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Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: BB

Date of Birth: xx/xx/xx

Dates of Hearing: 4/28/09, 6/4/09, 6/12/09

CLOSED HEARING

ODR No. 9474/08-09 AS

Parties to the Hearing:

Representative:

Parents

Parent Attorney

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Date Record Closed:

July 27, 2009

Date of Decision:

August 11, 2009

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

At the time the issues involved in this due process hearing arose, Student was an IDEA eligible student who resided and had been educated in Council Rock School District. In the spring of 2005, between Student's 9th and 10th grade school years, the District completed a reevaluation report which Parents considered inappropriate. The District ultimately prevailed in the federal court case that was ultimately brought as a result of the due process complaint triggered by the parties' disagreement over the reevaluation.

Before the litigation on that matter was completed, the parties disagreed again over a program and placement proposed by the District in December 2005 for the remainder of the 2005/2006 school year. Parents withdrew Student from the District, enrolled Student in a private school and commenced a due process hearing to obtain tuition reimbursement and compensatory education. By agreement of the parties, that complaint was dismissed without prejudice to Parents' right to reassert the claims after a final decision on the reevaluation complaint, since the program /placement issues would inevitably be affected by the outcome of that case.

After Parents renewed those claims in this case, the parties reached a partial agreement, leaving only one underlying issue to be determined: whether Parents are entitled to tuition reimbursement based upon an IDEA violation or a violation of §504 of the Rehabilitation Act of 1973. The parties also agreed that the only IEP to be considered was offered by the District in December 2005

After a three session hearing in the spring of 2009 and written closing arguments by counsel, this matter is ready for disposition. For the reasons explained below, Parents' claim for tuition reimbursement is denied.

ISSUES

1. Are Student 's Parents entitled to tuition reimbursement under the IDEA statute and regulations from January 2006 through Student's graduation at the end of the 2007/2008 school year?
 - a. Did Council Rock School District propose an appropriate program and placement for Student on December 12, 2005?
 - b. If not, was the private school selected by Parents appropriate for Student?
 - c. If so, are there any equitable considerations supporting denial or reduction of reimbursement?
2. Even if there was no IDEA violation, did Council Rock School District's actions in this matter violate §504 of the Rehabilitation Act of 1973, thereby supporting tuition reimbursement?

FINDINGS OF FACT

1. Student , born xx/xx/xx, is currently late teen aged. At the time the claims in this matter arose, Student was a resident of the Council Rock School District and eligible for special education services. (Stipulation, N.T. p. 9).
2. The only relief sought by Parents in this matter is tuition reimbursement from the time Student enrolled in a private school, [REDACTED] Academy, in January 2006 through graduation in June 2008. (Stipulation, N.T. p. 9).
3. The tuition reimbursement question in this matter is based entirely upon whether the IEP offered for Student by the District on December 12, 2005 was appropriate under both the IDEA statute and §504 of the Rehabilitation Act of 1973. (Stipulation, N.T. p. 9).
4. At the time relevant to this case, Student 's diagnosis was other health impairment (OHI) and specific learning disability according to the District's reevaluation report dated June 25, 2009. 34 C.F.R. §300.8(a)(1), (c)(9), (10); 22 Pa. Code §14.102 (2)(ii). (N.T. pp. 139; S-1, p. 15, S-2).
5. Prior to the District's latest reevaluation, Student's IDEA eligibility was based upon Asperger's Syndrome. There was also a diagnosis of ODD (oppositional-defiant disorder). (N.T. pp. 63, 471, 472)
6. The District issued a permission to reevaluate Student on September 29, 2004 in order to compile updated information as Student transitioned from middle to high school. The

evaluation began after Parents returned the PTRE on March 11, 2005 and culminated in the June 29, 2005 report (N.T. pp. 60, 524—528; S-1)

