

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: S.C.

Date of Birth: [redacted]

Dates of Hearing:

March 15, 2016

May 18, 2016

June 1, 2016

CLOSED HEARING

ODR Case #17184-1516AS

Parties to the Hearing:

Parent[s]

Oxford ASD
125 Bell Tower Lane
Oxford, PA 19363

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Michael Connolly, Esquire
30 Cassatt Avenue
Berwyn, PA 19312

Katie Metcalfe, Esquire
331 E. Butler Avenue
New Britain, PA 18901

June 22, 2016

July 8, 2016

Jake McElligott, Esquire

INTRODUCTION

Student¹ is a late teen-aged student residing in the Oxford Area School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² for specially designed instruction/related services as a student with specific learning disabilities in reading, mathematics, and written expression.

Parent claims, in her complaint, that the student was denied a free appropriate public education (“FAPE”) for the school years 2012-2013 through 2014-2015, inclusive, and seeks a compensatory education remedy for that alleged denial. As set forth more fully in the *Procedural History* section, the parent’s claims related to the school years were timely filed in parent’s complaint of December 2015.

Additionally, parents claim that the District has violated its obligations to the student under Section 504 of the Rehabilitation Act of 1973 (“Section 504”).³

¹ The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

² It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 (“Chapter 14”).

³ 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 services to “protected handicapped students”.

The District counters that at all times it provided FAPE to the student. The District also claims that it did not violate its obligations to the student under Section 504. As such, the District argues that the parents are not entitled to remedy.

For the reasons set forth below, I find in favor of the District.

ISSUES

Did the District deny a FAPE to the student in the 2012-2013, 2013-2014, and/or 2014-2015 school years?

If so, is the student entitled to compensatory education?

Did the District fail in its obligations to the student as a student with a disability under Section 504?

PROCEDURAL HISTORY

The parent filed the complaint in December 2015. (Hearing Officer Exhibit [“HO”]-1).

Because parent’s claims included allegations of denial of a FAPE prior to December 2013, the parties were directed to file offers of proof as to when parent knew, or should have known, of the actions which formed the basis of the parent’s complaint. (HO-3, HO-4).

Following an evidentiary session, parent’s complaint was found to have been timely filed. (HO-5).

FINDINGS OF FACT

1. The student was initially identified with specific learning disabilities in August 2006 (the outset of the student’s 3rd grade

year) and re-evaluated in June 2009 (the end of 5th grade). (Parent's Exhibit ["P"]-1, P-2).

2. Neither the August 2006 evaluation report ("ER") nor the June 2009 re-evaluation report ("RR") indicated that the student had difficulty with attention, focus, or attendance through those school years. (P-1, P-2).
3. In May 2012, the student was re-evaluated (near the end of 8th grade). (P-7).
4. The May 2012 RR indicated that the student's teachers reported that, at times, the student needed prompting to remain on task, was inattentive, and was sometimes tired and disorganized. (P-7).

9th Grade

5. In May 2012, the student's individualized education plan ("IEP"), near the end of the student's 8th grade, contained one goal each in written expression and reading comprehension, and two goals in mathematics. These goals were in place for most of 9th grade, the following school year. (P-8, School District ["S"]-21).
6. The student made progress on all four goals in the May 2012 IEP. (P-28; S-22).
7. The teachers reported that the student was consistently unfocused and easily distracted. (S-27 at page 19).
8. Over the course of 9th grade, the student had a significant number of class absences. The student was absent 24 times from homeroom; 16, 17, 18, 20, and 23 times in each of five year-long classes; and 9, 12, 12, and 12 classes in each of four semester-long classes. (P-27 at page 13).
9. The student failed mathematics in 9th grade, as well as half-year classes in graphic design, printing tech, and freshman seminar. The student's cumulative GPA at the end of 9th grade was 0.9688 (P-27 at page 13; S-43).

10th Grade

10. In April 2013, in the spring of 9th grade, the student's IEP was revised at its annual review. This IEP was in place for most of 10th grade. (S-27 at page 9).

