

Due Process Hearing for Joshua Koch

Date of Birth: 1/19/90

ODR File Number: 7330/06-07/AS

Dates of Hearing: March 28, 2007, April 11, 2007

DUE PROCESS HEARING

Parties:

Manheim Twp. SD
2933 Lititz Pike
Lititz, PA 17606-5134

Joshua Koch
1350 Country Club Dr.
Lancaster, PA 17601

Representative:

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Pro se

Date Transcript/Exhibits Received:

April 16, 2007

Date of Closing Statements/Record
Closure:

April 20, 2007

Date of Decision:

May 5, 2007

Hearing Officer:

Joy Waters Fleming, Esq.

Background

Joshua Koch “Student” is currently 17 years of age and enrolled in 11th grade in the Manheim Township School District, “District”. Student has Tourette syndrome and an obsessive-compulsive disorder.

The parties to this case, Parents and the Student¹ filed a due process complaint seeking various accommodations under §504 as well as classification as an eligible student under the IDEIA.

Issues

Is Student eligible for special education and related services under the Individuals with Disabilities Act?

Has the District satisfied its obligations to Student under §504 of the Rehabilitation Act?

Findings of Fact

1. Joshua Koch, “Student”, is currently 17 years of age and in the eleventh grade in the Manheim Township School District, “District”.
2. Student has attended school in the District since kindergarten.
3. Student has Tourette syndrome and an obsessive compulsive disorder. (SD-4)
4. In May 2006, Parents contacted the District about implementation of 504 plan to allow Student extended time for test taking and the SATs. (SD-1)
5. On June 8, 2006, after conducting an evaluation for 504 eligibility, the District concluded that Student’s impairments had only a

¹ The term “Parent” when used encompasses both parents. Student represented himself during this proceeding based on the request filed by his parents.

negligible impact on his learning and ability to perform manual tasks as compared to the average student in the general population. (SD-4, SD-13)

6. As part of the evaluative process to determine 504 eligibility, the District reviewed Student's grades, class performance and medical information. (SD-4.1)

7. After the determination of 504 ineligibility, Parents contacted the District and requested a psychoeducational evaluation to determine whether Student should be classified as other health impaired as a result of his Tourette syndrome. (P-7, p.12)

8. On June 20, 2006, after receiving Parent's request for an evaluation, the District enclosed a copy of IDEA, regulation 300.7 and requested that she "mark[], with a highlighter, area(s) of disability that you suspect that Josh "has". (SD-5)

9. In the June 20 letter, the District indicated it would wait a week to 10 days for a response before offering an evaluation. (SD-5)

10. On June 28, 2006, Parent met with the District. (SD-7, P-7, p. 19)

11. On July 26, 2006, the District wrote to Parent to determine whether they were still interested in an evaluation of Student. (SD-7)

12. Parents did not respond to the District's July letter. (N.T. 128-129, 138-139, 256)

13. Student started the 2006-2007 school year as an eleventh grader.

14. As an eleventh grader, Student's course load includes advanced placement, "AP", Spanish, accelerated theoretical algebra/trigonometry, honors chemistry, AP psychology, creative writing and college level English 101. (SD-28)

15. In October 2006, Dr. Margaret Kay conducted an independent educational evaluation at Student's request. (P-4)

16. After conducting an evaluation, Dr. Kay concluded that Student met the criteria to be classified as student with other health impairment and specific learning disabilities in written expression and reading fluency. (P-4, p. 22, N.T. 90)

17. In addition to specially designed instruction to improve writing skills, Dr. Kay recommended that Student receive an assistive technology evaluation as well as accommodations related to test taking and homework completion. (N.T. 97)

18. Parent provided Dr. Kay's evaluation to the District. (P-7, p. 33)

19. On October 31, 2006, the District issued a Permission to Evaluate (PTE) to Parents. (P-7, p. 35)

20. After receiving the PTE, Parents requested that Student receive extended test taking time. (SD-7, p. 37)

21. On November 10, 2006, the District informed Parents that Student could receive extra test taking time in most of his classes, if he requested (P-7, p. 41)

22. On January 5, 2007, the District issued its initial evaluation report. (SD-13.2)

23. As part of its evaluation the District reviewed the results of Dr. Kay's IEE, input from the parent and an advocate, a summary of assessment results from the first through eleventh grade and classroom performance. (SD-13.2)

24. As part of the District evaluation, an occupational therapist reviewed two handwriting samples of Student and concluded that he demonstrated adequate legibility and age appropriate abilities. (SD-13)