7. As a result of the evaluation, the District concluded that Student did not meet the criteria of a student with an autism disability for purposes of determining IDEA eligibility. In addition, based upon the conclusion that the ODD was a mental health diagnosis resulting from social maladjustment, not an IDEA disability category, the District concluded that it would not be addressed directly in an IEP. (N.T. pp. 98, 99, 273, 529; S-1)
8. As the District was aware, Parents disagreed with the change in Student's eligibility category. (N.T. pp. 471, 472, 477—480, 529, 530, 532)
9. Student's IEP at the beginning of 9th grade focused primarily on study skills and task/homework completion. It included goals in written expression, recording homework assignments, organization and social discrimination skills. Student continued to struggle with completing homework and other school-related tasks throughout Student's high school years, both in District placements and at the private school. (N.T. pp. 36, 40, 61, 79, 80, 83, 124, 491, 510; P-8, P-15, S-1)
10. Student was fairly successful through the fall of the 2004/2005 school year, when Student entered [a District] High School after participating in an 8th grade autistic support class. During the winter/spring of 2005, however, Student's school functioning began to deteriorate. (N.T. pp. 36, 37, 40—44, 225, 226, 470, 524; P-1, P-3, P-4, P-13, S-1, p. 4, S-20)
11. When Student returned to school for 10th grade at the beginning of the 2004/2005 school year, the IEP from 9th grade was continued with some changes developed at an August 2005 meeting to review the June 29, 2005 reevaluation report. A new IEP was offered to Parents at a meeting in October 2005, but was rejected by Parents. The October 18, 2005 IEP meeting was adversely affected by Parents' continuing disagreement over the eligibility category identified in the District's reevaluation report. (N.T. pp. 75, 81, 82, 154, 155, 160, 475, 478, 508, 531, 538, 544, 565, 568, 569; P-14, S-3, S-12, S-20)
12. At or prior to the October 2005 IEP meeting, Parents provided the District with private reports summarizing diagnostic profiles concerning Student's diagnosis of Asperger's Syndrome. Although the reports were discussed at an IEP meeting held in October, 2005, the District did not believe they provided new information concerning Student. (N.T. pp. 112—114, 143, 153, 473, 474, 475, 498, 541—544, 560, 571, 572; S-4, S-5, S-10, S-11, S-13)
13. During the fall of 2005, Student performed poorly in school and no longer enjoyed school as Student had in the past. Student's academic success was compromised by Student's refusal to complete tasks and homework, as well as numerous absences. Student was absent, signed out early or was tardy 25 times between August 30 and December 23, 2005. Parents provided the District with a doctor's note, dated December 23, excusing

Student from school from December 8—23 due to acute depression (N.T. pp. 72, 79, 80, 83, 175, 475, 476, 495, 496; P-13, P-19, S-19, S-20)

14. Before developing a behavior intervention plan to address Student's poor completion of homework and other school assignments in the spring of 2005, the District undertook a functional behavioral assessment (FBA) in the fall of 2004 through a certified behavior analyst working at the District under a private agency contract. The behavior analyst first observed Student while Student was in 8th grade, completed an FBA, developed a behavior support plan and worked with Student one on one to address Student's difficult behaviors in 9th and 10th grades. (N.T. pp. 194, 197—207, 228, 229, 249; P-6, S-1, p. 19)
15. After several classroom observations for a new FBA in the fall of 2005, the behavior analyst was unable to complete the FBA due to her limited time at the school, Student's frequent absences and Student's ultimate withdrawal from school. In addition, because she believed that her ability to obtain valid results was compromised because Student interacted with her during an observation, she also brought in someone else for some observations and interviews, which also contributed to the delay in completing the new FBA. (N.T. pp. 204, 212, 213, 229, 230, 258; P-16, S-3)
16. Since a new FBA was not completed during the fall of 2005, the IEP offered to the family in December 2005 did not include a formal behavior plan. Although a behavior intervention plan (BIP) was a necessary component of any program likely to be successful for Student, the behavior analyst nevertheless agreed with the proposed IEP, knowing that an FBA would need to be updated when Student began attending a different placement in January 2006 and that a formal behavior plan would then be developed. She also suggested several behavior strategies and supports that were incorporated into the proposed IEP and could be implemented before the new FBA was completed and the formal behavior plan developed. (N.T. pp. 215, 238—247, 257, 259; S-17)
17. From 9th grade through the fall of 10th grade, Student was attending Student's neighborhood school [REDACTED]. In the IEP proposed on December 12, 2005, the District recommended a change of placement to a different District school, [REDACTED] Alternative School. The proposal to reassign Student to Alternative School was based in part on a letter Parents brought to the October 18, 2005 IEP meeting detailing their views of Student's educational needs and how to meet them, as well as Parents' identification of Academy as the placement they were seeking for Student. (N.T. pp. 84, 165, 550—553, 559, 579—581, 591; P-14, S-9, S-17,)
18. Alternative School is an alternative school for Council Rock School District students in grades 10—12, including regular education students and students receiving services based upon IDEA or §504 eligibility. All students at Alternative School experienced some barrier to academic success in a regular high school setting. The program at Alternative School would have provided an educational placement for Student comparable to Academy. (N.T. pp. 124, 127, 128, 135, 492, 580—582, 591, 592, 594; P-15)

