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## DECISION

Due Process Hearing for RL

ODR File No. 7551/06-07 LS

Date of Birth:           xx/xx/xx

Date of Hearing:       June 7, 2007 – Open Hearing

Parties to the Hearing:

(Parent)

Philadelphia City School District  
440 North Broad Street, Suite 313  
Philadelphia, PA 19130

Hearing Officer:     Debra K. Wallet, Esq.

Record Closed:       June 7, 2007

Transcript Received: June 12, 2007

Date of Decision:     June 27, 2007

Representative:

None

Kenneth Cooper, Esq.  
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## BACKGROUND:

Student is a xx-year-old (date of birth xx/xx/xx) tenth-grade student of the Philadelphia City School District [hereinafter School District] who has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Asperger's Syndrome. Student is intellectually gifted and attends an elite magnet program with a concentration in aerospace and medical subjects. He has been generally successful in his academic career, but Father is concerned that Student's lack of organization and attention to detail has negatively affected his grades and classroom success. Father requested a due process hearing because he believes that the School District has failed to follow the current Section 504 service agreement.

## ISSUES:

1. Has the School District failed to follow the Section 504 service agreement?
2. Is the service agreement in need of revision?

## FINDINGS OF FACT:

1. Student is a xx-year-old (date of birth xx/xx/xx) in the tenth grade who resides with his Father, a resident of the School District. (Stipulations, N.T. 26-27).
2. Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Asperger's Syndrome. (Stipulations, N.T. 27).
3. Father asked for a due process hearing "to force the school, which my son attends, to follow the 504 service agreement that was agreed upon." (Due Process Hearing Request).
4. Both Father and the School District participated in a pre-hearing telephone conference on May 14, 2007.

5. At the June 7, 2007 hearing, the Hearing Officer received and admitted P-1 through P-3 (N.T. 208, 213) and P-5 through P-6 (N.T. 215-216). School District Exhibit 1 (S-1) was also admitted. (N.T. 193).

6. Father represented himself and gave sworn testimony. The School District called four witnesses: Ms. D, Assistant Principal at Northeast High School; Ms. A, Resource Room Teacher; Ms. K, Magnet Director; and Ms. B, School Nurse.

7. Student attends [redacted] High School not because it is his neighborhood school but because he has been admitted to a Magnet Program in aerospace and medical. (N.T. 75-76).

8. Student has a High Average to Superior range general intelligence. (P-6, p.7).

9. In the tenth grade, Student takes Advanced Spanish, Algebra II, English, African-American History, Advanced Chemistry, and Bio-Ethics. He has a 2.5 grade point average. (N.T. 41; P-2, P-5).

10. Student is the subject of a current Section 504 service agreement dated October 26, 2006. Father agreed to the assignment of related aides, accommodations, and services as follows which are quoted verbatim from the service agreement:

- o Contact father/home within 24 hrs. if homework not turned in;
- o Provide Student w/ algebra book for home;
- o Teachers will write all quiz/test grades in his agenda book;
- o Provide copies of tests that student gets D or F on to Mr. M, Rm. 131;
- o Resource room or Magnet office as needed for tutoring/testing;
- o Preferential seating;
- o Extra set of books only if provide a book to all students.

(S-1).

11. The 504 agreement currently in place for Student is generally appropriate to address his attention deficit disorder and Asperger's Syndrome. (See N.T. 89-93).

12. As a result of Parent's request, a meeting was held on October 26, 2006 to amend the previous 504 agreement. (N.T. 63).

13. During the tenth-grade year, Student failed to complete his homework on a regular basis. This is noted on the quarterly Interim Reports. (P-2).

14. The burden of having the teacher sign that Student had properly copied homework assignments was taken out of the 504 agreement, but it was later discovered that Student was not as compliant as initially thought. As a result, Father testified this requirement was put back into the plan although never written down. (N.T. 66-67).

15. Student was chosen as a Student of the Month at the recommendation of the magnet school director. (N.T. 110-112).

16. Parent testified credibly, and the Hearing Officer finds, that teachers were not fulfilling their obligations regarding reporting Student's failure to turn in his homework assignments. (N.T. 42-44).

17. Parent testified credibly, and the Hearing Officer finds, that there were sometimes long delays in notifying Father when Student had not turned in his homework. (N.T. 46-47).

18. Student turned in only 31% of his homework assignments in History from the beginning of school until Back to School night on November 2. He had turned in only 12% of his Bio-Ethics homework during the same period. (N.T. 59-60).

19. Parent requested that Student have the responsibility to write his homework assignments in the agenda book and teachers have the responsibility to sign the book indicating that Student has properly copied the assignments. (N.T. 44-45).

20. During the two years Student has attended High School, his grades have fluctuated. He has been in danger of failing subjects. (N.T. 71-72; P-2, P-5; *but see* N.T. 78-81).

21. In accordance with the 504 agreement, Student has been offered preferential seating in the classrooms, but he has not always taken advantage of this seating. (N.T. 106-107, 143).

22. Although the service agreement provides that all test grades and quizzes should be written in Student's agenda book, in the approximately one month period before the hearing, only 11 grades had been entered. (N.T. 131-132).

23. To address the missing homework and grades, the resource room teacher has now been assigned to call teachers to make sure they are compliant with the plan. (N.T. 137-138).

