

**This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.**

## **Decision**

Due Process Hearing for KF  
Date of Birth: xx/xx/xx  
File Number: 7272/06-07LS

Date of Hearing:  
February 23, 2007

CLOSED HEARING

Parties:

School District of Philadelphia  
440 North Broad Street  
Suite 313  
Philadelphia, PA 19130

Representative:

Pro Se

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Date Transcript Received:  
Date of Decision:  
Hearing Officer:

February 28, 2007  
March 10, 2007  
David F. Bateman, PhD

## **I. BACKGROUND**

Student is a xx-year old resident of the School District of Philadelphia (hereinafter District) eligible for Section 504/Chapter 15 Service Agreement as a handicapped student. He currently attends eighth grade at [redacted] School. The Parent requested the present due process hearing to determine the appropriateness of the Section 504 plans of February 2005, December 2005, and December 2006. She alleges the plans as offered by the District are inappropriate and are denying Student a free appropriate public education. Specifically, she states the service agreements lack specificity and lack standards for measuring progress. Finally, she alleges the service agreements deny Student the private school education that has been recommended by licensed behavioral and mental health professionals.

The District stated the Service Agreements are appropriate and are designed to provide Student with the opportunity to make meaningful educational gain consistent with the requirements of Section 504.

## **II. ISSUE PRESENTED**

The adequacy and appropriateness of the February 2005, December 2005, and December 2006, Section 504 Service Agreements.

## **III. FINDINGS OF FACT<sup>1</sup>**

### **A. Background**

1. Student was born xx/xx/xx. He is currently xx-years of age (HO-2).
2. Student is an eligible for a Section 504 plan as a protected handicapped student with a mental behavioral health disability (NT 10-11).
3. Student is a resident of the School District of Philadelphia (NT 11).
4. A Guardian Ad Litem Order appointing [name redacted] was issued on January 17, 2007 (HO-2). The Order states the Guardian Ad Litem shall be and is hereby permitted to see and consult with the child, and to take all necessary steps appropriate to and consonant with the representation of said child in this matter.
5. A psychoeducational evaluation was completed on July 29, 2004 (P-4) by Dr. B. The report lists a WISC IV full-scale IQ of 98, along with high achievement in reading and listening comprehension (P-4, p. 10). The report

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<sup>1</sup> References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number. References to Parent evidentiary exhibits will be designated "P" followed by the relevant exhibit number. "HO" followed by the relevant exhibit number will designate references to Hearing Officer exhibits.

recommends an instructional milieu that is therapeutic in nature and able to accommodate his high levels of anxiety and difficulties adhering to externally imposed time constraints. It further states Student is a good candidate for alternative therapeutic private schools such as [redacted] or [redacted]. It also recommends he be considered for placement in one of the newly established onsite partial hospital day programs, currently being implemented in the public schools in collaboration with local mental health agencies.

6. [Redacted Psychiatric] Hospital in Philadelphia discharged Student on September 2, 2004 after a stay relating to suicidal ideation (P-5). The discharge summary recommends a referral to short term partial hospitalization program with outpatient individual therapy, family therapy, outpatient psychiatrist and behavioral sessions and referral for long-term partial hospitalization program.
7. The District issued an evaluation report on October 29, 2004 (S-3). Student's current level of functioning was described as very high, such that he was recommended as a potential candidate for participation in the Johns Hopkins University Talent Search Program (S-3, p. 3). The report summarizes Student's problems with mental health issues. The report reviewed his eligibility for the category of emotional disturbance. (S-3, p. 10). The report concluded he was not eligible for special education and related services as a student with an emotional disturbance because he did not require specially designed instruction (S-3, p. 11). The report states he is eligible for a Section 504 plan.