19. At the time the District recommended Student's transfer to Alternative School, it was serving 24 students. Classes generally included 4 or 5 students and sometimes as many as three staff members. Alternative School follows the District's grade level curriculum for each student with enhancements and adaptations designed to overcome the issues, such as lack of motivation, or work refusal that interfered with the students' academic progress in a traditional high school setting. (N.T. pp. 592—596)
20. Student's IEP team believed that Student's academic needs could be met at Alternative School because of the availability of an academically challenging curriculum; opportunities to participate in extra-curricular activities; teacher consistency in how skills were taught to the students; small class size, permitting closer relationships and more one on one interaction between students and teachers; immediate feedback on academic tasks; a greater opportunity to build interpersonal relationships which encourages compliance; time flexibility; an informal atmosphere and a full-time therapist on staff to address resistance to completing academic tasks. (N.T. pp. 597—600, 603, 604)
21. Alternative School also had a general behavior plan in place for all students that could have supported Student until the new FBA could be completed and a specific behavior plan developed for Student. (N.T. pp. 601—604)
22. A change in placement to Alternative School was recommended for Student for a number of reasons, including the smaller class sizes Parents believed Student needed, unsuccessful attempts to engage Student in school by various other means and the potential for Student to experience greater success in the alternative setting in terms of both academics and the behaviors that had adversely affected academic success and appeared to be increasing. (N.T. pp. 84, 85, 96, 97, 165, 166)
23. Academy, the private school in which Student enrolled in January 2006, was initially attractive to Parents because of Student's good feelings about the school when Student was enrolled there for a study skills enrichment program. Throughout Student's tenure at Academy, Parents appreciated its supportive atmosphere and understanding teachers. (N.T. pp. 490, 491, 506)
24. Student's Parents obtained a new private evaluation of Student after Student left the District and had attended Academy for approximately two terms. The evaluation included a nearly day-long observation of Student at Academy. (N.T. pp. 118, 122; P-15)
25. At Academy, there were 4 or 5 students in Student's English and psychology classes, both of which were taught by the same teacher but included different students. In English class, Student relied on a commercial summary because Student had not read the assigned book, needed to be prompted several times to return to task, and did not write down Student's homework assignment the first time. (N.T. pp. 124; P-15, p. 5)
26. Student did not interact with other students or appear to be engaged with the group in either of the classes. In the psychology class, Student was informed that Student had

failed a test due to not studying for it, and Student was slow to respond to directives. Student continued to exhibit poor study skills. (N.T. pp. 125; P-15, p. 5)

27. The small group setting, which permitted less structure and more spontaneous interaction with the teacher, appeared to be a good fit for Student, allowing Student's behavioral quirks without their making Student stand out as odd or different. Student enjoyed being in classes with students similar to Student in academic level or temperament. Student's grade reports from Academy reflect greater academic success than Student experienced in Student's District high school classes during 9th grade and the first half of 10th grade before disenrolling. (N.T. pp. 127, 128, 135, 492, ; P-3, P-13, P-21, S-20)

DISCUSSION AND CONCLUSIONS OF LAW

I. General Legal Standards—FAPE, Tuition Reimbursement, Burden of Proof

A. FAPE/Meaningful Benefit

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). “Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his/her program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

B. Tuition Reimbursement

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court established the principle that parents do not forfeit an eligible child's right to FAPE, to due process protections, or to any other remedies provided by the IDEA statute and regulations, by unilaterally selecting a placement other than that offered by the District. Parents do, however, place themselves at financial risk. Although parents are always perfectly free to decide upon the program/placement they believe will best meet their child's needs, to obtain public funding for that choice, they must meet well-established legal requirements

