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Pennsylvania

Special Education Hearing Officer

REMAND DECISION

ODR No. 9181/08-09 LS

Child's Name: M.L.

Date of Birth: [redacted]

Dates of Hearing: 12/10/2007; 12/12/2007;
12/14/2007; 12/20/2007

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

School District
Centennial
433 Centennial Road
Warminster PA 18974-5448

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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October 21, 2011

November 5, 2011

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

This case was returned from federal district court for an additional administrative decision after the presiding judge affirmed the original hearing officer's January 2008 decision that the School District violated §504 of the Rehabilitation Act of 1973 when it concluded in February 2006 that Student was not a protected handicapped student.

Centennial School District v. P[redacted] L. and L[redacted] L. ex rel. M[redacted] L., 2011 WL 3235726 (E.D. Pa. 2011) at *8. The district judge also determined, however, that the hearing officer erred by concluding, as a matter of law, that Student was not entitled to compensatory education as a remedy for the District's failure to correctly identify Student as protected under §504.

Consequently, the case was remanded to determine whether the District denied Student a free, appropriate public education (FAPE) from February 2006 until January 2007, when Student began taking medication for ADHD. Because the district judge further concluded that the medication mitigated the effects of the disability, Student's protected handicapped status was terminated in January 2007, obviating the need to assess the District's services from that time until Student left the District.

Based upon review of the testimony and documentary evidence that comprises the record of the original due process hearing and the findings of fact and discussion below, the District failed to provide Student with sufficient and effective accommodations during the relevant period to assure that Student derived meaningful benefit from the regular education program provided during the second half of the 2005/2006 school year

and the first half of the 2006/2007 school year. Consequently, Student is entitled to an award of full days of compensatory education for that period.

ISSUES

1. What, if any, accommodations did the School District provide to Student between February 2006 and January 2007 to address the effects of Student's ADHD on school functioning and performance?
2. Did the School District's failure to provide Student with a Service Agreement violate §504 of the Rehabilitation Act of 1973 by denying Student FAPE, or did the School District effectively address Student's needs arising from ADHD without a formal plan?
3. If the District denied FAPE, is Student entitled to compensatory education at the rate of 6 hours/day for the second half of 9th grade and the first half of 10th grade?

FINDINGS OF FACT

1. During the 2006/2007 school year, Student was enrolled in 9th grade. (S-2, p. 1)¹
2. During the 2nd quarter of 9th grade, a multi-disciplinary evaluation was undertaken at Parents' request to determine whether Student had a learning disability. Based upon the evaluation report completed in February 2006, the District concluded that Student did not have a learning disability and was not otherwise IDEA eligible in accordance the IDEA statute and regulations. (20 U.S.C. §1401, et seq.; 34 C.F.R. §300.8). (N.T. pp. 339—341, 360, 485—488; S-2, pp. 11, 13)
3. Although not discussed in the evaluation report, the school psychologist also concluded that Student was not eligible for services under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794(a), 34 C.F.R. §§104.32—104.35, 22 Pa. Code §15.2). (N.T. pp. 360, 364, 384—387)
4. Standardized tests of cognitive ability and academic achievement placed Student in the high average range of intellectual functioning and significantly above grade level when compared to a national sample of age and grade level peers. (N.T. pp. 340, 342, 349; S-2, pp. 6—8, 11)
5. Based upon input from classroom teachers regarding Student's performance, the results of the BASC-2 (Behavior Assessment System for Children-Second Edition), completed by Student and Parents, and Connors Rating Scales completed by Student, Parents and teachers, as well as her own classroom and testing observations, the school psychologist who conducted the 2006 evaluation concluded that Student exhibited symptoms of ADHD that should be further investigated. (N.T. pp. 358, 387—389, 393, 395—398; S-2, pp. 3, 4, 8—11)

¹ All citations to exhibits (designated as "P-" for Parent exhibits and "S-" for School District exhibits) and testimony (designated as "N.T.") are references to the evidentiary record compiled during the original due process hearing in this matter, conducted in four sessions in December 2007.