25. When interviewed by the school psychologist, Student indicated that he has difficulty taking and completing tests within the allotted time, that test preparation creates stress which aggravates his tics and that utilizing scantron answer sheets is problematic because of his compulsive tendencies. (SD-13)

26. When interviewed by the school psychologist, Student expressed that he needs a quiet place for test taking, extending time for testing and a copy of teacher's notes. (SD-13)

27. After the evaluation, the District concluded that Student did not meet the criteria for a specific learning disability or as other health impaired. (SD-13)

28. On January 6, 2007, Parent contacted the District and requested that during high stakes testing, lasting more than two hours, that Student receive extended time and breaks if needed. (P-7, p. 70)

29. On January 12, 2007, Student received notification from the College Board that he would receive extended testing time for the PSAT, SAT and AP examinations. (SD-15)

30. The District provided Student with extra time on his January 2007 mid-term examinations. (SD-16, p. 5)

31. On February 21, 2007, the District issued a 504 evaluation report based on information compiled from its IDEA evaluation, the IEE of Dr. Kay, a letter from Student's psychiatrist and data from a meeting held with the parents. (SD-16)

32. Midway through the eleventh grade, Student's grades ranged from a 65% in theoretical algebra/trigonometry to a 91% in honors chemistry. (Sd-16)

33. The 504 report issued by the District concluded that Student did not have a physical or mental impairment that substantially limited a major life activity. (SD-16)

34. On March 8, 2007, the District, through a memo entitled "Discretionary Provisions" advised Student's teachers that he would be permitted to mark answers on a test paper instead of a "scantron" scoring sheet that he can receive extra test taking time and that reduced homework could be requested. (SD-17-SD-18)

35. Due process hearings occurred on March 28, 2007 and April 11, 2007.

36. On March 30, 2007, the District issued a clarifying memo to Student's teachers advising that the prior communication concerning "discretionary" provisions for extended time during tests and other accommodations was in fact mandatory. (SD-31)

37. In his advanced placement Spanish class, Student's instructor, on occasion, has noted a decline in Student's physical appearance throughout the school year, less energy and more exhaustion and an occasional lack of focus. (N.T. 30-31, 54-55)

38. Student's Spanish instructor provided extended testing time for Student on his mid-term after receiving approval and she is able to modify his homework assignments using her own discretion. (N.T. 47)

39. On his Spanish mid-term examination, Student received extended time to take test. (N.T. 43-44)

40. In AP Psychology, Student's instructor no longer uses "scantron" answer sheets and has provided Student with additional time to complete a homework assignment. (N.T. 58, 65, 68, 70)

41. In his AP psychology class, Student's instructor has noticed a decline in Student's appearance and a lack of energy. (N.T. 86)

42. Although Student's writing in his psychology class is simplistic, his instructor believes the AP class is the appropriate academic level for him. (N.T. 63-64)

43. In his psychology class, Student has not exhibited difficulty in completing classroom tests within the time allotted. (N.T. 73)

44. In theoretical Algebra/Trigonometry, Student has received extended time to complete testing as well as accommodations regarding homework completion. (N.T. 162-163, 173, 175, 177)

Discussion and Conclusions of Law

Despite his diagnosis of Tourette syndrome and OCD, Student has a penchant for honors, advanced placement (AP) and college level courses. After Student's denial of eligibility for 504 status and a subsequent denial of eligibility under the IDEIA, Parents and their son requested a due process hearing for review of the District's decision pertaining to eligibility.

In November 2005, the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently in L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. Therefore, in this hearing, the Parent bore the burden of proof.

The Individuals with Disabilities Education Act (IDEA) as reauthorized by Congress in December 2004, 20 U.S.C. § 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* require that all eligible students receive a free, appropriate public education, (FAPE). The Supreme Court established the FAPE mandate to require "education specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188-89, 102 S. Ct. 3034 (1984).

Under the implementing regulations to the IDEA, a "child with a disability" is defined as a child:

(1)...evaluated in accordance with 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a serious emotional disturbance...an other health impairment, a specific learning disability, ...and who, by reason thereof, needs special education and related services.

34 C.F.R. §300.8

Student currently has a diagnosis of Tourette syndrome which is specifically included in the implementing regulations of the IDEA and of OCD which is not. In this case, Parents contend that the District failed to find Student eligible for special education under the “other health impaired” category although he is diagnosed with Tourette syndrome. Under the regulations, “other health impairment” is defined as “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that—

- (i) is due to chronic or acute health problems such as ...Tourette syndrome; and
- (ii) Adversely affects a child’s educational performance.