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon the *Burlington School Committee* case. The first step is to determine whether the program and placement offered by the district is appropriate for the child. Only if that issue is resolved against the district are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *See also*, *Florence County School District v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

C. Burden of Proof

The U.S. Supreme Court recently established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005). Consequently, in this case, because Parents challenged the appropriateness of the District's actions, and are seeking tuition

reimbursement based, in the first instance, upon a denial of FAPE, it was their burden to establish that the District failed to offer an appropriate program and placement for Student in December 2005, thereby meeting the first criteria for establishing their right to tuition reimbursement. Subsequently, Parents would also be responsible for demonstrating the appropriateness of their alternative placement. If both criteria were met by Parents, evidence offered by the School District would be considered in support of its contention that the equities of this matter demand that tuition reimbursement should be denied or reduced.

Here, Parents did not prove that the District failed to offer an appropriate program and placement for Student, making it unnecessary to consider the second and third Burlington/Carter factors. Evidence concerning Academy, however, will be considered insofar as it bears upon the conclusion that the District offered Student an appropriate program and placement in December 2005.

II. Application of the Law to the Facts of This Case

A. Parents' Arguments Concerning the Contents of the December 12, 2005 IEP

Parents' contentions that the IEP in question in this case was flawed, thereby establishing that they met the first criterion of the Burlington/Carter analysis, centered on two alleged deficiencies in the December 12, 2005 IEP. Specifically, Parents argued that the present levels of educational performance in the proposed IEP were outdated and insufficient, and that the absence of a behavior intervention plan based upon an updated FBA renders the IEP proposed by the District on December 12, 2005 inappropriate.

Although the proposed IEP did not include a description of Student's functioning in class from 10th grade teachers as part of the present levels of educational performance, that section of the proposed IEP did include current information from the District's recently completed

reevaluation. Moreover, the evidence presented at the hearing in this matter established that the same kind of difficulties Student began experiencing in the winter/spring of 2005 persisted and increased during the fall of 2005, and, indeed continued throughout Student's entire high school career. (F.F. 9, 13, 25, 26) There was also testimony that when the School District members of Student's IEP team met in December 2005, they determined that the information from Student's 9th grade teachers continued to accurately reflect Student's classroom functioning. (N.T. p. 608, 609) Consequently, there was no evidence that the absence of information from Student's 10th grade teachers would have altered Student's identified needs or otherwise substantively affected the appropriateness of the District December 2005 IEP offer.

Parents' arguments concerning outdated information in the present levels of educational performance went no further than identifying the absence of such information as a procedural deficiency. A conclusion that an IEP is inappropriate, however, may not be based solely upon a procedural violation. 34 C.F.R. §300.513(a)(1). Unless a procedural violation substantially impeded the Student's right to FAPE, or substantially affected Parents' ability to participate in the IEP process, it could not have substantively affected the appropriateness of the IEP. §300.513(a)(2). Parents presented no evidence that the absence of information from Student's 10th grade teachers in the present levels of educational performance, or any other procedural issue they raised, met either of those standards.

Another deficiency identified by Parents in the December 2005 IEP, the absence of a behavior plan, is a matter of greater concern, since the District agreed that a behavior plan was necessary for Student. (F.F. 16) This is not a case, however, where the District simply failed to include a necessary component in a proposed IEP. There was extensive evidence detailing the District's efforts to complete a new FBA in the fall of 2005, which was hampered by various

problems, including Student's absences from school and the need for an additional person to make some observations and conduct interviews. (F.F. 15) Moreover, once the District determined that it would propose a different school placement for Student, it would have been futile to complete the FBA and propose a behavior plan for the future based upon Student's functioning in a school setting Student would no longer attend. Consequently, even if the FBA had been completed and a full behavior plan developed between August and December 2005, both the FBA and the behavior plan would have been outdated, requiring updated information for the FBA and potentially substantial changes to any proposed behavior plan, as soon as Student began attending Alternative School. Finally, there was ample persuasive evidence from the District, that the December 2005 IEP included strategies to address Student's behavior needs until a formal plan could be developed, and that the kinds of behavior needs Student exhibited were generally shared by the student population at Alternative School, which had a general behavior program explicitly designed to address such issues. (F.F.18, 19, 21)

For all of the foregoing reasons, Parents failed to establish that there were such substantial deficiencies in the December 12, 2005 proposed IEP that it was inappropriate at the time it was offered. The evidence established that if the IEP had been implemented at the Alternative School as proposed by the District, it is reasonably likely that it would have permitted Student to make meaningful educational progress.