8. An IEP meeting was held on November 23, 2004 to review the evaluation report (S-4; NT 77). The meeting notes state, "Parent refused to participate in the IEP team meeting. The Parent was present but left the meeting during discussion of Student's eligibility for services under IDEA (NT 79). The Parent returned to the meeting when discussion proceeded to eligibility for Chapter 15 services."
9. A Notice of Recommended Educational Placement (NOREP) was issued on November 23, 2004 stating Student is a child with a disability but does not require specially designed instruction/special education (S-4). Parent refused to sign the NOREP and requested a Chapter 15 meeting (S-4, p. 5).
10. On February 5, 2005 the First Judicial District of Pennsylvania Court of Common Pleas-Family Division-Juvenile Branch issued an Order stating Student is to stay with paternal grandmother (S-2).
11. The District held a Section 504 meeting on February 10, 2005 (S-1). 15 individuals, including Student's parents and his grandmother, attended the meeting. The purpose of the meeting was to develop a plan for him to transition from [redacted] Partial Hospitalization Program to the sixth grade at the Elementary School (S-1, p. 2). The plan states Student does not require modification of the curriculum or instruction and that he will participate in the regular sixth grade curriculum.
12. The District completed a Section 504 Service Agreement on February 18, 2005 (P-7). The service agreement lists among other items: Student will participate in the School Based Behavioral Support program; ongoing data

will be collected and analyzed weekly across all settings within the school environment to determine progress on target behaviors; Student will be provided with a homework protocol that will outline daily homework tasks; Student will be provided with a check sheet to remind him of all the things he must pack to prepare for home with an adult reviewing the sheet to assure completion; Student will be given the opportunity to ask questions about any home assignments before leaving for the day; Student will receive curb to curb transportation.

13. A student history profile printed by the District on October 19, 2006 indicates suspensions in April 2005 and May 2006 (P-6).
14. The District completed a Service Agreement on December 16, 2005 (P-8). The service agreement lists among other items: Student will participate in the School Based Behavioral Support program; ongoing data will be collected and analyzed weekly across all settings within the school environment to determine progress on target behaviors; An adult will review his assignment sheet for homework to check for completion and accuracy; Student will be provided with a section on the homework protocol to fill in any long range projects or assignments and a count down process to show how many days he has to complete the project; Student will be given the opportunity to ask questions about any home assignments before leaving for the day; Student will receive curb to curb transportation; Student will be dismissed early once weekly for a standing outpatient therapy appointment; A consultation will be

made available to support Student's teacher and school personnel and family members if requested.

15. Student's grade seven report card indicates an instructional level of 8 for reading, and C's and D's as final grades (P-11).
16. The District completed a Service Agreement on December 15, 2006 (P-9). The service agreement lists among other items: Student will participate in the School Based Behavioral Support program; ongoing data will be collected and analyzed weekly across all settings within the school environment to determine progress on target behaviors; There will be on-going communication between staff and guardian to report progress on target behaviors as long as treatment is medically necessary; Student will copy homework assignments from the board every day and an adult will review for accuracy; Student will be given the opportunity to ask questions about any home assignments before leaving for the day; Student will receive curb to curb transportation; Student will be dismissed early once weekly for a standing outpatient therapy appointment; a consultation will be made available to support Student's teacher and school personnel and family members if requested.
17. Student's mother filed for a due process hearing on January 9, 2007 (P-3). The Parent objects to the Section 504 Service Agreements of February 18, 2005, December 16, 2005, and December 15, 2006. She also seeks to have Student's early acceptance into the [redacted high school].

18. The District completed a Functional Behavioral Assessment (FBA) on January 22, 2007 (P-1). The purpose of the FBA related to Student's problems with aggression. The FBA states that when Student gets angry he will ask for time to "Take 5" and the program will be monitored.
19. Student was suspended for two days in January 2007 for disruption of school, reckless endangerment, assault on school personnel, and threats (P-10).
20. A manifestation determination meeting was held on January 22, 2007 (P-2). The meeting was a result of serious incident report where Student got mad and jerked a teacher's arm. The team determined the behavior was not the result of a failure to implement the service agreement, but it was a manifestation of the student's disability (P-2, p. 5).



