

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: KS

Date of Birth:

Dates of Hearing: None

CLOSED HEARING

ODR No. 9693/08-09 AS

Parties to the Hearing:

Parents:

School District of Philadelphia
440 North Broad Street, Third Floor
Philadelphia, PA 19130-4015

Parent Attorney:

Marc B. Auerbach, Esq.
Law Offices of Marc B. Auerbach, LLC
625 Fitzwater Street
Philadelphia, PA 19147

School District Attorney:

Kenneth Cooper, Esq.
Office of General Counsel
School District of Philadelphia
440 North Broad Street, Third Floor
Philadelphia, PA 19130-4015

School District:

Office of General Counsel

Date Record Closed: March 20, 2009

Date of Decision: March 23, 2009

Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

KS¹ (“Student”), an elementary school student of the Philadelphia City School District (“School District”), contends that the School District denied a free appropriate public education (“FAPE”) to Student by failing to evaluate and program appropriately for Student’s disabilities. The parties have resolved their dispute by agreeing to submit this matter for my decision on the basis of stipulated facts in lieu of due process hearing. Accordingly, I have accepted the parties’ stipulations and, based upon the record created by stipulation, I find that the School District has violated Student’s Section 504 rights.

ISSUES

- Has the School District violated Student’s Section 504 right to FAPE?
- Is Student entitled to compensatory education?

FINDINGS OF FACT

1. Student is [an elementary school aged] child enrolled in the School District and currently attending the School (hereinafter “E School”). Student is in fifth grade and is raised by Student’s mother (“Parent”). (JE1)²
2. Until October 29, 2008, Student regularly attended Student’s neighborhood school, School (“Z School”). (JE1)
3. Student is a disabled child. In 2006, Student was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and Oppositional Defiant Disorder (“ODD”), for which Student has received treatment since the diagnosis. The School District

¹ All future references to [Student] will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

² References to “JE1” are to the parties’ Joint Exhibit Number 1.

- has been aware of Student's diagnosis of ADHD/ODD since approximately June of 2006. (JE1)
4. Student has a history of ADHD/ODD behaviors. They include, but are not limited to difficulty focusing, a lack of attentiveness, a lack of impulse control, failure to follow the directions of teachers, distractibility, disruptive classroom behaviors and fighting. The most recent incident occurred in October 2008, which led to the suspension and ultimate transfer of Student from Z School. (JE1)
 5. On October 16, 2008, while attending the Z School, Student is alleged to have been involved in a fight with another child. As a result, Student received a five (5) day out-of-school suspension from 10/20/08 through 10/24/08. (JE1)
 6. On October 29, 2008, the School District advised Parent that Student was subject to a disciplinary transfer and assigned Student to an Alternative School, the ("C School"). However, the School District also advised Parent that the School District did not have transportation available to take Student to and from C School, which is over four (4) miles from Student's home. Parents' economic circumstances and lack of resources prevented her from transporting Student, and herself as escort, to and from school on public transportation. Consequently, Student was absent from school numerous days over a two week period, from 10/29/08 - 11/13/08, due to a lack of transportation to C School. (JE1)
 7. A Disciplinary Hearing was held on November 13, 2008 in order to determine whether the transfer to C School was appropriate. The Disciplinary Hearing Officer held that it was not appropriate to transfer Student to C School, but would not assign Student back to Z School due to the School District's objection. (JE1)

8. Between the Disciplinary Hearing on 11/13/08 and 12/10/08, the School District would not permit Student to attend Z School, but did not provide an alternative school assignment to Student. Consequently, Student did not attend school during that period. (JE1)
9. Between December 11, 2008 and January 5, 2009, Student was permitted by the School District to return to Z School on a temporary basis, until it reassigned Student to another school. (JE1)
10. On January 5, 2009, the School District advised Parent that Student was re-assigned to E School starting on January 6, 2009, but that no transportation was available for Student. The School District further advised Parent to place Student on public transportation, specifically a SEPTA bus, to get to and from E School. Parent advised the School District that she could not permit Student to travel unescorted on a SEPTA bus, especially given Student's ADHD. Parent also advised the School District that she could not afford to escort Student every day to and from E School. (JE1)
11. Between January 5, 2009 and February 6, 2009, Student missed school on numerous days due to Parent's inability to assume the expense of transporting Student via public transportation. (JE1)
12. Given Student's above-noted disability, Student requires a revised Section 504 plan that includes a behavioral support plan. (JE1)
13. The parties agree that the School District will transfer Student back to Student's neighborhood school, Z School. (JE1)