6. The school psychologist concluded that Student's school performance and achievement was adversely affected by attention difficulties, noting that Student could focus and concentrate in a 1:1 setting, but was easily distracted and lost focus and concentration in a large classroom setting. (N.T. pp. 358, 399; S-2, pp. 11, 12)
7. In the evaluation report, the school psychologist recommended several accommodations to address Student's school performance, including: a) a behavior plan to assist Student in timely completing class work and homework, with goals for classroom behavior and modifications to the behavior plan as needed; b) a weekly progress sheet as a motivational strategy and to help monitor assignment completion; c) extra time for written tests; d) a mentor at school to meet with Student regularly to sustain motivation. (N.T. p. 360; S-2, p.12)
8. A component of the behavior plan envisioned by the school psychologist was Student verbally negotiating a reward for turning in completed assignments. The school psychologist did not know whether a behavior plan was ever developed, or whether any of the other recommended accommodations were provided to Student. She believed that during 9th grade, Student was provided with extra time for tests, particularly in light of the amount of time Student had missed earlier in the school year due to physical injuries sustained in an accident. She was also aware that Student had a good rapport with the Spanish teacher and went to her for additional help. (N.T. pp. 361, 362, 409)
9. Parents agreed with the accommodation recommendations in the evaluation report, but received no indication that any were ever implemented, other than an assignment book that Parents had been using for several years. (N.T. pp. 24, 25, 29, 32—34, 97, 98)
10. During the second semester of 9th grade, Student received the following grades: World History, "C" (3rd & 4th quarters)—final grade—"C"; Literature & Writing, "D" (3rd) and "C" (4th)—final grade—"C"; Spanish "D" (3rd) and "F"(4th)—final grade—"F"; Geometry, "D" (3rd) and "B" (4th)—final grade—"C." (N.T. pp. ; S-1, p. 6)
11. For 10th grade, Student was assigned to "A" track classes for biology and English. In general, material was taught at a faster pace and was more difficult in the "A" track than the "B" track English class. For biology, however, there was no "B" track, only "A" track and Honors classes. (N.T. pp. 449, 450, 457)
12. During 10th grade (2006/2007 school year), Student's biology class was an inclusion class co-taught with a special education teacher. The teacher reported that during the first semester, Student performed poorly due primarily to failure to

- submit assignments. Student's received a "D" for the 1st and 2nd quarters and on the mid-term exam. (N.T. pp. 427, 428, 430, 449; P-2, p. 2, S-1, p. 7)
13. Student's English class changed between the 1st and 2nd quarters of 10th grade due to a change in Student's vocational-technical school schedule. Student was not assigned to a co-taught, inclusion English class. Student's grades for the 1st and 2nd quarters were "D" and "F" respectively. (N.T. pp. 458, 460 ; S-1, p. 7)
 14. Student received a "D" (1st quarter) and an "F" (2nd quarter) in Algebra 2, and a "D" (1st) and "C" (2nd) in a vocational school English and Rel. Tech. class. (S-1, p. 7)
 15. Both the biology and English teachers reported that during the first semester of 10th grade, Student was easily distracted, often off task, needed frequent re-direction/reminders and often failed to complete assignments. (N.T. pp. 430, 432, 450, 461; S-1, p. 7)
 16. Neither the biology nor the English teacher were aware that Student had been evaluated, did not receive a copy of the recommendations listed in the 2006 evaluation report, and did not discuss Student's needs and performance with other District staff, such as the school psychologist or guidance counselor. (N.T. pp. 433, 443, 444, 460, 463, 473)
 17. Parents discussed Student's difficulties with the regular education biology teacher and the English teacher and sought feedback from the biology teacher concerning Student's behavior and performance in order to hold Student accountable at home and at school. (N.T. pp. 438, 442, 444, 463, 464; S-1, p. 7)
 18. At some point in the fall of 10th grade, at Parents initiative, Student began keeping an assignment book for all classes, and asked the teacher to initial it at the end of each class period. Both the biology and English teachers signed the assignment book when Student requested it. (N.T. pp. 438, 464, 465; S-1, p. 7;)
 19. The biology teacher implemented "preferential grouping" by choosing the peers Student worked with on class projects in order to minimize interactions with peers likely to increase Student's distraction. Instead of an extrinsic reward system, the teacher used a personal relationship with Student, conversation/reflective dialogue to encourage Student to take satisfaction from achievement. Those strategies were generally used in the classroom with all students. (N.T. pp. 439, 440, 451)
 20. In accordance with his usual classroom management and teaching practices, the biology teacher provided accommodations for all students in the class, including a predictable structure/routine, distributing daily lesson goals, posting assignments on individual hand-outs and the school website, presenting concepts through different modalities and a wrap-up routine at the end of the class period. For

Student, specifically, the teacher cooperated with Parent's efforts to check that assignments were being completed. (N.T. pp. 446—449)

