

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Student's Name: M.H.

ODR File No.: 5801-05-06-AS

Date of Birth: xx/xx/xx

Dates of Hearing: September 29, 2005; November 22, 2005

Type of Hearing: Closed

Parties to the Hearing:

Parents

Parent

Represented by:

Heidi Konkler Goldsmith
30 Cassatt Avenue
Berwyn, PA 19312

Date Final Transcript Received:

November 27, 2005

District

Great Valley S.D.
47 Church Rd.
Malvern, PA 19355

Represented by:

Hollie John, Esquire
Sweet, Stevens, Tucker & Katz
P.O. Box 5069
New Britain, PA 18901

Date of Decision:

April 10, 2006*

Hearing Officer:

Linda J. Stengle

*Delay in decision communicated to parties via phone call in March 2006. LJS

Background

The student is in ninth grade and is currently attending a private school. The parents requested the hearing to challenge the district's finding that the student was ineligible for supports and services under a Section 504 Service Agreement. The parents asked that he be found eligible, that the student be awarded compensatory education, and that the parents be reimbursed for the cost of an Independent Educational Evaluation.

Findings of Fact

1. In fourth grade, the 2000-2001 school year, the district conducted a screening for ADHD and found that the pattern of observations was indicative of factors associated with ADHD. The district notified the parents of its finding. The school psychologist suggested that the school team may wish to consider behavioral or environmental interventions. (S 5)
2. On March 7, 2001, the district conducted a functional behavior assessment. It listed several "problem behaviors." (S 6)
3. On March 8, 2001, the district issued a behavior management plan. It stated that the student displayed inappropriate social skills due to an inability to "read" social cues from others and situations which impacts interpersonal relationships and his ability to work cooperatively in a group. It also stated that he avoided responsibility when he was corrected, that he was displaying impulsivity, and that he acted out or withdrew in order to gain control over his environment. (S 7)
4. The student's report card for fifth grade noted that the student was experiencing difficulty in the development of the following skills or behaviors when compared to grade level expectations: demonstrating respect for personal items, making good use of time, accepting responsibility for his own behavior, practicing self control, following directions, and listening effectively. (S 1)
5. On September 12, 2002, the parent notified the school that the student was diagnosed with ADHD in the spring of fourth grade and that she would like to investigate the possibility of having him supported through a Section 504 service agreement. She included with her request a physician's note that the student did indeed have ADHD and was under medical care. (S 9)
6. The district did not conduct an evaluation of the student before convening a 504 service plan meeting because the student was "doing very well." (N.T. 166-167)
7. In sixth grade, the district notified the parent that the student, on October 7, 2002, had a D+ in Spanish. (P 12)
8. On October 16, 2002, the district convened a team meeting and "offered" a 504 service agreement, which stated that no accommodations were needed at the time. (S 10, S 13)
9. Also in sixth grade, the district notified the parent that the student, on November 7, 2002, had a D+ average in science. (P 11)
10. In sixth grade, the district notified the parent via an interim report of student progress that he, on January 23, 2003, had a C- in health. The teacher noted that he needed to improve test and quiz grades, needed to make better use of class time by paying attention and/or completing class work, and needed to improve study habits and

- skills. (P 10)
11. For sixth grade, the student's progress reports noted that he had missed homework assignments, that he needed to be more attentive, and that he would benefit from consistent daily effort. (P 1)
 12. On April 10, 2003, the student was suspended for fighting with another student. He had ripped another student's shirt during the altercation. (S 4)
 13. In seventh grade, teachers noted on report cards that the student needed to show more self-discipline when working in groups, made poor use of class time, talked excessively to the point of impeding class progress, failed to complete a major project, and would benefit from consistent daily effort. (P 4, P 8)
 14. Also in seventh grade, the district notified the parent that the student had, on March 23, 2004, a grade of 52.08% in social studies. (P 9)
 15. Terra Nova scores for seventh grade were 83% in reading, 47% in language, 68% in math, and 68% for total score. (S 16)
 16. In eighth grade, the student's report card included comments that the student needed to be more attentive, that he lacked initiative, that he did not work up to his ability, was capable of doing better, and that he often did not hand in or make up homework. Written expression was below grade level. (S 1, S 14, P 5, P 6, P 7; N.T. 211-214, 230-231, 262-263, 276)
 17. At the end of eighth grade, the district notified the parents that the student was being recommended for a developmental reading class as a result of a review of his progress in language arts and reading. He was also being placed in the second lowest level for math and the lowest level course for language arts. (P 13; N.T. 203-204, 271)
 18. January through March of 2005, the student was taken off his medication for ADHD. He was placed back on medication sometime in March. (S 13, N.T. 133)
 19. On February 17, 2005, the student [engaged in aggressive behavior]. (S 4)
 20. It was clinically significant that the incident occurred while the student was not medicated. (N.T. 113)
 21. On March 3, 2005, the parent retained specialized counsel who filed a request for a due process hearing. (S 12)
 22. On March 15, 2005, the district requested permission to evaluate the student for eligibility for specialized instruction. The parent consented on the same day. (S 13)
 23. On March 23, 2005, the district issued its Evaluation Report. (S 16)
 24. His full scale IQ was identified as 108 on the WISC – IV. His verbal comprehension was 116; perceptual reasoning was 100; working memory was 102; and processing speed was 103. (S 16)
 25. The school psychologist identified a significant discrepancy between ability and achievement. (S 16; N.T. 87-94)
 26. During the evaluation process, the student disclosed "sensation seeking" tendencies, and the evaluator noted that the parents observations of occasional conduct problems were consistent with sensation seeking tendencies. (S 16)
 27. Both sensation seeking tendencies and hyperactivity/inattention difficulties were noted at home and at school. (S 16)
 28. Sensation seeking activities and poorly developed skills are inter connected. (N.T. 109-110)
 29. The evaluator was unaware that the student, despite his 116 IQ score, was attending

