Chapel Area 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] After exiting from special education services under the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")[2] at the end of the 9th grade (the 2009-2010 school year), the student experienced difficulty in the educational environment at the outset of 11th grade (the 2011-2012 school year). In the fall of 2011, the District denied the parents' request for an accommodation plan under Section 504. As the result of an alleged denial of a free appropriate public education ("FAPE") under Section 504, parents claim they were required to enroll the student in a private school. Parents seek from the District reimbursement for the private school tuition.

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

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[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.

[2] 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162.

ISSUES

Was the student denied a FAPE for the District's alleged failures under its Section 504 obligations?

If so, are parents entitled to tuition reimbursement?

FINDINGS OF FACT

1. The student was identified in 1st grade as a child with a speech and language disability. In 3rd grade, the student was identified as a student with the health impairment of attention deficit hyperactivity disorder ("ADHD"). The student received specially designed instruction and/or related services to address these disabilities. (School District Exhibit ["S"]-6; Notes of Testimony ["NT"] at 42-43).

2. In 6th grade, the student was exited from special education for speech and language needs. The student continued to receive special education for ADHD. (S-6).

3. In April 2009, near the end of 8th grade as the student anticipated a transition to high school, the parties considered exiting the student from special education but mutually decided to continue special education for ADHD. (Parents' Exhibit ["P"]-1; S-14; NT at 46-48).

4. In 9th grade, the 2009-2010 school year, the student received special education to support needs related to ADHD. The student was identified as needing support in organizational skills, remaining on task, and self-advocacy. (S-14; NT at 47-49).

5. In June 2010, at the end of 9th grade, the District issued a notice of recommended educational placement ("NOREP") to exit the student from special education. (S-2).

6. In August 2010, the parents approved the NOREP and returned it to the District. While the NOREP indicates that the parents requested that the student be exited from special education, the decision was decided mutually between the parties. (S-1, S-2; NT at 42-49, 80-82, 236-237).

7. On August 10, 2010, on the cusp of 10th grade, the student was exited from special education. (S-2).

8. In 10th grade, the student achieved mostly B-level grades (B+, B, and B-) along with two A-level grades (A, A-), and one C+ grade. The student failed one class. While the student's grades are evidence of academic progress, the student's mother testified credibly that the 10th grade year presented multiple academic and school-based challenges for the student. (S-9; NT at 49-57).

9. In August 2011, on the cusp of 11th grade, the parents sought a private neuropsychological evaluation of the student. (P-19).

10. In mid-September 2011, after consultation with the parents, the student's school counselor referred the student for a Section 504 evaluation. (P-2; NT at 57-59).

11. In late September 2011, the private evaluator's report was delivered to the parents who, in turn, provided it to the District. The private evaluator reaffirmed the diagnosis of ADHD, noting many of the needs persisted in terms of organization and task approach. The evaluator also noted attendant anxiety. The evaluator felt the student qualified for accommodations in the school environment, and would be helped by academic coaching as well as counseling support. (P-19; NT at 60).

12. By mid-October 2011, the student had dropped Spanish class, was working multiple hours with parents after school, and, as a result of anxiety, was engaging in [redacted]. (NT at 57-60, 228-232, 259-260).

13. In mid-October 2011, the District issued its Section 504 evaluation. The District noted the concerns with organization and task approach that had been a consistent part of the student's profile but did not see the need for a Section 504 plan. (P-3; NT at 274-275).

14. The student's grades through mid-October, on this record, indicated that the student had an 85% grade in accounting (the student's math credit), a 72% grade in history, and mostly As and Bs in chemistry. (P-15, P-16; S-10, S-11, S-12).

15. On November 8, 2011 the parents and a school-based team met to discuss the results of the Section 504 evaluation. At that meeting, the District's director of special education indicated that

her interpretation of a 1996 policy letter, *Letter to McKethan*,[3] issued by the Office for Civil Rights at the U.S. Department of Education ("OCR") led her to an understanding that the student, having been previously exited from special education, was not eligible for a Section 504 plan. The meeting broke down and ended over this assertion. (NT at 61-63, 234-235, 301-304).

16. Between mid-October and the Section 504 meeting on November 8th, the student continued to show satisfactory academic progress, although across accounting, history, and chemistry, the student seemed to struggle consistently with tests as opposed to homework, projects, and labs. (S-10, S-11, S-12).