B. Parents' Underlying Concerns About the District's Ability to Program Effectively for Student Arising from Their Disagreement over the Change in Student's IDEA Eligibility Category

Although the appropriateness of the District's reevaluation from June 2005, was no longer in dispute at the time the hearing in this case was held, it substantially affected this matter in that the parties' dispute over the reevaluation results permeated and adversely affected the

parties' relationship during the summer and fall of 2005. Parents were extremely upset over the District's removal of Asperger's as Student's disability category, believing that it was essential to assure that Student's teachers were aware that Student has Asperger's in order to deal with Student effectively in class. *See* N.T. pp. 477—480. On the other hand, however, Parents acknowledged that Student also had a learning disability. N.T. p. 491. Parents' concerns centered on whether Student's IDEA eligibility should continue to be based upon Student's Asperger's diagnosis.

Parents' testimony concerning the inappropriateness of the IEPs offered by the District in the fall of 2005 centered on their belief that removing Asperger's as Student's disability category denied Student's teachers important information about Student. Parents, however, presented no evidence to establish how Student's special education goals and objectives would have been altered had Asperger's rather than specific learning disability and OHI been identified as the basis for IDEA eligibility in 2005. The only specific deficiency in the District's proposed IEPs that Parents identified was the absence of a goal to address Student's needs in the areas of social skill development. There is no reason, however, that Parents could not have made a specific request to add one or more goals in that area, rather than attempting to address that alleged deficiency via their disagreement with changing Student's disability category. More important, however, was the effect of the disability category controversy on Parents' ability to objectively assess whether the services offered as part of the curriculum at the Alternative School, which the District proposed as a new placement for Student in the December 12, 2005 IEP, would have met Student's needs regardless of Student's eligibility category. Parents' state of mind, including their belief that the District was not paying sufficient attention to the extent of the problems Student was experiencing, is certainly understandable in light of

Student's increasing difficulties in school during the fall of 2005. Their alarm over Student's deteriorating school situation crystallized in the disagreement over the disability category.

The issues in this case, however, must be determined on a purely objective basis. The appropriateness of the District's proposed placement, which depends on whether the program offered at Alternative School would have met the needs identified by both the District and Student's Parents, were examined without regard to whether Parents were justified in withdrawing from the process of developing an appropriate program and identifying an appropriate placement for Student after the October 18, 2005 IEP meeting. The evidence presented by the District, and, indeed, by Parents via their independent school psychologist, established that the District's offer of the Alternative School in the IEP dated December 12, 2005 was reasonably calculated to assure that Student would make meaningful educational progress, and, therefore was an offer of FAPE. Since the District met the first prong of the Burlington/Carter analysis by offering an appropriate program and placement, Parents' claim for tuition reimbursement must be denied on that basis alone.

C. Parents' Evidence Concerning the Benefits of Academy

The limited information concerning Academy, the private placement Student's Parents selected and considered appropriate for Student, was provided by the testimony of the private school psychologist Parents hired to complete an independent evaluation and by Student's Mother. Only the psychologist actually observed Student at Academy.¹

¹ If it were necessary to determine the appropriateness of Academy as a placement for Student in comparison to the District's proposal in order to complete the legal analysis required for a decision in this matter, the psychologist's testimony would have been given little or no weight with respect to that issue in the absence of an observation of Student in either the District high school placement before Student disenrolled, or an observation of the Alternative School, where Student would have attended had the December 12, 2005 IEP been accepted. The psychologist was unfamiliar with Alternative School and with Student's prior placement at a District high school. (N.T. pp. 137)

To the extent that Parents intended the testimony of the private psychologist to further support their contention that the District's proposed IEP was inappropriate, it was ineffective for that purpose. The psychologist's opinion testimony on that issue was unreliable due to her obvious unfamiliarity with Student's placement in 9th grade and the beginning of 10th grade when Student left the District. She testified, *e.g.*, that she did not "know that [Student] ever actually attended the regular high school." N.T. p. 126. Written records from the School District, however, establish without doubt that Student had attended [REDACTED] for ½ school years. F.F. 17.