34 C.F.R. §300.8 (c) (9)

A specific learning disability is defined as a:

Disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak...including conditions such as perceptual disabilities, brain injury...” 34 C.F.R. 300.8(a)(1)(10)(i)

In this case, the District evaluated Student after receiving an IEE from the Parent that recommended that Student receive special education. (FF. 15-18) That IEE specifically determined that Student met the criteria to be classified as exceptional because of an other health impairment and specific learning disabilities. (FF. 16-17) After its evaluation, the District reached an opposite conclusion recognizing Student’s diagnosis but concluding that he was not OHI nor learning disabled. (FF. 22-27) That evaluation thoroughly considered the data gathered by both the District and Dr. Kay and satisfied all requisite legal elements. (FF. 22-27)

Although the IDEA was reauthorized in 2004, the regulations were not published and available until August 3, 2006. Prior to that time, under the old implementing regulations, Tourette syndrome was not recognized as an OHI. In the commentary accompanying the regulations, the reasons stated for its inclusion, are as follows:

However, we do believe that Tourette syndrome is commonly misunderstood to be a behavioral or emotional condition, rather than a neurological condition. Therefore, including Tourette syndrome in the definition of *other health impairment* may help correct the misperception of Tourette syndrome as a behavioral or conduct disorder and prevent the misdiagnosis of their needs.

Student, through the presentation of evidence has satisfied the first prong in that his Tourette syndrome and OCD result in his limited strength, vitality or alertness along with a heightened sensitivity to environmental stimuli that results in limited alertness in school. (FF. 25-26, 37, 41) Student credibly testified that he requires an inordinate amount of time and mental energy to complete assignments. (FF.32) He is not always able to complete a test or homework within the time offered and has required extended time for test taking. (FF. 21, 29-30, 38-39) During the school day, Student is frequently exhausted and suffers physically from the suppression of tics. (FF. 32) All of this takes it toll both mentally and physically. Although he has chosen to pursue a rigorous course of study, there is no evidence that a less challenging route would result in a different outcome. Student is purpose driven and would undoubtedly demonstrate the same level of devotion and preparedness to any course of study.

Under the final prongs, the Parents and Student have not sustained their burden of proof. Although Student undoubtedly experiences the manifestations of both Tourette and OCD, the evidence has not sufficiently demonstrated that the impact necessitates special education and related services. On the contrary, this record is replete with evidence that Student performs successfully in school both academically and behaviorally. (FF.1314, 15, 22, 32) In fact his academic performance, in some regards, surpasses that of his regular education peers. (FF. 14, 32) The provision of special education to this student is not warranted. The evidence consists not only of grades, but also teachers' anecdotal reports, specialists' observations, and test scores. (FF.15, 22, 31) If there is any notable adverse affect, it is the preparation time needed to complete his assignments as well as the stress and strain of the intensity of examinations. However, even without the extended time for tests and the flexible submission of homework, Student is achieving. (FF. 22, 30) Likewise, the District's evaluation examined all necessary elements to determine the existence of a learning disability and its conclusion will not be disturbed. Based on the totality of evidence, the

District's determination of ineligibility of Student for special education was appropriate.²

Next, Parent contends that Student is entitled to certain protections and accommodations under section 504 of the Rehabilitation Act to which he has been denied. Section 504 of the Rehabilitation Act of 1973 is a civil rights law designed to eliminate discrimination on the basis of disability in any program or activity receiving Federal financial assistance. Section 504 guarantees certain rights to individuals with disabilities, including the right to full participation and access to a free and appropriate public education (FAPE) to all children regardless of the nature or severity of the disability.

Specifically, 34 C.F.R. §104 states:

"No otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
29 U.S.C. §794.

The Act defines a person with a handicap as one who:

- 1) Has a mental or physical impairment which *substantially limits* one or more major life activities;
- 2) Has a record of such an impairment; or
- 3) Is regarded as having such an impairment.

34 C.F.R. § 104.3(j)

"Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 34 C.F.R. §104.3(j)(2)(ii).

² Parent also contends that the requested evaluation did not occur within the legally requisite timeframe. Although the District's initial response of placing the identification onus on the Parent was regrettably unprofessional, the evidence has established that the District attempted to follow through on the Parent's request and that a lack of response was interpreted as a lack of interest. (FF. 7-12, 19) In any event, no procedural violated resulted.

Additionally, section 504 regulations require a school district to provide a (FAPE) to each qualified student with a disability³ who is in the school district's jurisdiction, regardless of the nature or severity of the disability. FAPE consists of the provision of regular or special education and related aids and services designed to meet the student's individual needs.