21. As part of standard teaching practices, Student's English teacher for the 2nd—4th quarters implemented preferential seating for Student in her class during the 2nd quarter. Both the English and biology teachers individualized instruction and followed up with questions to check understanding of the material taught. These strategies were used generally with all students in all classes they taught. (N.T. pp. 440, 448, 466, 468, 472, 475, 476; S-1, p. 7)
22. In both the biology and English classes, all students were provided as much time as needed to complete tests. The biology teacher did not feel that Student's classroom behavior required a behavior plan. (N.T. pp. 445, 446, 474)
23. The District provided a §504 plan to students who could not be academically successful with regular classroom accommodations only. A §504 Plan would be written in order to document the student's disability, assure the legal protections of the statute to protected students, and assure that accommodations specified in the plan were provided. Additional provisions to a §504 Plan, beyond regular education accommodations, might include more frequent progress reports to parents. (N.T. pp. 402, 406, 410, 411)

DISCUSSION AND CONCLUSIONS OF LAW

1. Parameters of the Decision and the Record

In accordance with the district court's remand order, the fundamental question that must be answered via this decision is whether the District's failure to properly identify Student as a protected handicapped student under §504 in February 2006, and the consequent failure to develop a §504 Service Agreement in accordance with 22 Pa. Code §§15.2, 15.7, resulted in substantive harm to Student.² *Centennial School District v. P[redacted] L. and L[redacted] L. ex rel. M[redacted] L.*, 2011 WL 3235726 (E.D. Pa. 2011) at *13. The district court defined such harm as a denial of FAPE, *i.e.*, the failure to

² Although the §504 education regulations found at 34 C.F.R. §§104.33—35 provide generally that a qualified handicapped student must be provided with appropriate regular and special education and related services "designed to meet individual educational needs as adequately as the needs of non-handicapped persons are met" (§104.33(b)(1)), the federal regulations do not specify that a written plan must be developed, other than providing that an IEP that meets IDEA standards would likewise meet §504 standards. (§104.33(b)(2)). The Pennsylvania regulations that implement §504 in the context of education, found at 22 Pa. Code Chapter 15, provide the alternative of a less formal Service Agreement.

assure that Student received an educational program that provided significant learning and meaningful benefit. 2011 WL 3235726 2011 at *13.

The parties agreed that the record of the original hearing before Hearing Officer Bateman in December 2007 provided sufficient information to comply with the remand order, and a review of the testimony and documents admitted into that record confirms that an additional hearing session would not have yielded additional relevant evidence of Student's school performance and accommodations provided during the period covered by the remand order. The 10th grade teachers who testified were consistent in their description of Student's major problems in their classes, *i.e.*, distractibility, lack of focus, and primarily, failure to complete assignments. (FF 12, 15) Student's 9th grade teachers had provided similar information for the February 2006 evaluation report. (S-2, pp. 3, 4)

The teachers who testified at the December 2007 hearing were also consistent in describing the accommodations that they provided to Student. (FF 19, 20, 21, 22) They also agreed that they were not informed of Student's evaluation or of the accommodation recommendations in the evaluation report, and did not speak to any other staff members concerning Student's difficulties. (FF 16) Given the consistency of the teachers' testimony, it is highly unlikely that having other teachers testify at a hearing session would have provided different or additional testimony on those matters. Moreover, although they testified less than a year after Student was in their classes, neither of the teachers had been able to recall many details in their testimony concerning Student's needs and functioning in their 10th grade classes beyond their general recollections of Student's lack of focus and failure to complete assignments. (*See*, N.T. pp. 431, 436, 460, 463, 467) It is reasonable to conclude that if other teachers from either 9th or 10th

grades had testified at a hearing in 2011, they would have been able to recall anything more or different in terms of providing accommodations to Student five years after they taught Student. It is also reasonable to infer that Student's overall school performance and the District's response to Student's educational needs via any of the staff who taught Student in the 2005/2006 and 2006/2007 school years was fairly and comprehensively described by the two teachers who testified at the original hearing.

In addition, both Parents and the school psychologist who conducted the 2006 District evaluation testified extensively at the original hearing concerning the original evaluation and their understanding of what occurred with respect to the accommodation recommendations in the report, and could not have added any new facts to the record.