On the other hand, the psychologist's factual testimony concerning Student's functioning at Academy compared to the evidence of Student's functioning in the last District placement revealed little, if any, difference. Student's task avoidance behaviors and refusal to complete or even write down homework assignments persisted and interfered with Student's academic progress at Academy just as it had in the District. *See*, F.F. 25, 26; N.T. p. 126, P-15 at 4, 5.

More important to the decision in this case, however, was the psychologist's ultimate conclusion that Student was successful at Academy due, primarily, to three factors: small class size; opportunity to interact informally with teachers and the fact that "an alternative setting where there were a variety of kids with a variety of different kinds of issues" gave Student the opportunity to feel less isolated and more in the mainstream than Student would in a large public high school setting. F.F. 27; N.T. p 128. The District's evidence demonstrated that Alternative School also fits that description. (F.F. 18, 19, 20, 21) Parent's expert witness, therefore, supported the conclusion that the District's proposed placement would have been appropriate for Student in that it would have permitted Student to make at least as much progress and experience as much success as Student did at Academy.

III. Parents' §504 Claims

Unlike the IDEA statute which creates affirmative obligations to provide an eligible student with a free, appropriate public education (FAPE) in the least restrictive environment (LRE), the Rehabilitation Act is a prohibition statute, providing that

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his 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.

29 U.S.C. §729a

To succeed in establishing a §504 case, a Parent must prove 1) that the student has a disability; 2) that he or she is otherwise qualified to participate in school activities; 3) the LEA receives federal financial assistance; 4) the student was excluded from participation in, denied the benefits of or subjected to discrimination at school. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490 F.3d 337, 350 (3rd Cir. 2005).

In the context of educational rights, the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled student with a free, appropriate public education (FAPE). *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009). The substantive right to FAPE, as well as the procedural safeguards to which a qualified disabled student is entitled under §504 may be satisfied by complying with IDEA substantive and procedural requirements. 34 C.F.R. §§104.33(b)(2),

104.36; *Centennial School District v. Phil L. and Lori L.*, 559 F.Supp.2d. 634 (E.D. Pa. 2008); *Lyons v. Smith*, 829 F.Supp.2d 414 (D.D.C. 1993).

In this case, Parents contended that the District's failure to specifically address Student's ODD diagnosis by means of a service plan constituted a §504 violation. Although Parents provided an extensive discussion of the law applicable to §504 plans, they failed to produce any evidence of intentional discrimination. Parents also failed to identify any action the District should have taken to address Student's needs arising from the ODD diagnosis other than to provide an appropriate behavior plan. Parents, therefore, relied upon the same evidence they cited to establish that the proposed IEP was insufficient under the IDEA statute as their proof of a §504 violation. The only additional supporting argument was Student's lack of success in school.

The District, however, was continually attempting to address all of Student's behavior needs, including those Parents contended arose specifically from Student's ODD diagnosis, albeit with little success. Parents cannot, however, prove a §504 violation by relying upon the failure of the District's efforts in the face of its serious and sustained attempts to address Student's needs in the context of appropriate efforts to address Student's needs under the IDEA statute. Since The District fulfilled its IDEA obligations to Student, it also met its co-extensive educational obligations under §504. Consequently, Parents' claim for tuition reimbursement based upon the absence of a §504 plan to address Student's ODD is also denied.

CONCLUSION

Because the IEP offered by the District on December 12, 2005 which provided for Student's transfer to the Alternative School was an offer of a program and placement in which Student was reasonably likely to make meaningful educational progress, Parents did not meet

their burden of persuasion with respect to the first of the criteria they were required to establish to support a claim for tuition reimbursement. It was, therefore, unnecessary to consider the remaining criteria, appropriateness of Academy and equitable considerations, to determine that Parents' tuition reimbursement claim should be denied insofar as it was based upon a violation of the IDEA statute.

Because the District fulfilled its IDEA obligations to Student, which are co-extensive with its §504 obligation to offer FAPE, and Parents provided no evidence of intentional discrimination against Student on the basis of disability, Parents' claim based upon a violation of §504 of the Rehabilitation Act is likewise denied.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parents' claims in this matter are **DENIED**.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

August 11, 2009