- lower tracked academic classes. (N.T. 119-120, 150-152)
30. The school's evaluator did not know if the student was on or off medication at the time he was evaluated by the school. Accommodations may vary depending on whether or not the student was on medication. (N.T. 133-134)
 31. The student's executive functioning was impaired as to his ability to focus and to manage his behavior. (N.T. 123-124)
 32. The evaluator for the district did not consider the possibility of a non-verbal learning disability. (N.T. 152)
 33. When asked if a forty point discrepancy between IQ and achievement would cause the evaluator to nonetheless exclude the student from eligibility under IDEA or Section 504 if the student were achieving was performing in the average range, the evaluator confirmed that his interpretation was that the criteria for eligibility was whether or not the student was meeting "age expectations." (N.T. 92-93)
 34. Regarding ADHD, the school's psychologist said that the student would not be found eligible unless his functioning in school was significantly impaired. (N.T. 98)
 35. The Evaluation Report stated that the student did not have a specific learning disability because his academic skills were considered to be "age appropriate." The Report acknowledged consideration of eligibility as Other Health Impaired due to the student's documented ADHD, but stated that manifestations of the ADHD did not rise to the level requiring an IEP or a 504 Service Agreement. (S 16)
 36. On June 1, 2005, the parents withdrew the request for hearing to pursue an independent evaluation. They reserved their right to request a hearing later in the year, which resulted in this decision. (S 19, S 21)
 37. The parents obtained an Independent Educational Evaluation during the summer of 2005. The privately obtained evaluator found that the student should be provided with a Section 504 plan in 2001. The evaluator determined that he had a Nonverbal Learning Disorder which involved a social processing deficit. (S 21; N.T. 307-308)
 38. At the time of the report, the student was attending private school and was engaged in therapy. In therapy, he had goals to work on impulsivity and argumentativeness. (S 21)
 39. The independent evaluator has a bachelor's degree from Harvard, a master's degree from Boston University, and a doctorate in clinical psychology from Boston University. She did pre-doctoral work at Children's Hospital in Boston and pre and post-doctoral work at Children's Hospital in Philadelphia. She is a licensed clinical psychologist and a developmental neuropsychologist. (N.T. 287-289)
 40. The school's psychologist and ER author has a bachelor's degree in psychology and a master's degree in elementary guidance counseling, both from Eastern College. He is a certified elementary guidance counselor and a certified school psychologist. He is not licensed. (N.T. 35)
 41. The independent evaluator recommended several accommodations for the student including a clear behavioral plan, use of the computer, outlines or study guides, approaches which take advantage of his strong oral skills, individual therapy, and a therapeutic social skills group. (S 21)

Issues

Does the student qualify for a section 504/Chapter 15 service plan?

If so, is he entitled to compensatory education for the period from September 2003 through the culmination of this hearing?

Are the parents entitled to reimbursement for an IEE conducted by Drs. P and L?

Discussion

Burden of Proof

The parents, in this case, bear the burden of persuasion as they are the party that requested the hearing. *Schaffer v. Weast* was silent on the issue of burden of production, which is a moot subject in this case.