2. Accommodations and Effect on Student's Academic Performance

The record leaves no doubt that the only accommodations provided to Student during the period at issue were those generally available to all non-handicapped students. (FF 19, 20, 21, 22) In the evaluation report, the school psychologist made recommendations for accommodations such as a behavior plan, a weekly progress sheet and a mentor, which were not generally provided to regular education students and might have more effectively addressed Student's specific and individual needs. (FF 7, 8) The record establishes, however, neither the evaluation, the suspicion of ADHD, nor the recommendations were disclosed to Student's teachers, making it impossible for them to implement recommendations that exceeded accommodations and strategies offered to all students. (FF 16) The only recommendation in the evaluation report that was explicitly implemented was allowing additional time for tests, because that was an accommodation provided to everyone. (FF 22) The teachers identified only one individualized

accommodation provided to Student that was not generally available to all students, *i.e.*, signing the assignment book when presented to them by Student. (FF 18, 20) That strategy, however, was initiated by Parents and managed exclusively by Student and Parents. (FF 18) Moreover, since the teachers also testified that failure to complete assignments was the primary impediment to Student's success in school, it was obviously not effective as the only individualized accommodation provided to Student. (FF 12, 15)

Finally, there is also no doubt that with grades far below what could reasonably be expected based upon Student's high average cognitive potential and performance on standardized achievement tests (FF 4), Student was very unsuccessful overall and, therefore, did not derive meaningful benefit from the educational program provided from the second half of 9th grade through the middle of 10th grade. Student's overall average in academic courses was 69.75—"D" for the 2nd half of 9th grade and 63.87—"F" for the first half of 10th grade.³ Although Student's basic academic skills were above grade level, as measured by standardized tests of achievement comparing Student to a national sample of same age peers, (FF 4, S-2, p. 7), Student was clearly unable to apply those skills effectively to learn the content presented in high school academic classes, or at least was unable to demonstrate significant learning of course material. The regular education accommodations provided by the District did not provide sufficient help to Student to overcome the effects of ADHD on academic performance.

³ The averages were derived from the numerical grades reported in S-1, pp. 6 & 7. The final grades from the 3rd and 4th quarters of 9th grade were added and divided by 4, the number of classes for which grades were reported for those quarters. For 10th grade, the numerical grades for each class for the first 2 quarters were added and divided by 8, the number of grades reported for the 1st two quarters.

The numerical averages were then compared to the District's description of letter grade equivalents to the numerical scores on the District's grade reports, P-2, to express the averages as letter grades for each of the semesters for which progress is to be assessed.

The District suggested that Student's admission to substance abuse had at least as much to do with Student's poor school performance as the unrecognized effects of the unidentified ADHD disability. (District Memorandum of Law at pp. 5, 9) There is, however, no indication in the testimony of the teachers or of the school psychologist that Student exhibited symptoms such as sleeping in class or erratic behavior that often indicate the effects of substance abuse.

3. Substantive Effect of the Absence of a §504 Service Agreement

Since the District did not appropriately conclude that Student was a protected handicapped student in February 2006, it did not develop a Service Agreement. An additional issue to be determined in accordance with the district court's remand order is whether the absence of a formal agreement was merely a procedural violation or had a substantively negative effect on Student's ability to derive meaningful benefit from the educational program. In addition to the discussion above outlining the ineffectiveness of the classroom accommodations actually provided to Student, the lack of a formal Service Agreement prevented Student from receiving the supports and accommodations that would have been provided had Student's handicap been appropriately identified.

The District's school psychologist acknowledged several purposes and benefits of a formal service agreement, including recognition and documentation of handicap-related needs, provision of additional services to Students who cannot succeed with regular education accommodations and supports only and accountability for assuring that necessary accommodations are provided. (FF 23) It is quite clear from the record in this case that Student received none of those benefits.

Although Student's teachers, at least those who testified at the hearing, obviously recognized Student's difficulties and offered their standard accommodations, it is also obvious from review of their testimony that they did not believe they bore any greater responsibility to support Student with additional accommodations or to discuss Student's difficulties with other staff, such as a guidance counselor or the school psychologist, and seek additional help because Student was not identified as a handicapped Student. *See, e.g.,* N.T. pp. 443, 444. None of the information in the February 2006 evaluation report was provided to the teachers, as would have occurred had a written Service Agreement been developed.

