

This is a redacted version of the original hearing officer decision. Information that would breach the student's right to confidentiality has been removed. The redactions do not affect the essential elements of the document.

Pennsylvania
Special Education Hearing Officer

REMAND DECISION

Child's Name: ML

Date of Birth: [redacted]

CURRENT ODR No. 9181/08-09 LS

Parties to the Hearing:

Representative:

Parents

Parent Attorney:

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179 North Broad Street
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School District

Centennial School District
433 Centennial Road
Warminster PA 18974-5448

School District Attorney:

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Remand Decision:

October 4, 2010

Hearing Officer:

Anne L. Carroll, Esq.

PROCEDURAL HISTORY

The first administrative due process hearing in this matter, which resulted in the case currently pending in district court, was held in late 2007, followed by the hearing officer's decision concluding that Student was ineligible for special education under the IDEA statute, but was a protected handicapped student and eligible for services under §504 of the Rehabilitation Act of 1973. (1/11/08 HO Decision, p. 23) This review and reconsideration of the original hearing officer's decision is required by the district court's remand of the January 2008 decision to the administrative hearing level for determination of a legal/factual issue concerning §504 eligibility that was not fully addressed and adjudicated in the original decision.¹

The district court determined that in concluding that Student was a protected handicapped student under §504, the hearing officer did not appropriately consider whether medication Student was taking for ADHD mitigated the effects of that condition to the extent that Student did not qualify for the protections afforded by §504.

¹ At the time the original due process complaint in this case was filed, most IDEA and §504 administrative hearings were conducted by part-time hearing officers under contract with the Office for Dispute Resolution (ODR). In addition, the part-time hearing officers, along with two full-time hearing officers, operated under a "two tier" system whereby, with several exceptions (including §504 cases), an administrative Appeals Panel reviewed hearing officer decisions at the request of either party. Between the time the original complaint in this case was filed and the first remand in 2008, however, Pennsylvania adopted a one-tier system in which there is no longer an administrative appeals panel. In addition, the contract hearing officers were almost entirely replaced with full-time hearing officers. Consequently, neither remand could be returned to the original hearing officer for further consideration, since he had been a part-time, contract hearing officer. Both remands were assigned to the same full-time hearing officer.

It should be noted that since Parents did not challenge the administrative decision concerning Student's IDEA non-eligibility in the district court, the 2008 change from a 2 tier to a 1 tier administrative process by the elimination of the appeals panel had/has no effect on administrative hearing issues remanded for further consideration because review of §504 issues was never within the jurisdiction of the administrative appeals panel. Review of administrative hearing officer decisions concerning §504 issues has always been conducted only in the district court.

By agreement of the parties, that determination was revisited via review of the original record, including selected testimony and exhibits that the parties agreed are relevant, along with additional briefs.

LEGAL ISSUE

As framed by the district court, the question whether Student should have been identified as a protected handicapped student under §504 depends upon whether the medication Student was taking allowed Student to function as well as non-disabled students. If the impairments to Student's attention, focus and learning arising from ADHD were corrected by medication, the disability would not have "substantially limited a major life activity," thereby eliminating §504 eligibility in accordance with the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475, 482, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999)

RELEVANT FACTS/DISCUSSION

Student was first evaluated for IDEA eligibility in February 2006 (9th grade). The District school psychologist found no evidence of a learning disability since Student's academic achievement was above grade level and commensurate with a high average intellectual capacity, and, therefore, concluded that Student was not eligible for IDEA classification and services. (S-2, pp. 7, 11, 13)

Based upon the results of behavior rating scales administered as part of that evaluation, the school psychologist also concluded that attention and concentration difficulties impacted Student's educational performance, particularly in a large classroom setting. (N.T. pp. 125, 126; S-2, pp. 11, 12) Further psychological/psychiatric evaluation for attention deficit and hyperactivity was recommended, along with vocational school, a

behavior plan to assist Student in completing assignments and extra time for tests. (N.T. pp. 127, 129; S-2, pp. 8—12)

Student's ADHD diagnosis was first made after a private clinical psychologist began treating Student in January 2007. (N.T. pp. 37, 39, 501; P-4, p. 3) In a May 2007 letter, the psychologist noted significant improvements in Student's academic performance and self-control after treatment with Adderall, as well as a re-emergence of focus and attention difficulties when Student was not taking the medication. (P-3, pp. 1, 2) Parents testified at the hearing that the problems arising from Student's ADHD had not entirely abated with the medication, which required several adjustments to remain effective. (N.T. pp. 40, 41, 43, 504) Student's dosage was raised from 10 to 20 milligrams within a few weeks due to Student's complaints that it was no longer as effective as when Student first began taking the medication. (N.T. p. 40) Approximately 2 months later, after additional complaints about the diminishing effectiveness of the medication, the dose was increased to 30 mg., but later dropped back to 20 mg. due to side effects from the higher dose. (N.T. pp. 40, 41) Student also reported that after learning that the medication was to be increased to 30 mg. but before the higher dose was available, Student stopped taking the medication regularly, feeling that it was no longer effective. (N.T. pp. 42, 43; S-1, p. 5)

In August 2007, the District conducted a second evaluation for IDEA eligibility and a separate §504 evaluation. (S-1, S-3) The IDEA evaluation report included Student's grades from 9th grade (2005/2006 school year), from the first 2 quarters of 10th grade, prior to the ADHD diagnosis and beginning the medication, and from the third and 4th quarters of 10th grade. The 10th grade 3rd and 4th quarter grades encompassed the

period Student first began taking the medication and when Student began to miss doses. (S-1, pp. 6, 7) The reports show that Student's grades in the 3rd and 4th quarters of 9th grade were lower than in the first two quarters of that year, and fairly consistent with the first 2 quarters of 10th grade. There was a significant increase in Student's grades during the 3rd quarter of 10th grade, followed by a general falling back in the 4th quarter to grades that were similar to the first 2 quarters of 10th grade. With one exception, Student's final grades in 10th grade, 2 Ds, an F and a C, are lower than the 9th grade final grades for comparable subjects.