In Pennsylvania, all special education due process proceedings are conducted in accordance with the due process hearing requirements identified in IDEA, so this case, which encompasses rulings under Section 504 of the Rehabilitation Act of 1973 is affected by *Schaffer*. Arguably, placing the burden of persuasion on the parent has always been the intention in Pennsylvania. Explicit language in the PARC Consent Decree (1973) states that districts could very easily fulfill their burdens of production by presenting their reports (IEPs, ERs), and then outlines several parent-directed “rights,” or opportunities, for the presentation of evidence.

“Introduction by the school district or intermediate unit of the official report recommending a change in educational assignment, provided a copy of such report was given to the parent at the time notice was given, shall discharge its burden of going forward with the evidence, thereby requiring the parent to introduce evidence (as contemplated in paragraphs f, r, s, and t herein) in support of his contention.” (id at 22)

It should also be noted that while the Decree originally conceived that decisions were to be based on substantial evidence, IDEA has expressly lowered the standard to a “preponderance” of the evidence. This record was reviewed, and the decision written in accordance with *Schaffer* and the explicit review requirements of IDEA, as required by Chapter 14 of 22 PA Code, which governs due process hearings. The parents bore the burden of persuading me that the district denied the student a free appropriate public education.

Does the student qualify for a Section 504/Chapter 15 service plan?

Section 504 protects all qualified persons with a disability who have a physical or mental impairment which substantially limits one or more major life activities. The student is considered “qualified” because he is of an age at which he qualifies to attend school. The Section 504 regulations define a “physical or mental impairment” as **any** physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or endocrine; or any mental or psychological disorder such as mental retardation, organic brain

syndrome, emotional or mental illness and specific learning disabilities. The definition of “impairment” is left open-ended purposefully because the regulation was not intended to limit the range of diseases or medical conditions that may come into play. Appendix A to Part 104 – Analysis of Final Regulations (1973) specifically identifies diabetes and orthopedic impairments, for example, as qualifying impairments.

OCR’s position is that “Students may have a disability that in no way affects their ability to learn, yet they **may need extra help of some kind from the system to access learning**. [Emphasis added] For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler at school. Without regular administration of the medication and inhaler, the child cannot remain in school.” *Letter to McKethan*, 23 IDELR 504 (OCR 1994).

An OCR decision issued in 1992 on an IDEA (special education) student provides support for the notion that no medical diagnosis is required. *Letter to Parker*, 18 IDELR 965 (OCR 1992). Here, for example, OCR indicates that for purposes of compliance with the IDEA (and in the absence of more specific state law requirements on eligibility) no medical evaluation by a licensed physician is needed to find that the child with ADD/ADHD qualifies as Other Health Impaired (OHI). In other words, if no medical evaluation is required under federal law for special education eligibility (which involves more severe disabilities and access to more extensive special education and related services) the same is true under 504

Reg. Sec. 104.35 Evaluation and placement.

(a) Preplacement evaluation. A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) Evaluation procedures. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) Placement procedures. In interpreting evaluation data and in making placement decisions, a recipient shall

(1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior,

(2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered,

(3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with Reg. Sec. 104.34.

(d) Reevaluation. A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

The parents persuaded me that the district failed to follow required evaluation processes for this student in a timely manner. Instead of adhering to the regulations guiding the implementation of the Rehabilitation Act, it waited until 2005 to perform an evaluation. (FF 6, 23) The process of asking around and deciding unilaterally that an evaluation was not needed because the student was “doing very well” does not adhere to the regulatory guidelines for the evaluation process. (FF 6)

Once it did provide the belated evaluation, the parents persuaded me that the district came to the wrong conclusion. The school’s psychologist erred in denying the student eligibility for a Section 504 plan because the student was performing in an “age appropriate” way. (FF 33, FF 35) He did not consider whether or not a non-verbal learning disorder was present and neglected to identify the academic level at which the student was being instructed. (FF 29, FF 32) He ignored a significant discrepancy between IQ and achievement and between domains of the IQ test. (FF 24, FF 25) He stated that ADHD and the student’s impaired executive functioning affected social skills, behavior, and the student’s ability to focus. He ignored the connection between the student’s sensation seeking activities, his conduct issues, and his poorly developed social skills. (FF 27, FF 31, FF 28, FF 26) The evaluator did not take note of whether the student was on or off medication at the time of the evaluation, though he admits that this information had an impact on the determination of accommodations. (FF 30) The district’s resulting conclusion that the student is ineligible for a Section 504 plan is erroneous. (FF 37) The district’s own testimony and documents show that the student’s non verbal learning disability and his ADHD substantially limited his ability to access the general curriculum in a way that is consistent with his abilities. (FF 3, 7, 8, 9, 10, 11,12, 13, 14, 15, 16, 17, 19, 20,24, 25, 27, 29, 30, 31) The parents’ privately obtained independent educational evaluation far exceeds the quality and accuracy of the district’s document. The parents’ evaluator is better qualified and possesses a better, more accurate, and more sophisticated understanding of Section 504 and how it seeks to support students with impairments than does the district’s evaluator. I weighted the parents’ evaluator much more heavily due to her greater education, and credentials. (FF 39, FF 40) In addition, her interpretation is that which more closely matches the statute.