24. Ms. A, resource room teacher, supervises Student's taking of tests, helps him with his homework, and checks his agenda book for information. (N.T. 149-152).

25. Ms. A testified credibly that Student has greatly improved in his relationships with other students between the ninth and tenth grade. (N.T. 153-154).

26. Although the resource room teacher is generally aware of when Student takes tests and quizzes, she has not monitored the agenda book to ensure that the test scores had been written down. (N.T. 164-166).

27. The school nurse, a member of the 504 conference committee, offered the opinion that Student's ADHD and Asperger's Syndrome resulted in disorganization and lack of attention to detail. In the nurse's opinion, the 504 Agreement addresses these issues appropriately. The Hearing Officer adopts this opinion and so finds. (N.T. 187-190).

28. The parties stipulated that there have been times when responses to the Parent's concerns have been untimely and occasions when class assignments were turned in late or not completed. (N.T. 209).

29. There have been times when more than 24 hours has elapsed between Parent request and school response. (N.T. 210-214).

30. Parent has expressed an interest in changing the 504 service agreement to reinstate the need for teachers to sign the agenda book indicating that Student has written down his homework assignment accurately and that homework has been turned in. He has also expressed concerns about Student's workload. (N.T. 221-222).

31. The Hearing Officer finds that the School District has not fully complied with the terms of the 504 Service Agreement. (N.T. 209-214).

32. The School District agrees that the plan itself should be modified to assist Student in better adapting to his ADHD limitations. (N.T. 231-232).

### CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction to determine the merits of the Section 504 claims.
2. Student is eligible for, and in need of, a Section 504 service agreement.
3. The instances of technical noncompliance with the Section 504 service agreement do not rise to the level of a denial of a free appropriate public education (FAPE).

4. The instances of noncompliance do not constitute unlawful discrimination warranting remedial action.

5. Although the School District has not always complied precisely with the Section 504 service agreement, there has been no showing by Parent that the School District has failed to ensure that Student has been given an equal opportunity to participate in, and benefit from, the educational services provided in the Magnet Program.

## DISCUSSION OF ISSUES

### **Has the School District failed to follow the Section 504 service agreement?**

Initially, it must be understood that this is not a case under The Individuals With Disabilities Education Improvement Act of 2004 [hereinafter IDEA 2004], 20 U.S.C. §1415 *et seq.* Student has never been shown to qualify for services under IDEA 2004 as an eligible student in need of specialized services. *Molly L. v. Lower Merion School District*, 194 F. Sup. 422, 427 (E.D. Pa. 2002) (explaining that the definition of eligibility under the IDEA requires the need for specially designed instruction); *Delaware County Intermediate Unit v. Jonathan S.*, 809 A.2d. 1051, 1056 (Pa. Commonwealth Court 2002).

Student is subject to a Section 504 service agreement addressing his undisputed diagnoses of ADHD and Asperger's Syndrome. To be eligible for services under Section 504, Student must have a physical or mental impairment that substantially limits one or more major life activities. 34 C.F.R. §104.3(j)(1). Student's diagnoses, particularly his severe impairment in organizational abilities, appear to have a substantial impact upon Student's ability to learn, which is a major life activity recognized in the regulations. 34 C.F.R. §104.3(j)(2)(ii).

The Parent here is obviously very concerned about the success of his son from both an academic and behavioral standpoint. He is to be commended for being an interested Father

who wants to monitor his son's schoolwork and insure that homework assignments are completed in a timely fashion. Father credibly testified to many instances in which the School District has failed to implement the Section 504 agreement. However, at present the resource room teacher has been charged with responsibilities which should reduce the instances of noncompliance.

The Hearing Officer does not make light of the violations; an agreement should have meaning and be more than simply a piece of paper. Obviously, the team believes that these relatively simple procedures described in the 504 agreement will significantly help student be successful in school. Yet, this Hearing Officer is without authority to provide any remedy for what appear to be de minimis violations of the agreement when compared to the program provided to Student at this magnet school. There is no evidence that Student has been the victim of discrimination or that he has been denied school opportunities because of his disabilities. To the contrary, the school seems quite willing to help Student, but it has simply failed to put sufficient mechanisms in place to allow for swift action when there is Student noncompliance. The School District could certainly do better in communicating with Father more quickly and it is urged to do so.

Compensatory education is a remedy when an eligible student has not been provided with a free appropriate public education. In this case, there is no evidence that the Student has been denied FAPE. Student is making significant progress with the existing 504 service agreement and he is generally succeeding in school—perhaps doing better behaviorally than academically at this point. This remedy has not specifically been requested by Father, but it would not be awarded even if it had been requested.

**Is the service agreement in need of revision?**

The School District does agree that the agreement itself should be modified to assist Student in better adapting to his ADHD limitations. It will be ordered to make these modifications in an expeditious fashion after the start of the new school year.

ORDER

The parties having agreed that the 504 Service Agreement is in need of modification and based upon the foregoing findings and conclusions of law, the Hearing Officer enters the following:

As soon as practical, but in no event later than ten days after the start of the 2007-2008 school year, the School District shall convene a service agreement planning conference to consider, adopt, and implement modifications to Student's existing 504 Service Agreement.

Date: June 27, 2007

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