#### **IV. DISCUSSION AND CONCLUSION OF THE LAW**

Student is a xx-year old resident of the School District of Philadelphia (District). He is eligible for a Section 504 plan because he is a student with mental behavioral health disability. A Due Process Hearing was requested to determine if the Section 504 Plans of February 2005, December 2005, and December 2006 as offered and provided by the District are appropriate. The Parent alleges as a part of her opening statement the accommodation plans as provided by the District are inappropriate, do not provide him a free appropriate public education, lack specificity or standards and guidelines for measuring his progress, there are no time lines in which the document is to be reviewed, and denies him a private school education.

The United States Supreme Court has altered the burden of proof in cases brought under the IDEA. Even though this is not an IDEA case, the standards and procedures used are similar. In *Schaffer v. Weast*, 126 S. Ct. 528 (2005), the Court held that the party requesting an administrative due process hearing under the IDEA bears the burden of proof (i.e., the burden of persuasion) at the due process hearing. Thus, in this case, as the party requesting the hearing, the Family bears the burden of proof at the hearing.

#### **Student's Educational Placement**

Before there is a discussion regarding Student's educational placement, a review of the necessary components of the law is appropriate. It will start with a discussion of the Section 504 requirements.

To become eligible for services and protection against discrimination on the basis of a disability under Section 504, a student must be determined, as a result of an evaluation, to have a “physical or mental impairment” that “substantially limits one or more major life activities.”<sup>2</sup>

In addition, a student is protected from discrimination on the basis of a disability under Section 504 if a district treats him or her as if they have such an impairment, even if the student no longer has such an impairment or never had one in the first place.<sup>3</sup>

The statute holds that

No otherwise qualified disabled individual in the United States....shall, solely by reason of a disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.<sup>4</sup>

Regulations at 34 C.F.R. § 104.3(j)(i) include a catalogue of human misery, as set out below:

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin and endocrine; or

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<sup>2</sup> 29 U.S.C § 706(8)(B).

<sup>3</sup> 29 U.S.C § 706(8)(B).

<sup>4</sup> Section 504, 29 U.S.C. § 794(a)

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Note that the definition does not define specific diseases; nor is the regulation intended to limit the range of diseases of medical conditions that might come into play

To be eligible for the protections under Section 504, an individual must meet the definition of a person with a disability. This definition is "Any person who:

- i. Has a physical or mental impairment which substantially limits one or more of such person's major life activities,
- ii. Has a record of such an impairment, or
- iii. Is regarded as having such an impairment."<sup>5</sup>

Major life activities include self-care, performing manual tasks, seeing, hearing, speaking, breathing, learning, and walking. Section 504 covers only those persons with a disability who would otherwise be qualified to participate and benefit from the programs or other activities receiving federal financial assistance.

Additionally, individuals who are nondisabled are entitled to protection against disability on the basis of discrimination, in the sense of exclusion from participation in, or denial of the benefits of, district programs. The purpose of including nondisabled students within the reach of the statute is to protect them from being injured by the prejudice of stereotypical attitudes of others.<sup>6</sup>

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<sup>5</sup> Section 504, 29 U.S.C. §706(7)(B)

<sup>6</sup> See *Southeastern Community College v. Davis*, 1979-80 EHLR 551:177 (1979).

Under Section 504, school districts have a child find requirement. School districts are to annually “undertake to identify and locate every qualified handicapped person residing in [the district’s] jurisdiction who is not receiving a public education.”<sup>7</sup>

Section 504 also requires due process hearings to be held to resolve disputes between parents and school districts. 34 C.F.R. § 104.36 compels school districts to establish and implement “an impartial hearing with opportunity for participation by the [student’s] parents or guardians and representation by counsel, and a review procedure.” A school district meets the requirements by complying with the procedural standards of the Individuals with Disabilities Education Act.<sup>8</sup>

Just what actions are required has become a matter of debate within the past few years, as districts claim that the particular modifications and accommodations they propose meet their obligations under Section 504. That obligation is found in 34 C.F.R. § 104.4, which states that, as a general matter, a district must take all reasonable steps to ensure that a student with a disability is provided with an equal opportunity to participate in, and benefit from, an educational program effective as that provided to nondisabled students. This imposition of a limitation of the district’s obligation to reasonable accommodation dovetails with the imposition of the same limitation capping a district’s obligation to alter an existing facility.