14. The parties agree that the School District will provide 200 hours of compensatory education to Student. (JE1)
15. The parties agree that School District will perform an adequate Functional Behavior Assessment and implement an adequate Behavior Support Plan in consultation with the Interagency Team, including Foundations Behavioral Health. The Behavior Plan will address Student's inattentiveness, poor focus, distractibility, unwillingness to cooperate with teachers, disruptive classroom behavior, conflicts with peers and implementing controls for unstructured transition periods during school. (JE1)
16. The parties agree that the School District will formulate and provide a revised Section 504 Support Plan. (JE1)
17. The parties agree that the School District has agreed and will pay reasonable attorneys fees and costs. (JE1)
18. On February 5, 2009 Student's parent filed the due process hearing request that results in this decision. Joint Stipulations of Fact were submitted in lieu of due process hearing, and the record was closed with that submission on March 20, 2009. Joint Exhibit 1 is admitted into the record. (JE1)

DISCUSSION AND CONCLUSIONS OF LAW

A party establishes a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. §794, where (1) he is 'disabled' as defined by the Act; (2) he is 'otherwise qualified' to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. Andrew M v. Delaware

County, 490 F.3d 397 (3rd Cir. 2007); Ridgewood Board of Education v N.E., 172 F.3d 238 (3rd Cir. 1999) When an education agency fails to provide a disabled child with a free and appropriate education, it violates Section 504 because it is denying a disabled child a guaranteed education merely because of the child's disability. It is the denial of an education that is guaranteed to all children that forms the basis of the claim. Andrew M v. Delaware County, 490 F.3d 397 (3rd Cir. 2007)

A recipient of federal funds that operates a public elementary or secondary education program or activity must establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of the Individuals with Disabilities Education Act is one means of meeting this requirement. 34 C.F.R. §104.35

Where a School District persists too long in providing/revising Section 504 plans for a student and, at a certain point, knew or should have known that the student's Section 504 plans were not appropriate programming and that the student required an individualized education program, the School District has been found to have violated its IDEA child find requirements. EH v Unionville-Chadds Ford School District, Special Education Opinion No. 1838 (2007)

Burden of Proof

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Education, 435 F.3d 384 (3d Cir. 2006) If the evidence is not in equipoise, but rather one party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence. In this case, Student bears the burden of persuasion because Student contends that the School District denied FAPE to Student by failing to evaluate and program appropriately for Student's disabilities.

The School District violated Student's Section 504 right to FAPE

Student has a history of ADHD/ODD behaviors including, but not limited to, a lack of impulse control, failure to follow the directions of teachers, disruptive classroom behaviors and fighting. (JE1) The School District has been aware of Student's diagnosis of ADHD/ODD since approximately June of 2006. (JE1) As the result of a fight with another child in October 2008, Student received a suspension and transfer from Student's neighborhood Z School. (JE1) A month later, a local agency Hearing Officer held that it was not appropriate to transfer Student from Z School, but the Hearing Officer would not assign Student back to Z School due to the School District's objection. (JE1) Another month ensued before Student was permitted by the School District to return to Z School on a temporary basis. (JE1) Eventually, the School District agreed not to transfer Student to a different school at all. (JE1)

Thus, for two months, from October 20, 2008 to December 10, 2008, Student did not attend school because the School District would not permit Student to attend Z School, first because it improperly transferred Student (as found by a local hearing officer) and later because it simply would not allow Student to return to Z School and did not provide an alternative school assignment to Student. (JE1) This is a denial of FAPE. Because the parties agree to the relief requested, I have no trouble finding, pursuant to the stipulated facts in this record, that the FAPE denial is based upon Student's disability and, therefore, violates Section 504.

Relief

Compensatory education may be awarded for the period of time that a school district deprives an eligible student of FAPE. Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999) In this case, I will award 200 hours of compensatory education in accordance with the parties' agreement.

CONCLUSION

Student is a child with a disability who was suspended and transferred from Student's neighborhood school after an alleged fight. Although a local hearing officer found the transfer to be improper, and although Student ultimately has returned to the neighborhood school, the School District's actions prevented Student from attending school for two months. In lieu of a due process hearing, the parties have stipulated to the facts in this case and they have agreed to particular relief. Based upon those stipulated facts, I conclude that the School District has violated Student's Section 504 rights and I will award the relief requested.

ORDER

- The School District shall transfer Student back to Z School, Student's neighborhood school.
- The School District shall provide 200 hours of compensatory education to Student.
- The School District shall perform a Functional Behavior Assessment and implement a Behavior Support Plan in consultation with an Interagency Team, including Foundations Behavioral Health. The Behavior Plan shall address Student's inattentiveness, poor focus, distractibility, unwillingness to cooperate with teachers, disruptive classroom behavior, conflicts with peers and implementing controls for unstructured transition periods during school.
- The School District shall formulate and provide a revised Section 504 Support Plan.

Daniel J. Myers

Daniel J. Myers
HEARING OFFICER

March 23, 2009