17. On November 9, 2011, the District sought permission to evaluate the student for special education. (S-3).

18. On November 10, 2011, the high school principal, the student's teachers and the student's school counselor met with parents to discuss supports and accommodations for the student. The accommodations included having a set of textbooks both at school and at home, daily assignment tracking, locker access for forgotten assignments or items, emailing parents when work is late or missing, segmenting/structuring larger assignments, and access to classmate notes/teacher notes/PowerPoint slides. The student also had access to a portable computer for note-taking in class. Finally, teachers were provided with the contact information of the student's independent academic coach. (P-4, P-17; NT at 64, 66-69, 275-276, 304-306).

19. The student's teachers testified credibly that they were aware of the services and accommodations, and implemented those services and accommodations after the November 10th meeting. (NT at 321-334, 396-401, 408-420).

20. On November 11, 2011, parents wrote a letter to the high school principal indicating concerns with (a) the District's stance regarding a Section 504 plan vis a vis its interpretation of the OCR letter and (b) their frustration of having to undergo another evaluation process to re-qualify for special education. The letter was forwarded to the District's special education office. (P-7; NT at 306-308).

21. On November 11, 2011, parents returned the permission to evaluate, granting their permission for the District to evaluate

[3] See below for the citation to *Letter to McKethan* and a full discussion of the letter.

whether the student required special education and related services. (S-3).

22. By November 22, 2011, parents had not heard back from the high school principal and so re-initiated contact. The principal was not aware that the special education office had not responded to parents' concerns. (P-8; NT at 64-65, 308-311).

23. At some point in November following the Section 504 meeting on November 8th, parents began to investigate private schooling options for the student. (NT at 237, 452-454).

24. Throughout November and December 2011, the parties communicated regarding the student's accommodations and academic work. At times, the communications included the student's private academic coach. (P-9, P-17; S-4, S-5).

25. On December 15, 2011, the parents made a deposit with a private residential school in central Pennsylvania. (NT at 78-79, 451).

26. On December 23, 2011, the parents informed the District that they were withdrawing the student and would seek a private placement at public expense. (NT at 241, 451).

27. On January 3, 2012, the student's school counselor circulated an email to the student's teachers regarding the need for the student to complete all outstanding work to allow the student to begin classes at the private school on January 9, 2012. (P-10).

28. Over December 2011 and the early part of January 2012, the student worked diligently and completed all outstanding work at the District. (P-10, P-11, P-12, P-13; S-13; NT at 71-74).

29. January 10, 2012 was the student's last day at the District. The student had completed all coursework and received passing grades for 11th grade. (S-9; NT at 78-79).

30. On January 11, 2012, the student began attending the private school. (NT at 78-79).

31. Contemporaneous with the student's wrapping-up of coursework at the District, the District completed its evaluation on January 9th and mailed the evaluation report to the parents on January 10th. (S-6).

32. The District evaluation report found that the student was eligible for special education as a student with the health impairment of ADHD. (S-6).

33. On February 6, 2012, the District crafted an individualized education plan ("IEP") and offered to implement the IEP at the District high school. On March 5, 2012, parents rejected the NOREP. (S-7, S-8).

34. The private school provides appropriate programming to meet the student's academic and organizational/task-approach needs. (P-5, P-6; NT at 79, 93-129).

DISCUSSION AND CONCLUSIONS OF LAW

Provision of FAPE under Section 504

To assure that an eligible child receives a FAPE under Section 504, a student must be provided "regular or special education and related aids and services that …are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met" and also comply with procedural requirements related to least restrictive settings, evaluations, and access to procedural due process. (34 C.F.R. §104.33(b)). In meeting these requirements, the school district is held to analogous standards under IDEIA. P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009). Specifically, such interventions must 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 District provided FAPE to the student under Section 504. This finding hinges on two critical factors: (1) the District's provision of services and (2) the District's undertaking of a contemporaneous IDEIA evaluation process.

Even though it was outside the four corners of a Section 504 plan, the District provided multiple services and accommodations immediately after the Section 504 meeting on November 8th. (FF 10, 12, 13, 15, 18, 19). And, while not minimizing the academic difficulties that the student encountered at times in the fall of 2011, the student made meaningful educational progress across all classes. (FF 12, 14, 16, 27, 28, 29). In sum, then, the record taken in its entirety supports the conclusion that the District provided the student with FAPE under its Section 504 obligations.

Second, and critically, the District recognized that the mutual decision of the parties to exit the student from special education in August 2010 may have been misguided. (FF 5, 6, 7, 17). After the Section 504 meeting on November 8th, the District immediately sought permission to evaluate the student under the provisions of IDEIA. (FF 17). While the District's position at the November 8th meeting, given its purported reliance on *Letter to McKethan* (see below), is seemingly

incongruous with the pursuit of a special education evaluation, the District's actions reveal that it did not shy away from its obligations to understand the student's educational needs and to provide FAPE. (FF 15, 17, 20, 21, 22, 31, 32, 33).

