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Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: ET

Date of Birth: XX/XX/XX

Dates of Hearing:
November 17, 2008 & November 20, 2008
February 5, 2009, February 24, 2009 & March 5, 2009

CLOSED HEARING

ODR Case # 8977-07-08-LS

Parties to the Hearing:

Ms.

Mr. Richard Agretto
Bethlehem Area School District
1815 Main Street
Bethlehem, PA 18017

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

Ms. Glenna Hazeltine
King, Spry, et. al.
One West Broad Street
Suite 700
Bethlehem, PA 18018

March 30, 2009

April 14, 2009

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (“student”) is a teen-aged student residing in the Bethlehem Area School District (“District”) who has been identified as a student with a disability under Section 504 of the Rehabilitation Act of 1973 (“Section 504”)¹ and Chapter 15 of the Pennsylvania education regulations (“Chapter 15”)². Student’s parents claim that the District failed to implement Student’s Section 504 plan/Chapter 15 service agreement (“Chapter 15 service agreement”).

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

ISSUES

Did the District appropriately implement the student’s Chapter 15 service agreement over the period September 2007 –February 2008?

FINDINGS OF FACT

1. Student is a student residing in the Bethlehem Area School District.

¹ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the Rehabilitation Act of 1973 at 34 C.F.R. §§104.1-104.61.

² 22 PA Code §15.1-15.11.

2. Student has been diagnosed with central auditory processing disorder (“CAPD”). The student’s CAPD exhibits itself as “underdeveloped auditory processing skills in the areas of speech-in-noise and binaural listening.” The underdevelopment negatively impacts Student’s ability to understand and decode verbal messages unless presented in simple language and in a quiet environment. (Parents’ Exhibit [“P”]-1; Notes of Testimony [“NT”] at 34-35).
3. In September 2006, a Chapter 15 service agreement was developed for Student for Student’s 7th grade year. (School District [“S”]-2).
4. The Chapter 15 service agreement identified five areas of difficulty—note-taking, preferred seating, test-taking, missed assignments, and difficulty with asking questions. (S-2 at page 2).
5. The Chapter 15 service agreement included the following accommodations: for note-taking, use of selective tape recording and teacher prompts for note-taking; for preferred seating, seating away from noise or disruptive students; for test-taking, additional time if necessary; for missed assignments, teacher prompting on the missed work followed by notification of parent; and for difficulty asking questions, extra time to ask questions or to seek clarification. (S-2 at page 2).
6. The Chapter 15 service agreement was implemented by the District in 7th grade without incident or allegation of inappropriateness.

- The 7th grade Chapter 15 service agreement was in effect for the first few weeks of 8th grade. (NT at 25, 391-392).
7. In 8th grade, each student in the District is assigned to a homogenous group of fellow-learners to allow teachers to focus instruction and techniques appropriately. Each group of students works with specific teams of teachers over the course of the school year. Student was among a group of learners performing at or above grade level; instruction for Student and Student's fellow-learners is often accelerated or enriched. Additionally, Student participated quite successfully in middle school theatrical productions. (NT at 191-194, 197, 358-359, 525-529, 535-539, 755, 762).
 8. In September 2007, the Chapter 15 service agreement was due for annual review. On September 17, 2007, at the request of the student's mother, Student's team of 8th grade teachers and Student's guidance counselor met with Student's private counselor who gave the educators insight into the nature of Student's CAPD and its effects on Student. (NT at 45-48, 392-395).
 9. The 8th grade Chapter 15 service agreement remained essentially the same, although one of the accommodations was slightly revised: for missed assignments, Student was to write down all assignments in Student's planner and have Student's teachers initial it, with Student's mother checking the planner each night.

- The 8th grade Chapter 15 service agreement became effective with parental approval on September 27, 2007. (S-7).
10. Three of the members of the 8th grade teaching team testified credibly at the hearing that they felt Student's Chapter 15 service agreement was appropriate and was appropriately implemented in their classes. (NT at 316-320, 355-360, 484-490).
 11. One member of the 8th grade teaching team testified that there was one instance where the Chapter 15 service agreement was not implemented in the teacher's class. Specifically, Student missed the first assignment of the school year, but parents were not notified until two days thereafter. Outside of that one incident, the teacher testified credibly that the Chapter 15 service agreement was appropriate and was appropriately implemented in the teacher's class. (S-2; NT at 685-700).
 12. On October 23, 2007, the parties met during the school day to discuss the Chapter 15 service agreement. At that meeting, it was revealed that Student had used Student's tape recorder in one class without the knowledge of the teacher. (NT at 564-570).
 13. Before employing Student's tape recorder, Student was supposed to indicate that Student was taping by signaling with a raised pencil in the air. None of Student's 8th grade teachers recalls Student employing the signal or tape recording in their class. Student testified that Student employed the signal before taping.

