

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: GA

Date of Birth: xx/xx/xxxx

Dates of Hearing:
November 18, & November 19, 2009
January 27, February 4, & March 4, 2010

CLOSED HEARING

ODR Case # 10286-08-09-KE

Parties to the Hearing:

Dr. Ron VanLangeveld
Wallingford-Swarthmore School District
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Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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March 29, 2010

April 13, 2010

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an 18-year old student residing in the Chester-Upland School District (“District of Residence”) who has been identified as a student eligible under federal and Pennsylvania special education laws as a student with a hearing impairment.¹ Responsibility for the student’s individualized education plan (“IEP”) and overall education program ultimately resides with District of Residence. For the entirety of the student’s K-12 education, however, the student’s IEP has been implemented in a hearing support classroom in the nearby [Redacted District].²

Following a behavior incident in October 2008 and subsequent 45-day exclusion from the hearing support classroom at [Redacted District], the student was not permitted by [Redacted District] to return. The student’s parent alleges that, by not allowing the student to return to the hearing support classroom housed within the [Redacted District], violated Section 504 of the Rehabilitation Act of 1973 (“Section 504”).³

¹ It is this hearing officer’s preference to cite to the implementing regulation of the Individuals with Disabilities in Education Act of 2004 at 34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162.

² The hearing support classroom is merely housed at [Redacted District] . The classroom is staffed and operated by the Delaware County Intermediate Unit.

³ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the Rehabilitation Act of 1973 at 34 C.F.R. §§104.1-104.61.

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

ISSUES

Has the [Redacted District] violated the anti-discrimination provisions of Section 504 by not allowing the student to return to the hearing support classroom housed in the [Redacted District] ?

FINDINGS OF FACT

1. The student has been identified as a student with a hearing impairment. Specifically, the student has severe sensori-neural hearing loss in the right ear and severe-to-profound sensori-neural hearing loss in the left ear. (District of Residence Exhibit-37).⁴
2. For the student's entire K-12 education, the student has received hearing support services in [Redacted District]. In the 2006-2007

⁴ A companion complaint against District of Residence, based on the same series of events underlying this decision, was filed at 10052-08-09-KE alleging violations of a free appropriate public education ("FAPE") under federal and Pennsylvania special education laws. Parent filed a motion to consolidate the two cases. Parent's motion was granted to promote judicial efficiency and to ensure that, should a remedy need to be apportioned in some way between District of Residence and [Redacted District] arising out of identical facts, there would be one, consistent record. See Hearing Officer Exhibit 2. Therefore, the record consists of three sets of exhibits—Chester-Upland's, [Redacted District] 's, and parent's. Note, however, that the decisions resolving each complaint are being filed separately.

- school year, the student entered 9th grade at a [Redacted District] high school. ([Redacted District] Exhibit-1; Notes of Testimony [“NT”] at 862).
3. In 9th grade, the 2006-2007 school year, the student received detention on six days and one day of out-of-school suspension. There was one incident of physical horseplay which resulted in three days of detention; the other detentions and the one-day suspension were the result of cutting detention or Saturday school, and one teacher removal from class. ([Redacted District] Exhibit-2).
 4. In 10th grade, the 2007-2008 school year, the student’s discipline record was more extensive. ([Redacted District] Exhibit-2).
 5. In October 2007, the student was involved in a pushing incident which resulted in two days of detention. ([Redacted District] Exhibit-2).
 6. In November 2007, the student cut two detention periods, which resulted in further detention and Saturday school. The student was also involved in an incident with another student in gym class that resulted in one day of suspension. ([Redacted District] Exhibit-2).
 7. In January 2008, the student was involved in a fight that resulted in a 4-day suspension. ([Redacted District] Exhibit-2).
 8. In early April 2008, a school-based team met to discuss the problematic behaviors building over the school year and