Student's 10th grade English and biology teachers provided input for the IDEA evaluation report and testified at the hearing. (N.T. pp. 425—479; S-1, p. 7) Both noted improvement in Student's attention and focus at the end of the 2nd quarter and beginning of the 3rd and another drop in performance as the third quarter ended and the 4th quarter began. (N.T. pp. 431—433, 458, 461, 463, 476, 477; S-1, p. 7) Student's biology teacher also noted, however, that the decline in Student's performance toward the end of the 3rd quarter was not a "complete regression" to the behaviors that Student had demonstrated in the beginning of the year. (N.T. pp. 437, 438, l. 1, 2; S-1, p. 7) Throughout 10th grade, the teachers continued to use strategies for maintaining Student's attention and focus, such as initialing an assignment book to assure that Student knew what Student needed to do for homework, preferential seating/grouping for reducing distractibility and for easily providing re-direction to task. (N.T. pp. 438, 464, 466, 468, 473; S-1, p. 7) Student continued to need such strategies throughout the year, but at reduced levels during most of the 3rd quarter, when the medication was most effective. (*Id.*)

The §504 evaluation report, also completed in August 2007, included the teachers' comments in the IDEA evaluation report concerning the improvement in Student's performance toward the middle of the 10th grade school year, after medication began, but did not include the additional comments that Student's performance declined again toward the end of the third quarter and during the 4th quarter. (S-3, p.2) Although the §504 evaluation report refers to the differences in Student's school performance when "medicated" and when "unmedicated" it fails to note that Student reverted to the "unmedicated" type of performance after initial improvement in attention, focus and completing assignments and projects.

The teachers' observations are reflected in Student's 4th quarter grades and are consistent with the testimony of Student's Parents concerning Student's report that the medication began to lose its effectiveness after several weeks, requiring a dosage increase, and that Student stopped taking the medication while awaiting another increase in dosage, based upon Student's perception of the diminished effectiveness of the medication. Although the medication may have ultimately been entirely effective in mitigating the negative impact of Student's ADHD on Student's school performance once the dosage was properly adjusted, and Student took it consistently, neither of those conditions existed throughout the second half of the 2006/2007 school year. At most, the evidence discloses that the ADHD medication showed considerable promise in controlling the effects of Student's disability, but Student's school performance remained low for a student with high average intellectual capacity, and Student continued to need the support of classroom accommodations as Student's symptoms waned and then increased again after a few weeks. Between January and May 2007, the ADHD

medication did not fully and consistently permit Student to function as adequately in school as a student with Student's intellectual capacity and no disability.

Finally, in assessing whether the ADHD medication so significantly improved Student's ability to engage in major life activities, particularly learning and other aspects of Student's school performance, that Student was ineligible for §504 protections, it must be noted that the question of Student's status as a protected handicapped student involves two distinct time periods, from the end of February 2006 until Student began taking Adderall in approximately the middle of January 2007, and from January 2007 forward.

The hearing officer who issued the original decision concluded that the District should have determined that Student was protected under §504 after completing its first evaluation for IDEA eligibility, since the report noted that Student exhibited difficulties with concentration and focus, and the evaluator proposed accommodations such as a behavior plan to increase assignment completion. (January 2008 HO Decision, p. 4, FF 6; pp. 18, 19, 20) At that point, Student did not yet have a clinical diagnosis of ADHD, and, therefore, was not on medication. The remand order was specifically directed toward examining the evidence to determine whether the medication eliminated the effects of Student's ADHD on major life activities, and, therefore, rendered Student ineligible under §504. Since Student was not on medication until January 2007, there appear to be no question of mitigation during the months between the District's first evaluation during the 2005/2006 school year and the time Student began taking Adderall. The evidence relating to the second half of the 2005/2006 school year was not, therefore, considered in the review of the record undertaken pursuant to the remand order.

SUMMARY/CONCLUSION

In accordance with the district court's remand order, the due process hearing record was re-examined to determine whether Student's ADHD medication so diminished the effect of Student's disability during the second half of the 2006/2007 school year that ADHD did not significantly affect major life activities, thereby rendering Student ineligible for the protections afforded to handicapped students under §504 of the Rehabilitation Act of 1973. According to the original hearing officer decision, Centennial School District should have identified Student as a protected handicapped student after issuing an evaluation report on February 28, 2006. At that time, Student had not yet received a clinical diagnosis of ADHD and was not on medication for ADHD during the remainder of the 2005/2006 school year (March—June 2006) and during the first part of the 2006/2007 school year (September 2006—app. mid-January 2007). Mitigation, therefore, was not a factor that affected Student's §504 eligibility during that period.

After beginning ADHD medication in January 2007, Student showed significant initial improvement in Student's ADHD symptoms. Nevertheless, Student continued to need classroom accommodations of the kind typically provided to students with ADHD to overcome the effects of that disability, and Student's school performance fluctuated after a few weeks due to diminishing effectiveness of the medication, resulting in a higher dosage, and Student's inconsistent use of the medication during the 4th quarter of the school year. Consequently, during the latter half of the 2006/2007 school year, the ADHD medication that Student was prescribed did not so significantly and consistently mitigate the symptoms of ADHD and its effect on Student's school performance as to

render Student ineligible for protection under §504 during the second half of the 2006/2007 school year. The evidence establishes that ADHD continued to adversely affect major life activities for Student, particularly learning, despite the initially positive effect of the medication.

Anne L. Carroll

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HEARING OFFICER

October 4, 2010