Both of these factors taken together, in conjunction with the weight of the entirety of the record, support the finding that the District met its obligations to provide FAPE to the student in the 2011-2012 school year. Accordingly, there is no remedy due for tuition reimbursement at the private placement.

Letter to McKethan

For a full understanding of the District's actions, and the parents' understandable frustration coming out of the Section 504 meeting on November 8th, one must understand how the District wrongfully relied on the applicability of *Letter to McKethan*, 25 IDELR 295 (December 31, 1996).

First, as a policy letter, *Letter to McKethan* has no binding authority. Interpretive policy pronouncements such as *Letter to McKethan* "do not rise to the level of regulation and do not have the effect of law." Michael C. v. Radnor Township School District, 202 F.3d 642, 649 (3d Cir. 2000), *quoting* Brooks v. Village of Ridgefield Park, 185 F.3d 130, 135 (3d Cir. 1999). They hold deference for a tribunal only to the extent that the policy letter is persuasive and/or helpful. Michael C. at 649.

Here, *Letter to McKethan* is not only unpersuasive but totally inapplicable. In *Letter to McKethan*, the question presented to OCR was: "once a school district has determined that a student is disabled within the meaning of (IDEIA) and has developed an IEP which conforms to the requirements (of IDEIA), can a parent reject IDEIA services and then compel the school district to develop an IEP under Section 504?" *Letter to McKethan* at page 1. The author opined that, if a parent rejects an IEP after an evaluation and IEP process under the provisions of IDEIA, the same parent cannot turn around and request an IEP to be provided under the provisions of Section 504. In short, as so often happens, the processes of IDEIA sweep up the processes of section 504, and in rejecting the former, the parents have, in effect, rejected the latter.

That is not the situation in this case. Here, the District and parents mutually agreed to exit the student from special education. (FF 3, 4, 5, 6, 7). An entire school year passed and, early on in the following school year, both the District and the parents became concerned about the student's school performance. (FF 8, 9, 10, 12). While the District found that the student did not qualify for a Section 504 plan, it put in place services and accommodations to provide the student with FAPE and began to evaluate the student under the provisions of IDEIA (see above). But it makes no sense whatsoever to conclude that *Letter to McKethan* controls this situation— by November 2011, parents had not yet had the opportunity to reject an IEP offered under IDEIA because

there had been no such offer! To adopt the District's reasoning would be to say to parents 'if your child exits special education, be on notice that the door to services and accommodations will slam behind you, and we will provide no services through any IEP under any statutory framework ever again'. Clearly, this is not what *Letter to McKethan* stands for.

In its closing, the District cites to Lamkin v. Lone Jack C-6 School District, F.3d , 58 IDELR 197 (W.D. Mo March 1, 2012) in support of that Court's adoption of the reasoning of *Letter to McKethan*. Where OCR confronted a hypothetical question in *Letter to McKethan*, the Lamkin court found itself with that exact question grounded in facts. In Lamkin, a student with multiple severe disabilities was aging out of the specialized, out-of-district placement where she attended. The school district designed an IEP for implementation at another specialized, age-appropriate, out-of-district placement, and the IEP team met to consider the IEP and placement. Parents disagreed with the proposed change in placement, and a week after the IEP meeting informed the school district superintendent that they were withdrawing their consent for the student to receive any services under IDEIA. In the same communication, the parents requested that the IEP be provided as an accommodation under Section 504. The school district informed parents that it would not implement the IEP as a Section 504 accommodation because parents had rejected services under IDEIA. The Lamkin court upheld the school district's position.

Again, Lamkin, like *Letter to McKethan*, holds that a school district need not offer an IEP as a Section 504 accommodation after parents have rejected an IEP when it was offered under the provisions of IDIEA. It is plain that the factual foundation of the instant case in no way resembles the hypothetical question posed to OCR, or the facts that confronted the Lamkin court.

Accordingly, as a matter of dicta, the District's reliance on *Letter to McKethan* as a basis for its stance on a Section 504 plan for this student is entirely misplaced.

CONCLUSION

The District provided FAPE to the student in the 2011-2012 school year under its Section 504 obligations.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Fox Chapel Area School District provided a free appropriate public education to the student in the 2011-2012 school year under its Section 504 obligations.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

July 31, 2012