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<sup>7</sup> 34 C.F.R. § 104.32

<sup>8</sup> 34 C.F.R. § 300.506

In this case, there is no dispute that Student is eligible as a child with a disability. He has mental behavioral health disability (NT 11). The dispute lies in the appropriateness of the plan as offered by the District.

In this case there was very little testimony or evidence regarding the specific plans that are in question. In fact, it was not until well in the hearing that the plans were even discussed (NT 95). Even then, it was just barely. The Parent made it clear as a part of the pre-hearing discussion she was seeking results from this hearing that could not be provided given the authority of the Hearing Officer. She did not, however, make it clear what her ultimate goal was as a result of the due process hearing process.

The Parent alleges the 504 plans as offered by the District did not provide Student a free appropriate public education. Both the IDEA and Section 504 mandate the provision of a free appropriate public education (FAPE) to covered students with disabilities. The procedural requirements for FAPE are more detailed under the IDEA; the substantive requirements appear to be similar, if not the same, when considered on the basis of serving the needs of an individual student with disabilities.

The IDEA sets forth the positive right to a free public education or FAPE, defined at 20 U.S.C. §1401 as special education and related services that: (1) are provided at public expense and under public supervision; (2) meet the standards of the state educational agency; (3) include an appropriate preschool, elementary, or secondary school education; and (4) are provide in accordance with an IEP.

While the Section 504 statute itself is a general prohibition of discrimination on the basis of disability, the DOE regulations include a FAPE requirement at 34 C.F.R.

§104.33(a): “A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s handicap.”

According to the Office of Special Education Programs, the most significant difference between the FAPE requirements of Section 504 and those of the IDEA is the latter defines FAPE as consisting of special education and related services, implemented on the basis of the IEP document, whereas under Section 504 FAPE may consist of either regular or special education, and related aids and services, as implemented by any appropriate means, including, but not limited to, an IEP.

The obligation for Section 504 is found in 34 C.F.R. § 104.4, which states that, as a general matter, a district must take all reasonable steps to ensure that a student with a disability is provided with an equal opportunity to participate in, and benefit from, an educational program effective as that provided to nondisabled students. This imposition of a limitation of the district’s obligation to reasonable accommodation dovetails with the imposition of the same limitation capping a district’s obligation to alter an existing facility.

Were the Section 504 accommodation programs offered to Student appropriate? In contrast to the IDEA, Section 504 leaves districts to their own devices in determining the range of information that should be contained in accommodation plans. Nevertheless, an accommodation plan should address the student’s disability, necessary accommodations, and placement in the least restrictive environment.

There was statement offered by the Parent that the Section 504 plans were inappropriate. There was no evidence placed in front of the Hearing Officer indicating additional or different supports were needed, or that the current supports were not meeting his needs. Granted, Student has had some problems, including several days of suspension over three years, and an incident in January 2007 where the District completed a manifestation evaluation. However, although a manifestation evaluation was necessary in January 2007, the team completing the evaluation found the behavior to be a manifestation of his disability, but not due to a lack of implementation by the District. There was no disagreement from the Parent on that finding, nor was there any evidence or testimony provided indicating non-implementation of the Section 504 accommodation plan.

Given the paucity of evidence and testimony provided, there is no reason to support a finding the Section 504 plans of February 2004, December 2005, and December 2006 are inappropriate. Even without the testimony or evidence, a review of the Section 504 accommodation plans indicates services provided to facilitate his education in the regular classroom. Section 504 is a nondiscrimination statute. As noted above, there is no requirement for the specificity the Parent alleges is missing. The plans as written clearly provide him supports for his educational needs.

Finally, Section 504 at its heart is a nondiscrimination statute. There was no evidence or testimony presented indicating he has been discriminated against on the basis of a disability.

**V. ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** the Section 504 plans of February 2004, December 2005, and December 2006 provided to Student are appropriate.

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Date

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Hearing Officer