Because an individual has a disability, is perceived as disabled, or has a record of a disability, does not automatically qualify that individual under Section 504. In order to receive services under Section 504, a child must first be determined to have a disability that substantially limits one or more major life functions, including education, learning, and behavior. Under State law, a child is determined to be a “protected handicapped student” if he:

- (i) Is of an age at which public education is offered in that school district.
- (ii) Has a physical or mental disability which **substantially limits** or prohibits participation in or access to an aspect of the student’s school program.
- (iii) Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under § 15.10 (relating to discrimination claims).

22 Pa. Code § 15.2 (emphasis added)

Furthermore, if both parties agree on the services to be provided, the District and parents must enter into a service agreement. The purpose of the service agreement is to describe the accommodations the student will receive along with the date the services will begin an end. 22 Pa. Code § 15.7 (a)

In this case, Parents requested and Student received an evaluation to determine the necessity of 504 services. (FF. 31) As part of that evaluation, the District reviewed medical reports validating the existence of Student’s impairment as well as his grades and classroom performance. (FF. 33) After the evaluation, the District concluded that on a scale of one (negligible) to five (extreme) representing degree of impairment, Student scored a “1”. (FF.) Because his score was less than “4”, the team determined Student ineligible for Section 504 classification. (FF.31)

³ The terms handicap and disability are used interchangeably throughout this decision.

Parents contend that Student's diagnoses entitle him to classification as handicapped or disabled for purposes of Section 504 and that the District reached an erroneous conclusion in denying this eligibility. In support of this contention, Student and Parents presented evidence about the many hours he must spend preparing for class, the anxiety and stress he experiences while taking tests and the mental strain exacted as a result of his desire to keep his grades up. Student also introduced the testimony of some of his teachers. (FF. 37-44) They had varying opinions regarding Student's academic functioning ranging from observations about the decline of his physical appearance to the lack of need for extended time taking tests. (FF.) All agreed that Student worked hard and was appropriately placed in the high expectation, college preparatory curriculum. (FF. 37-44) All that testified offered that they had provided either testing and/or homework accommodations to Student based on his request (FF.37-44) Many of these accommodations pre-dated the District's communication to Student's teachers mandating that they occur. (FF. 34, 36)

Based on the evidence presented, Parents have not sustained their burden of establishing that Student satisfies the definition of handicapped under either state or federal law. Without a doubt, Student has two conditions which render his life difficult and require him to exert more effort, diligence and tenacity than a typical student.) Those challenges coupled with his self-selected, rigorous academic standards and a refusal to compromise by taking the "easy" classes has resulted in a toll on his physical and emotional health. Despite, how incredibly impressed this hearing officer was by the poise and intelligence of Student and the sheer will he demonstrates to cope with the frustrations of his Tourette Syndrome, Student has not sustained his burden of proof.

Under the definitions of "handicapped" for both state and federal law, the crux of is that the disabling condition must "substantially" limit a major life activity. Although the §504 regulations do not define the term "substantial", the following definition is routinely accepted⁴:

Unable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the

⁴ See Letter to McKethan, 23 IDELR 504 (1995); Toyota Motor Mfg. v. Williams, 534 U.S. 184, 122 S.Ct. 681; 29 C.F.R. §§1630-2(j)(2)(i)-(iii).

condition, manner or duration under which the average person in the general population can perform that same major life activity.

Based on the totality of the evidence, Student's academic success although hard won is not indicative of a substantial limitation. He is achieving and progressing in school in some of the most difficult classes offered by the District. This conclusion is not intended to minimize the resultant emotional strain and depression experienced by Student; however, no substantial limitation, under the law, has been established. Furthermore, the District either out of concern for the strain felt by Student or as a protective stance has offered and implemented a variety of measures designed to reduce the strain of class work and test taking. (FF. 28, 34-36) These accommodations were put into place via a memorandum to all of Student's teachers for the remainder of this school year and will remain in place the next school year, until graduation. (FF. 36) The District's actions in this regard are to be commended and it is the hope of this hearing officer that those mandatory measures provide Student with the relief he believes is necessary to achieve.

ORDER

And now, this 5th day of May 2007, the District has satisfied its obligations to Student under § 504 of the Rehabilitation Act. Additionally, Student is not eligible for special education and related services under the Individuals with Disabilities Act.

Jurisdiction is relinquished.

By: Joy W. Fleming
Joy Waters Fleming, Esq.
Special Education Hearing Officer
May 5, 2007