11. The April 2013 IEP contained one goal each in written expression, mathematics, and reading comprehension. (S-27).
12. The April 2013 IEP indicated as a program modification: “Verbal prompts to keep (the student) on task because (the student) is often off task during teacher instruction.” (S-27 at page 32).
13. The student made marginal progress on the written expression and reading comprehension goals in the April 2013 IEP, although the progress was not at all linear or consistent. For example, the written expression showed decline at the outset of the progress monitoring then stagnation before rising in the final monitoring period. Likewise, the reading comprehension goal was stagnant until a spike above goal-level in the final monitoring period. In mathematics, the student began at a 7.4 grade equivalency, with a goal of 9.0 equivalency across three consecutive probes. The progress monitoring showed that the student’s grade equivalencies on progress monitoring were recorded at 11.9, 5.8, 5.8, and 8.0 (P-28; S-30).
14. Teacher input indicated that the student was often distracted and needed consistent prompting to attend to task. (S-32 at page 13).
15. The student’s absences markedly decreased in number in 10th grade. (P-27 at page 14).
16. The student did not fail any classes in 10th grade and earned final grades of one A, four Bs, and one C (79%). The student’s cumulative GPA at the end of 10th grade was 2.0441. (P-27 at page 14; S-43).

11th Grade

17. In April 2014, in the spring of 10th grade, the student’s IEP was revised at its annual review. This IEP was in place for the first half of 11th grade. (S-32).
18. The April 2014 IEP contained one goal each in written expression, mathematics, and reading comprehension. (S-32).
19. The April 2014 IEP repeated as a program modification: “Verbal prompts to keep (the student) on task because (the student) is often off task during teacher instruction.” (S-32 at page 26).

20. In October 2014, the student's IEP was revised to add additional specially designed instruction/modifications, geared to both assessing the student (tests/quiz design, access to a testing center), and positive feedback for being on-task and for self-advocacy. (P-12 at page 22; S-34 at page 22).
21. Over the course of 11th grade, the student's relationship with the assigned English teacher was strained. (Notes of Testimony ["NT"] at 159-161).
22. In December 2014, the student's treating physician provided a letter to the student's mother indicating that stress from school "has adversely affected (the student's) mental health, to the point where I have had to intervene with medication and a referral to counseling. I am gravely concerned about (the student's) mental health." (P-13).
23. The student's mother showed the letter to the District in December 2014 but did not share a copy. (NT at 165-166).
24. In February 2015, the student's mother shared a letter from a treating counselor "for feelings associated with anxiety and depression" related to the student's experiences at the District. (P-15).
25. The student's mother shared a copy of the counselor's letter upon her receipt of the letter in February 2015. It is unclear when, exactly, she shared a copy of the doctor's letter with the District. (NT at 601-602).
26. In March 2015, the student's IEP was revised. (P-16; S-36).
27. The March 2015 IEP included the information from the doctor/counselor as part of the student's present levels in the IEP. Additionally, specially designed instruction/modifications included access to the emotional support classroom as needed and an explicit schedule-change, allowing the student to complete English classwork in the emotional support classroom. (P-16 at pages 9, 28; S-36 at pages 9, 28).
28. In April 2015, the student's IEP was revised. (P-19; S-38).
29. The April 2015 IEP noted that the student had achieved the mathematics goal and the reading comprehension goal, these goals were removed from the IEP. (P-19; S-38).

30. Goals were added in the April 2015 IEP for anxiety-recognition/social-response and self-advocacy. (P-19 at pages 38-39; S-38 at pages 35-36).
31. At the time of the April 2015 IEP meeting, the student had excessive absences—25 in mathematics, 24 in science, 29 in academic support, and 30 in English. (P-19 at pages 21-26; S-38 at pages 18-25).
32. Specially designed instruction in the form of coping skills and anxiety management were added. (P-19 at page 42; S-38 at page 39).
33. The student did not fail any classes in 11th grade and earned final grades of five Bs, one C, and one D (in English). The student's cumulative GPA at the end of 11th grade was 2.1863. (P-27 at page 16; S-43).
34. All witnesses were found to have testified credibly. Heavy weight was accorded to the student's mother and the District emotional support teacher who provided some academic support services to the student. A medium degree of weight was accorded to the testimony of all other witnesses.