(NT at 313-314, 317, 326-327, 349, 355, 479, 516-517, 686, 689-690, NT-March 5, 2009³ at 80-81).

14. In January 2008, the parents requested revisions to the Chapter 15 service agreement. On February 4, 2008, Student's Chapter 15 service agreement was revised, and Student was reassigned to a new group of 8th grade teachers. (S-16; NT at 755-756).
15. In Student's graded coursework for 8th grade, Student's final grades included one A+, three As, one A-, and one B. (S-19).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of accommodations for students with disabilities who do not require special education is addressed in federal law (Section 504) and Pennsylvania law (Chapter 15).⁴

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".⁵

Likewise, a "protected handicapped student" under Chapter 15 must be of school age, must have a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of

³ The Notes of Testimony over the first four sessions are numbered sequentially from 1-778. The Notes of Testimony for the fifth and final session (March 5, 2009), however, are numbered from 1-104. Therefore, any citation to the Notes of Testimony from the March 5th session will be indicated with the date to avoid confusion with the same pages from the first session of the hearing.

⁴ 34 C.F.R. §§104.1-104.61; 22 PA Code §15.1-15.11.

⁵ 34 C.F.R. §104.3(j)(1).

the student's school program, and must not qualify under 22 PA Code §14.⁶ Furthermore, Chapter 15 requires:

A school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities.⁷

To establish a *prima facie* case of disability discrimination under Section 504, a claimant must prove that (1) claimant is disabled or has a handicap as defined by Section 504; (2) claimant is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) claimant 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 claimant's disability.⁸

⁶ 22 PA Code §15.2.

⁷ Id. at §15.3.

⁸ *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999); *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir. 1995).

In the instant case, there is no dispute that Student qualifies under the provisions of Section 504 and Chapter 15. The dispute between the parties centers on the alleged non-implementation of the Chapter 15 service agreement. As such, it is a claim that, as a result of Student's disability, Student was denied the benefits of an education under the terms of Student's Chapter 15 service agreement.

The weight of the record clearly supports the District's position that it appropriately implemented Student's Chapter 15 service agreement in the first half of Student's 8th grade year. The Chapter 15 service agreement appropriately identifies Student's disability, assesses Student's areas of difficulty, and provides appropriate accommodations. (FF 2, 4, 5, 9). Each of Student's 8th grade teachers testified credibly that the Chapter 15 service agreement was appropriate and was appropriately implemented in their classes. (FF 10).

The one instance where the Chapter 15 service agreement was not implemented was a minor occurrence involving a 2-day delay in notifying parents of a missed assignment. (FF 11). This is a *de minimis* infraction which did not deny Student any materials benefits of Student's education program.

Additionally, the entirety of the testimony regarding Student's use of a tape recorder indicates that any use of the tape recorder was minimal, at best, and, when employed, it was most likely used without the pre-determined signal. (FF 12, 13). Regardless, nowhere in the record

is there an indication that Student was forbidden to employ the tape recorder. As such, the use of the tape recorder is a non-issue in terms of the provision of an education to Student under the terms of Student's Chapter 15 service agreement.

It is the finding of this hearing officer that the District has appropriately implemented Student's Chapter 15 service agreement. Thus, the parents have failed to establish a prima facie Section 504 claim under the *Ridgewood/Matula* rubric.

CONCLUSION

The student qualifies for protection under Section 504 and Chapter 15 due to the impact of the student's disability on learning. The District, however, has met its obligations in the appropriate crafting and implementation of the student's Chapter 15 service agreement for the period September 2007-February 2008. Accordingly, there will be no remedy required of the District.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, it is the finding of this hearing officer that the Bethlehem Area School District appropriately crafted and implemented the Chapter 15 service agreement for Student over the period September 2007-February 2008.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

April 14, 2009