- particularly the January 2008 fight. The team decided to perform a functional behavior analysis. (Parent Exhibit-2; District of Residence Exhibit-40).
9. Approximately two weeks later, in mid-April 2008, the student received a detention for cutting a scheduled detention. Three days later, the student was involved in a fight that resulted in another 4-day suspension. ([Redacted District] Exhibit-2).
 10. The day after the fight, the functional behavior assessment was issued. (District of Residence Exhibit-38).
 11. A re-evaluation report, following the functional behavior assessment, was issued in May 2008 along with a positive behavior support plan. (District of Residence Exhibits 36, 37).
 12. In June 2008, an IEP meeting was held. (District of Residence Exhibit-35).
 13. At this time, the student and the student's mother were informed by the [Redacted District] school counselor that further fights would probably result in the student being removed from the District. This was referred to, with some dispute at the hearing, as a "three strikes rule". Still, the District was clear in June 2008 that further altercations could have consequences for the student at the District. (NT at 618-628).

14. In 11th grade, the 2008-2009 school year, the student was involved in a fight on October 22, 2008. ([Redacted District] Exhibit-2; District of Residence Exhibit-34).
15. A manifestation determination meeting was held October 28, 2008, and the student's behavior was found not to be a manifestation of the student's disability. The team recommended that the student be placed in a 45-day diagnostic placement "to help determine needs". (District of Residence Exhibit-33).
16. The student's mother participated by telephone. The manifestation determination worksheet indicates that the student's mother participated by telephone. The paperwork indicated that the team agreed to the transfer, but the student's parent disputes that she was ever in agreement with the manifestation determination result or the transfer to the "diagnostic" placement. (Parent's Exhibit-26; District of Residence Exhibit-33; NT at 904-911).
17. The student began the diagnostic placement on December 4, 2008. The 45-day placement was to have expired on February 18, 2009. At that point, the District of Residence out-of-district placement coordinator contacted [Redacted District] and was informed that the student could not return to [Redacted District]. (District of Residence Exhibit-21; NT at 760-761).

18. The student did not return to [Redacted District] in the 2008-2009 school year, although it was the desire of the student and the student's parent to do so. (NT at 939).
19. Parent filed complaints against [Redacted District] and District of Residence in May 2009.
20. On September 3, 2009, the federal District Court for the Eastern District of Pennsylvania issued a temporary restraining order determining that the student's pendent placement for 12th grade, the 2009-2010 school year, was at [Redacted District] pending the determination of these proceedings. (Hearing Officer Exhibit-3).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of access, benefits, and protection from discrimination for students with disabilities in K-12 educational environments is addressed in Section 504.⁵

Particularly, to establish a *prima facie* case of discrimination under Section 504, a plaintiff must prove that (1) he is disabled or has a handicap as defined by Section 504; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at the

⁵ 34 C.F.R. §§104.1-104.61.

school; and (5) the school or the board of education knew or should be reasonably expected to know of her disability.⁶

In the instant case, there is no dispute that the student qualifies under numbers 1, 2, and 5 above. Although the parent did not put on explicit evidence as to number 3 (the receipt of federal funds by [Redacted District]), this hearing officer takes judicial notice that the District is a recipient of federal funds. The crux of the dispute is whether, per number 4 above, the student has been excluded from participation in, denied the benefits of, or subject to discrimination at [Redacted District] due to the student's disability.

Here, the record supports a finding that [Redacted District] did not wrongfully exclude the student from the District when the student was eligible to return to the District in February 2009. At all times, the responsibility for the student's education lay with District of Residence. Regardless of whether the student was wrongfully removed from the [Redacted District] as the result of the manifestation determination process in October 2008, that decision was not the [Redacted District's]. When District of Residence requested that the student return to [Redacted District] in approximately February 2009, there is nothing in the record which indicates that [Redacted District] discriminated against the student in referring to or applying its code of student conduct.

⁶ Id. at §104.4; *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999); *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir. 1995).

CONCLUSION

[Redacted District] has not violated the student's rights under Section 504.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the [Redacted District] School District has not wrongfully excluded the student in violation of Section 504 of the Rehabilitation Act of 1973 when it refused to re-admit the student to its school building in the spring of 2009.

Pursuant to the September 3, 2009 order of court issued by the federal District Court for the Eastern District of Pennsylvania, however, the [Redacted District] School District may not, in the words of the order, "(alter) (the student's placement at [Redacted District]) without the consent of (the student's) natural guardian or further Order of this Court."

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

April 13, 2010