

*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: J.A.

Date of Birth: [redacted]

Date of Hearing:

February 26, 2013

### **CLOSED HEARING**

ODR Case #13355-1213AS

Parties to the Hearing:

Parent

Abington Heights School District  
200 East Grove Street  
Clarks Summit, PA 18411

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Harry McGrath, Esquire  
Bank Towers Building  
Suite 600  
321 Spruce Street  
Scranton, PA 18503

William McPartland, Esquire  
Marshall, Dennehy, et. al.  
P.O. Box 3118  
Scranton, PA 18505-3118

March 22, 2013

April 6, 2013

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

[Student] (“student”) is a [teenaged] student residing in the Abington Heights School District (“District”) who has been identified as a student with a disability under the Rehabilitation Act of 1973 (specifically under Section 504 of that statute, hence the follow-on reference to this section as “Section 504”).<sup>1</sup> The parties had come through a prior, contentious round of special education due process and appeal to federal court. The result of those proceedings, for the purposes of this matter, was a settlement agreement that established a compensatory education fund for use by the parent for the student’s educational needs.

Parent claims that the District wrongfully denied the student access to assistive technology in the form of a request for a computer. The District initially filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the matter sounded in contract law and should be heard in a different forum. The District’s motion was denied on the grounds that the parent’s claim, in the view of this hearing officer, was a claim that the District had denied the student a free appropriate public education (“FAPE”) in not providing assistive technology.

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<sup>1</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for the protection of “protected handicapped students”. 22 PA Code §§15.1, 15.10.

By the time the hearing convened, the student had been provided with the requested computer. Therefore, the District argued that any harm was remedied. But this was an alternative argument. The District continued to stand by its primary assertion, at the hearing and in its closing statement, that the parent's claim was grounded in breach of contract and not a denial of FAPE.

For the reasons set forth below, on substantive and not procedural grounds, I find in favor of the District.

### **ISSUES**

Was the student denied a free appropriate public education when the District denied a request for assistive technology in the form of a computer?

If so, is there any remedy due to parent?

### **FINDINGS OF FACT**

1. The student has been identified under the terms of Section 504 as a student with a disability, specifically attention deficit hyperactivity disorder. (School District Exhibit ["D"]-7; Notes of Testimony ["NT"] at 39-40).
2. In March 2011, a prior round of special education due process resulted in a decision in favor of the student. An appeal followed to federal district court. (D-1, D-2; Hearing Officer Exhibit ["HO"]-1).
3. In August 2012, the parties resolved the dispute. Part of the resolution involved an allocation of funds to a compensatory education fund for the educational needs of the student. (D-1).
4. For the parent to utilize compensatory education from the fund, parent was required to provide evidence of a payment, or an

obligation undertaken for payment, for educational services for the student. (D-1).

5. Part of the resolution also involved the preparation and issuance of an independent educational evaluation report (“IEE”), to be paid for by the District and to be considered by the student’s multi-disciplinary team. (D-1).
6. In the fall of 2012, the family attempted to utilize the compensatory education fund for counseling services for the student. Due to the meeting schedule of the school board, approval for payment from the fund was delayed, and the student’s therapist dropped the student from her client list. (NT at 51, 61-62, 88-90, 107, 110-111).
7. In early December 2012, when payment delays due to school board approval were brought to light, the District’s director of special education took over the payment-approval process for utilizing compensatory education from the fund. (NT at 88-90, 110-111).
8. At approximately the same time, the student’s mother requested that the student be provided with a computer. The District’s director of special education, knowing that the private evaluator was scheduled to meet with the independent evaluator in mid-December, indicated that he thought it was preferable to wait for the IEE report to see if that report addressed assistive technology needs. Still, the director of special education requested that the student’s mother supply information to him about the computer she had in mind. Information about the computer was not shared at that time. (NT at 48-51, 89-91).
9. On December 17, 2012, the student’s mother filed a special education due process complaint, alleging that the District refused to utilize the compensatory education fund for the student’s educational need for a computer. On the same day, the District’s superintendent replied by letter that the District was unaware of any request for educational services that followed the requirements outlined in the settlement agreement. (D-2, D-3; HO-1; NT at 50-51).
10. The District filed a sufficiency challenge to the complaint. Because the filing challenged the jurisdiction of special education due process and not any particular deficiency in the complaint, this hearing officer characterized it as a motion for lack of subject matter jurisdiction. The parties exchanged pleadings regarding the District’s jurisdictional challenge. (HO-2, HO-3, HO-4).

11. On January 11, 2013, the District's motion was denied. (HO-5).
12. By the end of January 2013, the student's mother had still not provided the District with any information regarding the computer. The District's director of special education solicited the assistance of the high school principal to see if she could facilitate obtaining from the student's mother any information about the computer. (NT at 92).
13. On January 30, 2013, the student's mother provided the District with a list of computer hardware and software from a computer retailer. (D-4; NT at 92).
14. The District ordered the computer. The purchase was delivered by the retailer in two deliveries, one on February 11<sup>th</sup> and the second on February 22<sup>nd</sup>. (D-5; NT at 53, 92).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Provision of FAPE under Section 504

To assure that an eligible child receives a FAPE under Section 504, a student must be provided "regular or special education and related aids and services that ...are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met" and also comply with procedural requirements related to least restrictive settings, evaluations, and access to procedural due process. (34 C.F.R. §104.33(b)). In meeting these requirements, the school district is held to analogous standards under the Individuals with Disabilities in Education Improvement Act of 2004

(“IDEIA”).<sup>2</sup> P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009). Where necessary for FAPE, a student must be provided with assistive technology, “any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability.” (34 C.F.R. §300.5).

In this case, the student’s family made a request for assistive technology as part of providing FAPE to the student. Until a month or so before the hearing session, the issue of assistive technology for the student was still an open question. Contrary to the District’s legal arguments, then, the question of FAPE for the student in light of assistive technology was still unresolved, and special education due process is the appropriate venue to hear evidence regarding such claims. (22 PA Code §§15.1, 15.8(d)).

Contrary to the parent’s claims, however, the District did not deny the student FAPE in its handling of the parent’s request for assistive technology. The District reasonably viewed parent’s request in early December 2012 in the light of what might emerge from the IEE regarding the student’s needs. Even then, however, the District did not dismiss the request out of hand; the District requested information about the

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<sup>2</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162.

computer, information which was not provided until the end of January 2013.

This is not to say that parent's apprehension that the District might not provide the computer was totally unfounded. In the fall of 2012, the District clearly was dilatory in handling requests for payment for the student's counseling services. But the District moved to address such delays through the direct involvement of the director of special education. And, the filing of the parent's complaint notwithstanding, the director of special education continued efforts to secure information about what computer, exactly, the parent was seeking in an effort to provide it to the student.

Accordingly, from December 2012 through February 2013, on this record, the District acted reasonably in providing FAPE to the student through parent's request for assistive technology.

### **CONCLUSION**

The District did not deny the student FAPE in its handling of the parent's request for assistive technology.

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**ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the School District did not deny the student a free appropriate public education.

Any claim not specifically addressed in this decision and order is denied.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

April 6, 2013