The District recognized that an additional accommodation that might have been provided via a Service Agreement was more frequent progress reports to Parents, (FF 23), and argued that the accommodation was, in fact, provided to Student, although there was no Service Agreement. (District Memorandum at 12) What the District characterized as "weekly progress reports..to parents," however, was actually described by the biology teacher as "weekly checks," referring to the assignment book. (N.T. p. 448) It was unclear whether the teacher checked Student's progress toward completing work listed in the assignment book on a weekly basis or whether the teacher initiated weekly checks of the assignment book when Student failed to request a daily signature. There was, however, nothing in the teacher's testimony indicating that the "weekly checks" had anything to do with progress reports to Parents.

In general, the District's attempts to characterize the minimal and generalized regular education supports that were made available to Student as a systematic and

individualized plan constitutes a tacit recognition that Student actually needed a formal Service Agreement.

Finally, the District's argument that Student's lack of interest and motivation was the true cause of the difficulties Student experienced rather than the effect of ADHD symptoms is unavailing. At best, the argument presents, in colloquial terms, a "chicken or egg" situation—did Student fail to make significant progress because of a lack of interest in school or did Student lose interest in school because it was so difficult to maintain focus and stay on task. The record strongly supports the latter, since Student's completion of work and engagement in school increased significantly, if briefly, after beginning medication to mitigate the ADHD symptoms. (S-1, p. 7; July 2011 district court decision, 2011 WL 3235726 2011 at *10)

4. Compensatory Education

An IDEA eligible student who has not received meaningful educational benefit is entitled to correction of that situation through an award of compensatory education, an equitable "remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009) (internal quotation marks and citation omitted).

Compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3rd Cir. 2010), citing *Reid v. District of Columbia*, 401 F3d 516, 518 (D.C. Cir. 2005). When a compensatory education award is warranted, it is awarded for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *Mary*

Courtney T. v. School District of Philadelphia at 249; *M.C. v. Central Regional School District*, 81 F.3d at 395; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3d Cir.1995).

Since the FAPE requirements of §504 are similar, if not identical, to IDEA FAPE requirements, there is no reason to believe that a denial of FAPE under §504 cannot be remedied with an award of compensatory education to the same extent as an IDEA violation, and the District made no global legal argument to the contrary. Rather, the District's arguments in support of its contention that no compensatory should be awarded in this case are based upon factual/legal issues specific to this case.

The District's first, somewhat circular argument, is that Student made meaningful progress even if FAPE was denied. Denial of FAPE, however, generally implies that the Student did not receive a meaningful educational benefit, and that is certainly the case here. It is true, as the District argues, that if there is appropriate progress despite a denial of services that should have been provided, a compensatory education award may not be warranted. Here, however, as discussed above, Student's progress was *de minimis*, particularly in light of Student's ability.

Similarly, a minimal or narrow compensatory education award may be warranted, as the District argues in this case, where the deprivation of services did not pervade a student's entire school day, such as, *e.g.*, when the record supports a need for a specific number of hours of reading or math instruction or related services each week. Here, however, Student's entire school day was affected throughout the relevant period. Consequently, an award of full days, or hour for hour, compensatory education is warranted.

In accordance with the district court's July 2011 decision, the period for which compensatory education could be awarded in this case is broadly described as the period between the District's February 2006 evaluation report and January 2007, when Student began taking medication for ADHD. More specifically, however, compensatory education is available only for the time Student was actually attending school during that period. Consequently, days that school was not in session or that Student was absent should be excluded from the compensatory education award. In addition, the District should be given the same amount of time to develop and implement a §504 Service Agreement that it would have to implement an IEP after an initial evaluation report is completed. Consequently, the compensatory education period should begin on March 10, 2006 and continue for every day that school was in session and Student was present until the last day of the 2005/2006 school year. For the 2006/2007 school year, the compensatory education period should begin with the first day of the school year and continue for every day that school was in session and Student was present until the date Student began taking medication for ADHD.

The final issues to be determined are the monetary value of the compensatory education award and how the family can use the award, given that Student is no longer of school age. The cost of the award to the District can be measured by the cost to the District to educate Student every day for which compensatory education is due. Parents request that they be permitted to use the award to reimburse the costs of the private school Student attended after leaving the District. There appears to be no reason that compensatory education could not be used for that purpose unless Student has a current need for services to address continuing ADHD symptoms and complete transition to adult

life. At this point, however, the family is in the best position, indeed, the only position to determine whether current services are needed or reimbursement for past secondary education services provided by Parents is an appropriate use of the compensatory education award, since Student is now a young adult who may have no current need for services to address the effects of ADHD.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

November 5, 2011