The district's many arguments in its closing brief mirror the failings of the district's evaluation report and betray a lack of understanding of Section 504. An impairment does not have to be listed in the DSM to be considered as a condition giving rise to a determination of eligibility under Section 504, nor would an Appeals Panel Opinion have any relevance in this consideration, given that Appeals Panels do not render Opinions on questions regarding Section 504 solely. The district cites further "support" in two OCR letters which predate those cited earlier in this section, so they were rejected in favor of the more up to date OCR determinations.

Compensatory Education

Section 504

Reg. Sec. 104.33 which identifies a public school's obligations to provide a free appropriate public education states:

(a) General. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education.

(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that

(i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and

(c) Free education.

(1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

By authority of the Rehabilitation Act, the Office of Civil Rights has awarded compensatory education to a student with a disability who had been denied appropriate education services. (*Chicago Board of Education*, EHLR 257:526, OCR 1984).

The district devotes a significant amount of its closing brief to the concept that somehow, a student who is in a private school is not entitled to compensatory education. Several cases and Appeals Panel Opinions were provided in alleged support of this position, and those were all reviewed carefully. None were on point. The parent in this case did not request tuition reimbursement at all, and this was a case seeking relief under Section 504 only.

The student in this case was denied a Section 504 plan. He should have been provided with one as early as 2001. (FF 37) The parent seeks compensatory education since September

2003, and **the student is entitled to compensatory education for the period of time requested.** There is very little to point to on the record which suggests hour for hour what is appropriate as an award. Given the accommodations that are identified by the independent evaluator, an hour per school day for each day of school since the start of the 2003-2004 school year is appropriate. (FF 41)

The parent may decide how the hours should be spent, as long as they take the form of any appropriate developmental, remedial, or enriching instruction that furthers the student's educational program. Such hours must be in addition to the student's then current educational program and may not be used to supplant such services. These services may occur after school hours, on weekends, and during the summer months, when convenient for the parent and the student. Reimbursement for the services shall be at the rate that the parent is obligated to pay, not a district determined rate. This provision shall remain in effect until the student's 21st birthday, but it is urged that the parent attempt to provide this student with compensatory services and supports as soon as possible. The hours are not to be used for college tuition, unless the parties both agree. Should the parties agree, the district may set up a fund with a set dollar amount that the parent may draw upon for educational services and equipment.

Independent Educational Evaluation

Schaffer v. Weast strikes down the oft cited considerations in IEE reimbursement cases. Earlier this year, the USSC stated:

They [parents] also have the right to an "independent educational evaluation of the[ir] child." *Ibid.* The regulations clarify this entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 CFR §300.502(b)(1) (2005). IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

Contrary to much of the case law in the Third Circuit, the USSC, with its new interpretation that the burden of persuasion falls on the party requesting the hearing, states that parents have a right to an independent educational evaluation, and moreover, that such is undeniably linked to the parent's ability to have a reasonable opportunity to challenge the school and exercise his or her rights to due process. Condensing this portion of *Schaffer* results in a clear obligation to grant requests for independent educational evaluations. Denying reimbursement for an Independent Educational Evaluation would equal a denial of the parent's due process rights.

In this situation, the parent had the obligation of providing persuasive evidence that the district had inappropriately declared her son ineligible, and because she was challenging an evaluation performed by the district, she certainly needed an expert with "firepower" to match the opposition. (FF 39, FF 40) The independent evaluator met that need and made it possible for the parent to prevail in this case. Furthermore, the independent evaluation added considerably to

the understanding of the student, pointing out that the student's impairments did indeed require accommodation via a Section 504 agreement. (FF 37)

The parent is entitled to reimbursement for the cost of the independent educational evaluation.

Order

It is hereby ordered that:

1. Student is eligible for accommodations and supports under Section 504 of the Rehabilitation Act of 1973.
2. The School District is to take the action of developing a Section 504 service agreement for Student.
3. The School District is obligated to provide him with compensatory education in the form and amount described in the Discussion Section above.
4. The School District is obligated to reimburse the parents of Student for the independent evaluation conducted by Drs. P and L.

date

Linda J. Stengle
Hearing Officer