DISCUSSION AND CONCLUSIONS OF LAW

Denial of FAPE/IDEIA

To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). 'Meaningful benefit' means that a student's program affords the student the opportunity for "significant learning" (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis*

or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

Here, the evidence for finding provision or denial of a FAPE is not clear-cut. In 9th grade, the student made the most consistent goal-progress; yet the student's absences were numerous, and the student's academic work was abysmal. In 10th grade, the student's goal-progress was minimal; yet the student's attendance and academic work both dramatically improved. In 11th grade, there is evidence of goal-progress and the student's academic work was strong—the sole exception being English where the student and teacher had a personality conflict; yet the student's outsized number of absences returned. Taken as a whole, as the evidence unfolds school year by school year, it does not amount to a denial of a FAPE.

Viewing those school years chronologically provides more insight into the provision of a FAPE by the District. In 9th grade, the student was making goal progress throughout the school year. Balanced against this were the large number of absences and, consequently, poor grades. The record supports a finding that the poor grades were due in large part to the absences from missed work. The record also supports a finding that, in school, the student did not exhibit behaviors that caused educators to view the student as having anxiety whether from input in IEPs, or testimony at the hearing; all note that the student was largely engaging and social with peers and adults, and even where the student's affect in

class was inattentive or distracted, it was rooted in tiredness or sociability.

Even if one assumes that it was a prejudicial flaw not to address absences in the April 2013 IEP (at the end of 9th grade), there was no denial of a FAPE in the 10th grade year due to absences—the student had excellent attendance and the student’s grades dramatically improved. But, here, the main driver of IEP instruction—goal achievement—is only marginally present. On balance, the student made progress on goals, but the record here is far less clear. It was progress, and it was meaningful, but not by much. Having found that, however, through April 2014, when the IEP team undertook its annual review, the student had not been denied a FAPE through 9th grade and most of 10th grade.

In 11th grade, the outset of the school year again saw the return of multiple absences, yet the student made goal progress for the first half of the school year before the student’s IEP team undertook multiple IEP revisions. Those meetings and revisions, in March and April 2015, were in response to information provided to the District related to schooling. Again, the record supports a conclusion that the student may have felt anxiety as a result of issues at school, and the District revised the IEP to reflect that, but educators were not seeing anxiety-related behaviors in the school environment. Ultimately, in 11th grade the student’s academic achievement was strong and where it wasn’t, the record supports a conclusion that the personality conflict between the student and the

English teacher played a large role in the lack of achievement in that class.

Altogether, then, over the three school years involved— 2012-2013/9th grade, 2013-2014/10th grade, and 2014-2015/11th grade— the student was not denied a FAPE.

Denial of FAPE/Section 504

Section 504 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).⁴ The provisions of IDEIA and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

Here, based on the findings related to denial of FAPE in the foregoing “Denial of FAPE/IDEIA” sections, those findings and that reasoning is adopted here. Therefore, analogously as found for claims under IDEIA, the student was not denied a FAPE under the provisions of Section 504.

⁴ Pennsylvania’s Chapter 14, at 22 PA Code §14.101, utilizes the term “student with a disability” for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term “protected handicapped student” for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term “student with a disability” will be used in the discussion of both statutory/regulatory frameworks.

Discrimination under Section 504

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) the student is disabled or has a handicap as defined by Section 504; (2) the student is “otherwise qualified” to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) the student was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of the student’s disability (34 C.F.R. §104.4; S.H. by Durrell v. Lower Merion School District, 729 F.3d 248 (3d Cir. 2013); *see also*, Ridgewood and W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995)).

In the instant case, the first, second and fifth prongs of this analysis are undisputed. While not a matter of evidence, the third prong—the receipt of federal funds by the District—is a near certainty. The crux of a finding that the District discriminated against the student in this matter, then, is the fourth prong: was the student excluded from participation in, denied the benefits of, or subject to discrimination at the District as the result of the student’s disability? To prevail in answering this multi-faceted question, a student must show that,

through acts and/or omissions, a school district acted with deliberate indifference in failing to meet its obligations under Section 504. (S.H.).

Here, the District did not act with deliberate indifference in any regard. Therefore, any claim for discrimination under Section 504 is denied.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District has provided the student with a free appropriate public education in the 2012-2013, 2013-2014, and 2014-2015 school years.

Additionally, the District has not acted with deliberate indifference in any manner regarding the student's status as a student with a disability.

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

Jake McElligott, Esquire
Jake McElligott, Esquire
Special Education Hearing Officer

July 8, 2016